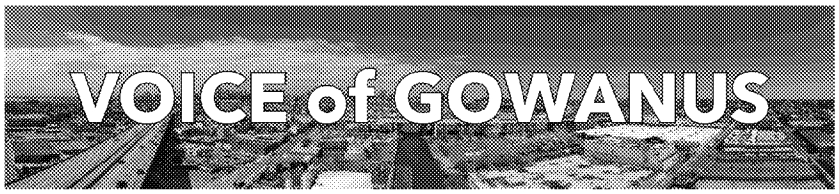

By Registered Mail and Email

Mr. Sean W. O'Donnell
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Mr. Breon Peace
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June 14, 2022

Dear Sirs:

By letter dated May 16, 2022 (copy attached), Voice of Gowanus (VoG) requested the USEPA Inspector General open a full investigation of multiple compliance and enforcement failures affecting the Gowanus Canal under Federal and State laws and regulations, including but not limited the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or "Superfund"), and the Clean Water Act (CWA).

VoG is writing again to follow-up on that correspondence for three reasons:

1. To request USEPA IG acknowledgement of receipt of the May 16, 2022 investigation request;
2. To identify additional areas for investigation (including potential criminal activity) based on events transpiring since the prior request;
3. To provide additional information regarding regulatory failures noted in the previous investigation request.

As the May 16th letter details, devastating effects from decades of compliance failure in Gowanus are being compounded by a planned 80-block rezoning that will likely add more than 30,000 additional residents to a sewershed already burdened with a Superfund Listing improperly disaggregated from 33 Canal-surrounding contamination sites in the NPL designation, an Impaired Water designation under CWA §313, repetitious Combined Sewer Overflow (CSO) Enforcement Orders leading to a Long Term Control Plan of questionable effectiveness, failed Water Quality Standard setting and enforcement, and a Sewage Backup Administrative Order that has yet to prevent raw sewage flooding of basements in Gowanus and surrounding neighborhoods. Now, premature construction is releasing contaminants and threatening the integrity of Canal, groundwater, and soil cleanups throughout the Gowanus area.

Construction Pile Driving in Source Contamination Operable Units

At a May 24, 2022 Gowanus Community Advisory Group (CAG) meeting with staff from EPA Region 2, NY State Department of Environmental Conservation (NYSDEC), and NY City Department of Environmental Protection (NYCDEP) in attendance, CAG and community members enquired as to the regulatory oversight being performed for the recent initiation of construction pile driving (i.e., 90 foot high foundation piles) on a parcel of the Citizens Gas Works Cleanup site to learn whether and how officials were providing approvals and oversight for construction in severely contaminated areas.

Specifically, the community asked which officials in any of the Agencies had reviewed the action, or provided approvals, or was conducting oversight of the construction to prevent toxic leakage, utility damage, and the compromising of other cleanup technology operating in the area. None of the Agencies indicated any prior review or ongoing monitoring action of the 90-foot piles penetrating the contaminated soil and groundwater, creating exposure pathways and toxic volatilizations in close proximity to a school and playground. Moreover, no regulatory staff could confirm compliance or consistency with Site Management Plans or the Certificate of Completion (assuming either has been completed for the Citizens Site), or if the pile driving was being monitored to protect the integrity of the centuries-old Bond-Lorraine sewer line running beneath the property.[1]

However, when the regulators were pressed to explain how 90-foot piles were being driven into a remedy-incomplete Manufactured Gas Works site with coal tar, PAH, and BTEX contamination as deep as 150 feet below the surface with no regulatory oversight, a representative of the NYSDEC claimed the only regulatory role for DEC in construction oversight at a Superfund Operable Unit was to receive and acknowledge a "Change of Use" certification. The DEC official further stated "there is never a formal approval that we give for this work."[2] In addition, the DEC representative indicated the regulatory deference, if not full abdication, adopted by DEC was driven by tax abatement program deadlines, explaining to the community: "I'm sure you're aware of the 421a program which is the purpose these piles are going in. They [meaning the developers] have until June 15 to place the piles in the site to qualify for tax credits."[3]

As the NYSDEC representative confirmed, regulatory overseers in all three environmental protection agencies at the Federal, State, and Municipal levels were all taking a hard pass from their duties—and risking public exposure, expanded contamination, and broader remedy damage—to allow a select group of developers to meet a June 15, 2022 construction start date necessary to claim expiring public subsidies to further private development and profit. At a minimum, USEPA and NYSDEC oversight should have confirmed that these piles in these locations reaching the intended depths would not create human exposure, damage the utility and remedy transport and pumping infrastructure, or otherwise damage the site capping efforts crucial to the integrity of the planned cleanup.

USEPA Decision-Making for Parcels Subject to Rezoning

In addition, further review of previous USEPA claims and actions has recovered key information provided by USEPA counsel to the CAG regarding the failure of Region 2 to participate in the Environmental Impact Review Process as a Cooperating and/or Involved Agency under the legal requirements of both the National Environmental Policy Act and the NY State Environmental Quality Review Act (Item D(4) in the May 16, 2022 request). Both statutes mandate that any Agency involved in decision-making for the action being assessed actively cooperate or be involved in the EIS. The NYS SEQRA Handbook states, "an agency is "involved" when the determination is made that the agency has ***or will have*** a discretionary decision to make ***regarding some aspect*** of the action (emphasis added)."[4]

The viability of most of the planned rezoning area for residential towers and other reuse depends entirely on whether a hundred years of embedded contamination can be removed or otherwise remediated such that the

---

[1] The Gowanus Superfund Community Advisory Group (CAG) has constantly sought answers through various CAG Committees regarding the conduct of the multiple soil and water cleanups in the Canal Zone, including properties and parcels left in State Superfund or State Brownfield programs that are clearly Subsites or Operable Units of the Federal Superfund Listing. That very evening, the CAG had only just received Region 2 answers to several written questions in which USEPA assured the Community in writing it would be overseeing the NYSDEC monitoring activities to "include geotechnical monitoring (vibration and crack monitoring) to protect nearby utilities and other sensitive structures at the site." While not specified, "sensitive structures" other than the Bond-Lorraine sewer include nearly two dozen coal tar recovery wells on and around the Citizens property intended to inter alia, prevent recontamination of the Gowanus Canal under the Superfund cleanup.

[2] A video recording of the CAG May 24, 2022 Meeting is available here. The exchange regarding the regulatory oversight (or lack thereof) for the 90-foot piles being drive-in to the contaminated soil and groundwater begins at approximately 1:35:00 of the tape.

[3] CAG May 24, 12002 Meeting Recording, approximately 1:40:00

[4] THE SEQR HANDBOOK, 4TH Edition, Chapter 3: PARTICIPATION IN THE SEQR PROCESS, p.62.

massive disturbances of soil and water required in high-rise construction (e.g., 90-foot foundation piles noted above) can be approved. To claim administrative land use re-designation through rezoning is separate from the decisions required to implement the rezoning via multiple construction and development projects is an overt act of segmentation barred by both statutes. Moreover it is inconceivable that the USEPA believes it has no decision-making responsibility in the development, construction, and sustainability of thirty-story towers being constructed around one of the country's most polluted waterways on top of soil and groundwater full of toxic contamination in a federal flood zone that is registered on the National Priorities List.

Examples of how consistently USEPA has been—and continues to be—a decision-maker in public and private party execution of the Gowanus Rezoning Plan are provided in the CAG meeting minutes of September 26, 2017, during which USEPA Region 2 counsel detailed all the decisions USEPA was making regarding the issuance of orders, cleanup, and other remedy actions required for reuse:

> —Major settlement issues for the balance of this year: EPA is in discussions with National Grid and NYS about issues related to the Fulton cleanup. We entered into an order last year with the City; we contemplated entering into an order with National Grid related to the cleanup of the park and other aspects – discussions are beginning now for a $100M cleanup order; there are discussions with the Powerhouse, which needs to come to EPA for PCB cleanup approval and to NYS for what they're doing with the brownfields program. It's a very complex cleanup, in addition to the First Street Basin. We are in discussions with parties to cash out.
>
> —There are 3.6 miles of bulkheads; the National Grid cleanup for Public Place bulkheads and the Fulton cleanup covers part of it – EPA is also working with developers. In total have eight different bulkhead orders going on right now in eight stages of discussion. At $10,000/linear foot, each requires separate approval, a consent order, and a design under EPA supervision. Later this year, we need to secure agreements with all parties to do remedial action (right now EPA is doing remedial design, which is 10% of the cost) such as dredging and tanks, which may include Natural Resources Damage Assessment (NRDA) trustees. The bulkheads need to be built first, specifically the parts around the upper part of the Canal and the pump station. EPA may negotiate a separate agreement with PRPs to split that work out from the overall dredging/capping work and get started before finalize the overall dredging/capping agreement.

These orders, settlements, and cleanup requirements, inter alia, remain operational today (including the repetitious attempts at enforcement and compliance) and are inextricably part of Gowanus Neighborhood air, land, and water reuse.

In light of the above, VoG reiterates its request for EPA IG investigation of the multiple issues previously identified, and hereby appends the following additional areas of investigation to the original letter of May 16, 2022:

- Continued USEPA leadership failure to rectify the original NPL Listing improprieties that left Subsite/Operable Units of the Gowanus Canal under the jurisdiction of NYSDEC given the obvious likelihood that improper and dangerous construction activities to "vest" 421a tax subsidies would occur;
- Multiple actions by EPA Region 2 that are approaching willful blindness to State and Municipal actions to minimize or avoid needed cleanup actions, manipulate remedy and construction timing, avoid ongoing compliance requirements under CWA, CERCLA, and Federal Emergency Management flood requirements, and generate inadequate and misleading data and information in the Gowanus Rezoning Environmental Impact Statement (EIS);

- Failure of oversight on all manner of monitoring and compliance assurance that would prevent dangerous premature construction for the primary purpose of securing expiring taxpayer subsidies;
- Failure to legally compel sewage retention tank construction through mandamus and other enforcement options under federal law;
- Failure of Region 2 to participate in the Environmental Impact Review Process as a Cooperating and/or Involved Agency, and prevent illegal segmentation between zoning administrative actions and inseparable redevelopment actions thereby intended in which USEPA has ultimate decision-making authority;
- Potential criminal violations of bribery, campaign finance, or other laws that may be affecting environmental protection decision-making in the Gowanus in favor of development and against human health and the environment, including:
    - Illegal Brownfield designations to provide financial assistance to developers;
    - Illegal issuance of construction permits or other building approvals in contravention of pre-existing Federal and State environmental law requirements at sites where construction will occur;
    - Unsupervised, faulty cleanup activity being used as a pretext for illegal evictions.

At a prior meeting of the Gowanus CAG, USEPA Region 2 confirmed the "lack of progress in certain areas, particularly with the CSO control tanks and non-compliance [with USEPA Enforcement Orders] by the City, and intentional and willful non-compliance by the City." Region 2 also told the CAG, "everyone knows that until the [administratively ordered sewage retention] tanks are built, even before the development happens from the rezoning, the cleanup is inadequate." Once again, CAG meeting revelations confirm the need for EPA IG investigation to identify and prevent fraud, waste, abuse, mismanagement and misconduct, and even possible criminal actions.

VoG thanks you in advance for confirming receipt of this and the prior correspondence, and for your attention to the ongoing enforcement failures at multiple levels of government. We hope the Gowanus Neighborhood will receive the necessary and proper enforcement attention our community deserves.

Sincerely yours,

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Cc:

The Honorable Joseph R. Biden Jr.
The Honorable Chuck Schumer
The Honorable Kirsten Gillibrand
The Honorable Nydia Velázquez
The Honorable Jerrold Nadler
The Honorable Kathy Hochul
The Honorable Jabari Brisport
The Honorable Jo Anne Simon
The Honorable Marcela Mitaynes
Administrator Michael Regan, EPA
Matthew Silverman, Assistant U.S. Attorney, Chief of Environmental Litigation, Eastern District, DOJ

Brenda Mallory, Chair, Council on Environmental Quality, Executive Office of the President
Matthew Tejada, Director, Office of Environmental Justice, EPA
Charles Lee, Senior Policy Advisor, Office of Environmental Justice, EPA
Lawrence Starfield, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance, EPA
Administrator Lisa Garcia, EPA Region 2
OIG Hotline

Atch: VoG Letter to USEPA Inspector General dtd May 16, 2022

www.VoiceofGowanus.org

By Registered Mail and Email

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May 16, 2022

Given that the USEPA Inspector General is the relevant oversight official trusted to speak the truth, promote good governance, and contribute to improved human health and the environment in the United States, our group Voice of Gowanus (VoG), a coalition of long-standing community organizations in Brooklyn's Gowanus neighborhood, is contacting you to investigate extensive enforcement and compliance failures related to the Gowanus Canal and its environs.

WHY WE ARE REACHING OUT

Gowanus is an epicenter of serious, overlapping environmental issues: Superfund Listing (with an additional 33 brownfield sites surrounding the limited Canal NPL designation), an Impaired Water designation under the Clean Water Act §313, repetitious Combined Sewer Overflow (CSO) Enforcement Orders leading to a Long Term Control Plan of questionable effectiveness, failed Water Quality Standard setting and enforcement, and a Sewage Backup Administrative Order that has yet to prevent repeated raw sewage contaminations in basements all across our community. All of these compounding issues make the Gowanus Canal one of the foremost nationwide examples of "a community overburdened by pollution." The inadequate, piecemeal cleanup at the improperly delineated Gowanus Canal Superfund site, along with continued CSOs, sewage backups, and permitting violations together pose a serious threat to human health and the environment. These failures require investigation to identify and prevent fraud, waste, abuse, mismanagement, and misconduct arising from this multi-decade failure to fully implement controlling federal law (the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or "Superfund"), and the Clean Water Act (CWA)) in a moment when responsible parties are taking new actions that will yet again exacerbate these already harmful conditions.

At the recent meeting of the Gowanus Superfund Community Advisory Group (CAG) on April 26th, 2022, a USEPA Region 2 representative confirmed the "lack of progress in certain areas, particularly with the CSO control tanks and non-compliance [with USEPA Enforcement Orders] by the City, and intentional and willful non-compliance by the City." Region 2 also told the CAG, "Everyone knows that until the [administratively ordered sewage retention] tanks are built, even before the development happens from the rezoning, the cleanup is inadequate."

Besides leaving excessive levels of legacy toxins in the soil and groundwater of the area, these ongoing federal compliance failures spanning nearly half a century are poised to further compound the environmental injustice that has plagued the Gowanus area and its border neighborhoods since nineteenth century industrialization. As part of the massive rezoning referenced above, which more accurate estimates suggest could bring over thirty

thousand new residents to the overburdened 80-block contamination zone, New York City is sponsoring development of low-income housing and a school on the most heavily contaminated areas of the former Citizen's Manufactured Gas Works. Like other gas plant sites in the area, coal tar, benzene and related toxins, and polyaromatic hydrocarbons remain in the soil and groundwater under and near the sites at levels well above the legal objectives for soil cleanup goals and groundwater quality standards. Another former gas works parcel—still not remedied in spite of New York's knowledge of gas plant contamination and danger since at least 1979—houses a public pool critical to the welfare and recreation of the public housing residents in our neighborhood. As raw sewage discharges persist, sea level rise and storm surge risks further compromise the Canal's ability to manage flooding in the FEMA Zone A. This has lead to the entire area being identified as a Disadvantaged Community by the Climate Justice Working Group (CJWG) as part of New York State efforts to combat climate injustice.

In addition to the statutory issues affecting the Gowanus, attempts by USEPA officials to fully apprise the affected community regarding inadequate response actions and secure all legally required response actions from the Potentially Responsible Parties have been met with public condemnation and potentially inappropriate personnel actions by regulatory officials charged with full transparency. Staff of the NYSDEC have publicly admonished USEPA personnel in public correspondence for describing shortcomings of proposed remedial actions, and New York City officials have claimed unavailable privileges to shield incorrect assertions regarding storm water management requirements under the State Pollution Discharge Elimination permits (SPDES) and the Superfund remedy. Adverse personnel actions appear to be ongoing.

Only investigation, truth, and good governance will prevent thousands of vulnerable current and prospective Gowanus residents from environmental threats and exposure that federal laws were specifically enacted to prevent. USEPA leadership must investigate the blatant disregard of discharge, backup, and restoration requirements by New York City and other responsible parties that have plagued the Gowanus for half a century, leaving it with permanent coal tar repositories, toxins, and storm, sea, and sewage waters flooding from without and within.

OUR REQUEST TO YOU

VoG hereby requests that you and your office immediately open an investigation into the failures of due process, enforcement and compliance assurance, as well as remedial response described herein affecting the Gowanus Canal and its surrounding neighborhoods and ecosystem. This investigation is imperative given New York City, a major cleanup responsible party, is also openly defying USEPA orders for sewer backup elimination, sewer retention tank construction, and SPDES provisions, while actively permitting redevelopment activity that will expose more vulnerable families, workers, and business owners to pollution and climate damage.

Specifically, VoG requests investigation into the following programmatic failures by New York City and other responsible parties to comply with federal law (including delegated authorities), and programmatic failures of Federal and State regulators in Region 2 to enforce federal law (including delegated authorities):

A. CERCLA/Superfund

1. Failure to include all parcels of three Manufactured Gas Works sites (Citizens, Fulton, Metropolitan), as well as multiple industrial and commercial source parcels bordering the Gowanus Canal, as Subsites and/or Operable Units of the Canal NPL Listing in 2010.
   - This includes the failure to enforce institutional controls at these parcels that limited restricted residential uses, and the seemingly arbitrary application of such institutional controls at the various parcels subject to similar levels of contaminated soil and groundwater.
2. Failure to apply CERCLA statutory, regulatory, and process requirements (including Applicable, Relevant, and Appropriate Requirements or ARARs) to cleanup of affected soils and the massive combined plume

contaminating the Canal's interconnected groundwater system, especially for parcels that will be rezoned for residential use.

3. Improper inclusion of ineligible Superfund Subsites and Operable Unit parcels and groundwater in the New York State Brownfield Program.
4. Failure to enforce multiple Superfund Administrative Orders, including injunctive and other relief.
5. Improper substitution of developer entities for Responsible Parties to pay for and execute necessary cleanup actions.

B. Environmental Justice

1. Failure to meet requirements of Executive Order 14008 requiring the Administrator of the Environmental Protection Agency to strengthen enforcement of environmental violations with disproportionate impact on underserved communities through the Office of Enforcement and Compliance Assurance.
2. Failure to execute the April 7, 2021 directive of Administrator Michael Regan on *Commitment to Environmental Justice* to strengthen enforcement of environmental statutes and civil rights laws in communities overburdened by pollution.
3. Failure to execute the April 26, 2021 directive from Lawrence E. Starfield, Acting Assistant Administrator to advance these Presidential and Administrator environmental justice (EJ) goals noted above that included, inter alia, a requirement to:
   - Prevent further pollution due to noncompliance, mitigate past impacts from pollution, and seek penalties for violations that impact overburdened communities;
   - Obtain injunctive relief that remediates the pollution and addresses past harms to communities; and
   - Enforce cleanup at all subsites and operable units of a fully and accurately designated Gowanus Canal Superfund Site.
4. Failure of Region 2 to participate in the Environmental Impact Review Process as a Cooperating and/or Involved Agency under the applicable requirements of both the National Environmental Policy Act and the NY State Environmental Quality Review Act, in accordance with requirements of EO 14008 to ensure that all federal agencies develop programs, policies, and activities to address the disproportionately high and adverse health, environmental, economic, climate, and other cumulative impacts on communities that are marginalized, underserved, and overburdened by pollution (no cumulative impact analysis was included in the Gowanus Rezoning FEIS, nor did Region 2 note this failure in its limited comments intended to substitute for required participation).
5. Failure to address cumulative additions of gas-burning residences and businesses likely to interfere with environmental justice actions to curtail fossil fuel consumption, including pipelines and electricity generation facilities operating in, or being added to, stressed communities.
6. Failure to act when New York City elected officials and bureaucrats, laboring under cleanup and compliance conflicts of interest, publicly promised already mandated compliance requirements, such as sewer backup clearances and CSO control, as potentially fraudulent inducements to overburdened communities to accept development that actually adds to their contamination burden (see unsigned, unexecuted, unenforceable Points of Agreement Memo purporting to "provide" multiple infrastructure recapitalization projects already required by law as consideration for NYCHA and other residents agreeing to rezoned development).[1]

C. Clean Water Act

1. Failure to enforce CWA provisions requiring Water Quality Standards promulgation by New York State under delegated authorities to meet federal designated use mandates for fishable/swimmable waters.
2. Failure to enforce CSO control requirements under SPDES permits issued to Owl's Head (NY 0026166) and Red Hook (NY 0027073) WRRFs for *Separate Storm Sewers* and *Sewer Connection Prohibitions* (paragraphs 9 and

[1] The massive Gowanus redevelopment plan has already prompted permit applications for over 5000 residential units, the vast majority of which will be high-end and/or luxury development loading into the already stressed and consistently overflowing hydraulic capacity of the Red Hook and Owl's Head sewersheds

10 respectively), including the failure to deny claims made by New York City that combined sewer system connections by additive Gowanus development constitute "Best Management Practices" under the SPDES.

3. Failure to enforce post-construction compliance monitoring to demonstrate attainment of water quality standards under the Gowanus Long Term Control Plan by New York State or New York City under the 2001 USEPA *Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews* using either the "presumptive" or "demonstration" approach.
4. Failure to enforce a Total Maximum Daily Load (TMDL) for the Gowanus Canal in light of ongoing CSO control failure, continued listing of the Canal as an Impaired Water under CWA §303, and failure to construct the CSO retention tanks remedy under the CERCLA Administrative Order.
5. Failure to adequately and effectively enforce the 2016 Sewer Backup Administrative Compliance Order (No. CWA-02-2016-3012) to New York City for violations of CWA Section 301 for failed operation and maintenance of its sewage Collection System. Sewer backup complaints have not been appreciably reduced since the Order was issued in 2016.

D. Subversion and Retaliation

1. Inappropriate curtailment of National Grid cleanup requirements at manufactured gas works sites to otherwise reduce rate base charges and potentially mislead shareholders regarding National Grid's full cleanup liability (see Attachment B).
2. Leveraging of developer funding to complete cleanups meeting ARAR-compliant cleanup objectives in potentially improper substitution of New York City, National Grid, and other PRPs.
3. Retaliatory personnel actions against USEPA staff for sharing accurate information with the public.
4. Failure to apply injunctive and other enforcement relief in the face of ongoing bad-faith negotiations, if not outright compliance defiance by Responsible Parties/Permittees.

In addition to the document links included above, VoG has attached additional materials supporting this Investigation Request, and further incorporates by reference the formal VoG Comments submitted on the Draft Environmental Impact Statement prepared for the Gowanus Neighborhood Rezoning.

It is the stated policy of the Biden Administration to organize and deploy the full capacity of its agencies to combat the climate crisis by implementing a Government-wide approach that: reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure. The total reverse of these objectives will occur under the massive, unpermitted 80-block rezoning demanding major fossil energy use being implemented in a FEMA Flood Zone A surrounding an Impaired Water also designated a Superfund Site subject to continuous coal tar, toxin, and sewage discharges in contravention of law.

VoG further hopes this IG investigation can address or include recommendations for all upland contamination source sites to be designated Subsites or Operable Units in the Gowanus Superfund NPL listing (or apply requirements CERLCA under the Superfund Alternative Program), for necessary compliance and enforcement assurance, and the need for a Supplemental Environmental Impact Statement before redevelopment that further impedes compliance can occur.

It would also be of assistance to the community if the investigation assessed the status of continued releases of pollutants from Gowanus Canal upland parcels as ongoing violations of the Rivers and Harbors Act, given the failure to include the upland parcels in the Superfund designation precludes application of the various superseding jurisdictional, permitting, and enforcement provisions only granted under Superfund.

VoG thanks you in advance for your attention to these enforcement failures that compound growing climate threats and are simply unsustainable for an unduly burdened community suffering under a century of historic environmental damage and injustice.

Sincerely yours,

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CC:

The Honorable Joseph R. Biden Jr.
The Honorable Chuck Schumer
The Honorable Kirsten Gillibrand
The Honorable Nydia Velázquez
The Honorable Jerrold Nadler
The Honorable Kathy Hochul
The Honorable Jabari Brisport
The Honorable Jo Anne Simon
The Honorable Marcela Mitaynes
Administrator Michael Regan, EPA
Matthew Silverman, Assistant U.S. Attorney, Chief of Environmental Litigation, Eastern District, DOJ
Brenda Mallory, Chair, Council on Environmental Quality, Executive Office of the President
Matthew Tejada, Director, Office of Environmental Justice, EPA
Charles Lee, Senior Policy Advisor, Office of Environmental Justice, EPA
Lawrence Starfield, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance, EPA
Administrator Lisa Garcia, EPA Region 2
OIG Hotline

ATCH:

Supplemental Compliance Enforcement Information
"Polluter is Not Paying" Review Memo

ATTACHMENT A

VoG Supplemental Information: Compliance and Enforcement

Superfund Cleanup/Upland Contamination (Manufactured Gas Works Cleanup)

A. Three manufactured gas plant (MGP) sites (Citizens, Fulton and Metropolitan) originally situated along the Gowanus Canal in mixed use areas remain contaminated with the known carcinogens coal tar, benzene, toluene, ethylbenzene and xylene (know as BTEX contaminants), and polycyclic aromatic hydrocarbons (PAH).[2] The three shore-base gas works sites are the primary defined major sources of coal tar and other cancerous toxics that contaminate the soils and groundwater beneath the Canal bed, the sediments deposited on the Canal bed, and the Canal water, leading to the 2010 Gowanus Canal inclusion on the National Priorities List.

- The gas works sites are also the source of off-site contamination that has migrated under streets and into proximate parcels, and that is not being addressed by NY Site Department of Environmental Conservation (NYSDEC) cleanup oversight.
- NYSDEC website for the "Fulton Works" states:

  "In addition to the high levels of soil contamination, BTEX and PAH compounds have been found in groundwater at levels which greatly exceed SCGs [soil cleanup goals]. Benzene was found at levels as high as 5,200 parts per billion (ppb), compared to the groundwater quality standard of 1 ppm. Ethyl benzene was found as high as 6,300 ppb, toluene as high as 2,200 ppb and total xylenes as high as 5,700 ppb; all compared to their individual groundwater quality standard of 5 ppb."[3]
- NYSDEC Website for the "Citizens Works" states:

  "Soil: Coal tar has been observed, in soil, across the site at various depths ranging from approximately seven to one hundred fifty feet below grade. Shallower coal tar impacts were observed in soil at locations which generally correspond to locations of former MGP structures. Tar saturation thickness varies across the site and ranges from bands less than an inch to several feet of coal tar. Coal tar has migrated off-site at depths over 100 feet. PAHs were observed in soil at varying depths across the site. PAHs were typically highest where tar was observed. The maximum concentration of total PAHs was observed on Parcel 1 at a concentration of 44,140 mg/kg in a sample collected from the interval at 19-22 feet below grade. Groundwater: Groundwater at the site has been impacted by MGP related contaminants of concern including coal tar in the form of non-aqueous phase liquid. Total BTEX, PAHs and cyanide were detected above groundwater quality standards in groundwater samples across many areas of the site. Total BTEX in groundwater ranged from non-detect (ND) to 49,400 parts per billion (ppb). Total PAHs in groundwater ranged from ND to 9,390 ppb. Total cyanide concentrations in groundwater ranged from ND to 1,410 parts per million (ppm)."

---

[2] As summarized in the November 30, 2017, *100% Remedial Design Report, Site Remediation, Former Citizens Gas Works Manufactured Gas Plant Site:* Chief among these compounds are benzene, toluene, ethylbenzene, and xylenes (collectively, "BTEX") and a more general class of SVOCs known as polycyclic aromatic hydrocarbons (PAHs). The specific PAHs of concern are acenaphthene, acenaphthylene, anthracene, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(g,h,i)perylene, chrysene, dibenzo(a,h)anthracene, fluoranthene, fluorene, indeno(1,2,3-cd)pyrene, 2-methylnaphthalene, naphthalene, phenanthrene, and pyrene. The sum of the individual concentrations of these PAHs is hereinafter referred to as "total PAHs". Cyanide and metals, which can be associated with purifier waste and feedstock materials (e.g., coal, oil, etc.) used in the gas manufacturing process, have also been detected in soil and groundwater at the Site. Collectively, BTEX, PAHs, cyanide, and metals are considered the primary Site-related constituents of concern. See: Page 9.

[3] It is worth noting that in spite of request after request by members of the Gowanus Community Advisory Group, these applicable or relevant and appropriate cleanup standards (ARARs) are never identified or disclosed to the Community, nor do they seem to be lawfully applied in any of the State or Brownfield activities.

"The site is underlain by a deep sand deposit, which has enabled the coal tar released from the former MGP to migrate both vertically (downward) and horizontally. ***Two other MGPs are also located nearby, and it is not always possible to tell where the tar plume from one site ends and the next begins.***" (Emphasis added)[4]

- Citizens, originally a four-parcel voluntary cleanup site, is the focus of planned redevelopment as low-income housing and a school that is providing approval leverage for the 80-block Gowanus upzoning.
  - KeySpan Corporation (now National Grid) and NYSDEC entered into a Voluntary Cleanup Agreement effective August 31, 2002, for the Site (Index No. A2-0460-0502; Site No.V00360).
    - The Voluntary Cleanup Agreement was terminated effective November 11, 2007
    - NYSDEC and National Grid, the City, Vichar, Inc., and Harvic International Ltd. subsequently entered into a Brownfield Site Cleanup Agreement (C224012; Index No. A2-0610-0808), effective February 19, 2009, that involved further investigation and eventual remediation of the Site consisting of Parcels I, II, and III
    - Parcel III, located at 459 Smith Street, was removed from the Citizens MGP Site in 2019 and re-entered in the Brownfield Cleanup Program as a stand-alone site (C224012B).
    - The Citizens and Smith Street MGP sites are being remediated to achieve a "Track 4" restricted residential cleanup under the Brownfield Cleanup Program (6 NYCRR Part 375 describes Track 4 remedy requirements)
- The original Decision Document for the Carroll Gardens Operable Unit (DD) of the K-Citizens MGP Cleanup Site signed April 23, 2007, included the following requirements:
  - Removal of tar-contaminated MGP structures, their contents and the immediately surrounding "heavily contaminated soil."
  - Removal of contaminated soil to a depth of eight feet below grade across the site.
  - Installation of a subsurface barrier wall along the Gowanus Canal to control tar "already migrated to depths beyond the reach of the excavation." *Final wall configuration and the need for groundwater treatment will be determined during the design phase of the project* (emphasis added).
  - Installation of coal tar recovery wells along the subsurface barrier wall to collect mobile tar for disposal in a permitted facility.
  - Development of a Site Management Plan (SMP) to manage the "*contamination above unrestricted levels remaining at the site*" through institutional and engineering controls placed on the site and future monitoring activities (emphasis added).
  - Placement of an environmental easement or deed restriction that requires compliance with the SMP and limits the future use of the site to restricted residential (notably, only one of 8 parcels at the Fulton Site was deemed eligible for restricted residential reuse).
- The Citizens Site was transferred into a Brownfield Cleanup (citation noted above) just before the Gowanus Canal Hazard Ranking Score generated by evaluating Canal surface water alone, was issued in April of 2009, leading to the Superfund listing.[5]
- Once transferred to the Brownfields Program, the data and analysis for contamination and cleanup requirements were further collected and evaluated in the *Former Citizens Gas Works MGP 50% Remedial Design* report dated June 6, 2011, which was confirmed as reviewed by the NYSDEC by letter on July 28, 2011.
  - The actual 50% Design Report is not on the Citizens MGP website, and does not appear in search results (links and references by community members in blogs yield a 404 error). However, references to the document appear throughout other analyses and reports provided, including a *Draft Pilot Test Program Work Plan* submitted to NYSDEC on May 18, 2011, in which Item 9 - Sewer Investigations indicates "Discussions are ongoing with the NY City Department of Environmental Protection (NYCDEP) regarding the replacement of a section of the Bond-Lorraine Street sewer on Parcel II to

[4] Additional data is also available in the Citizens 2011 Data Report for the Remedial Design Program.

[5] The contamination in the Gowanus surface water scored 50 on the Hazard Ranking Score, well in excess of 28.5 needed for Superfund Listing. This surface-water-only listing basis shut down further analysis regarding the hazard score for groundwater and/or soil.

allow for the anchorage of the barrier wall, and the lining of a sewer section on Parcel III that may be compromised due to construction activities. Permitting and construction details of these upgrades are to be refined in meetings with the agency in the near future."

- Notably, the 2013 USEPA Record of Decision for the Gowanus Superfund Cleanup also addresses the required replacement of the Bond-Lorraine sewer, stating specifically:
    - "NYC owns more than half of the property subject to the Public Place cleanup and also owns the Bond-Lorraine sewer beneath the property, which will need to be replaced as part of the cleanup. The sewer replacement will remove sewer flow obstructions which have been present at this location for decades. In so doing, the project will help reduce the frequency and volume of CSO events in this area of the canal. The locations for barrier wall tiebacks are dictated largely by the need to protect the reconstructed sewer line."[6]

- A *Supplemental Design Investigation Report, June 2016* was prepared for National Grid in accordance with a *Supplemental Design Investigation Work Plan* (SDI Work Plan; Arcadis 2015) that had been approved by the New York State Department of Environmental Conservation (NYSDEC) on April 20, 2015.
    - The Report presented the scope and results of the supplemental design investigation (SDI) conducted between May 2015 and February 2016 to support the completion of the remedial design (RD).
    - It included results of an In-Situ Solidification (ISS) bench-scale treatability study indicate that the solidification of DNAPL-impacted soil in the Holder Nos. 1/5 area of Parcel I is technically feasible.
    - Further, five of the six mix designs (Mix Design Nos. 1 and 3 through 6) met or exceeded the UCS and hydraulic conductivity performance criteria established for the treatability study, and were considered to be suitable for field-scale implementation.
- Then in 2020, an Explanation of Significant differences (ESD) altered the original Citizens MGP remedy, referencing multiple pre-remedial design investigations and analyses conducted during the 13 years after the DD was issued.
    - These investigations determined that coal tar contamination was present only in the areas surrounding the former MGP structures. Thus, the extensive excavation contemplated in the earlier design and decision documents was no longer deemed necessary, only targeted soil removal.
    - The new remedy includes removal of identified source material "to the extent feasible," site cover installation, and management under a long-term Site Management Plan.
        - Original remedy requirements for site-wide excavation of soil to a depth of 8 feet was deemed unnecessary and, it was concluded that residual contamination could be effectively addressed by placement of a site-wide cover.
        - Groundwater and In-Situ Soil treatment were no longer considered.
            - According to the Parties and NYSDEC, the scaled-back remedy actions would still render the site suitable for restricted residential use, consistent with the 6NYCRR Part 375 requirements for BCP track 4 remedies.
- The February 2020 Addendum No. 4 to the 100% Remedial Design Report[7] sent to the NYSDEC from National Grid includes the Groundwater Model Report from November of 2017, which states on Page 12:
    - It should be noted that future activities and conditions unrelated to the Site remediation have the potential to further increase groundwater mounding and reduce available freeboard[8] at the Site and along the entirety of the Gowanus Canal including, but not limited to, the following:
        - Remediation activities associated with the Gowanus Canal Superfund Site, including upgrades to existing bulkheads along the Canal and the targeted in-situ solidification of sediments in Remediation Target Areas 1 and 2, the design of which has yet to be completed;

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[6] GOWANUS CANAL SUPERFUND SITE RECORD OF DECISION, APPENDIX V RESPONSIVENESS SUMMARY, September 27, 2013, p. V-23

[7] Remedial Design Addendum No. 4, Revised Hydraulic Relief System, Former Citizens Gas Works Manufactured Gas Plant Site Carroll Gardens/Public Place; Borough of Brooklyn, Kings County, New York; Site Nos. C224012 and C224012B; February 23, 2020

[8] "Freeboard" is the measure of the buffer zone between the seasonal high water table and the lowest finished level of a building, and must be designed-in to prevent groundwater intrusion, especially if the groundwater is carrying contamination of any kind.

    - Other bulkhead modifications or upgrades not necessarily associated with the remediation of the Gowanus Canal Superfund Site;
    - Regional flood resiliency measures;
    - Future redevelopment of the Site and surrounding area;
    - Local and regional changes in surface cover types (e.g., infiltration galleries, permeable pavements, vegetated areas, etc.); and
    - Sea level rise and increased precipitation resulting from climate change.
    - ***These future activities and conditions were not evaluated as part of the Site-related modeling efforts described in this report since the scope and details of such future activities and conditions are not known at this time.*** (Emphasis added)
- At the Public Place site (PP, the two parcels of the Citizens site owned by NYC), a Pre-Design Investigation (PDI) Work Plan only completed on July 14, 2021, provides a scope of work for the additional investigation for contaminants and soil vapor requiring remediation, containment and/or mitigation in the areas proposed to be developed.
    - It remains unclear why this repeat work was completed, as GEI Consultants performed a Remedial Investigation between February 2003 and June 2005 along with the subsequent reports noted above that included 17 test pits, 53 soil borings; installation of 28, 2-inch diameter monitoring wells; 13 soil vapor probes; a tidal survey utilizing 17 monitoring wells and the Gowanus canal; and evaluation of tar recovery in six monitoring wells.
    - These more recent analyses indicate the Citizens Site water table ranges from approximately seven feet below sea level (bls) on Parcel II to 34 feet bls on Parcel I (again, implicating the amount of freeboard available to accommodate construction foundations and pilings).
- None of the documentation, so far as can be discerned, describes how long the planned site-wide "cover" will last, how it would be affected by construction penetration, and how exposure pathways can effectively be prevented given the high levels of unremediated toxins and the realities of school/residential exposure.
- No FEIS Analysis or other documentation indicates whether potential for vapor intrusion of volatilized contamination will enter buildings via elevator shafts, HVAC subsystems, or other exposure pathways created by infrastructure design, construction, and operation.
- March 2021 financial filings by National Grid (parent company of Brooklyn Union Gas or BUG) identify current and non-current cleanup liabilities in the US totaling $2.1B.[9] A question remains aa to whether and how the material risk from these liabilities is depicted in that securities reporting (which is now based on total assurance that all costs will pass to customers through rate base) (see Attachment B for more information)
    - The full cost of the Newtown Creek Superfund cleanup, where BUG is also a PRP, is not yet assessed
- On February 23, 2022, USEPA Region 2 sent a letter to NYSDEC indicating the planned remedies did not address the following key issues:
    - The potential for post-remediation off-site migration of remaining NAPL and/or contaminated groundwater;
    - The potential for post-remediation direct contact with contaminated soil or ground water;
    - The potential for post-remediation vapor intrusion into future buildings; or
    - Proximity of tar extraction pumping wells to future public recreation areas.

B. The failure to include the identified MGP Subsites/Operable Units of the Gowanus Superfund Site in the Federal Cleanup jurisdictions has prevented necessary application of CERCLA statutory, regulatory, and process requirements (including Applicable, Relevant, and Appropriate Requirements or ARARs) to affected soils and the massive overlapping plume contaminating the Canal's interconnected groundwater system.

[9] Among the nine companies listed on the National Grid financial reporting website that appear to be local energy companies with environmental remediation liabilities, Brooklyn Union Gas is reported to have $1.6 billion of the 2.1 billion NG North American total.

- Under CERCLA §121 and the NCP §300.430(f)(5)(ii), the EPA must select remedies that are protective of human health and the environment, comply with ARARs (unless a statutory waiver is justified), are cost effective, and utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. In addition, CERCLA includes a preference for remedies that employ treatment that permanently and significantly reduces the volume, toxicity, or mobility of hazardous wastes as a principal element and a bias against off-site disposal of untreated wastes.
- Municipal planning decisions to place housing and a school on particularly contaminated parcels of the Citizens Gas works requires full application of CERCLA process and standards requirements noted above to assure protective remedies for people as well as the Canal waters.
- All three regulatory entities—USEPA Region 2, NYSDEC and NYCDEP—are aware that necessary remediation has not been performed at these gas works sites. In fact, NYSDEC personnel recently admitted in a recorded public meeting that NYSDEC was glad USEPA had "taken over" a portion of the Fulton MGP site because the site would now be cleaned up.

C. The failure to include identified Subsites/Operable Units of the Gowanus Superfund Site has allowed improper inclusion of ineligible parcels in the New York State Brownfield Program.
   - Improperly excluding parcels from Superfund Subsite/Operable Unit designation has:
     (a) Allowed responsible parties such as National Grid and New York City, as Owners of the Gas Works Parcels, to avoid remediation expenditure; and
     (b) Caused USEPA Region 2 to improperly substitute developers as PRPs, and secure additional cleanup actions.
   - This, in turn, effectively makes USEPA a proponent of the massive rezoning action for the 80-block area around the Canal, as the promise of development profits turned on another funding tap to close the gap between what NYSDEC oversight required, and what was necessary to protect human health and the environment.
   - Furthermore, this "behind-the-scenes" leveraging of cleanup requirements and developer monies confirms USEPA as a decision-maker and therefore, at minimum, an "Involved Agency" under the NY State Environmental Quality Review Act (SEQRA).[10]

D. An example of proper Superfund Site designation in Region 2/NYS can be found at the Onondaga Lake Superfund Site (Syracuse, NY), and more specifically, the Niagara Mohawk (NM) - Hiawatha Boulevard - Former MGP Site, which is managed as a Subsite of the Onondaga Site, and is tracked in the EPA CERCLIS data base as Operable Unit #13 of the Onondaga Lake National Priorities List (NPL) Site (see Record of Decision, March 2010).
   - The selected soil and groundwater remedies for that Superfund MGP site were chosen in accordance with the requirements of CERCLA (42 USC §9601, et seq.), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300.
   - The NYSDEC-approved Remedial Design requires treatment of approximately 9,673 cubic yards (CY) of subsurface soil using In-Situ Solidification (ISS) from approximately ***4 to 22 or 24 feet bgs within an area impacted with coal tar dense non-aqueous phase liquid (DNAPL)*** and/or ***polycyclic aromatic hydrocarbons (PAHs) at concentrations greater than 500 parts per million (ppm)*** (emphasis added).
- The remedial action selected by USEPA and NYSDEC for the Hiawatha MGP to meet the requirements of CERCLA Section 121 included in-situ solidification of contaminated soils, and enhanced bioremediation of contaminated groundwater.
- The contamination at the Citizens and Fulton MGP sites is comparable to, if not greater than, that of the Hiawatha cleanup, and the Hiawatha Site hosts a wastewater treatment plant, not low-income housing, a school, and a playground.

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[10] Region 2 denied it held this status, and failed to assure a fully compliant Environmental Impact Statement (EIS) for the Gowanus Upzoning addressed the signifiant array of impacts resulting from NY City and PRP Federal compliance failures.

- ***That more protective remedies are applied at a sewage plant than sites used by the neighborhood, or rezoned to house families and support schoolchildren, contravenes CERCLA, but more importantly violates the most fundamental precepts and promises of EO 14008's environmental justice requirements.***

Clean Water Act Compliance

A. NYSDEC exercises delegated CWA oversight and compliance authority for SPDES permits issued to the sewage systems loading to the Red Hook and Owl's Head WRRFs
    - SPDES Permit for Owl's Head WRRF (NY 0026166) (Expires 10/31/2020)
    - SPDES permit for Red Hook WRRF (NY 0027073) (Expires 10/31/2020)
- The current Red Hook and Owl's Head SPDES Permits include the following requirements regarding CSO management in the respective sewersheds (which both include areas of the Gowanus):
    - Paragraph 9. *Separate Storm Sewers required:* Combined sewer/extension, when allowed shall be accomplished using separate sewers. These sanitary and storm sewer extensions shall be designed and constructed simultaneously but without interconnections. No new source of storm water shall be connected to any separate sanitary sewer in the collection system. If separate sewers are to be extended from combined sewers, the permittee shall demonstrate the ability of the sewerage system to convey, and the treatment plant to adequately treat, the increased dry weather flows. Upon written notification by the Regional Water Engineer, the permittee shall assess the effects of the increased flow of sanitary sewage or industrial waste, on the frequency, flow and pollutant loading on the CSOs including the impacts on the receiving water quality and usage. This assessment should use techniques such as collection system and water quality modeling contained in the Water Environment Federation Manual of Practice. (p. 11)
        - Paragraph 10. *Sewer Connection & Extension Prohibitions*: If there are documented recurrent instances of sewage backing up into house(s) or discharges of raw sewage onto the ground surface from surcharging manholes, the permittee shall, upon letter notification from DEC, prohibit further connections that would make the surcharging/backup problems worse. Wastewater connections to the combined sewer system downstream of the last regulator or diversion chamber are prohibited (p. 11)
- New York City has asserted—contrary to CWA and CERCLA law, permitting provisions, and CSO Guidance—that ongoing stormwater collection, and stormwater control requirements implemented as part of the upzoning redevelopment, can and should be connected to already overloaded combined sewers.
    - At the same time, in a what can be described as a conflict of interest, New York City has defied outstanding orders and schedules to build and place into operation critical CSO retention tanks needed to control current pollution loadings into the Canal (but likely to be inadequate for the fully built-out redevelopment pushed by the non-compliant New York City).

B. NYS adopted a revised Designated Use for waters in New York Harbor (including the Gowanus) in 2015
- USEPA approved the new Primary Contact Recreation designated use, but failed to act on the accompanying revised water quality criteria for total and fecal coliform (pathogen) to support the upgraded designated use
- USEPA was sued by Riverkeeper in 2017 under the Administrative Procedures Act (APA) for failure to act on reviewing and approving the new WQS.
    - USEPA completed a WQS review in March of 2018 and disapproved NYSDEC WQS for pathogens as not protective of a primary contact designated use.
    - NYSDEC did not resolve the USEPA disapproval in promulgating new WQS, so USEPA is now in the process of doing so; results are expected in July of 2022.

- Because of USEPA disapproval of the pathogen WQS, interim criteria to be applied revert to standards in place prior to the 2015 designated use revision to primary contact, meaning the Upper Gowanus remains designated SD, and no pathogen standard is applied.
- Monitored Pathogen levels in the Gowanus Canal routinely exceed 24,000 CPU/100ml (colony producing units) for enterococcus.
- It isn't clear whether NYS and NYC should be benefitting from their own misfeasance, as the absence of revised WQS allows these parties to characterize the impact from 30,000 additional users of Gowanus Canal waters—invalidly, and near-fraudulently—as effectively harmless due to its continued status as an SD waterbody.
- Additionally, the failure to properly promulgate and enforce WQS for primary contact recreation deprives the Gowanus Canal, the cleanup, and the residents of a key Applicable, Relevant, and Appropriate Standard (ARAR).

C. Gowanus Combined Sewer Outfalls (CSOs) discharge 293 million gallons, and two storm water outfalls discharge 59 million gallons of stormwater annually into the Canal
- This toxic sanitary and storm sewage has never been captured and treated by either the Red Hook or Owl's Head WRRF under current sewer system design, permit, and capacity limitations.
- The sanitary and precipitation loading into the sewersheds of Red Hook and Owl's Head WRRFs has already been increased by major development in Downtown Brooklyn, Atlantic Yards, Barclay Center, and other spot zonings, while year-on-year rainfall increases are 3.30" (RH) and 8.19" (OH)
  - In spite of these load increases, both plants reported a lower daily average flow rate into the plants—and increased capture rates—with no discernible upgrades to either plant's capacity and no identifiable offsetting reduction in NYC water use over the last decade.
- NYC steadily stonewalls Enforcement Orders for two retention tanks necessary for multiple compliance requirements: the Superfund ROD; the Long Term Control Plan (derivative of SPDES requirements and the Impaired Water Listing of the Gowanus Canal); and upgraded Water Quality Standards that will apply to the Canal.

- Region 2 has not:
  - Assured compliance with the provisions of the applicable SPDES permits "prohibit[ing] further connections that would make the surcharging/back-up problems worse"
  - Targeted enforcement of the 2016 Sewage Backup Order in and around the overburdened and Disadvantaged Gowanus Area
  - Enjoined further development, buildout, and additive sewage system loading of any kind unless and until the retention tanks required directly by the Superfund Record of Decision, repeat Administrative Orders, the Long Term Control Plan, SPDES permits, and updated Water Quality Standards are constructed as required by law, EO 14008, and USEPA Administrator policies; or, a TMDL is set for the Gowanus Canal.
  - Required or supported a revised or supplemental Environmental Impact Statement that would fully analyze:
    - CWA and Environmental Justice impacts of additive luxury development under the planned rezoning, including adverse impacts to water quality, CSO loadings, SPDES permit limits.
    - Cumulative impacts to the sewersheds governed by the CWA and adversely impacted by accumulating development.
    - Flood risk and corresponding risk to water quality and sewage backup control failures.

Attachment B

The Polluter Isn't Paying: Passing Cleanup Costs to Utility Ratepayers in New York State

Introduction

When the Gowanus Canal was added to the National Priorities List as a Superfund Site in 2010, under the federal Comprehensive Response, Compensation, and Liability Act (CERCLA), it supposedly triggered a foundational principle of the Superfund cleanup program: The Polluter Pays.

This cardinal principle of the 1980 Superfund Law was recently reaffirmed by current USEPA Administrator Michael Regan in an October, 2021 speech, when he stated "For years, the Superfund program has successfully protected American communities by requiring polluters to pay to clean up the hazardous waste and pollution they've released into the environment." He added, "Where we find contamination, we will seek necessary monitoring and cleanup from polluters."

At first blush, this principle appears to be at work in the multiple Gowanus cleanup actions. For the Canal waters specifically designated under the Canal listing, USEPA has identified several Responsible Parties, including the US Navy, the National Grid utility (providing natural gas services to Brooklyn, Queens and Staten Island), Consolidated Edison (electric utility) and the City of New York (for sanitary and storm sewage as well as ownership of contaminated property). These parties fund USEPA-supervised work underway to dredge contamination from the Canal bottom, inject grouting that solidifies contamination in the soil layers below the Canal bed, and construct barrier walls along the shoreline to prevent further contamination from migrating into the Canal waters.

In the case of National Grid, its legacy ownership of three Manufactured Gas Plant sites (MGPs) along the Canal has generated a significant portion of the Canal cleanup requirements, costs, and liabilities (last estimated at $500 million), which National Grid then charges to its customers under utility rate setting by the New York State Public Service Commission (PSC). Remediation costs under Federal and State Superfund requirements for soil and water assets at these three MGP sites (labeled "uplands" from the Canal) are also shifted onto utility customers under PSC rules.

According to an undated NYS Department of Environmental Conservation Report, 235 MGP-related sites have been positively identified in New York State out of an estimated 300 that may have historically operated. At 202 of the 235 sites, a current NYS utility has been identified as the responsible party, and entered into an order or agreement for the investigation and cleanup.

Unfortunately, virtually all the PRPs who are incurring costs to pay for their pollution have financial pass-through mechanisms available that simple shift the actual burden of these cost to either tax-payers or utility customers paying gas and electric bills. As the information below indicates, when it comes to the Gowanus, no polluter is paying—only the victims of the Gowanus toxic legacy and their fellow citizens who owe NYC taxes, or foot utility bills from affected companies, or both.

I. The Polluter Isn't Paying in Gowanus

A. National Grid North America Inc. currently serves more than 20 million customers throughout New York, Massachusetts, and Rhode Island.

The *National Grid North America Inc. and Subsidiaries Consolidated Financial Statements for the years ended March 31, 2021 and 2020* explains the financial shifting of cleanup costs from the Polluter to the Customer:

- At March 31, 2021 and 2020, *the Company's total reserve for estimated MGP-related environmental matters is $2.2 billion and $2.4 billion, respectively.*
- The Company had a current portion of environmental remediation costs of $173 million and $216 million included in other current liabilities on the consolidated balance sheets at March 31, 2021 and 2020, respectively.
- *Through various rate orders issued by the NYPSC, DPU, and RIPUC, costs related to MGP environmental cleanup activities are recovered in rates charged to gas distribution customers.*
  - Accordingly, the Company has reflected a *net regulatory asset of $2.3 billion and $2.5 billion* on the consolidated balance sheets at March 31, 2021 and 2020, respectively.
- Expenditures incurred for the years ended March 31, 2021 and 2020 were approximately $179 million and $103 million, respectively.
- The Company believes that its ongoing operations, and its approach to addressing conditions at historic sites, are in substantial compliance with all applicable environmental laws, and that the obligations imposed on it because of the environmental laws will not have a material impact on its results of operations or financial position since, as noted above, *environmental expenditures incurred by the Company are generally recoverable from customers.* (Direct text from Page 74; emphasis added)

On Page 27 of the Report, National Grid US further explains the concept of a Regulatory Asset:

> *The regulatory asset represents deferred costs associated with the Company's share of the estimated costs to investigate and perform certain remediation activities at former manufactured gas plant ("MGP") sites and related facilities.* ***The Company believes future costs, beyond the expiration of current rate plans, will continue to be recovered through rates.*** *The regulatory liability represents the excess of amounts received in rates over the Company's actual site investigation and remediation ("SIR") costs.* (Emphasis added)

B. The Brooklyn Union Gas Company ("the Company") is a gas distribution company engaged in the transportation and sale of natural gas to approximately 1.3 million customers in the boroughs of Brooklyn and Staten Island and two-thirds of the borough of Queens, all in New York City.

In the *Brooklyn Union Gas Company Consolidated Financial Statements for the years ended March 31, 2021, 2020, and 2019* (BUG), similar disclosures of liability and rate-base accounting are described:

- The Company has identified numerous MGP sites and related facilities, which were owned or operated by the Company or its predecessors.
  - These former sites, some of which are no longer owned by the Company, have been identified to the NYPSC and the New York State Department of Environmental Conservation ("DEC") for inclusion on appropriate site inventories.
  - Administrative Orders on Consent or Voluntary Cleanup Agreements have been executed with the DEC to address the investigation and remediation activities associated with certain sites.
  - Expenditures incurred for the years ended March 31, 2021, 2020, and 2019 were $134.4 million, $59.1 million, and $27.9 million, respectively.
- The Company estimated the *remaining costs of environmental remediation activities were $1.6 billion and $1.7 billion as of March 31, 2021 and 2020, respectively.*

    - However, remediation costs for each site may be materially higher than estimated, depending on changing technologies and regulatory standards, selected end use for each site, and actual environmental conditions encountered.
- During the year ended March 31, 2020, the Company received new information concerning the design and remediation work required at several sites, which resulted in the Company increasing its estimate for environmental reserve. The estimated increases were the result of new information arising from notices received from environmental regulators and updated cost estimates prepared by third party engineers. Based on this, the Company revised the total cost estimate accordingly and increased the provision by approximately $463.4 million. After recording an offsetting increase in regulatory assets relating to environmental remediation, there was no impact to the net assets of the Company.
- *By rate orders, the NYPSC has provided for the recovery of SIR [Site Investigation and Remediation] costs.*
    - *Accordingly, as of March 31, 2021 and 2020, the Company has recorded net environmental regulatory assets of $1.8 billion and $1.9 billion, respectively.* (Direct text from Page 37, emphasis added)

As in the National Grid US report, the BUG Report further stipulates:

> *The Company believes that its ongoing operations, and its approach to addressing conditions at historic sites, are in substantial compliance with all applicable environmental laws. Where the Company has regulatory recovery, it believes that the obligations imposed on it because of the environmental laws will not have a material impact on its results of operations or financial position.* (Page 37)

C. Notably, <u>an MGP site in Saratoga Springs, comparable to the Citizens MGP along the Gowanus and also owned by a National Grid company (Niagara Mohawk Power), was listed on the Federal NPL in 1990</u>.
- The Hazard Ranking Score (HRS) was 46 (a score of 28.5 establishes National Priorities List eligibility)

Elsewhere in NYS, <u>EPA designated Onondaga Lake, and its tributaries and upland areas which have contributed or are contributing hazardous substances to the lake (subsites), as a Superfund National Priorities List (NPL) site.</u>
- In a December 2020 Five Year Report for one of the Subsites, USEPA confirmed "The Onondaga Lake site includes 11 subsites, which are defined as any site that is situated on Onondaga Lake's shores or tributaries that has contributed contamination to, or threatens to contribute contamination to, Onondaga Lake." (Page 1)
    - The <u>upland sources designated as "subsites" of the Onondaga Lake cleanup include the Hiawatha Ave. MGP site</u> that currently hosts a wastewater treatment plant (the Hazard Ranking Score listed in the ROD was 50; Gowanus Canal scored the same just for surface water exposure)
    - Hiawatha Avenue MGP is being remediated to CERCLA standards as a Superfund Subsite, and under NYS law is not eligible for "Brownfield"status.

II. Summary

- Currently, Brooklyn Union Gas/National Grid (BUG/NG) offsets its estimated $1.6 billion liability for cleanup costs with $1.8 billion in Regulatory Assets, which is a kind of "accounts payable" it can and will collect on gas bills.
- In other words, cleanup costs incurred by BUG/NG as a responsible party under Federal and State Superfund laws, as well as Brownfield programs, are an allowable charge back to Staten Island, Brooklyn, and Queens customers who have already paid millions on their gas bills since cleanup programs began
- These Site Investigation and Remediation (SIR) costs will continue to be charged to customers under PSC rules
- The BUG service territory (SI, Queens, and Brooklyn) has only about 5% of the overall National Grid US customer base, but appears to be the location of about 73% of the National Grid remediation costs, meaning these ratepayers are disproportionately burdened when the Polluter Doesn't Pay.
    - BUG/NG is addressing two Superfund cleanups ongoing at Gowanus Canal and Newtown Creek
    - As gas hookup bans are implemented starting in 2024, the customer base could potentially decrease, or at best remain steady as costs continue to escalate, causing proportional increases to ratepayers.

- BUG/NG insistence on lower cleanup levels and cost-shifting to Gowanus area developers is consistent with minimizing SIR cost recovery requests to the PSC in rate case adjudication.
- Use of Brownfield procedures also appears to be part of the overall "cost containment" strategy to minimize cleanup outlays, but has the corresponding effect of potentially leaving contamination in place that can harm future users of these gas plant sites and surrounding parcels

III. Gowanus Rezoning Implications

As noted, the Gowanus Canal has been on the Superfund National Priorities List, since 2010, and BUG/NG is one of several parties responsible for cleaning up the contaminated Canal water, along with soil and groundwater assets at the MGP sites.

It remains unclear why MGP sites are retained in State cleanup programs and not incorporated as subsites in the federal Gowanus Superfund cleanup as is done in other locations in Region 2. Arguably, meeting the cleanup requirements of the Superfund Law (CERCLA §121) would be more costly but result in more contamination elimination and/or control particularly on sites considered suitable for development of housing and schools.

The current estimate for the Canal soil Cleanup is over $500 million, and National Grid has the largest share of that cleanup cost (separate funding is being used by NYC to construct retention tanks to keep toxic sewage and storm water out of the Canal, at an estimated $1.2 B). The information regarding rate-base allocations and subsidies raises significant issues as to whether and how cleanup decisions for the Canal and Uplands may be influenced by the financial and political aspects of NG/BUG's continued laying-off of remediation costs onto community ratepayers.

The joint status of NYC and BUG/NG as Superfund Responsible Parties is a potential conflict of interest.
- NYC is a major user of natural gas in public housing and other municipal facilities, which means the City is effectively paying for cleanup costs that have been allocated to BUG/NG under the Superfund actions.
- Higher gas prices caused by the rate-base subsidy leave the City with less money to spend on other capital and maintenance needs of the NYCHA complex, further exacerbating the environmental injustice of gas users underwriting utility cots and not company profits

This financial structure, and the resulting machinations to keep cleanup costs down, creates a cascading set of damaging outcomes in two significant policy arenas:

1. Climate Change:
- Allowing companies to recover the costs of rectifying their own imprudence and damage is effectively acting as a public subsidy of fossil fuel enterprises
    - Providing this level of public subsidy forty years after the passage of the Superfund and other laws may now be in contravention of the 2019 Climate Leadership and Community Protection Act that requires an 85% reduction in greenhouse gas emissions such as methane by 2050
- Increasing remediation costs can encourage gas companies like NG/BUG to look to increase the size and consumption of rate base, thereby adding to greenhouse gas emissions
- Continued subsidy of gas companies through public underwriting of accrued fossil company cleanup costs forces victims of climate change to subsidize the very corporations that overload airshed assets, contribute to sea-level rise, flooding, weather events, and engender a host of climate-related disasters and damage (while also having damaged the locality soil and water)

2. Environmental Injustice:
- Working families in a territory with 1.3 million customers are shouldering hundreds of millions of dollars in remediation costs, enabling greater profits, dividends, or multi-million dollar salaries enjoyed by National Grid stockholders and employees including the parent corporation, National Grid plc in London

- These same residents and customers lived and raised families surrounded by a toxic stew in the soils and waters of their neighborhood while corporations avoided cleanup outlays for decades. This in turn:
  - Postponed reckoning until the problems were nearly intractable;
  - Drove up ultimate costs; and
  - Allowed Responsible Parties to pocket the gained opportunity costs of avoided expenditure
- Developers who will directly profit from follow-on use are receiving properties restored at the expense of the Gowanus Neighborhood customers and other areas in the BUG service territory, and not at their own cost
- Millions-pinching in remedy selection and implementation to avoid rate base charges that might break the camel's back is leaving contamination in place that can affect all neighborhood residents, but especially low-income families whose health is already stressed from lack of health care and other co-conditions of economic impairment.
- Taxpayers are being hit with comparable financial pass-throughs for costs incurred NYC to control ongoing pollution from sewer overflows and other contamination to water assets that parallel the corporate pollution in the Gowanus area

IV. Recommendations

- Public officials in the legislative and executive branches of New York government should consider developing alternative cost recovery methods that do not force citizens to reimburse polluting profit-making corporations that incur cleanup costs
  - Consider statutory changes that revise accepted wisdom that ongoing pollution of public assets was "doing business" and current remediation costs are "reasonable."
  - Consider statutory changes that cap remediation costs that can be charged back to customer/victims at 10% or a some comparable negotiated ceiling, with the remainder absorbed by shareholder and executive compensation accounts.