NEW YORK CITY LAW DEPARTMENT

NACWA • November 2013

Developments in Clean Water Law Seminar

Murky Waters: EPA's Blending of the CWA and CERCLA at the Gowanus Canal Superfund Site

Daniel Greene, Senior Counsel

Environmental Law Division

New York City Law Department

- Basic Process at Superfund Sediment Sites
- Basis for Potential Superfund Liability for CSOs and Practical Implications of Potential Liability
- Lessons from Gowanus
  - CSO Components of the Superfund Remedy
  - Critique of EPA Region 2's Approach
  - Key Areas of Concern
  - Post-ROD Legal Options/Risks

Highlights of CERCLA Process at Sediment Sites

- Remedial Investigation/Feasibility Study (RI/FS)
  - Contaminants of Concern/Remediation Goals
  - Contaminated Sediments Technical Advisory Group (CSTAG)
  - National Remedy Review Board (NRRB)
- Proposed Plan (PRAP)
  - Public Comment
- Record of Decision/Responsiveness Summary (ROD)
- Five-Year Review (Recontamination)

CERCLA Liability: Responsible Parties

- Statutory definition of “Facility” includes any “equipment, pipe, or pipeline”
- Broad statutory definition of “hazardous substances”
- Federal courts have found discharges from sewer systems, stormwater outfalls as basis for CERCLA liability

Timing of Defenses

- Timing of Defenses
  - No pre-enforcement review of EPA determinations
  - Lengthy administrative process proceeds and PRP determination may not be formally challenged until PRP is sued or ordered to perform work

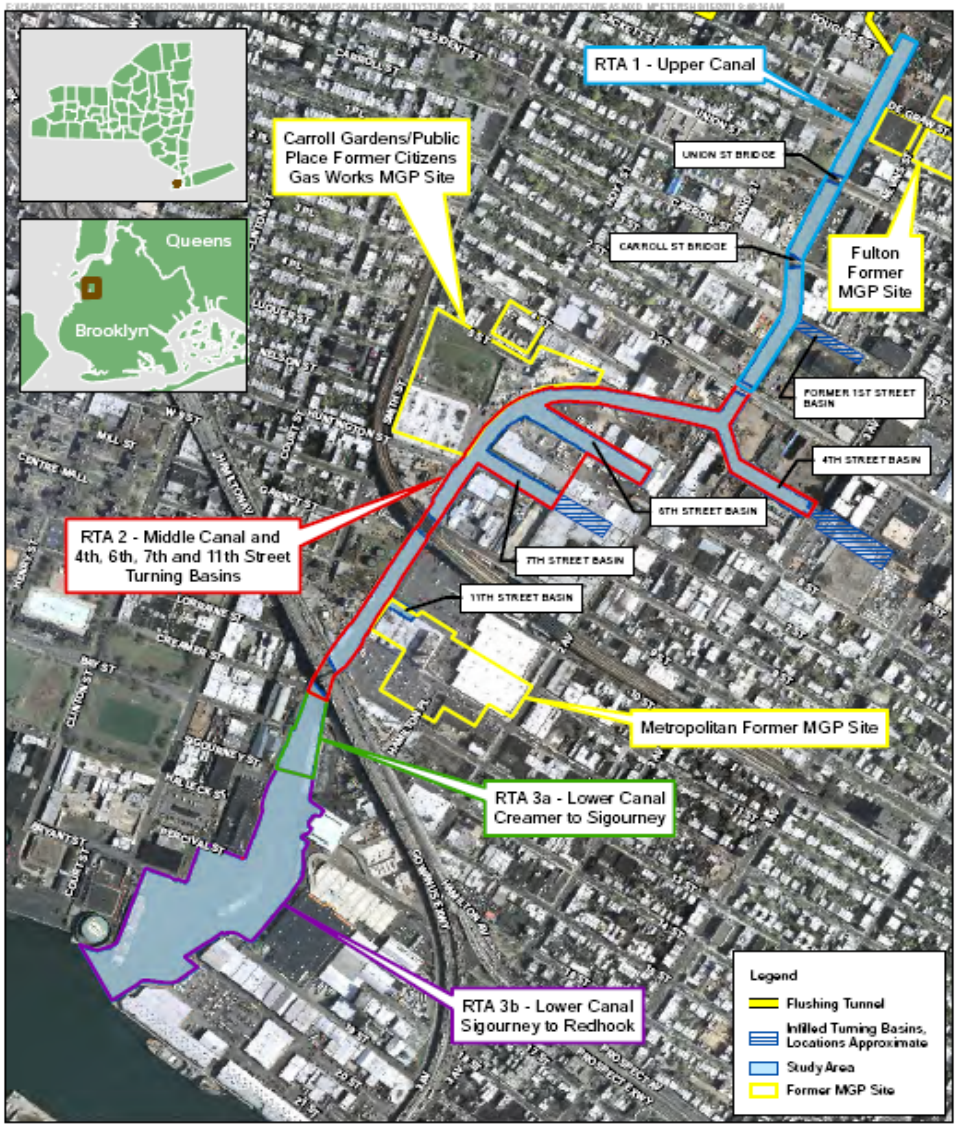
Possible Ramifications of Potential Liability

- Historic CSO Discharges
  - Potential contribution to implementing sediment remedies (dredging/capping)
  - Potentially subject to cost recovery action
- Historic and Ongoing CSO Discharges to Superfund Sites
  - Same risks as above
  - Potential source control “remedial” action at active outfalls

Source Controls

- 2002 EPA guidance -"Principals for Managing Contaminated Sediment Risks at Hazardous Waste Sites"
  - [S]ources might include … **discharges from stormwater and [CSOs]**
  - Recommends that site managers "prioritize sources according to *their relative contributions to site risk*"

- EPA's "Contaminated Sediment Remediation Guidance for Hazardous Waste Sites (2005):
  - Project managers should consider the potential for recontamination and factor that potential into the remedy selection process;
  - **If a site includes sources that could result in *significant recontamination*, source control measures will likely be necessary as part of the response action;**
  - Depending on situation, source control could be implemented before or after the in-water sediment remedy



GOWANUS CANAL

-1.8 miles long, 100 feet wide

-Created in 1860s

-Heavily industrial; now large residential areas

-Significant MGP Contamination

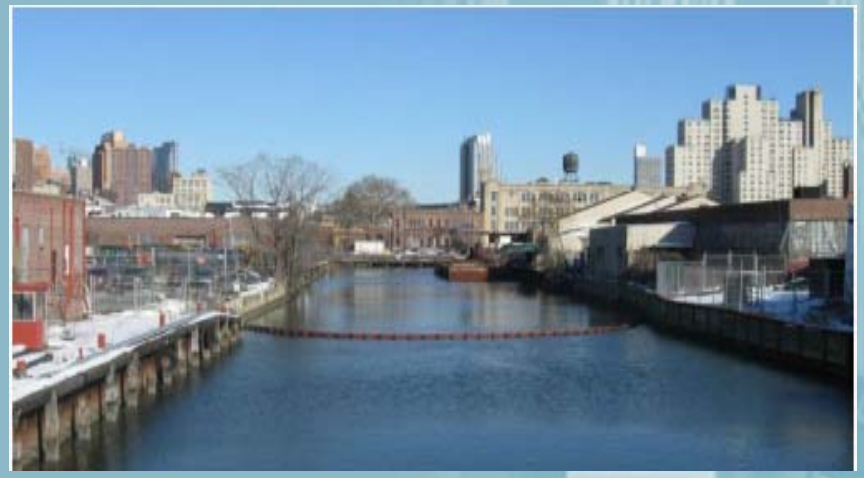
-10 CSO outfalls, 3 City-owned stormwater outfalls

-200+ non-City outfalls

(Image: EPA/CH2MHill – ROD)


Buttermilk Channel
Gowanus Canal
Upper New York Bay
Gowanus Creek Channel
Gowanus Bay
Legend
Approximate Limit of Gowanus Creek Channel
Flushing Tunnel
Infilled Turning Basins, Locations Approximate
Note:
The Gowanus Creek Channel referenced in text extends from between Bryant and Halleck Streets to 28th Street. Approximate extent shown by two small hatched lines on map within Gowanus Bay
0
750
1,500
Feet
FIGURE 1-2
Gowanus Canal and Adjacent Water Bodies
Gowanus Canal Feasibility Study
Brooklyn, New York
CH2MHILL

NEW YORK CITY LAW DEPARTMENT



GOWANUS CANAL

SUPER FUND ME!

Photos of Gowanus (DEP/Louis Berger Grab Sampling Report)

Sampling Area

Waxy sheen on surface water in vicinity of grab

Gowanus Canal Ongoing CSO Program

WWFP:

- **Goal – Attain Existing Water Quality Standards (Class SD)**
- **Pump Station/Force Main Upgrade – complete 2013/14**
- **Flushing Tunnel Repair and Upgrade – complete 2013**
- **Environmental dredging of head end**

LTCP:

- **Goal – Evaluate attainment of a high appropriate classification**
- **Evaluate effectiveness of WWFP projects**
- **Evaluate additional cost effective CSO controls**
- **Due 2015**

High level sewer separation – design 2012, complete 2020

Green Infrastructure

NEW YORK CITY LAW DEPARTMENT

The Gowanus Canal Flushing Tunnel

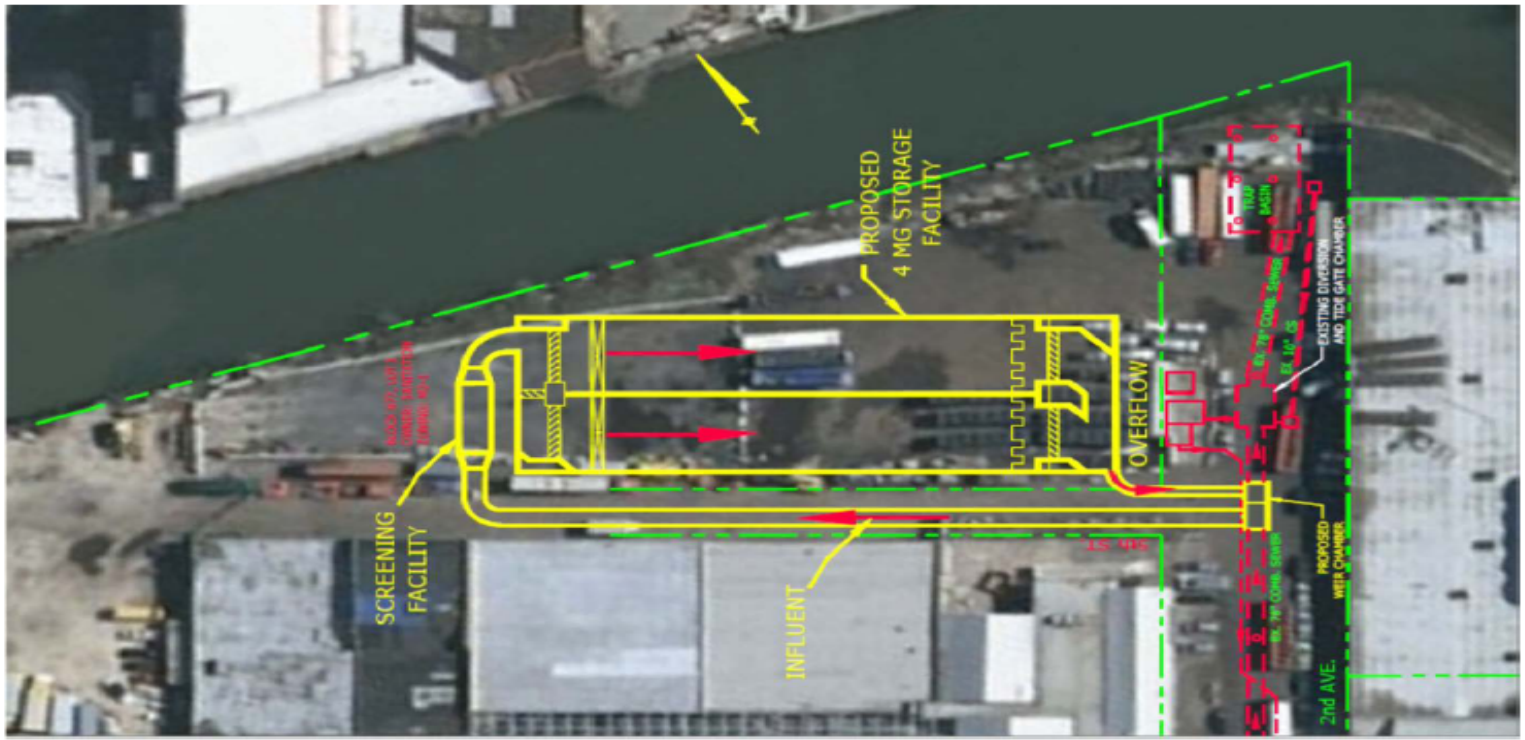
Gowanus Pumping Station Upgrade

- Path to the Gowanus ROD
  - EPA adopts “fast-track” approach for RI/FS
  - EPA/City/National Grid sample CSOs, find similar results but reach different conclusions
  - State and CSTAG (National EPA Panel) Express Concerns about Region 2’s Approach on CSOs
  - City Supportive of CSTAG Recommendations, Use of Adaptive Management
  - Vocal CAG Focused on CSOs

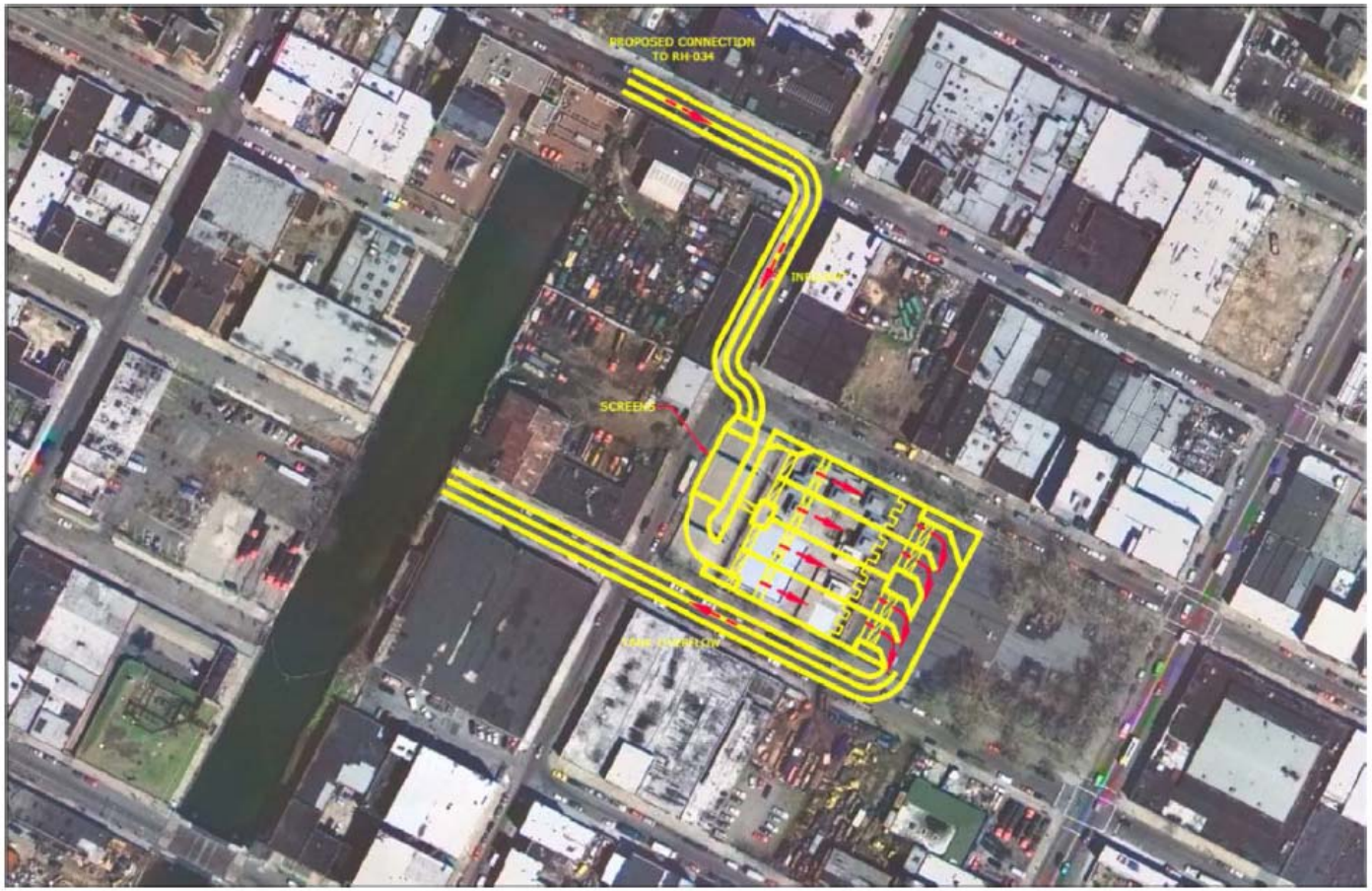
CSO Source Controls in Gowanus ROD

- Two in-line CSO retention tanks (8 million gallons, 4 million gallons) mainly to address two largest outfalls;
- Development of unspecified interim CSO controls to implement until completion of permanent controls;
- Indicates, but does not explain, that additional sampling and modeling efforts will be used in refining proposed CSO source controls

Conceptual Rendering of 4 MG CSO Tank



Conceptual Rendering of 8 MG CSO Tank



EPA's Basis of SF Source Controls

- Stated goal is to significantly reduce contaminated [PAHs, PCBs, pesticides, metals] solids discharges to the Canal post-SF remedy (i.e, prevent recontamination)
- EPA proposed measures because planned CWA project will not reduce two largest outfalls at head end
- CSO source controls intended to protect benthic community from low-levels of CERCLA hazardous substances
- For determining the amount of the reduction, EPA developed a "2X first flush" standard (20% of total discharge volume) to reduce CSO solids by 58 – 74 percent

- Key Areas of Concern for Municipalities/Sewer Authorities
  - Contaminants of Concern on Gowanus Included PAHs, Contaminants Commonly Found in Urban Stormwater Runoff
  - EPA's Use of Site Specific Risk Assessment to Establish Low Remediation Goals for Benthic Toxicity (20 ppm)
  - Allocation of Liability: Volume v. Toxicity
  - Personal Care Products/Pharmaceuticals
  - Timing of Source Controls

- Post ROD-Options
  - Administrative Order to Design Remedy
    - Opportunity to shape the remedy
    - Contribution protection for expended costs
    - Potential cost recovery action to recover portion of expended costs
    - No requirement to build remedy
  - Remedy Challenge
    - Await unilateral order from EPA or cooperate/sue approach
    - Key arguments would be remedy is arbitrary and capricious/does not comply with National Contingency Plan
    - Risk of significant monetary penalties

Daniel Greene
Environmental Law Division
New York City Law Department
100 Church Street
New York, NY 10007
212-356-2318
dgreene@law.nyc.gov