



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

November 6, 2020

Via Electronic Transmission

Honorable Vincent Sapienza, P.E.
Commissioner
New York City Department of Environmental Protection
59-17 Junction Boulevard
Flushing, NY 11373

Re: Gowanus Canal Superfund Site, Brooklyn, New York

Dear Commissioner Sapienza:

As you know, the U.S. Environmental Protection Agency (EPA) has been reviewing a request by the New York City Department of Environmental Protection (DEP) for an extension of certain DEP cleanup obligations at the Gowanus Canal Superfund Site. Specifically, on June 24, 2020, DEP requested a 12-month extension to complete the future construction of the RH-034 combined sewer overflow (CSO) tank, and an 18-month extension to complete construction of the OH-007 CSO tank. DEP's stated purpose for the request is to provide more flexibility in the next two fiscal years as a result of COVID-19 budgetary impacts.

EPA's evaluation of the merits of DEP's extension request has included reviewing DEP's financials, the potential short-term and long-term cost/benefits of an extension, and the impacts to the Canal cleanup that may occur if contaminated CSO solids discharges continue as a result of further delays to DEP's completion of the CSO solids controls component of EPA's September 2013 Record of Decision (ROD) for the Site (those controls are hereinafter referred to as the "CSO remedy").

DEP did not affirmatively submit any Department-wide or Site-specific financial information in support of its extension request. EPA's evaluation, therefore, included extension-related information primarily obtained by EPA through requests to DEP, as well as schedule and budget information for procurement, design, and construction of the CSO controls generated through EPA's oversight of DEP's CSO tank-related work from 2016 through 2020 and during EPA's review of DEP's CSO tunnel proposal. EPA also reviewed various publicly-available documents, including DEP's 2019 and 2020 Consulting Engineer's Annual Reports, documentation for the September 2020 issuance of \$650 million in New York City Municipal Water Finance Authority bonds, and the New York City Water Board's October 15, 2020 meeting documentation, including DEP's presentation entitled "Financial Update for NYC Water Board."

DEP's October 15, 2020 presentation regarding its financial status indicated that, while caution is needed due to COVID-19-related uncertainties, DEP's overall finances are stable and the near-term outlook is positive. This is necessarily consistent with the detailed reviews of DEP's finances contained in the extensive September 2020 \$650 million bond issuance documentation, including independent ratings analyses separately conducted by Standard and Poor's, Fitch, and Moody's.

DEP's October 15, 2020 presentation also indicated that, as part of its COVID-19 budget management strategy, DEP is seeking to push out capital commitments to future years. It should be noted that, even prior to COVID-19, the New York City Municipal Water Finance Authority's February 2020 Annual Report indicated that DEP planned to push out and reduce such capital spending into future years. Specifically, annual reductions ranging from \$300 million to \$500 million were planned during the 2022-2024 period from DEP's 2021 \$2.3 billion priority projects capital spending level. The portion of the spending within these annual priority project budgets that is devoted to mandates is to be reduced by 50% or more.

It is unclear whether any pre-COVID-19 delays in DEP's implementation of the Gowanus CSO controls have been influenced by DEP's efforts to reduce and push out mandated capital spending. However, EPA believes that DEP's conservative capital fiscal planning, together with DEP's latest financial projections, ensure that DEP has sufficient capacity for the relatively minor near-term spending necessary for the CSO controls federally mandated in the ROD.

Therefore, EPA strongly believes that the near-term costs of the Gowanus CSO controls must remain a DEP priority. Before reviewing the cost/benefits of the requested extension in further detail below, however, it is critical to first review the role of the CSO controls in the context of the overall cleanup status.

Dredging of the upper Canal is set to begin in mid-November 2020. The design, procurement and complex preparations for this portion of the Canal cleanup, in which the City has played a supporting role, are complete. This cleanup milestone comes some six years after EPA issued the dredging-related Remedial Design (RD) administrative order to the potentially responsible parties at the Site, a time-span that included the field performance of several pilot studies and the compilation of an extensive and complex engineering design report.

It has also been some six years since EPA issued the May 2014 CSO RD Unilateral Administrative Order (UAO) to DEP requiring the design of the two CSO tanks. That CSO design order was amended, at DEP's request, by inclusion of the remedial design of the RH-034 CSO Tank in an Administrative Order on Consent (AOC) issued in 2016, which also includes property acquisition for the RH-034 tank, and demolition and preparatory cleanup work on properties to be utilized for the tank construction. While DEP timely completed the property acquisition and has largely completed the RH-034 CSO tank design, DEP has not complied with other AOC schedule milestones which DEP itself formulated. Completion of the headhouse design, along with procurement and implementation of the demolition and preparatory cleanup work, is subject to significant, continuing delays which all began pre-COVID-19. Accordingly,

EPA considers the DEP to be in significant noncompliance with the 2016 RH-034 CSO Tank AOC and subject to stipulated penalties.

DEP is also in significant noncompliance with the May 2014 CSO RD UAO, which now covers just the design of the OH-007 tank. This noncompliance also pre-dates COVID-19. In the fourteen-month period since EPA declined to modify the ROD to adopt DEP's CSO tunnel proposal, EPA has repeatedly urged DEP to prevent further delays to the OH-007 design work. Prior correspondence to you recited my November 26, 2019 statement on this subject:

Earlier in the process of discussing the potential merits of the tunnel proposal, I was given the impression that the City's work on both tanks was fully proceeding in parallel with efforts related to the tunnel concept. I have come to understand that little progress has been made with regard to the OH-007 tank during the intervening months while the tunnel proposal was under consideration. I ask you to move forward with this work without further delay.

As noted in my September 2, 2020 letter to you, in the absence of any indicated progress by DEP on the OH-007 CSO tank design following that November 26, 2019 letter, EPA made detailed inquiries in January 2020 as to the OH-007 CSO tank design status. DEP informed EPA in February 2020 that four years earlier, in 2016, it had transferred the OH-007 CSO tank design funding to the RH-034 CSO tank design effort. EPA was not aware of this, despite DEP being required under EPA's administrative order to timely report and mitigate any compliance delays.

DEP's 2016 decision to defund the OH-007 CSO tank design was contrary to DEP's own June 2016 draft schedule, which set a July 16, 2020 completion date for the OH-007 CSO tank design. Over six years after EPA required DEP to commence the OH-007 CSO tank design, that work has not progressed past the initial Preliminary Design, and, as noted, we were informed in February 2020 that DEP does not even have a contract in place to continue and complete that work. DEP is potentially subject to statutory penalties for its significant noncompliance with the May 2014 CSO RD UAO.

The potential penalties for DEP's noncompliance with the two orders are substantial. EPA is seeking to resolve DEP's significant noncompliance and potential penalty liability in connection with memorializing an enforceable schedule for DEP's CSO remedy implementation.

The need to fund federal mandates may not be unilaterally overridden by the City. It should also be noted that as part of the 2016 RH-034 CSO Tank AOC, DEP specifically waived its rights to claim excused delays, or *force majeure*, for the following:

- a. Failure to obtain Comptroller approval for this Settlement Agreement or for implementing any requirement of this Settlement Agreement;
- b. Failure to obtain funding necessary for Respondent to perform its obligations pursuant to this Settlement Agreement, including for reasons of financial inability to complete the Work or increased cost of performance; [and]

- c. Failure to obtain necessary approvals from any City agencies or entities required for the performance of this Settlement Agreement.

EPA proposed these non-standard waiver requirements, to which the City agreed, in response to EPA's grave concerns regarding the extended timing and increased costs of DEP's CSO controls approach, and as documentation of DEP's expressed certitude regarding its ability to timely fund and execute the CSO remedy in exchange for a schedule delay needed to effectuate the change to DEP's preferred RH-034 tank location.

Among the first steps in resolving DEP's continued significant noncompliance is for DEP to complete critical, overdue procurements.

In December 2019, DEP submitted to EPA a schedule indicating that the OH-007 CSO tank design procurement would be completed by the end of 2020. DEP affirmed this in a February 14, 2020 email, stating:

The Request for Proposals for the OH detailed design was released on January 31, 2020 and the current proposal due date is March 13, 2020. DEP is working to expedite the procurement and register this contract in Fall 2020.

DEP's most recent communications to EPA have stated that DEP can provide no firm procurement, design, or construction milestones for the OH-007 CSO tank. Your letter of September 16, 2020 states:

As noted in the Monthly Progress reports that DEP has submitted to EPA, DEP had already issued a request for proposals (RFP) for the design work, received a single non-contested proposal, and confirmed that the proposal meets the minimum standards. DEP will now take the necessary next steps to refine the design's scope and to negotiate deliverables and costs with this vendor, and then submit the package to the New York City Comptroller for review and registration. We anticipate that registration will likely happen sometime after July 1, 2021. At that time, DEP will be able to provide EPA with a schedule for completing the design and permitting, which we currently estimate to be about 60 months.

The additional delay of some 9 months or more in completing this procurement, from fall 2020 until "sometime after July 1, 2021," is not acceptable to EPA.

EPA is cognizant that DEP's October 15, 2020 presentation to the Water Board indicates that COVID-19 impacts have impaired the City's ability to process procurements. Despite these impairments, on October 8, 2020, DEP issued a Superfund Support Request for Proposal for the Gowanus Canal and Newtown Creek Sites. The sole Gowanus Canal-related task seeks contractor support for the purpose of seeking a revision of the Gowanus CSO remedy called for in the 2013 ROD:

Task 11.2 The Consultant shall review the ROD issued by USEPA and develop alternatives for a re-issuance of the ROD or an Explanation of Significant Difference for

potential refinement of the clean-up goals. <https://www1.nyc.gov/site/dep/about/request-for-proposals.page>

Despite EPA's repeated requests (including both pre- and post-COVID-19), that the delayed OH-007 CSO tank design procurement and work be prioritized, DEP appears to be allocating procurement and budget resources, much needed in the CSO retention tank design effort, to altering the publicly vetted CSO remedy. The justification for this proposed use of public funds is not apparent as DEP has not raised this contract proposal with EPA.

DEP's RFP for contractor support for a proposal to change EPA's ROD is surprising because the City specifically waived its legal rights to challenge the CSO remedy (along with its original and increased cost) in the 2016 RH-034 CSO Tank AOC. EPA proposed, and DEP agreed to, this non-standard waiver provision so as to document DEP's stated intention to accept implementation of the ROD-required CSO controls, rather than continuing to challenge or seek to reduce them. Finally, as noted above, the design of the RH-034 CSO tank is nearly complete, so changes to the most significant component of the CSO remedy would be costly and untimely.

Returning to EPA's financial evaluation of DEP's schedule extension request, EPA believes that there are long-term costs to further delaying the CSO work. Delays to completion of the CSO controls significantly increase the likelihood that maintenance dredging of CSO solids by the City will be required. EPA estimates that the potential volume of CSO solids that will accumulate in the Canal due to DEP's relocation of the RH-034 CSO tank, delays due to ongoing noncompliance, and the requested extensions, and before accounting for 1,100% larger sewage loads from rezoning¹ and the City's recently announced 50% street cleaning reduction, may equal roughly one quarter of the sediment to be dredged, treated, and disposed during the upcoming dredging of the upper Canal. EPA estimates the cost of this maintenance dredging at approximately \$50 million, a cost that would need to be borne by the City. In addition to the environmental risks posed by compromising the completed dredging remedy, maintenance dredging presents a risk of costly damage to the complex absorbent cap and might also cause releases.²

EPA is cognizant of DEP's need to responsibly balance its near-term fiscal priorities, despite its cautiously optimistic October 15, 2020 projections to the Water Board. EPA, therefore, reviewed DEP's projected Gowanus Canal CSO-related spending for the near-term. This review indicates that there are fairly modest outlays needed for the design and preparatory construction steps for the CSO tanks. Consequently, EPA's financial analysis indicates that there would be only a nominal short-term benefit to DEP from the requested time extensions as far as DEP's stated

¹ See Gowanus Neighborhood Rezoning and Related Actions Environmental Assessment Statement at Table B-1.

² A comparison between DEP-provided costs and timeframes, with and without the requested extensions, for completing the design, property acquisition and construction of the two CSO tanks indicates that interest and inflation would also add approximately \$12 million to the lifetime project cost.

goal of gaining more flexibility in the next two fiscal years as a result of COVID-19 budgetary impacts.

EPA believes that there are more significant opportunities for near-term DEP budget savings. The largest short-term capital expenditure projected by DEP is the \$100 million property acquisition for the OH-007 CSO tank staging area and proposed headhouse location, as set forth in DEP's Basis of Design Report. EPA estimates that this acquisition would likely cost \$130 million in total. The proposed staging area consists of three parcels, while the headhouse location is a portion of a fourth parcel. DEP has twice declined to discuss EPA's offer to facilitate a no-cost, term-of-years access agreement with the responsible party that owns the staging area parcels. Based on EPA's property estimates, this approach would save DEP \$100 million. EPA also believes that the need for or timing of the acquisition of the headhouse location merits review. Changes in this design approach could eliminate or postpone DEP's need to expend approximately \$30 million.

On a smaller scale, EPA believes that savings would be achieved through DEP's elimination of its planned contract proposal expenditures related to modifying the Gowanus CSO remedy. Similarly, DEP has indicated that it plans to spend nine months validating the 2015 OH-007 CSO tank Basis of Design Report. DEP has confirmed its intention to rehire the contractor that originally produced that report, over a nine-month period, for validation of it. EPA believes that neither the time nor expense of that validation effort are necessary or justified.

EPA has also reviewed the different procurement and implementation schedules submitted by DEP between 2016 and 2020. That review indicates that DEP has, over time, provided EPA with varying and inconsistent timeframes for the same tasks. By distilling DEP's information, and using commonly applied professional practices, EPA has developed an alternate compressed schedule, which we are prepared to discuss with you, for earlier completion of the CSO controls that utilizes simultaneous, overlapping tasks where possible. This would increase the likelihood that DEP could avoid expending \$50 million for CSO solids maintenance dredging and would ensure completion of the two CSO tanks within the same timeframe as the projected completion of the cleanup of the Canal.

Based on the above, it is EPA's conclusion that the requested extensions are not justified. EPA would like to meet with DEP to discuss in more detail our evaluation of DEP's extension request, a resolution of DEP's significant ongoing noncompliance, and the issuance of an enforcement instrument which memorializes DEP's CSO remedy implementation obligations. Even as the upcoming dredging begins to cure the Canal's century and a half of pollution, EPA is cognizant that the CSO portion of the Canal remedy is of equal significance to the community.

My October 27, 2020 letter to you and the Director of the Department of Planning expressed EPA's rezoning-related concerns. The CSO tanks are part of the sewer infrastructure needed to address both existing sewer loads and the increased amounts anticipated from rezoning. EPA's goal is to ensure that neither the proposed rezoning nor any further delays in DEP's implementation of the CSO remedy impact human health or the environment within the Gowanus community.

Based on the time-critical nature of these issues, EPA's goal is to promptly reach an agreement in principle related to schedule, addressing noncompliance and memorializing CSO remedy implementation. In the event that EPA and DEP are unable to timely agree on a path forward, EPA will consider its enforcement options, including stipulated and statutory penalties. In advance of these discussions, EPA requests that DEP take immediate steps toward finalizing the procurements for the OH-007 CSO tank design and the CP-1 demolition tasks in the RH-034 AOC.

My staff will be in contact shortly to arrange a meeting between our respective project teams. We look forward to discussing these critical matters with you and your staff.

Sincerely,

A handwritten signature in blue ink that reads "Peter D. Lopez". The signature is written in a cursive style with a large initial "P" and a long, sweeping flourish at the end.

Peter D. Lopez
Regional Administrator

