

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

IN THE MATTER OF THE HI VIEW
TERRACE SUPERFUND SITE,
WEST SENECA, NEW YORK

NATIONAL FUEL GAS DISTRIBUTION
CORPORATION,

Settling Party.

Proceeding under Section 122(h)(1)
of the Comprehensive Environmental
Response, Compensation, and
Liability Act of 1980, as amended,
42 U.S.C. § 9622(h)(1).

ADMINISTRATIVE COST
RECOVERY AGREEMENT

EPA DOCKET NO.
II-CERCLA-95-0225

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D.

2. This Agreement is also entered into pursuant to the authority of the Attorney General of the United States to settle and compromise claims of the United States, which authority, in

the circumstances of this Settlement, has been delegated to the Assistant Attorney General for Environment and Natural Resources.

3. This Agreement is made and entered into by EPA and the National Fuel Gas Distribution Corporation ("Settling Party"). The Settling Party consents to and will not contest EPA's jurisdiction to enter into this Agreement or to implement or enforce its terms, and will not contest the validity or terms of this Agreement in any action brought by the United States to enforce the terms of this Agreement.

II. BACKGROUND

4. This Agreement concerns the Hi View Terrace Superfund Site ("Site") located in West Seneca, New York.

5. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604. The response actions included fencing of the Site, excavating soil contaminated with hazardous substances, including cyanide, and disposing of the contaminated soil off-Site.

6. EPA alleges that the Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is liable for response costs incurred at or in connection with the Site. The Settling Party denies these allegations.

7. EPA and the Settling Party desire to resolve the Settling Party's alleged civil liability for response costs incurred or to be incurred at the Site without litigation and

without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

8. This Agreement shall be binding upon the United States and shall be binding upon the Settling Party and its successors and assigns. Any change in ownership or corporate or other legal status of the Settling Party, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would

fall on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the next working day.

c. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

d. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

e. "Natural Resource Damages" shall mean damages, including cost of damages assessments, recoverable under § 107 of CERCLA for injury to, destruction of, or loss of natural resources at the Site.

f. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

g. "Parties" shall mean the United States and the Settling Party.

h. "Response Costs" shall mean all costs, including but not limited to, direct and indirect costs, that the United States has incurred or will incur for response actions at the Site, and all Interest on such costs.

i. "Section" shall mean a portion of this Agreement identified by a roman numeral.

j. "Site" shall mean the Hi View Terrace Superfund site, on Hi View Terrace in West Seneca, Erie County, New York. The Site is bounded on the north by Cazenovia Creek, and

encompasses four lots on Hi View Terrace: 94 Hi View Terrace, 100 Hi View Terrace, 110 Hi View Terrace, and 116 Hi View Terrace. The Site also includes contaminated soils in the immediate vicinity of those parcels and any groundwater or aquifer contamination originating from or relating to the Site.

V. REIMBURSEMENT OF RESPONSE COSTS

10. Within 30 days of the effective date of this Agreement, the Settling Party shall pay to the EPA Hazardous Substance Superfund \$75,000 in reimbursement of Response Costs.

11. The payment required in paragraph 10 shall be made by certified or cashier's check made payable to "EPA-Hazardous Substance Superfund," and shall be sent to:

EPA Region II
Attn: Superfund Accounting
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

The check shall be accompanied by correspondence referencing the name and address of the Settling Party, the Site name, the amount of the payment, the Site/Spill ID Number 022Y and the EPA docket number of this Agreement.

12. The Settling Party shall simultaneously send a copy of the check and the accompanying correspondence to:

Carol Y. Berns
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region II
290 Broadway, 17th Floor
New York, NY 10007-1866

Ronald Gherardi
Financial Management Branch
U.S. Environmental Protection Agency
Region II

290 Broadway, 29th Floor
New York, NY 10007-1866

13. Within 30 days of the effective date of this Agreement, the Settling Party shall pay to the United States \$25,000 for natural resource damages, in the form of a certified check made payable to "U.S. Department of the Interior" and referencing Account Number 14X1618 and the Hi View Terrace Superfund Site. The Settling Party shall forward the certified check by certified mail, return receipt requested to:

Chief, Division of Finance
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Arlington, Virginia 22203

with a copy to:

Mark Barash
Office of Regional Solicitor
United States Department of Interior
One Gateway Center, Suite 612
Newton Corner, MA 02158-2868

and shall reference that the payment is for natural resource damages for resources under the trusteeship of the Department of the Interior ("DOI") with respect to the Hi View Terrace Superfund Site. A copy of the check paid pursuant to this subparagraph, and any accompanying transmittal letter, shall be sent to the United States as provided in paragraph 12, above.

VI. FAILURE TO COMPLY WITH AGREEMENT

14. In the event the payments required by Paragraphs 10 or 13 are not made when due, Interest shall accrue on the unpaid balance through the date of payment.

15. In addition to the Interest required by this Section and any other remedies or sanctions available to the United States by virtue of the Settling Party's failure to comply with the requirements of this Agreement, if the Settling Party fails or refuses to comply with any term or condition of this Agreement, the Settling Party shall be subject to an enforcement action pursuant to Sections 122(h)(3) and 122(1) of CERCLA, 42 U.S.C. §§ 9622(h)(3) and 9622(1). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

VII. COVENANT NOT TO SUE BY THE UNITED STATES

16. Except as specifically provided in Paragraph 17 (Reservations of Rights), the United States covenants not to sue or take any other civil or administrative action against the Settling Party pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), or pursuant to Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, relating to the Site. This covenant shall take effect upon receipt by EPA of all payments required by Section V (Reimbursement of Response Costs) and, to the extent applicable, Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement. This covenant not to sue extends only to Settling Party and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY THE UNITED STATES

17. The covenant not to sue by the United States set forth in Paragraph 16 does not pertain to any matters other than those expressly identified therein. The United States reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all other matters, including but not limited to:

a) liability for failure of the Settling Party to meet a requirement of this Agreement;

b) liability arising from the past, present or future disposal, release or threat of release of hazardous substances, pollutants or contaminants outside of the Site;

c) criminal liability; or

d) liability for future disposal and future releases or threats of releases of hazardous substances at the Site, unless such future disposal, release or threat of release consists only of migration or movement of hazardous substances that originally came to located at the Site prior to the effective date of this Agreement.

18. In addition, notwithstanding any other provision of this Agreement, the United States, on behalf of its natural resource trustees, reserves the right to institute proceedings against the Settling Defendant in this action or in a new action seeking recovery of natural resource damages, based on

(a) conditions with respect to the Site, unknown to the United States at the date of EPA's signature of this Agreement, that

result in releases of hazardous substances that contribute to injury to, destruction of, loss of natural resources, or (b) information received after the date of EPA's signature of this Agreement which, together with other relevant information, indicates that there is injury to, destruction of, or loss of natural resources, of a type that was unknown, or of a magnitude greater than was known to the United States at the date of EPA's signature of this Agreement.

19. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

IX. COVENANT NOT TO SUE BY THE SETTLING PARTY

20. The Settling Party agrees not to assert any claims or causes of action against the United States or the EPA Hazardous Substance Superfund, including claims pursuant to Sections 106(b)(2), 111, and/or 112 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9611, 9612, arising out of response activities undertaken or to be undertaken at the Site or payment(s) to be made by Settling Party pursuant to this Agreement, or to seek any other costs, damages, or attorney's fees from the United States, its agencies, employees or contractors arising out of response activities

undertaken or to be undertaken at the Site. Nevertheless, the Settling Party reserves, and this Agreement is without prejudice to, actions against the United States based on any negligent actions taken directly by the United States pertaining to this Site (and other than for the purpose of seeking reimbursement for any response costs incurred and paid by Settling Party relating to this Site) that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA. Nothing in this Agreement shall be deemed to constitute pre-authorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

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

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

22. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Agreement. The United States and the Settling Party each reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

23. The United States and the Settling Party agree that the actions undertaken by the Settling Party in accordance with this Agreement do not constitute an admission of any liability by the Settling Party. The Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

24. This Agreement shall not be construed as limiting in any way the response or enforcement authority of the United States pursuant to Sections 104, 106, or 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, 9607, or any other provision of law, except as expressly set forth herein.

25. The Parties agree that the Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are any and all civil liability to the United States pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a), or Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, in connection with the Site.

26. The Settling Party agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement, it will notify EPA in writing no later than 60

days prior to the initiation of such suit or claim. The Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of the service of the complaint or claim upon it. In addition, the Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

XI. CERTIFICATION

27. By signing this Agreement, the Settling Party certifies that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors, or agents, which relates in any way to the ownership, operation or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Site;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site, after notification of potential liability regarding the Site; and

c. fully complied with any and all EPA requests for information concerning the Site pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e). Provision of false, fictitious, or fraudulent statements or representations to the United States may subject the Settling Party to criminal penalties under 18 U.S.C. § 1001.

XII. PUBLIC COMMENT

28. This Agreement shall be subject to a thirty-day public comment period pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

XIII. ATTORNEY GENERAL APPROVAL

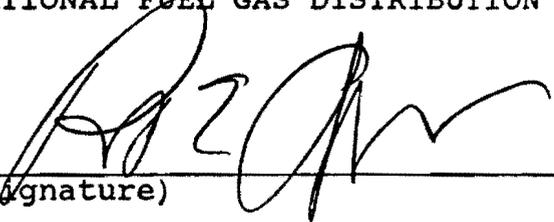
29. This Agreement is subject to the approval of the Attorney General or her designee, pursuant to Section 122(h)(1) of CERCLA.

XIV. EFFECTIVE DATE

30. The effective date of this Agreement shall be the date upon which EPA issues written notice to the Settling Party that the public comment period pursuant to Paragraph 28 of this Agreement has closed and that comments received, if any, do not require modification of the Agreement or withdrawal by EPA from this Agreement.

The Settling Party identified below had an opportunity to confer with EPA regarding this Agreement. The individual executing this Agreement on behalf of the Settling Party certifies under penalty of perjury under the laws of the United States and of the State of New York that he/she is fully authorized to agree to the terms and conditions of this Agreement, and to legally bind Settling Party thereto.

NATIONAL FUEL GAS DISTRIBUTION CORPORATION



(signature)

9/29/95

Date signed

Robert E. Glanville

(printed name of signatory)

Partner of Phillips, Lytle, Hitchcock,
Blaine & Huber, Counsel for National

(title of signatory) Fuel Gas Distribution Corporation

IT IS SO AGREED:

U.S. ENVIRONMENTAL PROTECTION AGENCY

Will: [Signature]
Jeanne M. Fox
Regional Administrator
U.S. Environmental Protection Agency
Region II

9/29/57
Date