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December 19, 2013

Susan E. Amron
Deputy Chief, Environmental Law Division
New York City Law Department
100 Church Street
New York, New York 10007

Re: Flushing Tunnel Activation

Dear Susan:

We are writing because we are concerned that the City of New York's decision to re-start the Flushing Tunnel at the Gowanus Canal Superfund Site will change the current sediment deposition conditions in the Canal, complicate remedial design work, and result in spoliation of evidence. Accordingly, we respectfully request that the City not re-start the Flushing Tunnel until these issues are better understood and resolved.

To date, EPA has spent in excess of $13 million and National Grid has spent $17 million – a total expenditure of more than $30 million – to sample and characterize sediment in the Canal. On November 15, 2013, the City submitted to EPA a Gowanus Canal model that shows that maximum discharge rates from the renovated Gowanus Canal Flushing Tunnel will be 40 percent greater and, at a minimum, scour and relocate within the Canal 1,000 cubic yards of sediment. The City acknowledges these changes in Canal conditions, that even larger sediment volumes will be moved once the Flushing Tunnel goes into full-scale operation, and that an estimated 20 percent of sediment will be deposited within the Canal and 10 percent will likely move into Gowanus Bay. The City's operation of the Flushing Tunnel will thereby cause the release of hazardous substances to the environment.

As you know, the remedial design ("RD") is predicated on a stable and reliable sampling regimen such as that performed by EPA and National Grid. The City stopped the Flushing Tunnel operation before EPA and National Grid began sampling and these operations remained stopped during the course of the sampling. The City's restarting of the Flushing Tunnel is changing the sampling profile and will make RD work more difficult. Simply, the Flushing Tunnel has changed and will continue to change the conditions studied during the past CERCLA investigation, create an ever-moving remedial target, and enhance costs for all parties. The City's own modeling indicates that re-starting the Flushing Tunnel will cause the spread of contamination which will worsen environmental conditions in the lower reaches of the Canal and cause sediment to be released to the bay. These changing conditions complicate the existing formidable challenges associated with developing a design that will lead to a successful remedy.

Lastly, the re-start of the Flushing Tunnel has the potential to destroy evidence needed both to properly characterize the Canal as well as to allocate responsibility for the costs of the RD and the

remedy itself. Such spoliation of evidence will leave National Grid and other industrial parties no choice but to invoke the benefits of adverse inferences against the City and the other remedies provided for under Rule 37 of the Federal Rules of Civil Procedure and other provisions of federal law that apply.

For the reasons stated above, we respectfully request that the City not re-start the Flushing Tunnel until these issues can be adequately resolved.

Sincerely,

/s Russell B. Selman

cc: Brian Carr
Donna L. Riccobono
Allen M. Hecht

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