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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

25th ANNIVERSARY

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June 23, 2014

Via Electronic and First Class Mail
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Mr. Christos Tsiamis
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290 Broadway, 20th Floor
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Re: Gowanus Canal Superfund Site, Administrative Order for Remedial Design, Index No. CERCLA-02-2014-2019

Dear Messrs. Carr and Tsiamis:

I. Notice of Intent to Comply

On May 28, 2014 the United States Environmental Protection Agency ("EPA") issued a unilateral Administrative Order for Remedial Design ("UAO") to the City of New York ("the City"). The UAO requires the City to perform the remedial design of certain elements of the remedy identified in the Record of Decision ("ROD") for the Gowanus Canal Superfund Site (the "Site"), including controls for combined sewer overflows ("CSOs") and the remediation of the former 1st Street turning basin. Paragraph 114 of the UAO requires the City to provide "written notice to EPA stating whether [the City] will comply with this Order." In accordance with paragraph 114 of the UAO, the City notifies EPA that it intends to comply with the terms and requirements of the UAO to the best of its ability.

Nothing in this letter shall be construed to limit the rights, claims and defenses the City may have against EPA or any other person in complying with this order or in any future actions, including claims and defenses that requirements of the UAO were not lawfully issued or were not compliant with the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, the National Contingency Plan (the "NCP"), 40 C.F.R. § 300 *et seq.*, legally applicable or relevant and appropriate requirements ("ARARs")

pursuant to Section 121(d)(2) of CERCLA, and/or relevant EPA guidance issued under CERCLA. Further, nothing in this letter, including the City's intention to comply with the UAO, shall be construed as an admission of any factual allegation or legal conclusion in the UAO or an admission of any liability for any matter described in the UAO. The City also reserves the right to seek reimbursement from Superfund pursuant to Section 106(b)(2) of CERCLA.

II. History of Consent Order Negotiations Between the City and EPA

The City believed that negotiations between the City and EPA on an administrative consent order for remedial design ("Consent Order") were proceeding in a productive and positive manner, so EPA's decision to abruptly terminate those discussions and issue the UAO came as a surprise. The City believes that the issuance of an UAO was unnecessary and contrary to EPA's prior representations. Immediately upon issuance of the ROD on September 30, 2013, the City expressed to EPA its intent and desire to negotiate a Consent Order. The City expended considerable resources in staff hours, consultant support and expense to accomplish that objective and made clear to EPA that the City's legal team, Department of Environmental Protection ("DEP") personnel across many offices (e.g, contracting, engineering design and construction, and water and sewer operations), and the City's retained consultants were available to expedite and complete Consent Order negotiations.

The City expended these resources because the City recognizes fully the enormous projected expense of the selected remedy and the significant, pervasive impacts to the community from implementation of the remedy. The City believes that the total cost of the selected remedy could exceed $1 billion and will result in traffic disruption, noise, odor, and possible loss of an important community park, that could last over a decade. Therefore, the City remains committed to evaluating, addressing and refining all of the selected remedy in a manner consistent with good science, cost-effectiveness and community input.

To meet these objectives, the City met early in the process with EPA and agreed in writing to the framework and essential conditions for the process and substance of the Consent Order. Specifically, on November 26, 2013, EPA determined that it was preferable to attempt separate negotiations for designing different portions of the ROD remedy. EPA determined in writing that the non-federal PRPs other than the City, including National Grid, would be responsible for the remedial design of the dredging, capping and disposal elements of the in-Canal remedy (the "Dredge Design") and for payment of EPA's past costs in the amount of $5 million. The non-federal PRPs other than the City are implementing that Dredge Design pursuant to a separate unilateral order. Contemporaneously, EPA confirmed in writing that it would pursue separately consent order negotiations with the City for the siting and design of the CSO remedy and the remedy for the former 1st Street turning basin, *without cost recovery*. See, EPA e-mail dated November 26, 2013.

On December 18, 2013, the City and EPA further refined the essential conditions and scope of the City's responsibilities for its portion of the remedial design. The City agreed to commence interim work on CSO facility siting design pursuant to the additional work provisions of an existing consent order between the City and EPA (Administrative Order and Settlement Agreement CERCLA-02-2010-2011) in exchange for EPA's express agreement, in writing, that a final order contain the following:

(1) Refinement of CERCLA performance standards for CSO control measures for the upper reach of the Canal *based on sampling and analyses, including post-Water Body/Watershed Facility Plan construction for monitoring studies*;

(2) *Assessment of engineering alternatives* in conjunction with the CSO Long Term Control Plan ("LTCP") to attain CERCLA performance standards; and

(3) Site selection activities for conceptual CSO source control measures described in the ROD (emphasis added.)

See City of New York letter dated December 18, 2013 and EPA's e-mail agreeing to those terms dated December 19, 2013.

These conditions came from, and are consistent with, the ROD: the requirement to assess alternatives to CSO tanks (ROD p. 55); the requirement for the CSO alternatives to be informed by and coordinated with the LTCP process (ROD, p. 89); and the requirement to refine performance standards for CSO controls based on additional sampling, analysis and modeling (ROD, p. 29).

Notably, between issuance of the ROD and issuance of the UAO, EPA did not request or propose any temporary CSO controls while the final CSO controls were being designed. Nor did EPA request or propose installation of stormwater controls for floatable oil and organics for planned and future separate stormwater outfalls. Although the ROD mentions interim CSO controls and best management practices for separate stormwater system generally, the ROD does not require, propose, analyze, evaluate or select *any* defined interim CSO controls or controls for separate stormwater outfalls.

In reliance on the December 18, 2013 agreement, the City performed on schedule all of the initial work required of the City by EPA. The City (i) retained a CSO facility siting contractor; (ii) conducted a site reconnaissance walk-through with EPA and its contractor; (iii) submitted a "first cut" list of potential CSO facility siting locations; (iv) submitted a detailed list of proposed sampling to refine CERCLA performance standards for CSOs; and (v) proposed and reached an agreement with EPA on a proposed schedule for CSO facility selection *and* evaluation of CSO alternatives that integrated the CERCLA and LTCP processes. The City even made a substantial offer to reimburse a portion of EPA's past costs despite EPA's initial statement that it was not seeking cost recovery from the City and its failure to make any specific

demand for cost recovery from the City until March, 2014. In light of this significant progress in negotiations, the City believed that further negotiations would have resulted in a Consent Order.

Notwithstanding the City's best efforts, EPA chose to terminate the Consent Order negotiations unilaterally and issue a UAO that contradicts EPA's own agreed upon framework and essential conditions for a final order. In particular, the UAO requires the City to (i) participate and cooperate in the Dredge Design with all non-federal PRPs who are already performing that work; (ii) implement interim CSO controls; and (iii) implement controls for floatable oils and organics for planned and future separate stormwater systems, but fails to (i) include a process for the ROD-required evaluation of CSO alternatives, and (ii) provide for the ROD-required sampling and modeling to refine CSO performance goals. This approach is unfortunate and positions the City unnecessarily as a respondent to an enforcement action when the City attempted in good faith to reach an agreement with EPA consistent with CERCLA and the ROD.

III. Sufficient Cause

A. Reservation of Rights and Standard for "Sufficient Cause"

1. Reservation of Rights

Paragraph 114 of the UAO requires that the City's written notice of intent to comply with the UAO "shall describe, using facts that exist on or prior to the effective date of this order, any 'sufficient cause' defenses asserted by the Respondent under Sections 106(b) and 107(c)(3) of CERCLA." The City objects to this requirement because CERCLA contains no provision authorizing EPA to require a respondent to a UAO to (i) describe the respondent's "sufficient cause" defenses, or (ii) limit a respondent's "sufficient cause" defense to information available to the respondent prior to the effective date of a UAO. Accordingly, the City reserves its right to raise any "sufficient cause" defense, or any information in support thereof, whether or not mentioned in this letter or existing or known to the City at the time of this letter.

2. Standard for "Sufficient Cause" Defense

Sections 106(b) and 107(c)(3) of CERCLA provide that a party is not subject to treble damages or civil penalties if that party has "sufficient cause" not to comply with a UAO. Parties have "sufficient cause" if they have a reasonable belief that they are not liable under CERCLA or can show that the applicable provisions of CERCLA, the NCP or applicable guidance give rise to an objectively reasonable, good faith belief in the invalidity or inapplicability of the UAO. *See, Solid State Circuits, Inc. v. United States Environmental Protection Agency*, 812 F.2d 383, 390 (8th Cir. 1987).

B. The City has "Sufficient Cause" Because the UAO Fails to Allege Sufficient Facts as to the City's Liability

EPA alleges that the City is liable only as the owner or operator of the Canal and certain properties surrounding the Canal under 107(a)(1) and (2), and as the owner or operator of the 1st Street turning basin. With respect to the 1st Street turning basin, the UAO, ¶30, states only that "*based on currently available information*", EPA *believes* Respondent owns the real property for the former 1st Street turning basin, *in whole or in part*" (emphasis added.) The City believes it is not the fee owner of the 1st Street basin. Also, the UAO contains insufficient factual allegations regarding the City's ownership of all the relevant facilities at the relevant times.

C. The City has "Sufficient Cause" Because Its Liability, if any, is Divisible

Assuming, *arguendo*, that the City is a liable party, the UAO requires the City to perform and participate jointly and severally in the entire remedy for the Gowanus Canal. However, liability under CERCLA is not joint and several if the harm caused by a party is divisible either because the harm is distinct or is reasonably capable of apportionment. *BNSF v. United States*, 556 U.S. 599 (2009). The City's liability, if any, is divisible. The ROD states clearly that the capping of the native layer of the Canal and in situ stabilization in the Canal is needed exclusively due to the presence of the NAPL attributed to National Grid's former MGP facilities. Therefore, the City has no liability for the capping and stabilization portion of the remedy. In addition, the ROD makes clear that different geographic sections of the Canal (upper reach, mid reach, and lower reach) have distinct impacts to sediment and that the City's contribution to each geographic section is divisible. And finally, the City believes that its CSO discharges are not and were not responsible for observed sediment contamination in excess of CERCLA risk-based thresholds, and therefore the City's share of liability for the ROD remedy is divisible.

D. The City has "Sufficient Cause" Because the UAO is Arbitrary, Capricious and Otherwise Not In Accordance with Law

1. The Statement of Work ("SOW") attached to the UAO requires that the City's remedial design include engineering controls for floatable oil and organics at planned and future separate stormwater outfalls, including the Carroll Street High Level Sewer Separation and the Lightstone development project. Although stormwater controls are mentioned in the ROD, the ROD states that such controls would be dictated by "applicable SPDES permits and best management practices," as opposed to a CERCLA mandate. ROD, p.56. EPA failed to perform the evaluation required by CERCLA and the NCP prior to selecting a remedy for these engineering controls on stormwater. Indeed, the ROD does not mention any selected remedy for those controls. Further, as a result of this unilaterally imposed requirement, the City will evaluate and may have to delay the much anticipated sewer separation project for Carroll Street that was scheduled to commence in July, 2014. Currently, with regard to development projects such as

the Lightstone project, DEP is not the appropriate agency that regulates the discharge from these systems; the New York State Department of Environmental Conservation is the appropriate agency.

2. The SOW also requires temporary measures for capture/control of CSO solid discharges until implementation of permanent CSO controls. Again, although this is mentioned in the ROD, EPA failed to perform an evaluation of alternatives required by CERCLA and the NCP prior to selecting a remedy for temporary engineering controls on CSOs. And again, the ROD does not mention any selected remedy for these temporary controls.

3. The ROD states:

> In order to achieve this minimum level of CSO solids control, *based on preliminary screening*, in-line sewage retention tanks would be constructed near outfalls RH-034 and OH-007 *unless other technically viable alternatives are identified.*

ROD at 55 (emphasis added). As EPA acknowledges, CSO tanks were selected as the CSO control alternative based only on *preliminary* screening, which as set forth below, is inconsistent with the NCP. Further, the ROD endorses specifically that "other technically viable alternatives" be identified and evaluated. As noted above, that was an express condition of the negotiation framework for the Consent Order, which EPA agreed to in writing. The UAO and SOW unilaterally delete this requirement and ignore the express authorization for an alternatives analyses in the ROD.

4. Similarly, the ROD acknowledges that "the range of contaminated CSO source control in the selected remedy [58-74%] incorporate an uncertainty factor which will be addressed during the remedial design." ROD at 29. The ROD states that in addition to resolving this uncertainty:

> The EPA's CERCLA remedial design will be informed and refined by the results of additional sampling and modeling as well as by coordination with NYSDEC and NYCDEP as they gather Post-Construction Monitoring ("PCM") data developed in accordance with EPA CSO guidance in advance of the LTCP submission to address CWA compliance.

Id. To that end, the City proposed specific sampling and modeling to address all of these ROD requirements. EPA did not meet with the City's technical team to evaluate the City's proposal and eliminated any specific reference to the City's proposed sampling and modeling from the UAO and the SOW.

5. The UAO contains requirements and deadlines that are not feasible or reasonably capable of performance. As an example, the City has informed EPA on many occasions with numerous examples that City procurement requirements will not allow retention of contractors on the schedule called for in the UAO and attached SOW. Moreover, the SOW requires the City to select tank locations by June, 2015 and complete 100% design of the tanks within two years thereafter. The City has informed EPA repeatedly that based on actual field experience with other CSO tank designs, a two year design schedule after site selection is absolutely infeasible. Significantly, the ROD itself contains no deadline for design of the CSO remedy and the UAO issued to the other non-federal PRPs for the Dredge Design contains no such three year deadline, even though the Dredge Design is intended to proceed on a parallel schedule. In fact, the Dredge Design schedule submitted by the non-federal PRPs proposed, at a minimum, a six year design with many contingencies that could extend that schedule substantially.

As an additional example of the infeasibility of the schedule and required work, the SOW requires that the City submit a 10%-25% design for CSO tanks by June, 2015. Based on information provided by the City, EPA previously agreed that a specific percentage design was not required by June 2015, but rather only that a specific list of tasks be completed by that date. The City and EPA agreed in writing to that list of tasks. The SOW contradicts that written agreement and imposes a requirement of a specific percentage design that cannot be completed by June 2015.

6. The UAO defines "Site" as the Canal and "any areas which are the sources of contamination to the Canal, areas where contamination has migrated from the Canal, and/or suitable areas in very close proximity to the contamination which are necessary for implementation of the Work. The Site is depicted generally on the map attached as Appendix D." The definition of "Site" is overly broad and vague. EPA concedes this point by depicting the Site on Appendix D with an approximate line. Notably, however, all three National Grid MGP sites are included within the Site boundaries and are part of the ROD remedy.

7. The SOW requires that the City's remedial design include engineering controls for floatable oil and organics at planned and future separate stormwater outfalls, including the Carroll Street High Level Sewer Separation and the Lightstone development project. Although stormwater controls are mentioned in the ROD, the ROD states that such controls would be dictated by "applicable SPDES permits and best management practices," as opposed to a CERCLA mandate. ROD, p.56. So the express requirement in the UAO to install end-of pipe controls to capture floatable oils and organics is new. EPA failed to perform the evaluation required by CERCLA and the NCP prior to selecting a remedy for these engineering controls on stormwater. Indeed, the ROD does not mention any selected remedy for those controls. Further, as a result of this unilaterally imposed requirement, the City will have to delay and evaluate the much anticipated sewer separation project for Carroll Street that was scheduled to commence in July, 2014.

8. EPA concludes in writing that the Turning Basin RD "is not on the same critical path as the retention tanks." EPA letter dated May 27, 2014, p. 12. Notwithstanding this conclusion and the UAO's acknowledgement that the City's ownership of the 1st Street turning basin remains unclear, the UAO requires the City to perform the remedial design for the turning basin. Also, the SOW requires that the City select a contractor for the remedial design of the turning basin within ninety days of the Effective Date of the UAO, a deadline which is impossible under the City's legally mandated procurement requirements. EPA is well aware of this fact, as procurement requirements were discussed at length in the negotiations and in our recent conference after issuance of the UAO. At the earliest, the City could retain a remedial design contractor for the 1st Street turning basin six months after the effective date of the UAO.

9. The UAO requires the City to comply with EPA guidance that have not been promulgated as regulations. UAO at ¶50; SOW at V.C., and VII.C. and E. To the extent the City is bound by guidance documents, so is EPA in its selection of the remedy for the Site.

10. Paragraph 105 of the UAO requires the City to secure and maintain insurance. CERCLA does not authorize EPA to order a party to secure and maintain insurance. The City is self-insured.

11. Paragraph 106 of the UAO identifies the manner in which the City can demonstrate financial assurance. The requirements as stated in Paragraph 106 are inconsistent with CERCLA and the NCP. The City is self-insured.

E. The City has "Sufficient Cause" because EPA's Selection of the Remedy is Arbitrary, Capricious and not Otherwise in Accordance with Law.

The City's comments on the Proposed Plan for the Site dated April 26, 2013, which are incorporated fully herein, set forth a non-exclusive list of reasons why EPA's remedy selection is arbitrary, capricious, not otherwise in accordance with law and inconsistent with the NCP. The reasons include, but are not limited to:

1. There is no basis under CERCLA for requiring a 58 to 74 percent reduction in CSO discharges. The CSO reduction requirement is based on several incorrect assumptions and technically indefensible Preliminary Remediation Goals ("PRGs") and violates the NCP's remedy selection requirements.

2. CSO solids cannot be (and have not been) responsible for observed sediment contamination (PCBs, PAHs, and metals) in excess of CERCLA risk-based thresholds.

3. EPA's risk management decision-making and remedy development is based on an underdeveloped Conceptual Site Model ("CSM") and incorrect conclusions regarding the nature and extent of the contamination, as well as contaminant fate and transport.

4. EPA's selection of reference areas is improper.

5. The PAH PRG calculated by EPA is not valid.

6. PRGs stated for metals, as well as the future bioavailability analysis, are not valid.

7. EPA incorrectly and inappropriately relied on the article by Stein et al. (2006) and others regarding stormwater runoff to establish its "first flush" standard for CSO discharge capture. EPA should instead use representative site-specific measurements to inform remedial decision-making.

8. The ROD remedy is based on inadequate information and lacks scientific support.

9. The ROD does not adequately address community impacts and siting considerations of locating a CSO in-line tank at Douglass & Degraw Pool/Thomas Greene Playground.

10. EPA's failure to perform a screening evaluation and/or a detailed evaluation of source control remedies violates the mandatory remedy selection requirements of the NCP.

11. EPA did not provide a sufficiently detailed evaluation of the remedial measures necessary to control sources from the three MGPs and other upland sites as required by 40 C.F.R. § 300.430(e)(9)(ii) and (iii).

12. EPA failed to provide an adequate estimate of the cost of the overall ROD remedy and the costs for CSO controls, including failure to include annual operation and maintenance costs, failure to apply the cost criterion set forth in the NCP, failure to address the cost and uncertainty related to legally alienating the Douglas & Degraw Pool/Thomas Greene Playground, failure to include the full costs of other upland controls (e.g., MGP site remediation, unpermitted discharges), and failure to include the cost of bulkhead repairs. The City provided EPA with cost estimates for the two CSO tanks identified in the ROD in an amount at least four times what EPA has estimated.

13. EPA's statement that it will develop interim CSO controls and controls for separate stormwater during the remedial design phase violates the remedy selection requirements of the NCP.

14. The Proposed MGP, upland source controls, interim controls for CSOs and separate stormwater discharge remedies are so vaguely defined that they deprived the City of a meaningful opportunity to comment.

15. Under CERCLA, EPA cannot delegate the responsibility for remedy selection to NYSDEC.

16. EPA and New York State failed to identify New York State's constitutional and statutory protection of parkland as an ARAR.

F. The City has "Sufficient Cause" Because EPA Failed to Address Fundamental Flaws in its Remedy Selection Identified by the Contaminated Sediment Technical Advisory Group ("CSTAG") and the National Remedy Review Board ("NRRB")

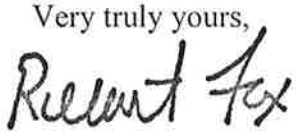
On January 30, 2012, CSTAG provided EPA Region 2 written recommendations on the Gowanus Canal remedy selection in accordance with the OSWER Directive 9285.6-08 Principles of Managing Contaminated Sediment Risks at Hazardous Waste Sites (Feb. 12, 2002). Among other things, CSTAG recommended that (1) EPA focus on remediation impacts from the sediment containing NAPL and coal tar from the MGP sites and delay any CSO requirements, and (2) EPA collect additional data to complete an appropriate CSM.

On November 28, 2012, the NRRB issued its recommendations on the Gowanus Canal remedy selection. The NRRB literature recommended additional data needs to complete an accurate CSM, questioned EPA's PRGs for PAHs and other contaminants, and questioned the technical basis for requiring CSO controls as part of the CERCLA remedy. EPA's remedy selection failed to address adequately these significant recommendations made by CSTAG and the NRRB, many of which are consistent with the City's comments to the ROD.

IV. CONCLUSION

The City intends to continue to cooperate with EPA in implementation of a remedial decision that is based on sound science, in compliance with CERCLA and the NCP and on a schedule that is feasible and consistent with City procurement and other rules.

Very truly yours,



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