

RIVERKEEPER.

December 23, 2009

VIA ELECTRONIC MAIL
Docket Coordinator, Headquarters
U.S. Environmental Protection Agency
CERCLA Docket Office
(Mail Code 5305T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Riverkeeper, Inc. Comments to National Priorities List, Proposed Rule FDMS Docket Id. No. EPA-HQ-SFUND-2009-0588, Newtown Creek, Brooklyn/Queens, NY.

Dear Docket Coordinator:

Please accept Riverkeeper Inc.'s comments on Proposed Rule FDMS Docket Id. No. EPA-HQ-SFUND-2009-0588 for the proposed listing of Newtown Creek, Brooklyn/Queens, NY on the National Priorities List (NPL). For the reasons listed below, Riverkeeper supports the proposed listing of Newtown Creek on the NPL as the only feasible approach to addressing the legacy of environmental contamination that has nearly obliterated the Creek's natural systems, and continues to present a public health risk for New York City residents living and working nearby. In order to comply with the legislative mandate of the Clean Water Act to return all the nation's waters to fishable and swimmable status, the contamination in Newtown Creek's sediments must be completely remediated to the maximum extent possible, and the continuing leaching of pollutants into the Creek from upland and adjacent contaminated sites must be halted. See Section §101(a)(2) of the Clean Water Act, 33 U.S.C.A. §1251.

Riverkeeper supports this listing because EPA is currently the only governmental entity with the resources, technical expertise and legal authority to ensure that a comprehensive remediation of Newtown Creek is accomplished. As described below, Riverkeeper has been actively involved in addressing pollution issues on the Creek since 2002, and is committed to actively participating throughout this process.

Riverkeeper also specifically supports, and incorporates by reference the comments submitted by the Newtown Creek Alliance and Laura Hofmann in response to this

proposed listing. Riverkeeper shares the concerns voiced by Laura Hofmann, and supports her efforts to elicit a comprehensive health study of Brooklyn residents living near the Creek, to determine once and for all what role the industrial activity on the Creek has played in affecting public health in the area. Based on Laura and other residents' accounts, there can be no doubt that living in close proximity to such long-lived and widespread pollution has exposed them to great risk of illness. Planning and implementing the remediation of Newtown Creek will ensure that future generations of Brooklyn residents will not face the same risk, at least not from the Creek.

Riverkeeper also urges EPA to carefully consider and fully address the concerns voiced by the Newtown Creek Alliance regarding the potential for disruption of existing industrial businesses on the Creek, as well as community supported development projects and New York City's efforts to address CSO issues on the Creek. EPA should make every effort to initiate constructive communication with local business owners who may be affected by a Superfund designation, either as potential PRPs or simply while trying to conduct business in the area.

1. Organizational Background Information

Riverkeeper is a not-for-profit, member-supported environmental organization, dedicated to protecting the ecological, recreational, and aesthetic integrity of the Hudson River and its tributaries, and the rights of all New Yorkers to clean communities and a clean environment. Since 1966, Riverkeeper has used litigation, science, advocacy, and public education to end pollution and restore ecological health to the area's water resources. Riverkeeper has long advocated for the remediation of historic contamination of the Hudson River, its tributaries, and the New York Harbor.¹

Riverkeeper has historically been involved in other Superfund actions on the Hudson and its tributaries. For over thirty years, Riverkeeper and its predecessor organization, the Hudson River Fisherman's Association, has aggressively fought to require General Electric to remove the polychlorinated biphenyls (PCB) from the Hudson

¹ Detailed information on Riverkeeper's mission and history can be found at our website, www.riverkeeper.org last accessed December 23, 2009.

River, and has served as part of the Superfund Community Advisory Group (“CAG”) for the Hudson River Superfund project. Phase 1 of the PCB dredging project recently ended and was declared a success by EPA. In July 2009, Riverkeeper submitted comments to EPA in support of its proposed listing of the Gowanus Canal in Brooklyn, New York to the National Priorities List.²

2. Riverkeeper’s Presence in Newtown Creek

Riverkeeper began waterborne patrols and investigation of Newtown Creek in 2002, as part of its watchdog pollution enforcement program. On the first patrol, Riverkeeper’s boat captain and investigator found what they deemed a “heart of darkness” in the midst of New York City.³ Oil sheens and garbage were readily visible, and the Creek reeked of raw sewage overflows, petroleum and other toxic industrial wastes. Stripped and abandoned cars were found dumped in a huge pile in a side channel of the Creek, their rusted hulks protruding above the waterline. On subsequent patrols, dead birds and fish were often spotted floating in the rancid water.

In 2004, following up on its initial observation and investigation of active oil sheens and leaching of oil through creek front bulkheads, Riverkeeper filed suit under the Clean Water Act (CWA) and the Resource Conservation Recovery Act (RCRA) against Exxon Mobil Corporation for its failure to stop the pollution of Greenpoint, Brooklyn and Newtown Creek caused by an estimated 17 million gallon oil spill that resulted in a plume of contaminated groundwater and oil collecting under Greenpoint and seeping into the Creek.⁴ In 2007, the New York Office of the Attorney General (OAG) filed a similar suit in response to the same oil spill. Riverkeeper, ExxonMobil and OAG are currently in settlement negotiations regarding these lawsuits.

² Riverkeeper’s comments on the Gowanus Canal proposal can be found at <http://www.riverkeeper.org/campaigns/stop-polluters/contaminated-sites/gowanus-canal/>, last accessed December 23, 2009.

³ See Reuters article on Newtown Creek, at <http://www.planetark.com/dailynewsstory.cfm/newsid/29581/story.htm> last accessed December 23, 2009.

⁴ Information on Riverkeeper’s lawsuit against Exxon can be found at <http://www.riverkeeper.org/campaigns/stop-polluters/contaminated-sites/newtown/>, last accessed December 23, 2009.

Riverkeeper also actively supported the efforts of local elected officials to fund additional studies to determine the extent of oil pollution in the Creek and the potential health impacts arising from it. Congresswoman Nydia Velazquez and Congressman Anthony Weiner successfully funded an EPA study of the Creek that was released in September, 2007. In a key finding, the study estimated the size of the spill was between 17 and 30 million gallons, possibly much higher than the original 17 million gallon estimate, and clearly many times the magnitude of the *Exxon Valdez* spill of 1989.⁵

Riverkeeper also became involved in organizing local residents and business owners to urge the State of New York to re-evaluate whether its approach to addressing the oil pollution and other water quality issues on the Creek was working. In 2002, Riverkeeper co-founded the Newtown Creek Alliance with Councilmen Yassky and Gioia of Brooklyn and Queens, respectively.⁶ The Alliance is made up of a diverse group of local residents, elected officials, business owners and environmental non-profit organizations.⁷

Riverkeeper has also actively pursued other sources of pollution on the Creek, ranging from cement plants and scrap yards to recycling facilities, utilizing Clean Water Act citizen suit enforcement as well as coordinating investigations with the New York Department of Environmental Conservation (NYSDEC), EPA Region 2 enforcement staff, and other governmental authorities.⁸ Riverkeeper has also worked to establish constructive and collaborative relationships with business owners along the Creek who operate their facilities in an environmentally responsible manner.

Finally, Riverkeeper is actively involved in a number of efforts to address stormwater and combined sewer overflow (CSO) pollution into Newtown Creek. The Creek has 22 CSO outfalls that dump an estimated 2.7 billion gallons of raw sewage annually into the Creek.⁹ Riverkeeper is a co-founder of the Storm Water Infrastructure Matters

⁵ Environmental Protection Agency, *Newtown Creek/Greenpoint Oil Spill Study*, Brooklyn, NY, September 12, 2007.

⁶ Information on the Newtown Creek Alliance can be found on its website, at <http://www.newtowncreekalliance.org/about.htm> last accessed December 23, 2009.

⁷*Id.*

⁸ Examples of some of Riverkeeper's past enforcement actions can be found at <http://www.riverkeeper.org/campaigns/stop-polluters/pollution-enforcement/>, last accessed December 23, 2009. Click on "NYC Enforcement Actions" tab to see a list of actions undertaken by Riverkeeper against specific alleged polluters.

⁹ EPA Assessment and Remediation Division, *HRS Documentation Record-Newtown Creek (September 2009)* at 13.

("SWIM") Coalition, which works to reduce stormwater and CSO pollution in New York City.¹⁰ In addition, Riverkeeper has partnered with the Newtown Creek Alliance and the Greenpoint Manufacturing and Design Center on a Brownfields Opportunity Area (BOA) grant for Newtown Creek administered by the New York Department of State, and a "Green Sewersheds" demonstration project grant funded by the United States Forest Service and administered by the NYSDEC. Taken together, the work that results from these initiatives will help inform current and future planning for economic redevelopment, open space, and stormwater pollution abatement in the Newtown Creek area of Brooklyn and Queens, and if implemented will improve the quality of life for New Yorkers living and working in this area.

3. History of Pollution on Newtown Creek

As the EPA's own assessments in support of this proposed listing show, Newtown Creek has suffered from over a century of industrial development and sewage pollution. Starting in the mid 1800's, Newtown Creek supported one of the busiest centers of industry and commerce in New York City. Over 50 petroleum refineries lined the banks of the creek as well as fertilizer and glue factories, sawmills, and lumber and coal yards.¹¹ During the late 1800's, the tidal salt marshes along the creek were heavily contaminated by waste discharge from the local refineries and industries.¹² Virtually all the tidal marshes in the Creek were filled in or destroyed by the end of World War II, when the Creek was one of the busiest industrial waterways in the country.¹³ As a result, the Creek no longer has a natural freshwater flow, and is nearly stagnant except for the tidal influence from the East River. Areas near the head of the Creek above English Kills and in Maspeth Creek and Dutch Kills are particularly bad, due to the garbage booms that catch floatable solids and the large CSO outfalls that are located in them.

Both the EPA's 2007 study and its recent sampling of the Creek to support the proposed NPL listing clearly show that the sediments in the entire length of the Creek are

¹⁰ See SWIM coalition website at http://swimmablenyc.info/?page_id=2 last accessed December 23, 2009.

¹¹ <http://www.epa.gov/region02/superfund/npl/newtowncreek/>

¹² Newtown Creek Oil Spill: A review of remedial progress, page 4. Available at: http://www.epa.gov/region02/superfund/npl/newtowncreek/newtowncreek_review.pdf.

¹³ *Supra* Note 9, at 12-13.

extremely contaminated with a staggering range of toxic pollutants, including petroleum, heavy metals, VOCs, SVOCs, PAHs, and PCBs. The contamination is also widely dispersed throughout the Creek's sediments, making it difficult to pinpoint the source of much of the long-lasting pollutants. The diversity and high concentrations of pollutants, combined with the sheer complexity and breadth of the contaminated area, make Newtown Creek an ideal candidate for Superfund designation. While Riverkeeper is well aware that these same factors will likely result in a decades –long timeframe for cleanup, there does not appear to be an alternative to the EPA's Superfund process that would accomplish the necessary goal of properly addressing this level of historic and ongoing pollution in any meaningful way. A holistic, comprehensive approach, however methodical and slow moving, is the only answer if the Creek is ever going to be "restored" to a functioning natural system that supports wildlife and allows for safe recreation.

4. Newtown Creek Pollution is a Threat to Public Health and the Hudson-Raritan Estuary

Newtown Creek pollution represents an immediate and ongoing threat to public health. Riverkeeper staff members have observed numerous recreational activities including kayaking, fishing, and boating along the canal.¹⁴ Other community members catch fish for subsistence and consumption out of the creek.¹⁵ For these reasons, Riverkeeper urges the EPA to expediently add Newtown Creek to the National Priorities list.

Recent testing indicates that sediment and surface waters continue to threaten public health and wildlife in Newtown Creek. The New York City Department of Environmental Protection began sampling Newtown Creek sediment and surface water in the early 1980s.¹⁶ These and other similar samples revealed the presence of pesticides,

¹⁴ See Attachment A to Riverkeeper's comments for examples of fishing and recreation on the Creek.

¹⁵ EPA News Release, 9/29/2009. Available at:

<http://yosemite.epa.gov/OPA/ADMPRESS.NSF/0/DFB99EE54944C2BD8525763A00699DB1>

¹⁶ <http://www.epa.gov/region02/superfund/npl/newtowncreek/>

metals, PCB's, and Volatile Organic Compounds.¹⁷ In addition, Riverkeeper's independent water quality sampling in Newtown Creek revealed dangerously high levels on Enterococcus bacteria, a raw sewage indicator. Out of 28 total sampling dates, Enterococcus levels exceeded established safety thresholds 17 times at a sampling location near the Metropolitan Avenue Bridge and 12 times at the Dutch Kills portion of Newtown Creek.¹⁸

In addition to the public health risks posed by over a century of heavy industrial pollution and ongoing combined sewer overflows, Newtown Creek pollution threatens the Hudson-Raritan Estuary of New York and New Jersey. The Hudson-Raritan estuary was designated an estuary of national significance by the EPA and includes the tidally influenced portions of all waters that drain into the New York Harbor.¹⁹ The polluted waters of Newtown Creek threaten to degrade this nationally significant estuary and impede efforts to restore the estuary. Adding Newtown Creek to the National Priorities list will contribute to the larger efforts to restore New York Harbor and the Hudson-Raritan estuary.

5. Superfund Represents the Best Method to Comprehensively Remediate Newtown Creek and Account for the Concerns of Local Residents

The complex nature and broad extent of toxic pollution on Newtown Creek demands the high level of expertise that only the EPA's Superfund program can provide. The range of possible contaminants in Newtown Creek was generated by over 140 years of industrial discharge, raw sewage, and oil seepage. These contaminants include heavy metals, dangerous chemicals, and unsafe bacteria levels. Further, the extent of the pollution is unknown and possibly unmatched. A remediation plan for the Creek must account for consumption subsistence fishing and primary and secondary-contact water recreation.

The Environmental Protection Agency Superfund program has the resources to address the diverse range of community and small business interests, and potential

¹⁷ EPA News Release, 9/29/2009. Available at:

<http://yosemite.epa.gov/OPA/ADMPRESS.NSF/0/DFB99EE54944C2BD8525763A00699DB1>

¹⁸ Riverkeeper's full sampling results are available at: <http://www.riverkeeper.org/special/swimmableriver/>

¹⁹ <http://www.harborestuary.org/aboutestuary.htm>

concerns arising out of a Superfund designation for Newtown Creek. Residents of the neighboring communities live and work on properties situated on or near the canal. These residents, employees, and small business owners naturally want to understand how adding Newtown Creek to the National Priorities List will affect their lives, jobs and businesses. While Riverkeeper has been pleased thus far with the EPA's efforts at community outreach, I urge the agency to maintain and if necessary increase its commitment to the highest level of community involvement, including community meetings and providing transparent access to Superfund documents.²⁰

6. Conclusion

Riverkeeper urges the EPA to place Newtown Creek on the NPL, so that the long process of characterizing and designing a remedy for this historic waterway can begin as soon as possible. Riverkeeper agrees with EPA that the Superfund process is the best way to achieve a comprehensive clean up of Newtown Creek, and urges EPA to make every effort to carry out this process with the utmost transparency and accountability. For this process to be a success, it is essential that the needs and concerns of local residents and business owners are given the highest consideration.

Riverkeeper appreciates this opportunity to submit comments. If I may provide any clarification regarding the above, or additional information, please contact me via electronic mail at phillip@riverkeeper.org, or by phone at 914-478-4501, ext 224.

Respectfully Submitted,



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Hudson River Program Director

_____/s_____
Michael Pesa-Fallon

²⁰ <http://www.epa.gov/superfund/community/index.htm>