

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
CITY OF CONCORD, NEW HAMPSHIRE
AND
ENERGYNORTH NATURAL GAS, INC. D/B/A/ Liberty Utilities Corp.
("Liberty")
FOR THE
REMEDICATION OF PROPERTY LOCATED ADJACENT TO
EXIT 13 OF INTERSTATE 93 IN CONCORD, NEW HAMPSHIRE

I. PARTIES

A. CITY OF CONCORD, a municipal corporation duly existing under the laws of the State of New Hampshire and having a usual place of business at 41 Green Street, Concord, New Hampshire 03301 ("City").

B. LIBERTY UTILITIES (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities, incorporated in the State of New Hampshire, having a principle place of business at 15 Buttrick Road, Londonderry, NH 03053 ("Liberty").

C. The City and Liberty are hereinafter collectively referred to as the "Parties."

II. BACKGROUND

WHEREAS, the New Hampshire Department of Environmental Services ("NHDES") Hazardous Waste Remediation Bureau requires that Liberty perform supplemental remedial action within the area known as Healy Park, including the so-called "Exit 13 Pond" located adjacent to the Exit 13 interchange of Interstate 93 in Concord, New Hampshire (together the "Site"), to further address sediments impacted by residual coal tar;

WHEREAS, on March 23, 2009, Liberty filed a plan and technical memorandum prepared by Anchor QEA summarizing its proposed remedy for the Site (the "Presumptive Remedy") which plan, Figure 2, is attached as Exhibit A;

WHEREAS, Stormwater from the City is discharged to the northwest portion of the Pond through a culvert that passes under the Exit 13 northbound on-ramp, prior to discharge to the Merrimack River. Exhibit A, Figure 2 at C.

WHEREAS, a predecessor to Liberty performed a remedial action approved by NHDES at the Site on or about 1998;

WHEREAS, the Supreme Court of New Hampshire ruled in *EnergyNorth Natural Gas, Inc. v. Continental Ins. Co.*, 146 N.H. 156 (2001) that a predecessor to Liberty intentionally caused through inherently injurious conduct the damage to the Site referenced herein, and such damage was not a “mistake” for the purposes of triggering a general liability insurance policy;

WHEREAS, the Presumptive Remedy has been approved on a preliminary basis by NHDES, subject to receipt and review of design plans and specifications, as set forth in the letter from NHDES to Liberty dated May, 4, 2009, and which letter is included as Exhibit B;

WHEREAS, the City is in discussion with Liberty regarding final design plans and specifications to the Presumptive Remedy, which is referred to herein as the “Final Remedy”;

WHEREAS, Liberty seeks access to the Site to conduct appropriate research at the Site to support the design of the Final Remedy (“Investigation Activities”), to implement the Final Remedy subject to NHDES approval, and for Liberty to maintain the Final Remedy in perpetuity; and

WHEREAS, the Parties wish, by this Memorandum of Understanding (“MOU”), to establish the rights, duties and obligations among and between themselves for the Final Remedy to be undertaken at the Site.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the City and Liberty, and its successors and assigns agree as follows:

III. THE FINAL REMEDY

1. The land on which the Site is situated, and on which the Final Remedy is to take place, is owned by the City; generally constituting an area known as Healy Park and is shown on the attached Exhibit A, Figure 2 at C.
2. Liberty will conduct investigation activities to support the design of the Final Remedy.
3. The Parties shall cooperate to work toward development of the Final Remedy to the satisfaction of both parties.
4. Liberty shall submit the Final Remedy to the City for its approval;
5. If the Parties are unable to agree on the Final Remedy or any modifications to the Final Remedy that may be necessary to satisfy local, state and/or federal regulatory agencies, this MOU may terminate upon notification by the City to Liberty that it is unable to reach agreement on the Final Remedy.
6. In the event that the Parties reach agreement on the Final Remedy, Liberty shall submit the Final Remedy to the NHDES for its approval;

7. A portion of the Work may also require approvals from New Hampshire Department of Transportation (“NHDOT”) in relationship to NHDOT’s right-of-way for the on-ramp at Exit 13 to Interstate 93 northbound. Liberty shall be solely responsible for obtaining any permissions or approvals from NHDOT that may be necessary to implement the Final Remedy.

IV. REMEDIAL ACTIVITIES AT THE SITE

8. Upon obtaining all necessary approvals for the Final Remedy (such approved remedy is hereinafter referred to as the “Final Approved Remedy”), Liberty shall be solely responsible for the implementation of the Final Approved Remedy at the Site. Such implementation includes, but is not limited to, engineering, construction, operation and maintenance in perpetuity of the Final Approved Remedy, as may be amended from time to time by any regulatory authority with jurisdiction over the Final Approved Remedy. Maintenance includes, but is not limited to (and for purposes of clarity, this is not intended to be a complete or exhaustive list), maintenance of any infrastructure located on the Site and associated with the Final Approved Remedy, removal of sediment, vegetation, and debris within the area of the Final Approved Remedy. Liberty will ensure that access to the outfall is unobstructed to allow the City to have access to the outfall if necessary and for compliance with any regulatory authority with jurisdiction over storm water discharges. Liberty will ensure that the Final Approved Remedy will be designed so that it will not be impacted by the City’s storm water discharge. If any damage to the Final Approved Remedy does occur, for any reason including but not limited to discharge from the City’s storm water outfall, it shall be Liberty’s obligation, and the City will have no duty, to perform any repair or other remedy that is necessary. Any increased storm water discharge maintenance that is required due to the Work shall be Liberty’s obligation as part of its maintenance of the Final Approved Remedy.

9. Liberty shall comply with all local, state and federal regulatory requirements in performing the Final Approved Remedy at the Site.

10. Liberty shall complete the construction of the Final Approved Remedy (referred to herein as the “Work”) as approved by NHDES.

11. Liberty shall be solely responsible for obtaining any and all local, state and federal approvals necessary to implement the Final Approved Remedy.

12. Following completion of the Work, Liberty shall perform maintenance on the Final Approved Remedy to maintain its functionality.

V. ACCESS TO SITE

13. Liberty shall obtain the City’s prior approval of its access location to the Site prior to performing the Investigation Activities and the Work at the Site.

14. The City hereby grants to Liberty a limited license during the Term (as hereinafter defined) to enter upon and cross the Site for the sole purpose of performing the Investigation

Activities, the Work and any future maintenance of the Work, at no cost or expense to the City. Liberty agrees that no activity shall be performed on the Site other than activity related to the Work. Additional activities on the Site not specified therein shall require the City's written prior approval.

15. Within thirty (30) days of the conclusion of performing the Work, Liberty shall remove any and all of its material not belonging to the City from the Site and restore the Site to its original condition with its inclusion of the Work on the Site. Liberty shall be solely responsible to pay any costs associated with restoring the Site to its original condition with its inclusion of the Work, and to repair any damage that it caused to the Site.

16. The City shall cooperate with Liberty to implement an activity and use restriction including institution of a groundwater management zone ("GMZ"), if necessary, to effectuate the Final Approved Remedy.

VI. NOTICE AND COOPERATION

17. The Work associated with the Final Approved Remedy to be performed by Liberty in NHDOT's right-of-way is not anticipated to affect or impede traffic using the Exit 13 northbound on-ramp to Interstate 93. Liberty shall cooperate with NHDOT to ensure the safe operation of the Exit 13 northbound on ramp at all times during the performance of the Final Approved Remedy.

18. Liberty shall inform NHDOT of this MOU ten (10) days in advance of any proposed work or maintenance associated with the Final Approved Remedy.

VII. INSURANCE REQUIREMENTS

19. Insurance Term: During the term of this MOU, Liberty shall procure and maintain for the duration of the MOU insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Liberty, its agents, representatives, or employees. All the insurance required under this MOU shall name the City as additionally insured, and all insurance policies and certificates shall include a provision requiring thirty (30) business days' written notice to the City by certified mail of any cancellation, material change, or reduction in coverage.

20. No Limitation: Liberty's maintenance of insurance as required by this MOU shall not be construed to limit the liability of Liberty to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity.

21. Minimum Scope of Insurance: Liberty shall obtain insurance of the types and coverage described below:

- a. Commercial General Liability Insurance naming the City as an additional insured, by written endorsement with a waiver of subrogation favoring the City in an

amount not less than \$2,000,000 per incident or occurrence and \$4,000,000 in the aggregate.

b. Comprehensive Automobile Liability Insurance in an amount not less than \$2,000,000 per occurrence and \$4,000,000 in the aggregate. Such automobile liability insurance will be provided by the developer with respect to its “owned, leased or borrowed” automobiles and otherwise will be provided for each employee of Liberty providing services under this MOU.

c. Professional Liability Insurance appropriate to the Liberty’s business.

d. Pollution Liability Insurance covering losses caused by pollution conditions that may arise from Liberty’s performance of this MOU. Liberty’s Pollution Liability insurance shall be written in an amount of at least \$4,000,000 per loss, with an annual aggregate of at least \$8,000,000. Liberty’s Pollution Liability shall cover bodily injury, property damage, cleanup costs and defense including costs and expenses incurred in the investigation, defense, or settlement of claims. If Liberty’s Pollution Liability insurance is written on a claims-made basis, then Liberty warrants that any retroactive date applicable to coverage under the policy precedes the effective date of this MOU; and that continuous coverage will be maintained or an extended discovery period will be exercised for a period of ten (10) years beginning from the time that work under the MOU is completed.

e. Umbrella/Excess Liability Insurance is acceptable and shall solely be applicable to meet the above Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance defined requirements. Liberty shall cause each insurance company to provide the insurance on an umbrella basis in excess over and no less broad than the liability coverages required herein for Commercial General Liability Insurance and Comprehensive Automobile Liability Insurance, with the same inception and expiration dates as Commercial General Liability insurance, and with coverage that “drops down” for exhausted underlying aggregate limits of liability coverage. Each umbrella/excess liability insurance shall be on an occurrence basis.

22. **Additional Insured:** The City shall be named as an additional insured, by written endorsement with a waiver of subrogation favoring the City on Liberty’ Pollution Liability insurance policy. Coverage certified to the City under this paragraph must be maintained in minimum amounts of \$4,000,000 per occurrence, with an annual aggregate of at least \$8,000,000.

23. **Acceptability of Insurers:** All insurance shall be issued through valid and enforceable policies issued by insurers authorized to transact insurance business in the State of New Hampshire and having an A+ or better financial rating from a recognized insurance accreditation institution (such as A.M. Best Company).

24. **Liberty’s Indemnification of the City Shall be in Addition to Insurance Requirement:** Liberty’ obligation to hold harmless and indemnify the City shall not be limited by the requirement for, or existence of, insurance coverage.

25. Verification of Coverage: Before commencing work and services, Liberty shall provide to Tina Waterman, City of Concord Purchasing Manager at 311 N. State Street, Concord, New Hampshire 03301, the original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of Liberty. The City reserves the right to request and receive a certified copy of all required insurance policies.

26. Right to Increase Limits: The City shall have the right to require Liberty to increase such limits when, during the term of construction, minimum limits of liability insurance commonly and customarily carried on comparable and responsible business operations, it being the intention of this sentence to require Liberty to take into consideration inflation in establishing minimum limits of liability insurance maintained from time to time for the operations under this MOU, but not without sixty (60) days advanced written notice to Liberty.

27. Notice of Cancellation: Liberty shall provide the City with written notice of any policy cancellation within two business days of their receipt of such notice.

28. Failure to Maintain Insurance: Failure on the part of Liberty to maintain the insurance as required shall constitute a material breach of contract, upon which the City may, at its sole discretion, after giving five (5) business days' notice to Liberty to correct the breach, immediately terminate this MOU or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the City on demand, or at the sole discretion of the City, offset against funds due Liberty from the City.

VIII. INDEMNIFICATION

29. Liberty shall defend, indemnify, and hold harmless the City and its officials, agents, and employees (collectively, the "Indemnified Parties") from and against all demands, claims, suits and actions seeking damages, penalties, attorney's fees, costs, expenses, equitable relief, statutory relief or any other relief on account of bodily injury, death, personal injury, property damage, economic injury and any other injury or loss, (collectively, "Liabilities") arising from or relating to this MOU, unless the Indemnified Parties were solely negligent.

30. In addition, Liberty shall defend, indemnify and hold harmless the City for any costs, expenses and liabilities arising out of a claim, charge or determination that Liberty's officers, employees, contractors, subcontractors or agents are employees of the City, including but not limited to claims or charges for benefits, wages, fees, penalties, withholdings, damages or taxes brought in connection with laws governing workers compensation, unemployment compensation, social security, medicare, state or federal taxation, and/or any other similar obligation associated with an employment relationship.

31. The indemnification obligations set forth herein shall survive the term of the contract. Liberty must choose defense counsel acceptable to the City and obtain the City's consent to any proposed settlement.

IX. OBLIGATION OF GOOD FAITH

32. The parties to this MOU agree that they shall exercise their rights and obligations in good faith in accordance with this MOU, and will implement all Site activities in accordance with the Final Approved Remedy.

X. AMENDMENT OR TERMINATION OF THIS MOU

34. The provisions of this MOU may be waived or modified only by instruments in writing executed by each of the parties hereto. No waiver by any party at any time, express or implied, of any breach of any provision of this MOU shall be deemed a waiver of a breach of any other provision of this MOU or consent to any subsequent breach of the same or any other provision.

XI. TERM

35. The Term of this MOU shall continue until the Work is completed, no further construction or maintenance is required and NHDES or other appropriate regulatory agency has issued a “no further action” letter or similar document stating that the Work has satisfied all remedial objectives and no further action on the Site is required.

XII. DUTY TO COOPERATE

36. The Parties shall reasonably cooperate with each other in connection with the subject matter of this MOU.

XIII. NO ADMISSION OF LIABILITY

37. The execution of this MOU shall not, under any circumstances, be construed as an admission by Liberty or the City of any liability with respect to the Site or with respect to any waste containing or constituting hazardous substances allegedly contributed to the Site. This MOU shall not be admissible in any proceeding except in an action to seek enforcement of the terms herein.

XIV. NO RELEASE OF NON-PARTIES

38. Except as otherwise provided in this MOU, it is not the intention of the Parties to release any other persons or entities not party to this MOU from any claims or liabilities.

XV. CHOICE OF LAW AND VENUE

39. This MOU will be governed by and construed under the laws of the State of New Hampshire without regard to conflicts-of-law principles. Any dispute under this Agreement shall be resolved within the venue of the Merrimack County Superior Court in the State of New Hampshire, or its equivalent jurisdictional successor.

XVI. RULE OF CONSTRUCTION

40. Any judicial rule of construction requiring or allowing an instrument to be construed to the detriment of or against the interests of the drafter thereof shall not apply to this MOU.

XVII. SEVERABILITY

41. In the event that any provision of this MOU is determined by a court to be invalid, the remainder of this MOU shall not be affected thereby and shall remain in force.

XVIII. COUNTERPARTS

42. This MOU may be executed in one or more electronic (.pdf) counterparts, each of which will be deemed to be an original of this MOU and all of which, when taken together, will be deemed to constitute one and the same MOU.

XIX. DISPUTE RESOLUTION

43. Should a dispute arise with respect to the performance of this MOU, the Parties agree to work to resolve any disagreement through good faith negotiation.

XX. EFFECTIVE DATE

44. This MOU shall not become effective until the date of approval the parties.

XXI. LOSS OF PROPERTY

45. Liberty agrees that the City shall not be liable for any loss, damage, or destruction to any property not owned by the City located within the Site, whether caused by the City or third parties.

XXII. AUTHORITY

46. The Concord City Council authorized the City Manager to execute this MOU at its November 9, 2020 City Council Meeting.

XXIII. NOTICES

47. Notices effectuating the requirements of this MOU shall be directed as follows:

to Liberty:

Mary Casey
Liberty Utilities
15 Buttrick Road
Londonderry NH 03053

Mary.Casey@libertyutilities.com

with a copy to:

Michael Sheehan
Liberty Utilities – Legal
116 N. Main Street
Concord, NH 03301

Michael.Sheehan@libertyutilities.com

to City of Concord:

Thomas J. Aspell, Jr., City Manager
City of Concord
41 Green Street
Concord, NH 03301

XXIV. EXECUTION

IN WITNESS WHEREOF, the undersigned parties have executed this MOU as designated on their respective signature pages. Each party and the individual executing this MOU represent and warrant that the individual executing this MOU has been duly authorized to enter into this MOU, and to bind the party on whose behalf such individual is executing.

This MOU is acknowledged this _____ day of _____, 2020

For the CITY OF CONCORD:

By: Thomas J. Aspell, Jr., City Manager

This MOU is acknowledged this _____ day of _____, 2020

For LIBERTY UTILITIES (ENERGYNORTH NATURAL GAS) CORP.:

By: Susan Fleck, President