

CITY LAW

JULY/AUGUST 2011

CENTER FOR NEW YORK CITY LAW

VOLUME 17, NUMBER 4

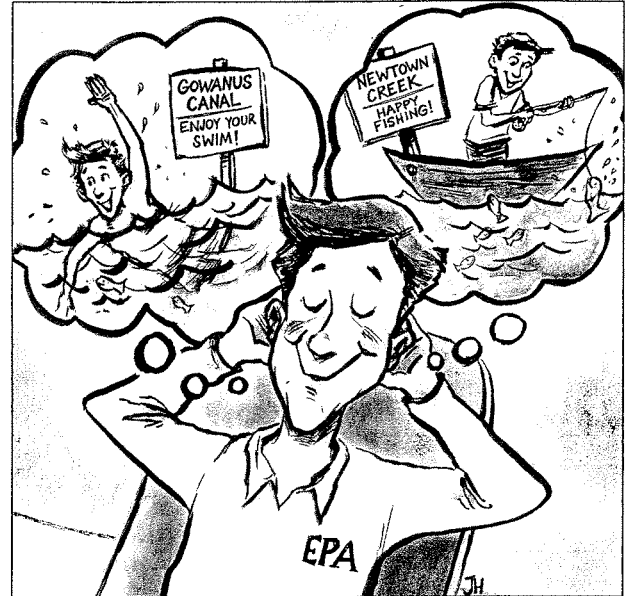
Gowanus Canal & Newtown Creek Superfund Sites: A Proposal

by Larry Schnapf

The federal Environmental Protection Agency (EPA) in 2010 designated as federal superfund sites the entire length of the Gowanus Canal in Brooklyn and 3.8 miles of Newtown Creek on the border of Queens and Brooklyn. Property owners near these water bodies fear that EPA's action will lower property values and make it even more difficult to obtain loans and otherwise develop their land. Many small businesses also fear that they may become responsible for paying a portion of the cleanup costs. The superfund process could take five to ten years to complete, during which time property owners will be faced with significant economic uncertainty. There is, however, a way to relieve many of the smaller property owners by giving them an early release.

Gowanus Canal Superfund Site

The Gowanus Canal (Canal) runs for 1.8 miles through the Brooklyn residential neighborhoods of



Gowanus, Park Slope, Cobble Hill, Carroll Gardens, and Red Hook. The adjacent waterfront is primarily commercial and industrial, currently consisting of concrete plants, warehouses, and parking lots. At one time Brooklyn Union Gas, the predecessor of National Grid, operated a large manufactured gas facility on the shores of the Canal.

EPA's initial investigation identified a variety of contaminants in the Canal's sediments including polycyclic aromatic hydrocarbons (PAHs), volatile organic contaminants (VOCs), polychlorinated biphenyls (PCBs), pesticides, and metals. The sources of the contamination are believed to be discharges from 250 pipes and individual outfalls that directly discharged into the Canal, combined sewer outfalls that the City built and maintained, and general contaminated runoff and contaminated groundwater. Many of the discharges from the outfalls did not have discharge permits.

EPA has identified several potentially responsible parties, or PRPs, and is actively searching for additional responsible parties. EPA sent notices to 21 entities, including the City of New York, advising that the agency believed they were responsible for the contamination. EPA has also sent requests for additional information to an additional 34 suspected entities. Thus far, the City of New York

and National Grid, the largest likely contributors of the Canal's pollution, have entered into administrative

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orders to perform a groundwater investigation under EPA's oversight. The initial remedial investigation report was completed earlier this year. EPA hopes that the feasibility study for the remediation will be completed by the end of 2011 and that a remedy will be selected in 2012.

A Community Advisory Group of interested businesses has been formed for the Canal site. EPA appointed a paid facilitator to work with the group, and a technical sub-committee has been formed to apply for a technical assistance grant from EPA to assist the community group's participation in the administrative process.

Newtown Creek Superfund Site

Newtown Creek (Creek) is a 3.8-mile-long tidal water body that has been bordered by a variety of heavy industrial facilities including oil refineries, petrochemical plants, fertilizer and glue factories, sawmills, and lumber and coal yards. EPA concluded that metals, VOCs, PAHs and PCBs are present in Creek sediments at elevated concentrations from numerous sources, such as storm water runoff, New York City combined sewer outfalls, discharges from permitted and unpermitted private outfalls, and contaminated groundwater.

The superfund process for Newtown Creek has not advanced as far as the Gowanus Canal. Thus far, EPA has identified six potentially responsible parties for the site and is continuing its search for additional parties. The initial parties named by EPA are: BP America, Inc., National Grid (as successor to Brooklyn Union Gas Company), ExxonMobil Oil Corporation, Phelps Dodge Refining Corporation, Texaco, Inc., and the City of New York. The agency is currently negotiating with the six entities to perform a comprehensive investigation.

Overview of Federal Superfund Program

The federal superfund law (known more formally as the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA) imposes strict and joint liability on four classes of potentially responsible parties to cleanup or pay for cleanups associated with the release or discharge of hazardous substances or wastes. The four types of responsible parties are current and past owners, current and past operators, persons who arranged for disposal of hazardous substances (generators), and transporters of hazardous substances.

Initially, EPA conducts an investigation to determine if the site should be placed on the federal superfund list, the inventory of the nation's most heavily contaminated sites. As part of EPA's investigation, the agency will also seek to identify potentially responsible parties for the site. EPA usually only identifies a handful of responsible parties. Once these parties agree to

perform the work, they will often perform their own investigation to locate additional responsible parties to share in the investigation and cleanup costs. It is common for many superfund sites to have hundreds of responsible parties. The costs will generally be allocated or shared based on the volume of wastes sent to the site or the relative toxicity of a particular party's waste. Many of these additional second- or third-tier responsible parties are small businesses. To minimize the transactional costs for these smaller entities, EPA is authorized to enter into what is known as *de minimis* or *de micromis* settlements where the smaller entities will make a payment in exchange for a release from further responsibility.

Prior to selecting a cleanup remedy, EPA will perform or have the responsible parties perform a comprehensive investigation of a site, known as a remedial investigation. After the extent of the contamination is known, a feasibility study will be performed to identify cleanup options. EPA will then identify a proposed final cleanup in a document known as a Record of Decision. The cleanup remedy must comply with nine statutory criteria including protectiveness of human health and the environment, long-term and short-term effectiveness, and state and community acceptance. Following a public meeting and consideration of public comments, EPA will issue a final decision selecting one of the remedial alternatives.

Once the cleanup remedy has been selected, EPA will authorize drafting of the detailed engineering plans. After the publication of the remedial plan and a public comment period, a construction contract will be awarded to perform the remedial action. Upon completion of the remedial action and approval by EPA, the site may be removed from the superfund list.

To enable meaningful public participation in the lengthy process, the superfund law provides that technical assistance grants of up to \$50,000 may be awarded to citizen groups whose members are affected by releases or threatened releases of hazardous substances at superfund sites. The grants are intended to help the community evaluate the risks posed by a site.

Proposal for Global Administrative Settlement

The Gowanus Canal and Newtown Creek sites present difficult management challenges. The most common source of contaminants for both superfund sites are discharges from storm water runoff and from combined sewer overflows and leaking sewers. These discharges have allowed contaminants to escape into the environment and migrate to the water bodies through groundwater or deteriorated bulkheads. Thousands of businesses in the neighborhoods near the two water bodies are connected to the sewer systems. Thus it is possible, if not likely, that wastewater from these locations was discharged into the

Canal or Creek. Businesses and property owners are concerned that they may ultimately be identified as responsible parties.

Since it will be years before the cleanup remedies will be selected for the two sites, it is difficult to estimate the final cleanup cost. Some believe the Gowanus Canal cleanup could exceed \$500 million. Even if the City of New York and National Grid are hypothetically responsible for 95 percent of the cleanup, that would still leave \$25 million to be paid by other responsible parties.

To eliminate the uncertainty facing the thousands of small businesses and property owners who have used the sewer system or whose properties may have discharged contaminated runoff, EPA should consider entering into a global administrative settlement with these parties. EPA should enter into *de micro-mis* settlements with businesses that qualify as small businesses under the Small Business Administration lending programs, as well as with businesses or property owners that did not use any of the hazardous substances detected in the sediments. Thus, a business or property owner could qualify for this settlement if the only connection to the superfund site is that storm water contaminated from upgradient sources may have flowed across the owner's property or sewer outfalls happen to be located on the property. The party would receive a covenant not to sue from EPA as well as protection against being sued by other responsible parties looking to find others to share in the cleanup costs. The small business or non-contributor should not be required to make any payment for this relief.

For businesses that may not qualify as a "small business" and that may have handled small quantities of hazardous substances, EPA should consider entering into a *de minimis* settlement in exchange for a modest administrative payment. The *de minimis* settlement would also contain a covenant not to sue and contribution protection.

There is precedent for providing liability relief to thousands of small businesses and property owners who become associated with a large superfund site simply on the basis of geography. EPA addressed similar concerns in California in the mid-1990s with respect to properties located above regional groundwater plumes contaminated with solvents. EPA identified as superfund sites two vast zones of groundwater known as the San Gabriel Valley and the San Fernando Valley Superfund Sites. In theory, businesses and property owners located within the boundaries of these superfund sites could have been liable as responsible parties. These parties were concerned that banks would be reluctant to extend loans to properties located in superfund sites. Even if they could obtain loans, these parties were concerned that their property values would plummet because of potential

liability concerns.

To address these concerns, EPA entered into a cooperation agreement with the California Regional Water Quality Control Board for Los Angeles County (Water Board) for the San Fernando Valley Superfund Site. The Water Board conducted assessments of businesses to determine the extent of solvent usage and to assess past and current chemical handling and disposal practices. After conducting these inspections and performing a thorough record review, EPA and the Water Board determined that approximately 2,500 businesses used little or no solvents, or had no evidence of contributing to solvent contamination based on soil and groundwater testing results. Based on this information, EPA and the Water Board sent "No Further Action" letters notifying the businesses and property owners that the agencies did not intend to hold them responsible for groundwater contamination of the San Fernando Valley Basin Superfund Sites. EPA may still re-open a site investigation or request participation in the cleanup if the agency becomes aware of new information or site conditions change.

EPA entered into a similar cooperative agreement with the Water Board for the Azusa/Baldwin Park area of the San Gabriel Valley Superfund Site. The Water Board inspected more than 1,400 commercial and industrial businesses. EPA ultimately identified 21 responsible parties who were significant contributors to the groundwater contamination. Hundreds of other companies were sent "No Further Action" letters to inform them that EPA did not believe they had contributed to the groundwater contamination.

If EPA lacks the resources to survey the thousands of small businesses affected by the Gowanus Canal and Newtown Creek sites, perhaps the community group could perform the work using EPA grant funds. The community group might also be able to obtain a brownfield opportunity area assessment grant from the New York State Department of Environmental Conservation.

EPA usually enters into the *de minimis* or *de micro-mis* settlements for more traditional superfund sites like landfills where small businesses have sent waste. However, the Gowanus Canal and Newtown Creek are unique superfund sites that cut a swath through densely populated areas and present the most diverse sources of contaminants encountered by the superfund program. EPA is not precluded under the superfund law from providing the relief suggested in this article. Indeed, such an approach could serve as a model for other contaminated rivers elsewhere in the nation. □

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