

## Newtown Creek Community Advisory Group (CAG)

# TECHNICAL MEETING SUMMARY

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June 10, 2020 | Virtual Meeting No. 3

### Summary of Presentations and Discussion<sup>1</sup>

**Questions and discussion regarding the material presented are included in bullets in the sections below.**

- *Direct responses from EPA are noted and in italics.*

#### EPA Approach to De Minimis, De Micromis (and Ability to Pay) Parties

Per CAG request, Michael Mintzer, EPA Office Regional Council, provided an overview of De Minimis settlements. Mr. Mintzer reviewed how the settlements work, the different components of each settlement procedure, how disbursement happens, and the different qualification requirements. Mr. Mintzer noted that settlement shares for de minimis settlements include a base amount plus a premium. The base amount is the percentage of all waste contributed to the site by the settling party compared to the total waste contributed to the site by the other potentially responsible parties. The base amount is then multiplied by a premium to account for unknowns in remediation costs, and unknowns in the total waste contributions. These unknowns become more certain as to total site costs as the remedy is developed in the RI/FS until it is finally costed in the Record of Decision; and unknowns as to waste contributions of other PRPs gain certainty as additional PRPs are identified by EPA. EPA premiums may be 50% to 100%, with the derivation of the premium amounts described in EPA guidance documents. The base amount with the premium is then multiplied by the total site costs to get the allocable share of the settling de minimis party. .

If the settling party believes that it lacks the financial resources to pay its allocable share and still be able to carry on its business operations, it may ask EPA to reduce its allocable share in accordance with EPA's "ability to pay" policies. Moreover, he clarified that De Minimis seeks to settle PRPs to pay a fair, allocable share of their contamination contribution. To trigger this process, EPA will notify De Minimis parties that they may be eligible for settlements, for which EPA then makes an offer after analysis of financial information. Ability to Pay settlements had their origin in EPA Guidance, and were enacted into law in the so-called "Brownfield Amendments", an amendment to CERCLA (the "Superfund Law) enacted into law In 2002.

To view EPA's full presentation with detailed information on De Minimis settlements please [click here](#), or visit the [Newtown Creek CAG website](#). The questions asked by CAG members after the presentation follow below in **bolded text**.

<sup>1</sup>For additional detail of the presentations, refer to the slides found at <https://newtowncreekcag.wordpress.com/presentation-slides/>

## Q&A

- **For those that may be new to these discussions, can someone just briefly remind everyone what OU1, 2 & 3 are?**
  - *OU1 = Entire Creek cleanup site*
  - *OU2 = Clean that addresses Sewage Overflow*
  - *OU3 = Proposed Early Action to dredge miles 0-2 (East River to K-Bridge)*
- **As there are many new people on the call today, please explain what the acronyms PRP, ROD CERLA mean.**
  - *Potential Responsible Parties (PRP): Cause the necessity for remediation, “potential” b/c it has not yet been proven in court that they are responsible.*
  - *Record of Decision (ROD): which documents the required remedy.*
  - *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): “The Superfund Law”*
- **How does EPA define “small businesses” to potentially relieve unqualified parties? It seems arbitrary – reminds me of Exxon settlement and how they ended up with a large slap on the wrist. There needs to be some sort of incentive w/in the settlement to discourage future contamination.**
  - *EPA Response: De Minimis and ability to pay are independent settlement scores. It doesn’t matter how small the business is, sometimes the small companies can be a major party. They may have more toxic waste, but if they are a de minimis party, EPA will look at them and the possibility of settling if they can demonstrate that their waste releases are small compared to others and what is in the creek. They would still be entitled to settle as a de minimis party. If they provide information that is incorrect after having paid their settlement, then they are subject to further review and contributions. I do not know that anything is perfect, but we make a great effort to have accurate information and disadvantages for providing inaccurate information.*
- **Could you clarify the “cash-out covenant”? For example, let’s say someone is sitting on property in Newtown Creek and they pay out, is the new owner also purchasing the covenant and is the covenant attached to the lot or the private corporation? Would this be transferred to a purchaser?**
  - *EPA Response: The settlement is cash out means that the party settling won’t be doing work, they are just paying money and probably wouldn’t be suitable to do the work because that would be a big number, and this would have significant resources. The covenant comes from the US, it is simply a promise and the US covenants that once settled will not come after and are finish unless we re-open for whatever reason. WE (EPA) give a covenant.*
  - *EPA Response: Regarding the second question, the person who owns the property now bought it from someone and might have been operating on that property for 50 years all along. Yet, when it is purchased you get to start all over again unless you are releasing contamination that your prior owner has left behind, you are being judged on your behavior. You do not have responsibility of the prior owner unless you release what was left behind. If you are about to buy a piece of*

*property you can qualify as a bonafide perspective purchaser and you'd have to do an appropriate inquiry about the property to learn about recognized environmental conditions that could be released, and you would have to address those releases. You can actually insulate yourself from liability by qualifying as a bonafide perspective purchase. It is widely known by environmental lawyers that this is available, and it would be unfortunate if whoever was buying did not take advantage.*

- **Is the covenant is bound to the property lot or to the entity that happens to be on it (e.g. I own a jelly bean factory that used to be a refinery and I decide to sell my property to an LLC), is the covenant that I arrive at bound to the property or to a specific entity? If the latter, will it be easy to hide the true ownership of the site?**
  - *EPA Response: The settling entity is the person that has done the release (person could be an individual or a corporation).*
- **Can you share with the group any updates/status for De Minimis settlements/negotiations for this site?**
  - *EPA Response: We're still early for that measure. We do not have sufficient information to be considering de minimis settlements yet. As we move closer to a ROD, perhaps we'll know more. Settlements are available to the PRP and if the small business does not have any liability they do not need to settle. If they do have liability, then it would be appropriate, but we are still too early.*
- **Facilitator Question: It is typically after the ROD these settlements happen. In other sites in Region 2 do you have examples of where this has begun to happen?**
  - *EPA Response: Yes, and it will control the premiums when you know. Sediments sites are more complicated, so we do not have other examples. There has been some consideration of this at other sites, but I do not know whether anything has moved forward. I do not have specific information.*
- **What about for the Gowanus or Passaic sites?**
  - *EPA Response: I did not ask the site attorneys. No one at EPA has this information or has started the process. I have no idea if anything is going on, but I can check to find out how things are working.*
- **How many years out is the ROD for OU1?**
  - *EPA Response: 2024. If small parties were being harassed at this point, they could speak to EPA. However, I don't think this is happening.*
- **If there is a property owner who needs to speak with someone. Who do they talk to at EPA for these kinds of questions?**
  - *EPA Response: They can contact Michael Mintzer.*
- **What is a De Micro Settlement?**
  - *EPA Response: This applies to a waste contributor who contributed no more than 100 gallons of hazardous substances. Truly tiny, but those under the statute would not be liable and this is the best position to be in, they don't need to settle because they are not liable.*
- **The CAG thought it was a good idea to learn about de minimis settlements because we're getting closer to the end. As a CAG we are talking about getting early approval**

on a remedial solution for two miles of the creek. So, if this is the point where the whole process is at, it would make sense to start re-learning about this and how EPA and PRPs are going to move forward in identifying other folks they would like to invite to their cleanup party. We thought it would be a good time for all of us to get a grounding in what these settlements are and what it means for local businesses/property owners. Also, to give us an understanding of the timeline that things are moving on.

- **In determining a De Minimis PRP, over what periods of time are the rough estimates of the allocation of fair allocable shares calculated?**
  - *EPA Response: From as far back as we have information, we have to come up with what we are actually putting into the calculations and then if there is a lot of information that is many years old, we include this. EPA has to make a reasonable estimate. If there were receipts from 1920, this information is what we punch in. Do we think that there were earlier disposals and no documents, or do we think that what was provided is all documentation, so it is the total contribution? We would like to know everything from beginning to end that a particular waste disposer put into the creek.*
- **Since these determinations are based on rough estimates, can it be reasonably expected that the majority of Newtown Creek businesses will be evaluated?**
  - *EPA Response: We'll have to face that when it is on our desk. Maybe it is doable, but sometimes there are limitations on what we can know in a reliable way. EPA does the best that we can do with the info we can collect.*
- **What is the total # of PRPs?**
  - *EPA Response: We have 18 identified today, and they are all major party PRPs (i.e. their releases into the Creek are significant) and many operated for 100 years. In PRP identification, always looking to see if the person who operated 100 years ago is connected to someone today to identify who is the "legal successor".*
- **I feel like some of the pre-questions we sent have not been answered in this presentation. Can we add those answers (i.e. nearby de minimis settlements- particularly on Gowanus, size, and total cost information)?**
- **If the ROD isn't until 2024, how does this comport with a best tracked partial cleanup of OU3? Business are interested to know the potential ranges for them.**
  - *EPA Response: The covenant usually applies to the site in a settlement, but if there was a reason to do a particular OU where parties were facing very real liability, I don't know that there would be any bar to doing a more limited settlement for an area. I don't know for sure – talking off top of my head.*
- **Is this the sort of thing that insurance covers? If so, what kind of insurance?**
  - *EPA Response: NYS is a difficult state to collect insurance for hazardous releases. There was more insurance coverage and it has been gradually offered less. There is lower likelihood of coverage (1973 is a date that mattered for when you had your insurance in NY). Not a real expert on this, would have to look at what the policies are and the dates, as well as the nature of the coverage. Definitely if you have concerns, you'll want to put in a claim because need notice.*

- **Is there an overall estimation of the cost of the cleanup for this site or Gowanus?**
  - *EPA Response: Gowanus has a ROD signed, so that would include a cost estimate. For NTC, is too early to say. Every site is unique. For Gowanus, \$506 million is what it was when the ROD was signed, but I suspect that the cost will be greater than this.*
  - Facilitator comment: Past superfund site costs are not indicators of future costs.

## Other Items, Next Steps, Reminder of Next Virtual CAG Meeting

Following the EPA presentation on De Minimis settlements, the discussion then turned to next steps and planning for the July CAG meeting. The following action items were suggested, some for immediate action and others to be further considered for future agendas.

### **For immediate action:**

- @CBI produces meeting summary w/ the details of this conversation
- @CBI investigate range of dollar amounts for requested sediment sites
- @EPA updating & sending De Minimis presentation to CBI (includes):
  - Live links on relevant slides
  - List of PRPs
  - Information about De Micro Settlements
- Agenda items for July 2020 CAG meeting (proposed):
  - Quick update on OU3 (FFS)
  - NYDEC Annual Update on land-based sites and where they are
  - Superfund and Dredging presentation from USACE (@CBI reach out to appropriate people about this).

### **For future discussion:**

- EPA will follow up on
  - Treatability Study
  - OU2 ROD (it is in process) – final response to the CAG will come soon

The meeting adjourned at 8 PM.