



RIVERKEEPER.
NY's clean water advocate

December 16, 2010

Caswell Holloway, Commissioner
NYC Department of Environmental Protection
59-17 Junction Boulevard
Flushing, NY 11368

Dear Commissioner Holloway:

I am writing on behalf of Riverkeeper, Inc. ("Riverkeeper")¹ to respond to the recent decision by the Department of Environmental Protection ("DEP") to restrict public access, including prohibiting the launching of kayaks and other watercraft, from the Newtown Creek Nature Walk Park, located on Newtown Creek in Brooklyn, as well as the DEP's prohibition of kayaking and other secondary contact recreation in the Gowanus Canal. I was dismayed to learn of these closures in early November, and my concern and frustration with DEP only grew when I discovered that the agency failed to make any effort to solicit feedback from local residents prior to making this ill-considered decision. While the DEP attempted to rectify this blunder by sending Matt Mahoney to a community meeting on November 10 and scheduling today's public meeting in Greenpoint, the DEP has thus far maintained the closure.² Riverkeeper strongly disagrees with DEP's decision, and urges the agency to immediately rescind the closure and redouble its efforts to fully explain its concerns regarding public access to Newtown Creek. Riverkeeper also supports the comment letters submitted by New York Assemblyman Joseph R. Lentol and New York City Councilman Steve Levin on December 7, and the Newtown Creek Monitoring Committee on December 9.

¹ Riverkeeper is a member supported environmental organization whose mission is to protect the ecological integrity of the Hudson River and its tributaries, and to safeguard New York City's and Westchester County's drinking water supply. For more information go to www.riverkeeper.org

² Riverkeeper appreciates the efforts made by Mr. Mahoney to continue communicating with concerned members of the public, including myself, following the November 10, 2010 Newtown Creek Monitoring Committee meeting which he attended and received comments on the closure.

Based on the minimal amount of information provided by DEP thus far, the closure is an arbitrary decision that violates the public trust doctrine, is unsupported by the facts, and contradicts New York City's broader efforts to encourage increased recreation on, and public appreciation of the city's waterways.³ The closure also threatens to set back efforts by local elected representatives, community groups and Riverkeeper to raise public awareness about the environmental challenges and potential benefits of this unique waterway.

Throughout its forty year history, Riverkeeper has fought to maintain and increase public access to the Hudson River and its tributaries for fishing, boating and simple aesthetic enjoyment. Central to that fight is our belief that the public trust doctrine grants the public unfettered access to the tidelands and waterfront of our navigable waters, and the resources they contain.⁴ This doctrine dates back to Roman law and the foundations of English common-law, and provides the underpinnings of the United States' approach to making the beauty and natural wealth of our waterways and coastlines accessible to the public to use and enjoy. Riverkeeper's early efforts to improve public access to the mid-Hudson occurred even before the entire Hudson River was declared a Superfund site by the EPA, and Hudson River striped bass and blue crabs were found to be contaminated with PCBs. At the time, water quality throughout the Hudson was generally worse than it is today, due to unremediated industrial sites, sewage pollution and illegal dumping. Once the health risks of eating contaminated fish and shellfish became known, Riverkeeper supported New York State's efforts to educate the public about the risks. We continue to work with and support the efforts of the New York State Department of Health ("DOH"), Department of Environmental Conservation ("DEC") and DEP to improve public education in this regard, both on the mid and upper Hudson, the East River, Newtown Creek and the Gowanus Canal. Despite this limitation, Riverkeeper and other environmental organizations, along with the DEC continue to encourage public recreation on the Hudson. Our combined efforts have resulted in establishing a firm foundation of public support for protecting and restoring the Hudson River ecosystem.

³ New York City's Department of City Planning, in consultation with other city agencies including DEP, is in the process of updating its Comprehensive Waterfront Plan. A key element of the Plan is enhancing the "Blue Network", the waterways surrounding New York City which is often referred to by city planners as the Fifth Borough. For more information on the Waterfront Plan update, go to http://www.nyc.gov/html/dcp/html/cwp/cwp_2.shtml , last accessed December 16, 2010.

⁴ See Treatise on Environmental Law, Chapter 10, Land Use Planning and Land Use Controls in the Context of Environmental Protection, § 10.05 The Public Trust Doctrine, Matthew Bender and Co., Inc., 2010.

Our goal in fighting for increased access was not to carelessly encourage the public to expose themselves to polluted waters, but rather to connect them to a remarkable natural resource that was either physically off limits or widely considered to be undesirable. By fighting for the public right to use the Hudson River, we enabled individuals to make a personal connection with this resource, learn about its magnificent and troubled environmental history, and discover what actions they could take, individually and collectively, to protect and restore it.

Riverkeeper firmly believes that this same approach will work for Newtown Creek and the Gowanus Canal. That is precisely why we oppose the DEP's closure of the Nature Walk's kayak launches and the prohibition against secondary contact recreation in the Gowanus Canal. Given the fact that the Nature Walk Park is one of only two public access points on Newtown Creek, the other being the Manhattan Avenue park, the DEP's closure of these launches amounts to a de facto violation of the public trust doctrine.⁵ With this doctrine as a foundation, connecting the public to Newtown Creek is the best way to build a constituency that will support its improvement and long-term environmental health. Conversely, denying the public access to a resource, even a polluted one, does just the opposite. Over time, it erodes public interest in and support for the resource, thereby allowing government to focus its attention elsewhere and consigning the underutilized waterway to "second class" status.

In the case of Newtown Creek, local residents and business owners know all too well the downside to reduced government attention. Until a few years ago, Newtown Creek and the Gowanus Canal's pollution were left largely unaddressed by the state and federal governments. A combination of efforts by local elected representatives, community groups and Riverkeeper over the past eight to ten years have reaped major dividends in re-focusing attention on these waterways. The settlement of the ExxonMobil oil spill suit, and the recent designations of both waterways as Superfund sites by the EPA are the clearest indications that we have turned a corner in our collective struggle to clean up Newtown Creek and the Gowanus Canal. In addition, local boating organizations like the Long Island City Boathouse promote responsible boating in and around the city's waters, including Newtown Creek, and take steps to educate

⁵ At the time of this letter, Riverkeeper has received conflicting information about the status of the Manhattan Avenue park kayak launch. Based on conversations with DEP staff, the NYC Parks Department had closed the Manhattan avenue kayak launch. However, Parks officials have not confirmed this, and recent visits to the park found no signs prohibiting kayaking, or other efforts to prohibit access to the launch dock.

boaters about the risks of coming in contact with contaminated water.⁶ Riverkeeper believes the best way to build support for restoring Newtown Creek is to educate the public about the potential risks of kayaking or boating in an industrial waterway, so that they can make an informed choice about whether to be on the water. This includes not only proper hygiene and awareness of the risks posed by bacterial pollution of waterways after heavy rains, but also support for teaching the public the “rules of the road” when piloting a small craft in industrial waterways like Newtown Creek, the East River and New York Harbor. Riverkeeper would fully support efforts by DEP and DOH to install signs and other public information at the Nature Walk Park that would provide accurate information about the potential health risks of kayaking in the Creek after heavy rains, and proper hygiene to prevent or mitigate such risks. Riverkeeper also encourages DEP to consider posting information on its efforts to reduce stormwater pollution in Newtown Creek and the harbor at large. Such information, if presented properly and accurately, can go a long way towards building public support for DEP’s use of precious financial resources to improve water quality.

In addition to threatening the public trust doctrine, Riverkeeper also challenges the DEP’s decision because it simply lacks any modicum of scientific support. At the Newtown Creek Monitoring Committee meeting on November 10, Matt Mahoney stated that the decision was based on information about to be released from a health study being conducted by the New York State DOH. Yet when pressed for specific examples of data that indicated an imminent public health risk, he could not cite any. He simply responded that DEP had made the decision based on early reports of the study. He could not say when the study would be released, or the type of data the agency was relying on. Upon further investigation, Riverkeeper learned that the DOH is in the process of completing a public health risk assessment for Newtown Creek, as part of the Remedial Investigation Feasibility Study (“RIFS”) overseen by EPA in the Superfund process. However, neither a draft or final study has been released, nor has DEP offered any additional detail as to information in the draft study that would support the closure. DEP also failed to cite any of its own water quality sampling data to support the closure. It is now over a month later, and despite repeated requests by community residents and boaters to supply supporting data, DEP has thus far failed to do so.

⁶ For more information on the LIC Boathouse go to <http://www.licboathouse.org>, last accessed December 16, 2010.

In contrast to DEP's apparent lack of data, Riverkeeper has been conducting water quality sampling on the Hudson River since 2006 and on Newtown Creek since 2008. Through a partnership with Columbia University's Lamont Doherty Earth Observatory and Queens College, Riverkeeper staff analyzes water samples taken in 85 different locations on the Hudson Estuary, from Waterford above the Troy Dam, to the Battery in New York City.⁷ The samples are analyzed for Enterococcus, bacteria that serve as a common indicator of human sewage. One of Riverkeeper's sample sites in Newtown Creek is located at the mouth of the Dutch Kills, directly across from the Nature Walk Park. While water quality throughout the estuary, including Newtown Creek, varies depending on precipitation, tidal patterns and other influences, samples taken over this past year from the Dutch Kills location generally showed acceptable or undetectable levels of Enterococcus during periods without heavy rains.⁸

However, Enterococcus counts were extremely high following severe wet weather events, not only at the Dutch Kills site but throughout the East River and harbor. For example, samples taken on October 12, 2010, following several days with over an inch of rainfall, found bacteria levels that exceeded our equipment's measuring capability. In fact, *every single sample site around New York City on October 12 save one showed Enterococcus levels above acceptable limits, except for the treated sewage outfall at the 125th street wastewater treatment plant, on the West side of Manhattan.*⁹ While Enterococcus is not the only pollutant found in the city's waterways, it is a reliable indicator of untreated human sewage, which is generally the pollutant of concern when regulating primary and secondary contact recreation in public waterways. DEP has not indicated whether concern over exposure to sewage pollution underlies its decision to close the kayak launches. If it is, this sampling data tends to undercut DEP's reasoning for closing only this site.

Following this reasoning, in order to fully protect the public from sewage pollution, DEP should close all of its launch sites and waterfront parks that allow direct access to the city's waterways during and after heavy rain events. This conservative approach would protect the city from potential liability, but would of course severely hamper the city's efforts to promote

⁷ Riverkeeper's water quality sampling data and a detailed description of the program can be found at <http://www.riverkeeper.org/water-quality/locations>, last accessed December 16, 2010.

⁸ Sampling data for Newtown Creek's Dutch Kills location shows no exceedances for dates in June, July and September 2010 that followed dry weather days. See <http://www.riverkeeper.org/water-quality/locations/nyc-hudson-bergen/newtown-creek-dutch-kills>

⁹ Follow link at Note 6 to see October 12 sampling data.

waterfront recreation and would further undercut support for improving water quality, as discussed above. If DEP is concerned about other contaminants in the water column or river sediment, a practical approach would be to conduct sediment sampling for a wide range of toxic contaminants at all of the city's kayak launches and waterfront parks that allow direct public access to the water, such as Brooklyn Bridge Park, and publicly disclose the sampling results. The public would have access to a more complete set of data on water and sediment quality, and would be better equipped to meaningfully support policy solutions to address contaminated areas.

Riverkeeper firmly believes that the public has the right to have ready access to all scientific information available on water quality for the waters around New York City, so that they can make informed decisions about whether to recreate in areas with impaired water quality or contaminated sediment. If the data shows that there is a significant public health risk in a particular area, then it makes sense to restrict access to that area. However, in this case DEP has failed to provide anything near the amount of information needed to support a closure of the kayak launches. On the contrary, the closure of Newtown Creek and Gowanus Canal for kayaking and boating appears arbitrary and without factual support, and should be reversed.

Finally, Riverkeeper is concerned that the DEP's decision to single out Newtown Creek and the Gowanus Canal for prohibitions on kayaking and boating could be construed as the beginning of a concerted effort to "sacrifice" these waterways in order to achieve compliance with federal and state water quality standards for the city as a whole. Restricting recreational use could be seen as providing future support for the DEP to claim that Newtown Creek and the Gowanus Canal's "existing uses" only support industrial ship traffic, and therefore should not have to be restored as close as possible to the "fishable, swimmable" requirement of the Clean Water Act as other, more widely used areas of waterways around New York City. Riverkeeper would oppose any effort undertaken by DEP or New York City in this regard, and urges DEP to reaffirm its commitment to improving water quality in all the city's waters, particularly Newtown Creek and the Gowanus Canal, which suffer disproportionately from the dual burden of historical industrial contamination and untreated sewage pollution.

In closing, Riverkeeper reiterates its request that DEP rescind the closure of the kayak launches at the Newtown Creek Nature Walk Park and the prohibition of kayaking and boating in the Gowanus Canal. We encourage the DEP to re-start its public participation process on this

issue once the public health risk assessment is released by DOH, so that an informed discussion can take place between DEP and the public as to the best path forward. Riverkeeper will support efforts by DEP to improve public education about water quality around New York City, because we firmly believe a well-informed public can be not only an advocate for positive change, but an ally to DEP in its effort to improve water quality throughout New York City. Riverkeeper cannot support DEP's current effort to restrict public access to Newtown Creek and the Gowanus Canal, and will continue to seek all avenues to effectuate a reversal of this misguided policy.

Respectfully,

A handwritten signature in black ink that reads "Phillip Musegaas". The signature is written in a cursive, slightly slanted style.

Phillip Musegaas, Esq.

Hudson River Program Director

Cc via electronic mail: Assistant Commissioners Carter Strickland, Angela Licata