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Via email

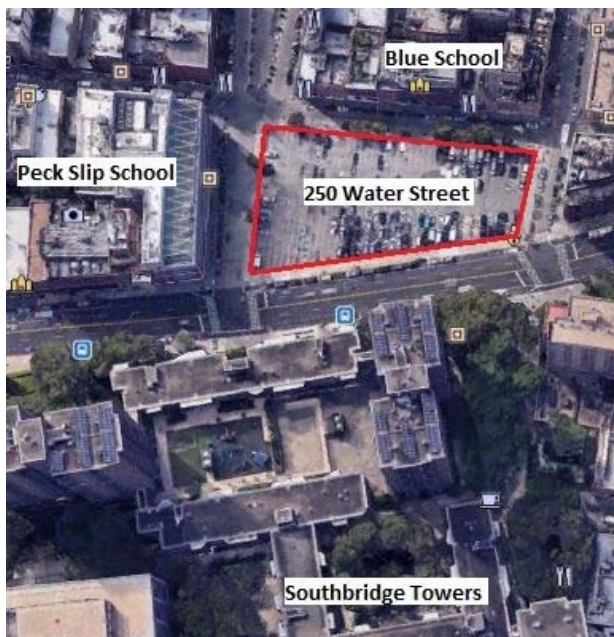
Basil Seggos, Commissioner
Michael J. Ryan, P.E., DER Director
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Re: **250 Water Street – Brownfield Site**
BCP Site No. C231127

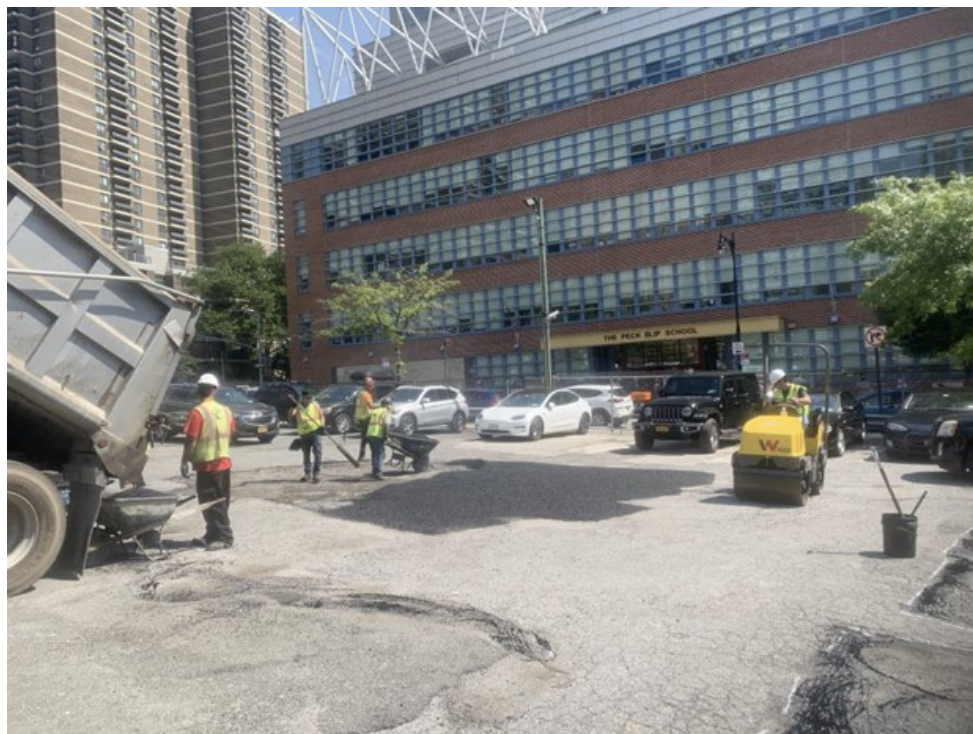
Dear Commissioner Seggos and Director Ryan:

I am writing on behalf of Children First, South Street Seaport Coalition, Inc., Save Our Seaport, Seaport Coalition, and a group of individuals and families whose homes and schools adjoin the Brownfield site at 250 Water Street in Manhattan (the “Site”).

The Site, which was previously used by a thermometer factory, chemical companies, and a variety of other industrial operations, is contaminated with 22 contaminants above soil cleanup objectives (SCOs)—including elemental mercury, lead, PCBs, chlorinated VOCs, petroleum VOCs from an underground tank spill, and tar-related products from creosote-treated timbers. Mercury was found in soil the Site at levels 1000 times the SCOs. Mercury is, of course, highly toxic to human health, posing a particular threat to children and their development in early life. Yet, there are two schools and many residences adjacent to the Site.



In fact, the Site is separated by only 30-foot-wide cobblestone streets from a public elementary school, the Peck Slip School (P.S. 343), and an independent school, the Blue School for 2-year-olds through 8th grade. From 7:30am-4pm on weekdays, that portion of Peck Slip is closed to traffic for use by Peck Slip School as an “Open Street/Play Street” for student recreation, leaving zero feet of separation between those children and the contaminated Site. During Covid, the schools are required to open their windows while students are in classrooms. In addition to the adjacent schools, Southbridge Towers, with 1,650 residential units, a senior center, a pre-school/daycare center, and ground-level air intakes, is just across Pearl Street.¹



The Site presents a unique challenge as here has *never* been a site in the BCP program with two adjacent schools and so many other highly sensitive receptors in such close proximity to elemental mercury. After being frequently asked for any precedents, Department staff eventually claimed that 509 West 34th Street (C231094) is a location where mercury remediation has been completed “within a high-density population area and/or near schools.”² However, 509 West 34th Street is not remotely similar to 250 Water Street in that regard. Most of the blocks surrounding 509 West 34th Street contain parking lots and other construction sites. Residential and school uses were at much greater distances there.

¹ As the Independent Community Monitor advising Community Board 1 has explained: “In addition to the adjacent schools, there are thousands of people living in the adjacent residential high-rise buildings, including young children, senior citizens, pregnant women, and individuals with pre-existing health conditions, including respiratory impairment—many of whom suffered because of 9/11 and post-9/11 air quality impacts and who have more recently suffered COVID-19 related ailments.” September 30, 2021 Excel Environmental Resources, Inc. letter to DEC, at 5.

² See 250 Water Street, Responsiveness Summary, Nov. 15, 2021, at Response 21.

Under the current conditions at the 250 Water Street, the likelihood of exposure to school children and adults is limited because of the Site's impervious surface. But, as DEC has acknowledged, complete exposure pathways may result from the planned excavation of more than 20,000 cubic yards of contaminated soil. These routes of exposure include inhalation of mercury or VOC vapors volatilizing from contaminated soil and groundwater and inhalation of dust arising from contaminated soil.

Despite the obvious risks to children and the other sensitive receptors, DEC has, unfortunately, allowed the volunteer, a subsidiary of The Howard Hughes Corporation ("Howard Hughes"), to cut many corners. Even after approving a final RAWP and issuing a Decision Document on November 15, 2021, crucial information about the Site's potential to release mercury vapors on the remains unknown. And the RAWP is *less* protective of the community than the RIWP was.

In this letter, we call to your attention to three critical issues that should be addressed properly *before any further ground-intrusive remedial activities occur at the site.* In particular, we ask the Department:

- (1) to ensure meaningful, effective citizen participation for the public and their consultants on the upcoming (a) Remedial Design Investigation Work Plan, (b) the results of the Remedial Design Investigation, and (c) any revisions to the RAWP;
- (2) to take seriously and follow through on its recognition that the RAWP may need to be revised based on the results of the test pit investigations; and
- (3) to require that the test pit excavations and the riskiest part of the cleanup itself, excavation of mercury hotspots, are done when students are not in school, without creating nuisance conditions for residences.

DEC may not rush the remediation to meet the developer's profit-driven timelines at the expense of human health and safety.

I.

DEC SHOULD NOT HAVE ALLOWED HOWARD HUGHES TO MOVE THE TEST PIT INVESTIGATIONS FROM THE REMEDIAL INVESTIGATION TO A POST-RAWP-APPROVAL PHASE OF THE CLEANUP

The first major issue here is that test pit investigations, with air monitoring for mercury and VOC vapors, were added as a contingency phase of the Remedial Investigation but then not conducted, even though the RI results—which were based solely on narrow-diameter soil borings—clearly illustrated the need for test pitting.

A. The RI Results Were Inconsistent and Anomalous with Respect to Mercury Vapors, Which Were Found Throughout the Site.

The Remedial Investigation at the Site tested for elemental mercury vapors in four different ways. First, when soil samples were removed from the ground these extracted soil cores were screened for mercury vapors using a Jerome meter. The vast majority of these screenings detected mercury vapors from the soil borings.³ Second, after tubing for soil vapor sampling was inserted in the ground, mercury vapors were detected in the tubing.⁴ Third, the Community Air Monitoring Program (“CAMP”) monitoring at the perimeter of the site detected mercury vapors of 1.4 µg/m³ (as a 15-minute average concentration), which is in excess of the mercury Action Level of 1 µg/m³, at Perimeter Monitoring Station #1 (PM-1) on the edge of Pearl Street near Peck Slip.⁵ On another occasion, the CAMP monitors at the perimeter detected mercury vapors at PM-5, which is the monitoring station on Peck Slip, closest to the Peck Slip School, measuring 0.9 µg/m³ (15-minute average concentration), which is just under the 1 µg/m³ action level.⁶ And the perimeter monitoring stations detected mercury vapors leaving the site at PM-4 and again at PM-1 on another date.⁷

The only type of mercury vapor testing that did not detect mercury vapors onsite was the laboratory testing of a sorbent through which subsurface vapors were pumped for a 2-hour test period.⁸ And that fourth type of testing *did* detect mercury vapor samples collected from below the Pearl Street sidewalk adjoining the site.⁹

³ RIR at Appendix C, Soil Boring Logs, PDF pp. 165, 167, 169-170, 172-178, 180, 182-188, 207-216, 222-223, 225, 228-230.

⁴ RIR at PDF p. 269 (Soil Vapor Sampling Log Sheet reporting “maximum initial mercury vapor concentration of 1.13 micrograms per cubic meter (µg/m³) was observed” on 7/9/20); *id.* at PDF p. 296 (Site Observation Report reporting “Mercury vapor concentrations above background were identified at a maximum concentration of 6.63 micrograms per cubic meter (µg/m³)” on 7/27/20); *id.* at PDF p. 40 (soil findings for mercury: “highest mercury vapor screening value of 6.63 µg/m³”); *id.* at PDF p. 302 (“Mercury vapor concentrations above background were identified . . . at a maximum concentration of 1.72 micrograms per cubic meter (µg/m³)” on 7/28/20); *see also id.* at PDF pp. 92, 283, 289-90.

⁵ *Id.* at PDF p. 422 (Daily Air Monitoring Report showing mercury concentration of 1.4 µg/m³ in ambient air at perimeter monitoring station PM-1 (on Pearl Street near Peck Slip) on 7/27/20); *see also id.* at PDF p. 298 (site observation report for 7/27/20 reporting concentration of 1.4 µg/m³ in ambient air at perimeter monitoring station PM-1 as a maximum 15-minute average concentration). Langan has expressed its belief that this 1.4 µg/m³ recording was an error, due to a power surge in the equipment, but, in any event, the 0.9 µg/m³ reading on 7/27/20 was extremely close to the action level.

⁶ *Id.* at PDF p. 434 (Daily Air Monitoring Report showing mercury concentration of 0.9 µg/m³ (just under Action Level) in ambient air at perimeter monitoring station PM-5 (on Peck Slip) on 7/27/20).

⁷ *Id.* at PDF p. 292 (Site Observation Report for 7/9/20).

⁸ *See* RIR, Table 5, Soil Vapor Sample Analytical Result, PDF pp. 139-143.

⁹ *Id.* (SV38 and SV39).

As our engineering consultant, Keith Brodock, P.E., P.P., of Integral Engineering, P.C. explained in his September 29, 2021, letter to the Department, mercury vapors were found to exist throughout the Site, yet the RI results included a troubling inconsistency with respect to mercury vapors:

1. ... As identified in the *Remedial Investigation Report* dated June 23, 2021 (“RIR”), mercury and other volatile organic compound (“VOC”) vapors exist throughout the site, as evidenced from the soil vapor laboratory results¹⁰, the soil vapor screening observations (during soil vapor probe purging and other subsurface soil vapor screening)¹¹, and the perimeter air monitoring data¹². *Indeed, the highest mercury vapor reading during soil vapor point installation and purging on July 9, 2020 was 1.13 µg/m³ at location SV37¹³, which is on the western perimeter of the site, outside of the identified mercury-impacted soil hotspot area.* In addition, the highest concentration of VOC vapors in laboratory soil vapor samples was 39,300 µg/m³ at location SV32¹⁴ near the southeastern corner of the site. ...

* * *

5. **The inconsistency between the mercury soil vapor laboratory results and the empirical field measurements for mercury vapor should be evaluated.** It is anomalous that mercury vapor was detected during onsite soil vapor point installation and purging¹⁵, and during onsite soil core screening¹⁶, but was not detected in the onsite soil vapor samples analyzed by a laboratory¹⁷. For example, mercury vapors were identified during soil vapor point installation and purging at onsite location SV37 at a concentration of 1.13 µg/m³, yet mercury vapor was not detected in the laboratory-analyzed soil vapor sample from this location with a laboratory reporting limit of 0.00075 µg/m³, which is well below the concentration already measured at this location. It is anomalous that mercury was detected onsite in various field measurements, but not in the laboratory-analyzed samples, where there was a much lower

¹⁰ E.g., data from SV05, SV21, SV32, SV37 (RIR PDF p. 92 [all page numbers refer to the PDF page number]).

¹¹ E.g., the daily field reports on July 8, 2020, and July 9, 2020 (RIR pp. 283, 289–290).

¹² E.g., the VOC and mercury vapor readings on July 9, 2020 (RIR p. 292).

¹³ RIR p. 290

¹⁴ RIR p. 92

¹⁵ See fn. 10.

¹⁶ E.g., soil boring log for SB17, which is outside of the mercury hotspot (RIR pp. 172–173).

¹⁷ RIR pp. 139–143

threshold for identification (reporting limit); this discrepancy should be evaluated.

Integral Engineering letter to DEC, Sept. 29, 2021, at 1-3 (emphasis added).

B. Test Pit Investigations Were Included in the RIWP and Are Necessary for Resolving the Mercury Vapor Anomalies, as Well as Supplementing the 2-Inch Soil Borings, But Were Never Conducted.

DER-10 explains that subsurface soil samples should be collected “via borings and/or test pitting ... as needed to characterize the site.” DER-10, § 3.5.1(c). The draft RIWP called for soil samples and soil vapor samples to be collected using only using very narrow (2-inch-diameter) borings, but no test pits. DEC received technical comments from the Independent Community Monitor (Lawra Dodge, P.G., LRSP, of Excel Environmental Resources, Inc.), explaining that soil borings are insufficient, and that test pits are a necessary part of the investigation “to aid in the visual identification of the anomalies^[18] of potential concern” and to more closely simulate excavation conditions. Excel Environmental Resources, Inc. letter to DEC, Jan. 16, 2020, at 5-6. This, Ms. Dodge explained, is particularly important given that there is “*no doubt the elemental mercury was handled at the Site,*” which “is in extremely close proximity to a multitude of sensitive receptors.” *Id.* at 2 (emphasis in original).

In response to these comments the final RIWP added a “Contingency Phase 6” for potential test pits. With respect to this “potential” test pitting, the final RIWP stated:

3.4.4 Contingency Test Pits

Test pits *may be excavated* to investigate subsurface anomalies identified during the geophysical survey, investigate potential contaminant sources, or otherwise achieve the objectives of the RIWP (i.e., to characterize the nature and extent of contamination at the site, support the preparation of a qualitative human health exposure assessment and to provide sufficient information to evaluate remedial alternatives). . . .

* * *

. . . If test pits are deemed necessary, an addendum to this RIWP that describes the test pit investigation methodology will be submitted to NYSDEC. The addendum may include revision to the HASP, CAMP and/or QAPP.

Final RIWP, May 13, 2020, at 30-31.

¹⁸ The RI results included two different types of anomalies: the mercury testing anomaly (inconsistency) referred to in Mr. Brodock’s comments above, and the subsurface anomalies (*i.e.*, debris or other material underground that prevented advancement of soil boring), which is what Ms. Dodge was referring to here.

DEC then approved the final RIWP in a May 19, 2020 letter, which states:

Test Pits - Although there is language in the work plan describing how test pits would be performed if determined to be necessary, if a significant test pit program is needed a supplemental RIWP must be submitted by Langan to the DEC for review and approval.

May 19, 2020 letter from DEC's Michael Komoroske, P.E. to Howard Hughes, at 1

And Langan's June 8, 2020 presentation to Community Board 1 on the "Revised Remedial Investigation Work Plan" touted the fact that the "updated RIWP text" included "Contingency Test Pits and Soil, Soil Vapor, and Groundwater Samples."¹⁹

Howard Hughes conducted the investigation over the Summer of 2020, during the schools' summer break. During the remedial investigation work, a September 3, 2020 Site Observation Report reported that Langan had completed the implementation of Phase 5 of the Remedial Investigation, and that "Langan will compile and evaluate the results from investigation phases 1 through 5 to determine if supplemental soil borings, soil vapor points, groundwater monitoring wells, test pits, and media sampling are required to satisfy the objectives of the RIWP."

But the test pit program has not been conducted. The 2-inch soil borings were the only subsurface investigation method used for soil or soil vapor samples. That was improper. DEC has never explained—in any written document—why the test pits were not during the investigation stage. In the September 2021 public meeting, DEC and Langan representatives stated, merely, that so long as the test pits are done, they do not see why it matters *when* they are done.²⁰ In fact, it does matter, significantly, as discussed below

C. The Department Improperly Allowed Howard Hughes to Move Test Pits from the RIWP to a "Remedial Design Investigation" (Pre-Design Investigation), Which Threatens the Health and Safety of the Neighboring School Children and Residents.

At the September 2021 public meeting and in the response-to-comment, DEC indicated that the test pit investigations that should have been done in the Remedial Investigation stage which *precedes* approval of the cleanup plan will instead be added to a Remedial Design Investigation (RDI) (more typically referred to as Pre-Design Investigation (PDI)) phase of the remedy implementation. This has adverse consequences for the integrity of the BCP process, for the scope of the remedy, and for the community protection measures to be required during the cleanup. The deferral of these test pit investigations is improper in several ways.

¹⁹ See "Work Plan.BCP.C231127.2019-09-16.Draft RIWP PowerPoint Presentation for Public Meeting" at 18.

²⁰ See 9/21/21 Public Meeting video, <https://www.youtube.com/watch?v=t8MuAqHjfuk>.

First, the Brownfield Law makes a clear distinction between investigation of contamination and cleanup of that contamination. There is no legal mechanism that allows DEC to move the test pit component of the investigation from the former to the latter just because a volunteer would prefer to do it that way.

Second, the promised test pits are nowhere to be found in the RAWP or Decision Document. There is a section in the RAWP describing the purpose of the upcoming RDI, but it mentions only “waste characterization ... to refine the proposed remedial elements and obtain a soil dataset for off-site disposal facility approvals.” Final RAWP at 40. This is not test pitting with air monitoring to assess the extent of mercury and VOC vapors volatilizing from soil; it is something else entirely.

That has legal consequences. When DEC requires an activity in an approved plan, it is automatically incorporated as a binding, enforceable part of the Brownfield Cleanup Agreement. 6 NYCRR § 375-1.6(d)(2)(i). A PowerPoint presentation, YouTube video, or response-to-comment statement does not carry the same force of law. After not requiring test pits to be completed *prior* to approval of the cleanup plan, DEC failed to require them *in* that cleanup plan, thereby compounding the error. That omission also violates 6 NYCRR § 375-3.8(g)(1), which requires the Decision Document to describe the remedy. If test pits are part of the remedy, they should have been described in both the RAWP and Decision Document as a formal, binding, enforceable requirement.

Third, DEC failed to provide *any rationale whatsoever* for not completing test pits as part of the pre-cleanup-approval investigation. No explanation is given in the November 2021 approval documents or in earlier documents. To be sure, there are wholly conclusory statements that, in DEC’s opinion, the approved remedy is “fully protective of human health and the environment.” But this is insufficient. In light of the testing anomalies and the subsurface anomalies discussed above that resulted from soil borings, and the proximity of highly sensitive receptors, DEC was required to explain why test pits were not required to satisfy the objectives of the RIWP and the statutory requirement to “[f]ully characterize the nature and extent of contamination at the brownfield site.” ECL § 27-1411(1).

Fourth, if test pits investigations will occur, the public is unaware of any specifics as to where and how they will be conducted on the site, and what laboratory testing or air monitoring would accompany them. The response-to-comment states that details will be in a forthcoming Remedial Design Investigation Work Plan (“RDIWP”). Further, it states that the school and community’s consultants “will be provided an opportunity to review and provide comments on the [RDIWP].” But that should have occurred prior to DEC’s approval of the cleanup plan, in a formal public comment period.

The Brownfield statute mandates “meaningful ... and effective citizen participation” (ECL § 27-1417(1)) to “enable citizens to participate more fully in decisions that affect their health.” 6 NYCRR § 375-1.10. The Legislative History explains that “[o]ne of the major goals of [the] Assembly brownfields legislation is to assure community involvement in the clean-up of priority brownfields sites.” More specifically, the statute requires “[f]ull, timely, and accessible

disclosure and sharing of information by the Department ... including the provision of technical data and the assumptions upon which any analyses are based.” ECL § 1417(2). DEC must afford “the public the opportunity to have their views heard and considered.” *Id.*

The statute identifies “formal milestones” and specifies that proposed remedial investigation work plans must be subject to a minimum 30-day public comment period before being finalized and proposed remedial action work plans must be subject to a minimum 45-day public comment period before being finalized. ECL § 1417(3)(a), (c), (f). The regulations also provide for extensions to these comment periods. 6 NYCRR § 375-1.10(g).

DEC previously stated, in its May 2020 investigation plan approval letter, that a “supplemental RIWP” would be needed for “a significant test pit program.” And the Brownfield regulations provide that a RAWP can “also serve as the remedial design document for a site.” 6 NYCRR § 375-3.8(g)(4). RIWPs and RAWPs are both “formal milestones” for citizen participation. ECL § 27-1417(3). In contrast, an “RDIWP” is not mentioned anywhere in the statute or regulations. By deferring test pits to a peripheral, post-approval work plan, DEC took review and comment of the parameters of those plans out of the formal participation process and replaced it with an informal process, of unknown duration, offered only in the response-to-comments. This was improper and may hamstring the public’s and their consultants’ ability to comment effectively.

Fifth, the Department has acknowledged that the RAWP, including but not limited to its Community Air Monitoring Plan (“CAMP”), may need to be revised based on the results of the test pit investigations. Nov. 15, 2021 Response-to-Comment at 2 (Responses 5, 6, 9). This admission undermines an argument that the RAWP may be approved *before* obtaining those results. If the ability to later revise an approved plan could exempt an agency from having the requisite information in advance of granting the approval, then no final determination, no matter how insufficient, could ever be deemed inadequate—which is obviously not the law.

For a variety of reasons, proper administrative practice requires doing it right the first time, not hoping to correct it later. Among other things, because after-the-fact revisions take time and effort, there will be significant inertia working against making such post-approval changes. Further, DEC’s request that the community simply trust it and DOH to make all needed revisions later, during implementation, is particularly difficult to accept for those downtown residents who “lived through 9/11 [a]nd ... were told that the air was safe.”²¹ Indeed, DEC and Langan have fomented mistrust by, for example, stating at the September 21 public meeting that “*we did not identify mercury vapor on the site,*”²² when, in fact, mercury vapor *was* identified on the site during the investigation through virtually every form of testing for mercury vapors, and the only type of testing that did not detect mercury vapors was highly anomalous. *See* discussion above. Later during the September 21 meeting and in the response-to-comment (at response 11), DEC

²¹ 9/21/21 Public Meeting, <https://www.youtube.com/watch?v=t8MuAqHjfuk> (at 1:20:59).

²² 9/21/21 Public Meeting, <https://www.youtube.com/watch?v=t8MuAqHjfuk>, statement of Langan representative (at 08:31).

admitted that mercury vapors were detected on the Site. That these vapors were detected at levels near the Action Levels (specifically, $0.9 \mu\text{g}/\text{m}^3$, which is, of course, 90% of the Action Level of $1 \mu\text{g}/\text{m}^3$), even when only 2-inch soil borings were used instead of test pits, strongly suggests that the Action Levels may be exceeded during test pitting and, of course, during excavation of mercury hotspots.

Sixth, deferring test pits from investigation to the cleanup itself removed them from the explicit requirement in the approved investigation plan that “intrusive RIWP field tasks” must “be completed outside of school hours.” (See Section III, below, for more on this issue.)

Plainly, the test pit investigations should have been completed during the Remedial Investigation. As the Department acknowledged, the RAWP, CAMP, and CHASP may need to be revised based on test pitting results. The school and community’s consultants will carefully review the draft RDI Work Plan, when available. The Department must not continue and compound the prior shortcomings by approving an inadequate work plan for the long-overdue test pit investigations.

II.

THE DEPARTMENT’S APPROVAL OF A NON-PREFERRED, NON-PERMANENT TRACK 2 REMEDY WAS PREMATURE AND IMPROPER

DEC’s November 15, 2021 approval of a Track 2 remedy that will leave contaminants in the soil instead of a permanent and complete Track 1 remedy that would remove all contaminants was improper for several reasons, many of which have been described to the Department in prior comment letters. Among those reasons is that the RAWP fails to include complete descriptions, assessment, and analysis of the controls and monitoring that would protect people from exposure to harmful contaminants left on the Site when Howard Hughes finishes a partial cleanup and it (as well as its successors and assigns) are released from liability under ECL § 27-1421.

The State Legislature’s strong preference for permanent and complete cleanups is codified not only in the Brownfield Law’s Declaration of Policy (ECL § 27-1403), but also in two of the nine statutory remedy-selection criteria:

(d) Long-term effectiveness and permanence. A remedial program that achieves a complete and permanent cleanup of the site is to be preferred over a remedial program that does not do so.

(e) Reduction in toxicity, mobility and/or volume of contamination with treatment. A remedial program that permanently and significantly reduces the toxicity, mobility and/or volume of contamination is to be preferred over a remedial program that does not do so.

ECL § 27-1415(3).

The statute and its legislative history illustrate that the legislative purpose for favoring permanent cleanups was to avoid having to rely on post-cleanup engineering or institutional controls to protect people from the contamination left on-site, because such controls can fail for a variety of reasons. Section 27-1405(26) defines “permanent cleanup” as “a cleanup or remedy that would allow a site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls” (emphasis added). The legislative history of A.9120/S.5702 (2003), which became the Brownfield Law, notes the superiority of permanent cleanups so as to obviate “long term maintenance or monitoring.” Significantly, that same legislative history also contains a memorandum from DEC acknowledging, in the context of indoor vapor intrusion, an example of where exposure to contaminants went undetected despite a long-term monitoring program being in place. That memo stated DEC and NYSDOH’s opinion that it was not an isolated case.²³

Although Track 2 remedies can be approved in certain instances, the statute, regulations, and DER-10 prevent the Department from approving such a remedy in the absence of the following:

1. A complete description of any proposed use restrictions and/or institutional controls and the mechanisms that will be used to implement, maintain, monitor and enforce such restrictions and controls, by the remedial party and by state and local government.
2. A complete description of any proposed engineering controls and any site management requirements, including the mechanisms that will be used to continually implement, maintain, monitor and enforce such controls and requirements, both by the remedial party and by the state and local government.
3. An evaluation of the reliability and viability of the long-term implementation, site management and enforcement of any proposed institutional or engineering controls and an analysis of the long-term costs of implementing, maintaining, monitoring and enforcing such controls, including costs that may be borne by state or local government.
4. Sufficient analysis to support a conclusion that effective implementation, maintenance, monitoring and enforcement of institutional and/or engineering controls can be reasonably expected and will be sufficiently protective of human health and the environment.

DER-10, § 4.3(b)(1)-(4); *see also* ECL § 27-1415(7)(a); 6 NYCRR § 375-1.2(h).

²³ Memorandum from Robert L. Marino, DEC Director of Bureau of Hazardous Site Control, re: Contaminated Drinking Water and Indoor Air at Sites Under Remediation (Feb. 13, 2003).

Notably, the statute requires that all of this must be in the RAWP: “The department may approve a proposed remedial work plan that includes institutional controls and/or engineering controls as components of a proposed remedial program *provided the remedial work plan includes* [the items set forth in Section 27-1415(7)(a)(1)-(4)].” ECL § 27-1415(7)(a) (emphasis added).

For 250 Water Street, however, the Department approved the Track 2 remedy proposed by Howard Hughes *without* the “complete descriptions” and “sufficient analysis” required by ECL § 27-1415(7)(a). In fact, the final RAWP added no additional detail on these topics than were in the insufficient draft RAWP. Both of those documents and the Decision Document state that a Site Management Plan (SMP) will be prepared later, after the Final Engineering Report, and that the SMP will include an Institutional and Engineering Control Plan that identifies all use restrictions and engineering controls for the site and details the steps and media-specific requirements necessary to ensure that they remain in place and are effective. Decision Document at 3, 15-16. While some example controls are provided, this is not the complete description, evaluation, and analysis required by the statute. DEC has therefore improperly approved a remedy that will leave contaminants in the ground and rely in long-term controls and monitoring to protect the public, but has not yet received and analyzed a complete description of those controls.

DEC also failed to apply the “Community Acceptance” criterion of the nine statutory remedy-selection criteria. ECL § 27-1415(3)(h); 6 NYCRR § 375-1.8(f)(8). DER-10 explains that the community acceptance criterion is supposed to be “evaluated after the public review of the remedy selection process as part of the final DER selection/approval of a remedy for a site,” and that “[a]ny public comment relative to these criteria will be considered by DER after the close of the public comment period.” DER-10, § 4.2(j).

The draft RAWP prepared by Langan for Howard Howard Hughes merely gave the volunteer’s own, self-serving view that “[a]ll alternatives *should be* acceptable to the community because the potential complete exposure pathways will be eliminated through source removal and/or mitigated upon completion of the remedial actions” and that “The Track 2 and Track 4 remedies *may be* more acceptable to the community because of decreased short-term impacts and remediation duration and achieve the RAOs through removal of contaminated fill and the use of ECs and/or ICs.” Draft RAWP at 52-53, § 3.4.8 (emphasis added). The volunteer cannot, of course, speak for the community.

The Draft RAWP then concluded its four-sentence “Community Acceptance” section by stating:

The selected remedy will be subject to a 45-day public comment period. Any substantive public comments received will be addressed before the remedy is approved.

Id. Thus, at that point, it appeared as though DEC would proceed to address the community acceptance criterion after the public comment period, in accordance with DER-10, § 4.2(j).

DEC then received more than 450 written comments and nearly three hours of comment at the September 21, 2021 public meeting, all or virtually all of it rejecting—not accepting—the remedy proposed by Howard Hughes. Thus, the final criterion cuts strongly against approving the remedy and RAWP. The final RAWP, however, entirely fails to address any of the comments or the public acceptance criterion. Astonishingly, the “Community Acceptance” section of the final RAWP contains exactly the same four sentences as the draft, stating Langan and/or Howard Hughes’s own opinion on what “should be acceptable to the community” and what “may be more acceptable to the community,” and states that the remedy *will* be subject to a comment period. Final RAWP at 53, § 3.4.8. But that comment period ended before the final RAWP was prepared and approved, and showed that the community does not accept the Track 2 remedy (and asked for a permanent and complete remedy). This is not addressed anywhere in the RAWP or Decision Document. That was improper.

III.

DEC SHOULD RESRICT GROUND-INTRUSIVE INVESTIGATION AND MERCURY EXCAVATION TO NON-SCHOOL HOURS, WITHOUT CREATING “NUISANCE CONDITIONS” FOR RESIDENTIAL NEIGHBORS.

The final RIWP, which DER approved in May 2020, required all “intrusive RIWP field tasks” to “be completed outside of school hours.” Final RIWP at 30 (“The intrusive RIWP field tasks (e.g. soil boring advancement and monitoring well and soil vapor point installation) will be completed outside of school hours.”). This restriction was touted to the public as an important community protection measure in the Fact Sheets for the draft RIWP (Sept. 2019), which stated:

out of an abundance of caution due to two schools in the vicinity of the site, the NYSDEC and NYSDOH are requiring that ***all intrusive work be performed during non-school hours*** (emphasis added)

and the Fact Sheet for the final RIWP (May 2020), which stated:

out of an abundance of caution due to the site location, DEC and DOH are requiring that ***all intrusive work be performed during non-school hours*** (emphasis added)

Likewise, the presentation that Howard Hughes and Langan Engineering made to the public at Community Board meetings in September 2019 and June 2020 told the community that the Remedial Investigation would be:

- “Conducted outside of typical school hours” (Sept. 2019 PowerPoint)
- “Conducted when students are not in school” (June 2020 PowerPoint)

In contrast, the approved final RAWP contains no such requirement for the remedial design investigation (or any other ground-intrusive work). Yet DEC has not explained why, after restricting all ground-intrusive investigation to school hours in the RIWP, it did not do so in the RAWP. Indeed, there is no valid reason for omitting such restriction this time.

The proximity to sensitive receptors has, of course, not changed. If anything, the test pits to be conducted in the Remedial Design Investigation will be *more likely* to create mercury or petroleum vapors and respirable dust than the 2-inch borings completed pursuant to the RIWP because the pits will expose a larger area of the subsurface to the air.²⁴ Indeed, that is exactly the point of doing the test pits; since small-diameter borings do not expose nearly as much contaminated soil to air, test pits will more closely mimic actual excavation conditions. While it is a necessary component of the investigation, the test pitting itself puts the community at risk and, therefore, its timing is of utmost importance.

Accordingly, *the upcoming RDI Work Plan must restrict the test pit investigations and any other ground-intrusive pre-design investigation to non-school hours.*

But it must do so *without* creating nuisance conditions for the surrounding residential community. In particular, ground-intrusive investigation should *not* be shifted from school hours to early mornings or late nights, as that would adversely impact the residential community's quality of life and create new "nuisance conditions," due to noise and other impacts. As you know, DER-10 states (at page 133) that he "potential short-term impacts to be evaluated [during remedy-selection] include, nuisance conditions or potential exposures resulting from ... odors; vapors; dust; ... and noise"). Instead, the test pits should be done during school breaks, as was done in Summer 2020 (for the soil borings during the RI) and Summer 2021 (for the parking lot repair, which was itself ground-intrusive and required CAMP monitoring²⁵) or on weekends, as Howard Hughes is doing this month for the geotechnical investigation that is not part of the remediation but is also subject to the CAMP and CHASP.

We remind the Department that the test pits could have been completed during the Summer of 2021, when school was not in session and the only other work being done was parking lot repair. Thus, these timing issues are a problem of the volunteer's own making. As Community Board 1 told Commissioner Seggos in a recent letter:

As we understand, [the test pits] were not conducted as part of the [remedial] investigation phase so that they would not be done while children are in school. However, they were also not done over the summer during the school break and are now planned to be done as part of the RDI, potentially while school is back in

²⁴ As you know, administrative agency decisions must adhere to their own prior precedents absent a valid, articulated explanation for deciding to change course. Favoring a developer's scheduling preferences over community health and safety is, of course, not a valid reason.

²⁵ See June 8, 2021 letter from Rafi Alam, Project Manager, to Saul Scherl, Howard Hughes, approving Parking Lot Repair Work Plan May 28, 2021 for the 250 Water Street (Site No: C231127).

session. The community deserves an explanation as to how these events unfolded, and plans with specific detail on how these test pits will be conducted.

Letter from Manhattan Community Board 1, 9.30.21, at 2.

The community has never gotten that explanation. In the November 2021 response-to-comment, DEC responded only to the scheduling request regarding scheduling mercury remediation during the area schools' summer break (see below) and the request of "multiple community consultant[s] and elected officials ... that the remedial work including the test pits are conducted within a tent enclosure with a negative air pressure as an exposure safeguard" (Comment No. 26), which is itself a very important issue, but said nothing about scheduling test pits outside of school hours. Again, this should be addressed in the RDI Work Plan.

The riskiest portion of the remedial action—excavation of mercury and VOC *hotpots*²⁶ and the leaking underground tank and related debris and contaminated soil—should also occur when students are not in school. On this particular issue, the response-to-comment stated:

12. Requested that the remedial construction schedule is set that the mercury remediation is completed during the area schools' summer break.

Response: Comment noted and will be evaluated.

13. Requested that all remedial work is completed during school breaks due to sensitive population (school age children) in the vicinity.

Response: Noted. However, once remedial construction begins, it is appropriate to complete the work in the shortest amount of time. This may conflict with the time that school is not in session.

Simply "noting" a comment is not, of course, an adequate response. These important timing issues must be carefully evaluated and addressed. They should have been addressed prior to approving a remedy and the RAWP and issuing a Decision Document. If the Department intendeds to address them as part of the "means and methods" of the cleanup, then the schools, the community, and their consultants must be included in that discussion. The BCP Act requires "meaningful ... and effective citizen participation" with an "opportunity to have [the public's] views heard and considered." *See* ECL § 27-1417. This does not end with the RAWP approval because, first, the statute provides that "[i]n addition to the formal milestones ..., the public may provide comments at any time during the remedial program," and, second, it was DEC who chose to address those issues after it approved the RAWP.

²⁶ Please note that until the test pits have been completed, it is not clear how many hot spots there are, given that the RIS results showed that mercury and other VOC vapors exist *throughout the site*. *See* Integral Engineering comments quoted above.

Because the school children and neighbors are not presently at risk from exposure to the contaminants there is no environmental benefit to be gained from rushing the cleanup. The biggest health risks will come during excavation, while the impervious surface is removed. DEC should not increase those risks in order to placate a volunteer's development timeline and thereby increase risks to sensitive receptors.

Accordingly, the Department should require Howard Hughes to complete the excavation and off-site disposal of the "Mercury-Impacted Soil Hotspot" (RAWP at p. 40, § 3.2.3) and excavation of any other hotspots during the schools' summer breaks or otherwise when children are not in the classrooms, so long as that does not create nuisance conditions for the residential community.

* * *

Again, we ask the Department:

- (1) to ensure meaningful, effective citizen participation for the public and their consultants on the upcoming (a) Remedial Design Investigation Work Plan, (b) the results of the Remedial Design Investigation, and (c) any revisions to the RAWP;
- (2) to take seriously and follow through on its recognition that the RAWP may need to be revised based on the results of the test pit investigations; and
- (3) to require that the test pit excavations and the riskiest part of the cleanup itself, excavation of mercury hotspots, are done when students are not in school, without creating nuisance conditions for residences.

Thank you for your consideration of these important issues to the health and safety of the South Street Seaport community. We are available to discuss these matters at your convenience.

Sincerely,



Reed W. Super

cc (via email):

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