

## **Cleaning Up the Gowanus Canal: Superfund is the Last Resort**

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Cleaning up Brooklyn's Gowanus Canal is an important public goal. The Canal's sediments contain substantial historic contamination from old industrial uses along its banks. However, a federal effort conducted under Superfund by the Environmental Protection Agency ("EPA")—as EPA recently proposed—is not the only way to accomplish the cleanup. In fact, EPA's Superfund program brings with it an unwieldy legal process, and the stigma of the label "Superfund site." As a result, the recently proposed listing of the Canal the EPA's National Priorities List ("NPL")<sup>2</sup> may threaten to disrupt ongoing cleanup efforts already taking place at the Gowanus Canal and on surrounding properties, and threaten the substantial private investment in redevelopment efforts that are ongoing around the Canal. This memo will briefly outline the cleanup and investigation efforts currently underway at the Gowanus Canal, and describe the negative impacts an NPL listing may have on the Canal and the surrounding areas.

### **I. Cleanup Efforts Currently Underway**

Substantial cleanup efforts are currently underway at the Gowanus Canal. In 2005, the New York State Department of Environmental Conservation ("DEC") and the New York City Department of Environmental Protection ("DEP") signed a consent order (the "Consent Order")<sup>3</sup> that required substantial cleanup. The Consent Order requires the preparation of a watershed plan reducing discharges from sewer outfalls, "and bringing the Gowanus Canal into compliance with the Clean Water Act. The Consent Order specifically requires the preparation of a comprehensive Gowanus Canal Waterbody/Watershed Facility Plan (the "Waterbody Plan"). The Waterbody Plan in turn contains numerous substantive requirements, including:

- i. Reconstruction of the Gowanus Pump Station, which would reduce sewer outfall discharges to the Canal by 34 percent;
- ii. Rehabilitation of the Gowanus Canal Flushing Tunnel, which draws fresh water from New York Harbor into the Gowanus Canal's northern end, to increase the flushing capacity from 154 million gallons per day to 215 million gallons per day, and increasing flushing rates by approximately 40 percent;
- iii. Additional controls of floatable materials, which would reduce the presence of these pollutants in the Canal;

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<sup>2</sup> This is commonly referred to as listing the canal as a federal Superfund site, and takes place under the Superfund statute, or CERCLA, *see* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.*

<sup>3</sup> DEC Consent Order No. CO2-20070101-1, *available at* <http://www.dec.ny.gov/regulations/41353.html>

- iv. Dredging of the upper Canal, which will directly remove polluted sediment which has settled there.

Upon completion, the above measures will put the Gowanus Canal in compliance with state standards for dissolved oxygen—an important indicator of waterbody health<sup>4</sup>—for 100 percent of the time in the use class assigned to the Canal. The plan is expected to be implemented by December 2013.

In addition to these efforts under the Consent Order, the New York City Department of City Planning is undertaking an area-wide Gowanus rezoning effort, which includes the preparation of an extensive environmental impact statement ("EIS") under the New York City Environmental Quality Review ("CEQR") statute, the city equivalent of the New York State Environmental Quality Review Act ("SEQRA"). CEQR requires that all significant adverse environmental impacts identified in an EIS be mitigated and thereby reduced, to the extent practicable. Accordingly, City Planning will be assessing the Gowanus Canal and surrounding properties in detail with respect to potential exposures to hazardous substances, and requiring appropriate mitigation measures. One such mitigation measure is the (E) Designation, which, when placed on a property that has the potential for hazardous materials, requires that a testing and sampling protocol and appropriate remediation be conducted to the satisfaction of NYCDEP, before the issuance of a building permit by the Department of Buildings.<sup>5</sup>

Private entities are also undertaking significant cleanup efforts at numerous sites bordering the Canal. For example, an EIS has been prepared for the proposed redevelopment of 363-365 Bond Street, which includes analysis of various appropriate mitigation measures of potential significant adverse environmental impacts.<sup>6</sup> Similar efforts are underway at other properties. Several other sites abutting the Canal have been accepted into the DEC Brownfield Cleanup Program, or are undergoing DEC-supervised investigation and remediation efforts. These sites include three former manufactured gas plants ("MGP") properties, many if not all of which are subject to DEC cleanup agreements. These MGP plants are the likely historic source of the coal tar-related volatile contaminants present in the Canal.

## **II. The Federal Superfund Process Hampers Cleanup & Development**

It is widely known that Superfund cleanups are costly, lengthy, and expose nearby properties to potential stigma which may reduce property values. In fact, recent scholarship

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<sup>4</sup> US Geological Service, National Field Manual for the Collection of Water-Quality Data, at 6.2, *available at* [http://water.usgs.gov/owq/FieldManual/Chapter6/6.2\\_contents.html](http://water.usgs.gov/owq/FieldManual/Chapter6/6.2_contents.html)

<sup>5</sup> See New York City Planning, Gowanus Canal Rezoning, Draft Scope of Work at 36, *available at* [http://www.ci.nyc.ny.us/html/dcp/pdf/env\\_review/gowanus/draft\\_scope.pdf](http://www.ci.nyc.ny.us/html/dcp/pdf/env_review/gowanus/draft_scope.pdf).

<sup>6</sup> The EIS is available at [http://www.ci.nyc.ny.us/html/dcp/html/env\\_review/bond\\_street.shtml](http://www.ci.nyc.ny.us/html/dcp/html/env_review/bond_street.shtml)

finds that the average federal Superfund site takes approximate 12-13 years to complete.<sup>7</sup> However, even this number may not fully capture the realities of Superfund delays; even a cursory examination of NPL sites listed in New York demonstrates that numerous sites remain open for extensive periods of time, sometimes decades, during which time cleanup is not necessarily effectuated.<sup>8</sup> In fact, the time from a *proposed* listing to actual listing on the NPL is often up to 2 years.<sup>9</sup> Notwithstanding the cost and duration of Superfund, there is not clear evidence that a federal Superfund cleanup in fact improves the property values of a surrounding area.<sup>10</sup>

However, the Superfund program does bring with it substantial costs, by opening the door for multiple rounds of litigation. Once a site is listed in the NPL, potentially responsible parties ("PRPs") may seek to challenge that listing as arbitrary and capricious. If such an effort fails, the site then proceeds into a lengthy administrative process of remedial investigation and feasibility studies, a heavily regulated process which must conform to the National Contingency Plan ("NCP"), 40 CFR §§ 300 *et seq.* These regulations impose formalistic procedures on investigation, remedy selection and remedy implementation. Individual entities that are subject to CERCLA have their clean up actions circumscribed by the NCP procedures, and the discretion of the EPA. In addition to the costs associated with NCP compliance, a significant amount of time may pass before cleanup work actually begins. Once cleanup actions do begin, EPA or private parties who have conducted remediation may again be forced to litigate for recovery of those costs, if additional PRPs may be located.

CERCLA litigation tends to be protracted and costly, as a result of certain features of Superfund liability and the large amounts at stake. CERCLA generally imposes strict liability—without regard to fault—on any party who owns the facility, or owned or operated it at the time of a discharge of hazardous substances. In addition, liability is retroactive, i.e., the discharge may have occurred years or decades before CERCLA existed, and may have been legal at the time; these facts alone are generally no defense in an action to recover cleanup costs. CERCLA's reach is therefore often unfair because the law renders parties liable because of their status, as opposed to their culpability. For example, a new owner of a contaminated site may be liable for the contamination placed on that site many years ago by an entirely different party. Moreover, parties who are found liable are often deemed liable for the entire cleanup—a rule of "in for a penny, in for a pound," which gives even innocent

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<sup>7</sup> Greenstone & Ghallager, Does Hazardous Waste Matter? Evidence From The Housing Market And The Superfund Program, Mass. Inst. Tech. Working Paper 05-27 (January 30, 2008) *available at* <http://ssrn.com/abstract=840207>

<sup>8</sup> EPA, NPL Sites in New York, *available at* <http://www.epa.gov/superfund/sites/npl/ny.htm>. The time from nomination to listing is about a year to two or more; relatively few sites have been delisted; thus of the 110 NY sites only 20 have been delisted. Many of these active sites have been around since 1982 or 84. Construction has been completed on more sites than the delisted sites, and that construction completion appears to have taken ten years or more. These sites, however, have not been delisted presumably because the initial construction is still being used to remediate the site or the site has been reopened for further investigation, or both.

<sup>9</sup> *Id.*

<sup>10</sup> Greenstone & Ghallager, *supra*.

PRPs enormous incentive to litigate for years and decades to avoid a debilitating monetary judgment.

CERCLA's unfairness is aggravated by the penalties that EPA can impose upon PRPs. For example, EPA can order PRPs to investigate or implement a remedy without going to court, pursuant to Section 106 of CERCLA. PRPs—regardless of whether they spilled a drop of pollution on a site—seldom are able to resist such orders because they run the risk of enormous fines and treble cleanup costs. Section 106 costs can force a PRP to attempt to lay off costs on other PRPs, again through federal court litigation.

In sum, NPL listing of a site has the potential to vest tremendous discretion in the hands of the EPA, to lengthen the cleanup period for many years, and to burden the unfortunate parties that get caught up in the EPA web with years of litigation and costs. NPL listing means that the trial lawyers and engineers may profit, but the public may not see any cleanup for years or decades.

As a result, Superfund listing may create a substantial chilling effect on investment in and around a property, and in the case of the Gowanus Canal a listing will likely threaten the viability of substantial development on and around the Canal. A recent study by City Planning of projects being developed in the vicinity of the Canal revealed 68 separate projects, including residential, retail, medical, community, and commercial uses.<sup>11</sup> If these developments are faced with the prospect of Superfund litigation or EPA fines, they may be forced to take their investment elsewhere.

### **III. Efficient Cleanup is Best Accomplished Outside the NPL Process**

Instead of subjecting surrounding properties to the stigma, costs, and delays associated with a Superfund listing, the Gowanus Canal should be cleaned up using an efficient approach involving expedited enforcement of existing requirements and cleanup agreements.

To limit additional contamination to the Canal from sewer outfalls there should be increased enforcement against non-complying industrial sewer users. This will reduce the significant discharges of pollutants from these sources, improving dissolved oxygen conditions and reducing buildup of settled solids on the Canal bottom. Implementation of the Waterbody Plan discussed above will further improve site conditions. City Planning should implement its proposed rezoning with a full and proper EIS, including (E) Designations where appropriate to eliminate potential exposures to hazardous materials. These actions will in turn encourage redevelopment of surrounding parcels, and new building applications will trigger (E) Designation reviews and mitigation for relevant properties.

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<sup>11</sup> See NY City Planning, Gowanus Canal Rezoning Draft EIS, No-build List of Developments Proposed for Project Study Area (March 2009).

In addition to the dredging required in the Waterbody Plan, further dredging plans may be formulated as shoreline structures are stabilized and periodic dredging becomes feasible. To further effectuate cleanup of sediments, the DEC may exercise its authority under existing agreements and laws to require cleanup of coal tar contamination and related constituents emanating from the former MGP plants on the Canal, as part of off-site remedies for the MGP sites.

This approach to cleaning up the Canal will avoid the substantial costs, delays, and uncertainties embedded in the Superfund process. By averting NPL listing—or delaying it until absolutely necessary—property values will not be hurt by the stigma associated with Superfund, enabling a continuing investment in the area which will prompt further cleanups. Expensive litigation amongst neighbors may be averted, and funds allocated to cleanup, not legal fights over cost allocation. Accordingly, a Superfund listing should be implemented for the Gowanus Canal only as a last resort, after all other options have been exhausted and proven infeasible. At this time, in light of the substantial cleanup efforts already underway and the private investment in the area, a Superfund listing could impose substantial negative impacts on the Gowanus Canal area, and threaten to derail its continued cleanup and redevelopment.