

T. Caffoe

New York State Department of Environmental Conservation
Division of Environmental Enforcement
Western Field Unit
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July 25, 2002

Charles Johnson, Esq.
Monroe County Attorney's Office
307 County Office Building
Rochester, NY 14614

Thomas F. Walsh, Esq.
Jaeckle, Fleischmann & Mugel, LLP
Ellwanger and Barry Building
39 State Street
Rochester, New York 14614-1310

Re: Voluntary Cleanup Agreement
Brewer St.
Site#: V00214-8
File#: B8-0547-98-12

RECEIVED

JUL 26 2002

DER/HAZ. WASTE REMED
REGION 8

Dear Messrs. Johnson and Walsh :

The Voluntary Agreement for the above-referenced Site has been fully executed. Enclosed for your records is a fully executed quadruplicate original.

The Voluntary Agreement requires that the Volunteers, within 30 days of the effective date of the Voluntary Agreement, cause to be filed a Department-approved Notice of Agreement to give all parties who may acquire an interest in the Site notice of this Agreement. Further, Volunteer is obligated to provide the Department with evidence of such filing. Accordingly, the Notice is to be filed and a copy of same provided to me no later than August 19, 2002.

Contact me if you have any questions or comments.

Sincerely,

James Charles
Senior Attorney

JC:c:k
A:C897.11
Enclosure

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Implementation of a Remedial
Response Program at the
Brewer Street Site by

Rochester Pure Waters District,
Monroe County and
Rochester Gas and Electric Corporation

Volunteers.

AGREEMENT
INDEX NUMBER: B8-0547-98-12
SITE NUMBER: V00214-8

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DEFINITIONS

DER/HAZ WASTE REMED
REGION 8

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

- A. "Contemplated Use" restricted residential.
- B. "Covered Contamination": the concentrations of Existing Contamination remaining on the Site on the date that the Department issues the Release set forth in Exhibit "D."
- C. "ECL": the Environmental Conservation Law.
- D. "Day": a calendar day unless otherwise specified.
- E. "Department": the New York State Department of Environmental Conservation.
- F. "Existing Contamination": includes those polycyclic aromatic hydrocarbons ("PAH's") and benzene, toluene, ethylbenzene, and xylene ("BTEX's") and related volatile and semivolatile organic compounds present in the Site's soil, groundwater and sediments disclosed in the "Site Characterization and Remedial Alternative Evaluation Report," prepared by Blasland, Bouck & Lee, Inc., dated August 1998. The term also includes contamination encountered during the course of the implementation of the Work Plans, the nature and extent of which were unknown or inadequately characterized at the time the Work Plans were 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": 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": that piece of real property consisting of an approximate 3.25 acre portion of the approximately 13.1 acres, located at the foot of Brewer Street in the City of Rochester, which is included on the Monroe County Tax Map as part of Parcel No. 105.28-2-3.1, that either directly adjoins or lies south of the Middle Falls Dam on the east bank of the Genesee River, and located at the foot of Brewer Street in the City of Rochester. Exhibit A of this Agreement is a map of the Site showing its location.

I. "Volunteers": Rochester Gas and Electric Corporation, 89 East Avenue, Rochester, New York 14649, the owner of, and grantor of an easement in, the Site, and the Rochester Pure Waters District and Monroe County (collectively, the "District") 50 West Main Street, Rochester New York 14614, the grantee of an easement in the Site by means of which the District possessed a portion of the Site during the construction of the Cliff Street Siphon Tunnel Project which took place from November 1984 through December 1985.

J. "Supplemental Investigation Work Plan": the Department-approved Supplemental Investigation Work Plan that Volunteers 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.

K. "Remediation Work Plan": the Department-approved Remediation Work Plan that Volunteers shall implement and that is to be attached to this Agreement as Exhibit "C", 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 of the ECL and the Navigation Law. This Agreement is entered into pursuant to the Department's authority under those laws and constitutes an administrative settlement for purposes of 42 USC 9613(f). The Department has established a Voluntary Cleanup Program to address the environmental, legal and financial barriers that hinder the redevelopment and reuse of contaminated properties.
2. Volunteers represent, and the Department relied upon such representations in entering into this Agreement, that their involvement with the Site and the facility on that Site is the following: Rochester Gas and Electric Corporation is the owner and current operator of the Site and the District placed during the Cliff Street Siphon Tunnel Project tunnel spoils and other wastes into surface impoundments which the District constructed on 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. The Department alleges that the Site is an inactive hazardous waste disposal site, as that term is defined at ECL 27-1301.2.

B. 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. ECL 27-1313.3.a provides that whenever the Commissioner of Environmental Conservation finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site

1. to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and

2. to implement such program within reasonable time limits specified in the order.

C. 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.

D. Volunteers wish to enter into this Agreement in order to ensure, and the Department hereby determines that this Agreement constitutes a demonstration, that the response action 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. A. Volunteers are entering into this Agreement in order to resolve their potential liability to the State of New York for remediating the Existing Contamination under ECL Article 27, Title 13 the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, and under comparable statutory and common law theories of remedial liability. The Department finds that such resolution, undertaken in accordance with the terms of this Agreement, is in the public interest because private funds will be used to address environmental issues at the Site while ensuring the protection of human health and the environment.

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

6. The Department and Volunteers agree that the goals of this Agreement are:

A. for Volunteers to,

1. implement the Supplemental Investigation Work Plan and Remediation Work Plan; and

2. reimburse the State's administrative costs as provided in this Agreement, and

B. for the Department to release Volunteers and their successors and assigns and their respective secured creditors, under the conditions set forth in this Agreement, from any and all claims, actions, suits, and proceedings by the Department, which may arise under any applicable law as a result of the Covered Contamination.

7. Volunteers agree to be bound by the terms of this Agreement. Volunteers consent to and agree not to contest the authority or jurisdiction of the Department to enter into or enforce this Agreement, and agree 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, VOLUNTEERS AGREE TO THE FOLLOWING:

I. Performance and Reporting of the Supplemental Investigation Work Plan and Development and Implementation of the Remediation Work Plan

A. Volunteers shall commence implementation of the Supplemental Investigation Work Plan in accordance with the schedule contained therein and implement it in accordance with its terms.

B. Volunteers shall notify the Department of any significant difficulties that may be encountered in implementing any Work Plan, including the Supplemental Investigation Work Plan or any Department-approved modification to the Supplemental Investigation Work Plan, and shall not modify any obligation unless first approved by the Department.

C. During implementation of all investigation activities identified in the Supplemental Investigation Work Plan, Volunteers shall have on-Site a full-time representative who is qualified to supervise the activities undertaken.

D. In accordance with the schedule contained in the Supplemental Investigation Work Plan, Volunteers shall submit to the Department a final investigation report. The final investigation report shall:

1. include all data generated and all other information obtained during the supplemental investigation;
2. provide all of the assessments and evaluations identified in the Supplemental Investigation Work Plan;
3. identify any additional data that must be collected; and
4. include a certification by the individual or firm with primary responsibility for the day to day performance of the investigation that all activities that comprised the investigation were performed in full accordance with the approved Supplemental Investigation Work Plan.

E. After its acceptance of the final investigation report submitted under Subparagraph I.D of this Agreement, the Department shall determine whether it has sufficient information respecting the nature and extent of the contamination on the Site.

1. If the Department determines that it does not have sufficient information respecting the nature and extent of the Site's contamination, it will so notify Volunteers in writing. Volunteers shall collect such additional data under a Department-approved revision to the Supplemental Investigation Work Plan, which shall be attached to this Agreement as Exhibit "B-1" and made a part of this Agreement. However, if within 10 days after receipt of the Department's written notification both Volunteers elect in writing not to collect such additional data or if the Department and Volunteers cannot agree upon revisions to the Supplemental Investigation Work Plan, either party may terminate this Agreement pursuant to Subparagraph XIII.A.

2. If the Department determines that it has sufficient information respecting the nature and extent of the Site's contamination, it will so inform Volunteers in writing, and the Department will inform Volunteers in that communication whether the Department believes that remediation of contamination on the Site is needed to allow the Site to be used for the Contemplated Use.

3. If the Department determines that no remediation is needed to allow the Site to be used for the Contemplated Use, it shall so state in writing and shall provide Volunteers with the forbearance, release, and covenant not to sue described in Subparagraph I.K of this Agreement and with the notification letter described in Subparagraph I.L of this Agreement.

4. If the Department determines that remediation is needed to allow the Site to be used for the Contemplated Use, it shall so state in writing; and Volunteers shall develop a proposed Remediation Work Plan that shall be noticed for public comment in accordance with Subparagraph I.F of this Agreement. Such proposed Remediation Work Plan shall include,

among other requirements, an evaluation of the proposed remedy considering the factors set forth in 6 NYCRR 375-1.10(c)(1) through (c)(6), excluding consideration of cost-effectiveness. At a minimum, the remedial activities contemplated by the proposed Remediation Work Plan must eliminate or mitigate all significant threats to the public health or environment and must be protective for the safe implementation of the Site's Contemplated Use. If within 10 days after receipt of the Department's written determination, Volunteers elect not to develop a Remediation Work Plan; or, in the event that the Department concludes that a mutually acceptable Remediation Work Plan cannot be successfully negotiated, then, either party may terminate this Agreement pursuant to Subparagraph XIII.A.

The proposed Remediation Work Plan shall, subject to the termination provisions contained in Paragraph XIII., provide, *inter alia*, that if during the Remediation Work Plan's implementation, contamination is discovered that was not discussed in the final investigative report, Volunteers shall investigate the nature and extent of such newly discovered contamination, and the Remediation Work Plan will be revised to have Volunteers remediate such newly discovered contamination in the event that this remediation is needed to allow the Contemplated Use to proceed.

F. Upon development of a proposed Remediation Work Plan, the Department will publish a notice in the Environmental Notice Bulletin to inform the public of the public's opportunity to submit to the Department by no later than 30 days after the date of the issue of the Environmental Notice Bulletin in which the notice shall appear, comments on the proposed Remediation Work Plan and shall mail an equivalent notice to the City of Rochester and the County of Monroe. If, as a result of its review of the comments received, the Department determines that the proposed Remediation Work Plan for the Site must be revised:

1. due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the Remediation Work Plan; or
2. due to information received, in whole or in part, which indicates that the activities to be carried out in accordance with the Remediation Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use, then the Department will so notify Volunteers and will immediately commence negotiations with Volunteers to revise the Remediation Work Plan accordingly. However, if after good faith negotiations, Volunteers and the Department cannot agree upon revisions to the Remediation Work Plan, then, Volunteers may terminate this Agreement pursuant to Subparagraph XIII.A.

If the parties agree to a revised Remediation Work Plan, the revised Remediation Work Plan shall be attached to this Agreement as Exhibit "C-1;" Volunteers shall implement that Remediation Work Plan instead of the one contained in Exhibit "C;" and, unless revised as provided in Subparagraph I.G.1 of this Agreement, all references to "Remediation Work Plan" in this Agreement shall refer to the one contained in Exhibit "C-1."

3. Within 30 days after the determination of the final form of the Remediation Work Plan after completion of public comment, Volunteers shall promptly commence their implementation in accordance with its provisions.

G. Volunteers shall carry out the Remediation Work Plan in accordance with the schedule contained therein.

1. The parties agree that the Remediation Work Plan will be modified in the event that contamination previously unknown or inadequately characterized is encountered during the Remediation Work Plan's implementation and that such modification(s) shall appear in Exhibit "C-1" and all references to "Remediation Work Plan" in this Agreement shall refer to the one contained in Exhibit "C-1." However, if after good faith negotiations, Volunteers and the Department cannot agree upon revisions to the Remediation Work Plan, then, Volunteers may terminate this Agreement pursuant to Subparagraph XIII.A.

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

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

1. In accordance with the schedule contained in the Remediation Work Plan, as may be modified by agreement in writing between the Department and Volunteers, Volunteers shall submit to the Department a final engineering report that shall include but not be limited to: all data generated relative to the Site and all other information obtained as part of the implementation of the Remediation Work Plan; all of the assessments and evaluations required by the Remediation Work Plan; a statement of any additional data that must be collected; "as-built" drawings, to the extent necessary, showing all changes made during construction and a certification made by the professional engineer with primary responsibility for the day to day performance of the activities under this Agreement that all activities were completed in full accordance with the Remediation Work Plan, any Department-approved modification to the Remediation Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteers pursuant thereto, and this Agreement.

2. Volunteers shall submit a detailed post-remedial operation, maintenance, and monitoring plan ("OM&M Plan"), if needed, along with the final engineering report.

3. A professional engineer must prepare, sign, and seal the OM&M Plan, "as built" drawings, final engineering report, and certification.

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

K. 1. i. The Department shall notify Volunteers in writing whether the Department is satisfied with the implementation of the Remediation Work Plan, any Department-approved modification to the Remediation Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteers pursuant thereto, and this Agreement which notification shall not be unreasonably withheld.

ii. Within 60 days after completion of the Department-approved OM&M Plan, if any, Volunteers 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 OM&M Plan were implemented in accordance with that plan. The Department shall notify Volunteers whether it is satisfied with the OM&M Plan's implementation which notification shall not be unreasonably withheld.

2. Upon being satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Remediation Work Plan have been reached, the Department shall notify Volunteers in writing of its satisfaction and, except for the reservations identified below, the Department releases, covenants not to sue, and shall forbear from bringing any action, proceeding, or suit against, Volunteers and their lessees, sublessees, successors and assigns, and their respective secured creditors, 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 remain recorded until the Department approves their termination in accordance with Paragraphs IX and X of this Agreement, and (c) Volunteers and/or Volunteers' lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Department-approved OM&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 resource 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 Volunteers and the Department at the time of the development of the Remediation 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 Remediation 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, which indicates that the activities carried out in accordance with the Remediation Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;

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

v. due to fraud committed or mistake made by Volunteers in entering into or implementing this Agreement.

Additionally, the Department hereby reserves all of its rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to Volunteers, if Volunteers cause a, or allow the, 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 if Volunteers 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 Volunteers' lessees, sublessees, successors, or assigns who causes a; or allows the 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, after the effective date of this Agreement; who causes or allows 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; or who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation those parties may have respecting same established resulting solely from this Agreement's execution.

3. Notwithstanding any other provision in this Agreement, 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 Agreement shall be construed, or deemed, to preclude the State of New York from recovering such claim.

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

M. 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.K or in a "no further action" letter issued under Subparagraph I.L of this Agreement shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Covered Contamination.

2. Except as above provided in Subparagraph I.K of this Agreement and in the "no further action" letter issued under Subparagraph I.L 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.K and in the "no further action" letter issued under Subparagraph I.L of this Agreement shall not extend to parties (other than Volunteers) that were responsible under law before the effective date of this Agreement to address the Existing Contamination.

II. Progress Reports

A. Volunteers shall submit written monthly, unless a different frequency is set forth in the Remediation Work Plan, progress reports to the parties identified in Subparagraph XI.A.1 in the numbers specified in that Subparagraph that with respect to actions under this Agreement:

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 Volunteers or Volunteers' contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Agreement or conducted independently by Volunteers;
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 Volunteers' obligations under this Agreement, and efforts made to mitigate those delays or anticipated delays; and

6. include any modifications to the Work Plan that Volunteers have proposed to the Department and any that the Department has approved.

B. Volunteers shall submit these progress reports to the Department by the tenth day of every month following the commencement of implementation of the Supplemental Investigation Work Plan; and Volunteers' obligation to submit the progress reports shall terminate upon its receipt of the written satisfaction notification identified in Subparagraph I.K.2 of this Agreement approving Volunteers' final engineering report concerning the Remediation Work Plan's implementation. However, Volunteers shall continue to submit reports concerning the implementation of any OM&M Plan that may be required under this Agreement, in accordance with that Plan's requirements.

C. Volunteers 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 Volunteers make 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 with generally accepted technical and scientific principles. The Department shall notify Volunteers 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. a. If the Department disapproves a submittal, it shall so notify Volunteers in writing and shall specify the reasons for its disapproval within 30 days (60 days, in the case of the final engineering report) after its receipt of the submittal and may request Volunteers 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 Volunteers' submittal has been disapproved, Volunteers 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 and corrects the deficiencies.

b. After receipt of the revised submittal, the Department shall notify Volunteers in writing within 30 days of its approval or disapproval. If the Department disapproves the revised submittal, Volunteers shall within 30 days after receiving written notice that Volunteers' revised submittal has been disapproved make a further revised submittal to the Department which endeavors to address and resolve all of the Department's stated reasons for disapproving the revised submittal and corrects the deficiencies.

c. If the Department disapproves the further revised submittal, Volunteers may terminate this Agreement pursuant to Subparagraph XIII.A. If the Department approves a revised submittal, it shall be incorporated into and become an enforceable part of this Agreement.

B. Within 30 days after the Department's approval of the final engineering report, Volunteers shall submit to the Department one microfilm copy (16 millimeter roll film M type cartridge) or a copy in an electronic format acceptable to the Department of that report and all other Department-approved drawings and submittals. Such submission shall be made to:

Director, Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-7017

IV. Enforcement

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

B. Volunteers 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 Volunteers' reasonable control ("*force majeure* event"); provided, that Volunteers shall, within ten days of when they obtain knowledge of any such *force majeure* event, notify the Department in writing. Volunteers shall include in such notice the measures taken and to be taken by Volunteers to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteers 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

Volunteers hereby consent, upon reasonable notice under the circumstances presented, to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteers by any duly designated employee, consultant, contractor, or agent of the Department or any State agency having jurisdiction with respect to the matters addressed in the Work Plans for purposes of inspection, sampling, and testing and to ensure Volunteers' compliance with this Agreement all of whom shall abide by the health and safety rules in effect for work performed at the Site under the terms of this Agreement. Upon request, Volunteers shall provide, to the extent available to Volunteers, the Department with suitable office space at the Site, including access to a telephone, and shall permit the Department full access to all non-privileged records relating to

matters addressed by this Agreement and to job meetings. Raw data is not considered privileged and that portion of any privileged document containing raw data must still be provided to the Department.

VI. Payment of State Costs

A. Within thirty days after receipt of an itemized invoice from the Department, Volunteers shall pay to the Department a sum of money 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 work performed at or in connection with the Site prior to the effective date of this Agreement, as well as for negotiating this Agreement, reviewing and revising submittals made pursuant to this Agreement, overseeing activities conducted pursuant to this Agreement, collecting and analyzing samples, and administrative costs associated with this Agreement but not including those State expenses incurred after the Agreement's termination and not including the State's expenses incurred after the Department's notification identified in Subparagraph I.K.2 of this Agreement of its approval of the final engineering report pertaining to the implementation of the Department-approved OM&M Plan.

B. Such invoice shall be sent to Volunteers at the following addresses:

Christine Vitt, P.E.
Monroe County Department of Environmental Services
Suite 7100, City Place
50 West Main Street
Rochester, New York 14614

Kevin Hylton
Manager of Environmental Affairs
Rochester Gas and Electric Corporation
89 East Avenue
Rochester, NY 14649.

C. Each such payment shall be made by certified 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
625 Broadway
Albany, NY 12233-7012

D. Each party shall provide written notification to the other within 90 days of any

change in the foregoing addresses.

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 provided in Subparagraph I.K.2 of this Agreement and in any "no further action" letter issued under Subparagraph I.L 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, the right to recover natural resources damages) with respect to any party, including Volunteers.

B. Nothing contained in this Agreement shall prejudice any rights of the Department to take 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. 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 Volunteers fail to comply substantially with this Agreement's terms and conditions.

E. Except as otherwise provided in this Agreement, Volunteers specifically reserve any and all rights and defenses to contest, defend against, dispute or disprove any actions, proceedings, allegations, assertions, determinations, or orders of the Department, including any assertion of remedial liability against Volunteers; and reserve all rights and defenses Volunteers 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 Volunteers' compliance with this Agreement shall not be construed as an admission of liability, fault, or wrongdoing by Volunteers, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

F. Except as provided in Subparagraph XII.L, Volunteers reserve such rights as each may have to seek and obtain contribution and/or indemnification from its insurers and from other potentially responsible parties or their insurers for past or future response costs.

VIII. Indemnification

Volunteers shall indemnify and hold the Department, 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 Volunteers and/or any of Volunteers' directors, officers, employees, servants, agents, successors, and assigns except for liability arising from (i) vehicular accidents occurring during travel to or from the Site; or (ii) from willful, wanton or malicious acts or acts constituting gross negligence or criminal behavior by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Agreement. The Department shall provide Volunteer with written notice no less than 30 Days prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

IX. Notice of Sale or Conveyance

A. Within 30 days after the effective date of this Agreement, Volunteers shall

1. file the Notice of Agreement, which is attached to this Agreement as Exhibit "E," with the Monroe County Clerk to give all parties who may acquire any interest in the Site notice of this Agreement and
2. provide the Department with evidence of such filing.

Volunteers may terminate the Notice when the Department notifies Volunteers in writing pursuant to Subparagraph I.K.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 Remediation Work Plan have been reached and that the OM&M Plan, if any, has been successfully implemented.

B. If prior to receiving the above notice pursuant to Subparagraph I.K.2 from the Department, Volunteer Rochester Gas and Electric Corporation proposes to convey the whole or any part of its ownership interest in the Site, Volunteer Rochester Gas and Electric Corporation shall, not fewer than 60 days before the date of conveyance, notify the Department and the District 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 Volunteers' receipt of the Department's approval of a Remedial Action Work Plan which relies on institutional controls or any Department approved modifications thereto which rely on institutional controls, Volunteer Rochester Gas and Electric Corporation shall, unless otherwise authorized by the Department in writing, record a Department-approved instrument with the Monroe 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 Volunteers and Volunteers' successors and assigns to continue in full force and effect restrictions set forth in the Remediation Work Plan and OM&M Plan, if any; and

4. shall provide that Volunteer Rochester Gas and Electric Corporation, on behalf of itself and its successors and assigns, hereby consent 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 covenant not to contest such enforcement.

B. Within 30 days after Volunteers' receipt of approval of a Remedial Action Work Plan which relies on institutional controls or any Department approved modifications thereto which rely on institutional controls, Volunteers shall provide the Department with a copy of such instrument certified by the Monroe County Clerk to be a true and faithful copy of the instrument as recorded in the Office of the Monroe County Clerk.

C. Either or both of the Volunteers may petition 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 to terminate the deed restriction filed pursuant to this Paragraph when the Site is protective of human health and the environment for residential uses without reliance upon the restrictions set forth in such instrument. 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 will not unreasonably withhold its approval of such petition.

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 Volunteers shall be sent to:

Todd Caffoe, P.E.
New York State Department of Environmental Conservation
Division of Environmental Remediation
6274 East Avon-Lima Road
East Avon, New York 14414

with copies to:

Gary Litwin
Bureau of Environmental Exposure Investigation
New York State Department of Health
Flanigan Square
547 River Street
Troy, New York 12180-2216

Andrew English, P.E.
New York State Department of Environmental Conservation
Division of Environmental Remediation
625 Broadway
Albany, New York 12233-7017

James D. Charles, 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 Todd Caffoe, P.E.
- Two copies to Gary Litwin

2. Communication to be made from the Department to Volunteers shall be sent to:

Monroe County Attorney
Monroe County Attorney's Office
307 County Office Building
Rochester, NY 14614

Christine Vitt, P.E.
Monroe County Department of Environmental Services

Suite 7100, City Place
50 West Main Street
Rochester, New York 14614

Kevin Hylton
Manager of Environmental Affairs
Rochester Gas and Electric Corporation
89 East Avenue
Rochester, NY 14649.

Thomas F. Walsh, Esq.
Jaeckle, Fleischmann & Mugal, LLP
Ellwanger and Barry Building
39 State Street
Rochester, New York 14614-1310

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

C. Each party shall notify the other within 90 Days after any change in the addresses listed in this Paragraph XI or in Paragraph VI.

XII. Miscellaneous

A. 1. By entering into this Agreement, Volunteers certify that they have fully and accurately disclosed to the Department all information known to them and all information in the possession or control of Volunteers' officers, directors, employees, contractors, and agents which relates in any way to the contamination existing on the effective date of this Agreement, and to any past or potential future release of hazardous substances, pollutants, or contaminants, at or from the Site and to their application for this Agreement.

2. If the Department determines that information Volunteers 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. Volunteers 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. This Subparagraph XII.B does not prohibit Volunteers from using, subject to the Department's approval, any of their own in-house environmental professionals for tasks within their areas of

practice. The Department hereby approves the following in-house environmental professionals of Volunteers to manage the tasks implemented under this Agreement and to develop the Work Plans attached to this Agreement: Steven Mullin, Kevin Hylton and Christine Vitt. The responsibility for the performance of the professionals retained by Volunteers shall rest solely with Volunteers.

C. Each party shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by the other party. The Department shall make the results of all sampling under this Subparagraph available to Volunteers and Volunteers shall make the results available pursuant to its reporting obligations.

D. Volunteers shall notify the Department at least five working days in advance of any field activities to be conducted pursuant to this Agreement as well as any prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

E. 1. Subject to Subparagraph XII.E.2 of this Agreement, Volunteers shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Volunteers' obligations under this Agreement ("Authorizations").

2. In carrying out the activities identified in the Work Plans and OM&M Plan, the Department may exempt Volunteers 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. If Volunteers are unable to obtain such Authorizations, Volunteers may request assistance from the Department or a modification of their obligations under this Agreement to otherwise enable them to complete the work.

F. Volunteers, Volunteers' officers, directors, agents, servants, and employees (in the performance of their designated duties on behalf of Volunteers), and Volunteers' lessees, successors, and assigns shall be bound by this Agreement. Any change in ownership or corporate status of Volunteers including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Volunteers' responsibilities under this Agreement. Volunteers' 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 Volunteers. Volunteers shall not be considered operators of the Site solely by virtue of having executed and/or implemented this Agreement.

G. Volunteers shall provide a copy of this Agreement to each contractor hired to perform work required by this Agreement and to each person representing Volunteers with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement. Volunteers or Volunteers' contractors shall provide written notice of this Agreement to all

subcontractors hired to perform any portion of the work required by this Agreement. Volunteers shall nonetheless be responsible for ensuring that Volunteers' 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. The terms of this Agreement shall constitute the complete and entire Agreement between the Department and Volunteers concerning the implementation of the work plan(s) attached to this Agreement. 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 Volunteers of their obligation to obtain such formal approvals as may be required by this Agreement. In the event of a conflict between the terms of this Agreement and any Work Plan submitted pursuant to this Agreement, the terms of this Agreement shall control over the terms of the Work Plan(s). Volunteers consent to and agree not to contest the authority and jurisdiction of the Department to enter into or enforce this Agreement.

2. If Volunteers desire that any provision of this Agreement be changed, Volunteers shall make timely written application, signed by the Volunteers, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Todd Caffoe, P.E. and to James D. Charles, Esq. with copies to the parties listed in Subparagraph XI.A.

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. ECL 8-0105.5(i), 6 NYCRR 617.5(c)(29).

K. Except as provided in Subparagraph XII.L, the provisions of this Agreement do not constitute and shall not be deemed a waiver of any right Volunteers otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or any of Volunteers' insurers, for payments made previously or in the future for response costs. To the extent authorized under 42 USC 9613 and any other applicable law or regulation, Volunteers shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the alleged contamination which is the subject matter of this Agreement. In any future action brought by Volunteers against a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the provision of 42 USC 9613(f)(3) shall apply.

L. Volunteers and Volunteers' employees, servants, agents, lessees, sublessees, successors, and assigns hereby affirmatively waive any right they had, have, or may have to make a claim against the State of New York and 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 Volunteers' entering into or fulfilling the terms of this Agreement with respect to the Site.

M. If there are multiple parties, the obligations of the Volunteers under this Agreement are joint and several and the "bankruptcy" or inability to continue by any Volunteer shall not affect the obligations of the remaining Volunteer(s) to carry out the obligations under this Agreement.

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

XIII. Termination of Agreement

A. 1. Volunteers may elect in writing to terminate this Agreement without cause while the Department may only elect to terminate this Agreement for cause, which shall be established so long as the Department's stated reason is not arbitrary and capricious. The Department shall include in its notice of termination the basis for its election to terminate this Agreement.

2. In the event of any party's election to terminate this Agreement, this Agreement shall terminate effective the 5th Day after the non-terminating party's receipt of the written notification terminating this Agreement, except that such termination shall not affect the provisions contained in Paragraphs IV, VI and VIII and in Subparagraph XIV.L, nor Volunteers' obligation 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 activities were commenced under this Agreement, which provisions and obligation shall survive the termination of this Agreement.

B. Notwithstanding Subparagraph XIII.A, this Agreement shall terminate without notice in the event that Volunteers fail to submit additional Work Plans in accordance with Subparagraph II.E, unless other Work Plans are under review by the Department or being implemented by Volunteers.

DATED:

ERIN M. CROTTY, COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: JUL 18 2002



Susan I. Taluto
Deputy Commissioner
Water Quality and Environmental Remediation

CONSENT BY VOLUNTEER

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

Rochester Pure Waters District

By: Richard F. Mackey

Title: Deputy County Executive

Date: June 17, 2002

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

On the 17th day of June, in the year 2002, before me, the undersigned, personally appeared Richard F. Mackey, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

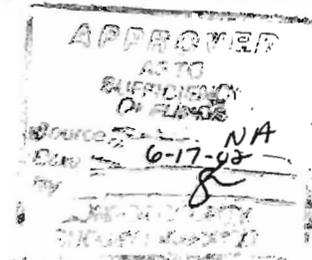
Mary Beth Musto

Signature and Office of individual taking acknowledgment

Mary Beth Musto

**Notary Public State of New York
Monroe County**

Commission Expires Sept. 25, 2002



CONSENT BY VOLUNTEER

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

Monroe County

By: Richard F. Mackey

Title: Deputy County Executive

Date: June 17, 2002

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

On the 17th day of June, in the year 2002, before me, the undersigned, personally appeared Richard F. Mackey, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Mary Beth Musto
Signature and Office of individual
taking acknowledgment.

Mary Beth Musto
Notary Public State of New York
Monroe County
Commission Expires Sept. 25, 2002

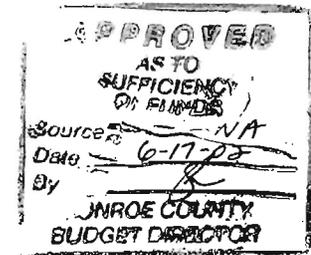


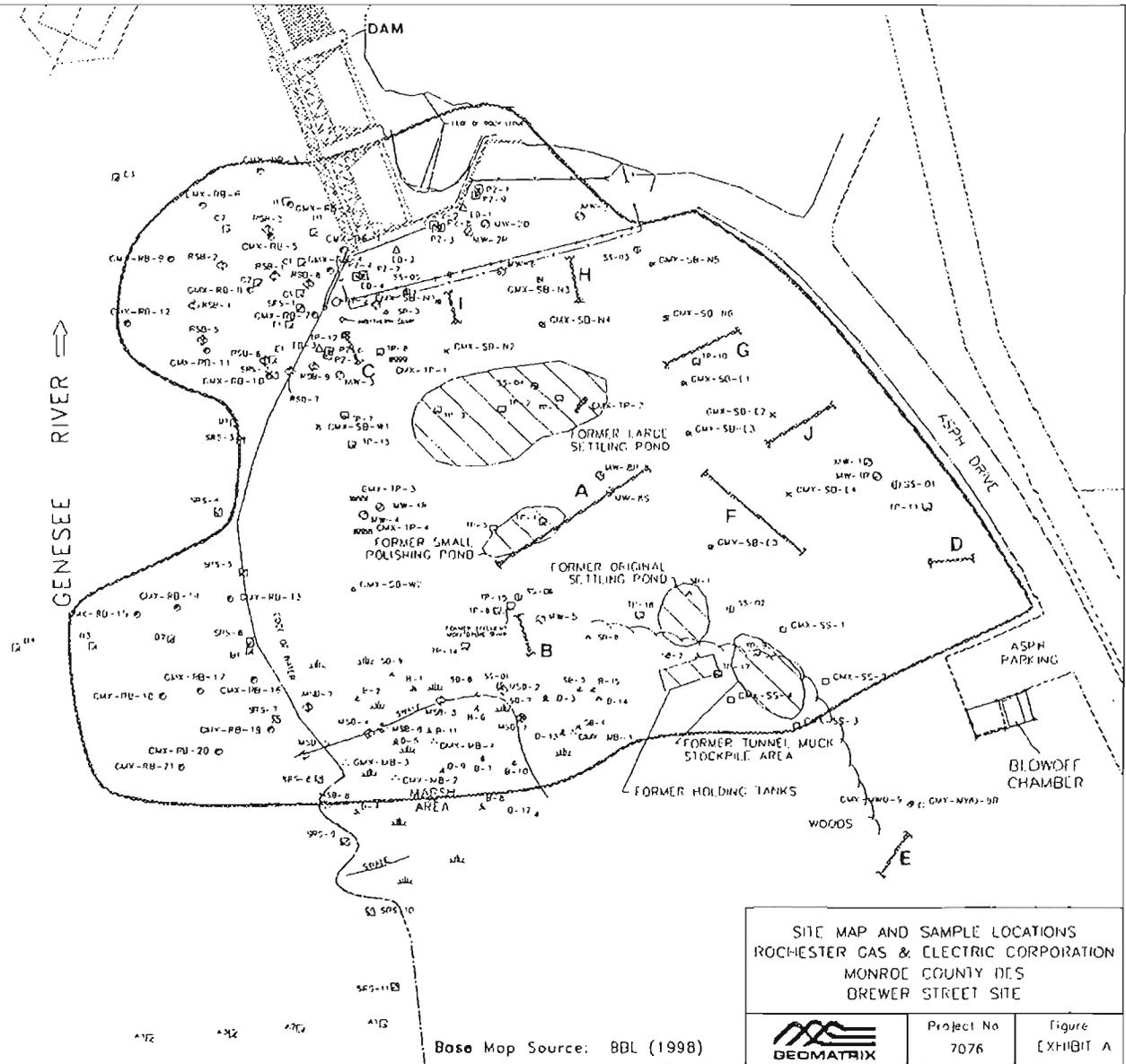
EXHIBIT "A"

Map of Site



LEGEND

- CMX-MU-1 ⚭ MARSH BORING LOCATION (2001)
- CMX-SB-E2 ⚭ SOIL BORING LOCATION (2001)
- LUX-SS-3 ○ SURFACE SOIL SAMPLE LOCATION (2001)
- CMX-RB-20 ⊕ RIVER SEDIMENT SAMPLE TRANSECT (2001)
- CMX-TP-1 ⊠ TEST PITS (2001)
- CMX-MWU-9 ⊕ UPGRADIENT OVERBYPEN MONITORING WELL (2001)
- CMX-MWU-9R ⊕ UPGRADIENT BEDROCK MONITORING WELL (2001)
- MW-1 ⊕ MONITORING WELL (1993, 1997)
- TP-1 ⊠ TEST PIT (1993, 1996, 1997)
- P2-1 ⊠ PIEZOMETER (1997)
- SB-1 CR B-1 ⚭ SOIL BORING (1993, 1997)
- EB-2 △ EXPLORATORY BORING (1997)
- SS-01 ⊕ SURFACE SOIL SAMPLE (1996)
- SRS-1 ⊕ SHALLOW SEDIMENT SAMPLE (1996)
- B1 ⊠ DEEP RIVER SEDIMENT SAMPLE (1997)
- RSO-1 ⊕ RIVER SEDIMENT BORING (1997)
- MSB-1 ⊕ MARSH SEDIMENT BORING (1997)
- E ⊠ TEST TRENCH (1996)
- ▭ SITE LIMITS (3.25 ACRES)



Base Map Source: BBL (1998)

SITE MAP AND SAMPLE LOCATIONS ROCHESTER GAS & ELECTRIC CORPORATION MONROE COUNTY DES BREWER STREET SITE		
	Project No 7076	Figure EXHIBIT A

DATE: 01/21/02
 DRAWN BY: J. W. BROWN
 CHECKED BY: J. W. BROWN

Exhibit A

EXHIBIT "B"
Supplemental Investigation Work Plan

EXHIBIT "B-1"
Revised Supplemental Investigation Work Plan

EXHIBIT "C"
Remediation Work Plan

EXHIBIT "C-1"
Revised Remediation Work Plan

EXHIBIT "D"

Assignable Release and Covenant Not To Sue

[On Department Letterhead]

[Insert Date]

Rochester Pure Waters District and
Monroe County
c/o Monroe County Attorney
Monroe County Attorney's Office
307 County Office Building
Rochester, NY 14614

Michael Tomaino, Esq.
General Counsel
Rochester Gas and Electric Corporation
89 East Avenue
Rochester, NY 14649.

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 Agreement entered into between and among the New York State Department of Environmental Conservation (the "Department"), the Rochester Pure Waters District, Monroe County, and Rochester Gas and Electric Corporation ("Volunteers"), Index No.B8-0547-98-12 (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Agreement's Work Plan, covering the remediation of the Site, that piece of real property consisting of an approximate 3.25 acre portion of the approximately 13.1 acres, located at the foot of Brewer Street in the City of Rochester, which is included on the Monroe County Tax Map as part of Parcel No. 105.28-2-3.1, that either directly adjoins or lies south of the Middle Falls Dam on the east bank of the Genesee River, and located at the foot of Brewer Street in the City of Rochester has been successfully implemented.

The Department, therefore, hereby releases, covenants not to sue, and shall forbear from bringing any action, proceeding, or suit against Volunteers and Volunteers' lessees and sublessees and Volunteers' successors and assigns and their respective secured creditors, for the further investigation and remediation of the Site 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 notices and deed restrictions remain recorded until the Department approves their termination in accordance with Paragraphs IX and X of the Agreement, and (c) Volunteers and/or Volunteers' lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Department-approved OM&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 resource damages nor to any further investigation or remedial action the Department deems necessary:

- due to off-Site migration of contaminants other than petroleum resulting in impacts to environmental resources, to human health, or to other biota that are not inconsequential and to off-Site migration of petroleum, irrespective of whether the information available to Volunteer and the Department at the time of the development of the Remediation Work Plan disclosed the existence or potential existence of such off-Site migration;
- due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the Remediation Work Plan which indicate that Site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;
- due to information received, in whole or in part, after the Department's approval of the final engineering report, which indicates that the activities carried out in accordance with the Remediation Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;
- due to Volunteers' failure to implement the Agreement to the Department's satisfaction; or
- due to fraud or mistake committed by Volunteers in entering into or implementing this Agreement.

Additionally, the Department hereby reserves all of its rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to:

- Volunteers, if Volunteers cause a, or allow the, 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 if Volunteers 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 Volunteers' lessees, sublessees, successors, or assigns who causes a, or allows the 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, after the effective date of the Agreement; who causes or allows 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; or who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation that party may have respecting same established resulting solely from the

Agreement's execution.

Notwithstanding the above, however, with respect to any claim or cause of action asserted by the Department, the one seeking the benefit of this release, covenant not to sue, and forbearance 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 release shall be construed, or deemed, to preclude the State of New York from recovering such claim.
- except as provided in Subparagraph I.F of the Agreement and in this letter, nothing contained in the Agreement or in this letter 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 Volunteers.
- nothing contained in this letter shall prejudice any rights of the Department to take any investigatory or remedial action it deems necessary if Volunteers fail to comply with the Agreement or if contamination other than Existing Contamination or Covered 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.
- nothing contained in this letter shall be construed to affect the Department's right to terminate the Agreement at any time during its implementation if Volunteers fail 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

By: _____

Its: _____

Appendix "A"

(to Exhibit "D")

Map of the Site

Exhibit "E"

NOTICE OF AGREEMENT

This Notice is made as of the ____ day of _____, 2002 by Rochester Gas and Electric Corporation which is the fee owner of a parcel of real property located at the foot of Brewer Street in the City of Rochester and is included on the Monroe County Tax Map as part of Parcel No.105.28-2-3.1, as more particularly described on Appendix "A" attached hereto (the "Property"); and

WHEREAS, Rochester Gas and Electric Corporation, by authorized signature, entered into an agreement with the Department and Monroe County, Index # B8-0547-98-12 (the "Agreement"), concerning the investigation and remediation of contaminants present on the Property, which Agreement was signed by the Commissioner of Environmental Conservation on _____; and

WHEREAS, in return for the remediation of the Property pursuant to the Agreement to the satisfaction of the Department, the Department will provide Rochester Pure Waters District and Rochester Gas and Electric Corporation and their lessees and sublessees and their successors and assigns, including their respective secured creditors, with a release, covenant not to sue, and forbearance from bringing any action, proceeding, or suit related to the Site's further investigation or remediation, subject to certain reservations set forth in the Agreement; and

WHEREAS, pursuant to the Agreement, Rochester Gas and Electric Corporation agreed that it would give notice of the Agreement to all parties who may acquire any interest in the Property by filing this Notice with the Monroe County Clerk,

NOW, THEREFORE, Rochester Gas and Electric Corporation, for itself and for its successors and assigns, declares that:

1. This Notice of the Agreement is hereby given to all parties who may acquire any interest in the Property; and that
2. This Notice shall terminate upon the filing by Rochester Gas and Electric Corporation or its successors and assigns, of a termination of notice of Agreement after having first received approval to do so from the New York State Department of Environmental Conservation or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department.

IN WITNESS WHEREOF, Rochester Gas and Electric Corporation has executed this Notice of Agreement by its duly authorized representative.

Rochester Gas & Electric Corporation

Dated: By: _____

Its: _____

[acknowledgment]

Appendix "A"

(to Exhibit "E")

Map of the Property