



## RIVERKEEPER®

### Via Certified Mail – Return Receipt Requested

September 14, 2009

107 Sixth Street LLC  
5307 17<sup>th</sup> Ave.  
Brooklyn, NY 11204

Jacob Marmurstein  
36-2<sup>nd</sup>-J Corp.  
5307 17<sup>th</sup> Ave.  
Brooklyn, NY 11204

RE: Notice of Intent to Sue 107 Sixth Street LLC and 36-2<sup>nd</sup>-J Corp. for Clean Water Act and Resource Conservation and Recovery Act violations resulting from activities at or near 97 9<sup>th</sup> Street, Brooklyn, NY 11215 and/or 38 2<sup>nd</sup> Avenue, Brooklyn, NY 11215.

To Whom It May Concern:

This letter constitutes Riverkeeper's NOTICE OF INTENT TO SUE 107 Sixth Street LLC (hereinafter "Sixth Street") and 36-2<sup>nd</sup>-J Corp. (hereinafter "J Corp."), as owners of contiguous parcels of property used in part as a parking lot, located at or about 97 9<sup>th</sup> Street, Brooklyn, New York 11215 and/or 38 2<sup>nd</sup> Avenue, Brooklyn, New York 11215 (parking lot) that are directly adjacent to the Gowanus Canal, for violations of the federal Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §1251 *et seq.*, and for violations of the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901. Specifically, this letter gives notice of our intent to seek redress for the illegal placement of fill and debris into the Gowanus Canal. This letter also gives notice of our intent to seek to prohibit using the shore of the Gowanus Canal as an open dump.

Riverkeeper is a non-profit, environmental watchdog organization that protects and safeguards the ecological integrity of the Hudson River, its tributaries, and the New York City Watershed. On behalf of our 7,000 members, we routinely patrol the region's waters including the Gowanus Canal and, when necessary, file citizen suits under the CWA and RCRA to prevent and remediate environmental pollution problems. Many of Riverkeeper's members and constituents live near the Gowanus Canal and recreate in and around this area of Brooklyn.

### Sixth Street and J Corp are Illegally placing fill and debris into the Gowanus Canal

Upon information and belief, Sixth Street and J Corp own contiguous parcels of property located at or about 97 9<sup>th</sup> Street, Brooklyn, NY 11215 and/or 38 2<sup>nd</sup> Avenue, Brooklyn, NY 11215.

Upon information and belief, these properties are, among other things, used as a parking lot for buses and other vehicles. Riverkeeper has documented what appear to be concrete railroad ties, concrete piles, rusted pipes, wood, metal, plastic, and other construction debris both sitting on and cascading from your property into the Gowanus Canal (the "Canal"). These materials and debris are being dumped into the Canal below the mean high water line and onto its banks. The dumping stretches across the bank in three major areas. The western portion contains assorted debris and construction materials, the middle portion contains plastic bags, as well as more debris, and the eastern portion contains mostly piles of concrete, including concrete ties.

Riverkeeper staff conducted waterborne surveillance of the parking lot property on May 29, 2009, June 19, 2009, July 15, 2009, and September 2, 2009. Riverkeeper staff documented these conditions during each of these boat patrols.

### Violations of the Federal Clean Water Act

Pursuant to sections 505(a) and (b) of the CWA, 33 U.S.C. sections 1365(a) and (b), Riverkeeper intends to sue Sixth Street and J Corp. for violating, and continuing to violate, effluent standards and limitations as defined under section 505(f) of the CWA, 33 U.S.C. § 1365(f), by discharging dredged or fill material into waters of the United States without a permit from the US Army Corps of Engineers. *See* CWA section 404, 33 U.S.C. §1344.

40 CFR § 232 defines "fill" as "material placed in waters of the United States where the material has the effect of... [r]eplacing any portion of a water of the United States with dry land; or changing the bottom elevation of any portion of a water of the United States." Examples given of "fill" material include plastics and construction debris. 40 CFR § 232.2. Any violation of effluent standards and limitations such as those contained in CWA section 404 are enforceable by citizens. *See* 33 U.S.C. §1365. As described above, the concrete ties, metal, wood, plastic, and other assorted construction debris dumped within the Canal constitute the discharge of "fill" material.

The United States Supreme Court has defined the phrase "waters of the United States" under the CWA to include, at its most basic, all waters "navigable in fact, or readily susceptible of being rendered so." *Rapanos v. United States*, 547 U.S. 715, 723 (2006). This definition clearly includes the Gowanus Canal. The Supreme Court further elaborated that the phrase also encompasses more waters than those simply navigable in fact. Specifically, it held that wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right are adjacent to such waters and therefore covered under the CWA. *Rapanos*, 547 U.S. at 742. The Gowanus Canal is navigable in fact and is therefore a "water of the United States" under the CWA.

Both Sixth Street and J Corp.'s discharge of fill into the Canal is ongoing, continuous, and in violation of the federal Clean Water Act, 33 U.S.C. §1251 *et seq.* Upon information and belief, Sixth Street and J Corp. do not possess valid CWA permits for the placement of the fill and debris. Sixth Street and J Corp.'s failure to obtain a required permit from the Army Corps of Engineers constitutes on-going violations of the CWA. CWA §301(a), 33 U.S.C. §1311(a) prohibits such discharges that are not in compliance with (among other sections of the Act)

section 404 of the CWA. Section 404(a) requires the Secretary of the Army, through the Corps, to issue permits for the discharge of dredged or fill material into waters of the United States.

### Violations of the Federal Resource Conservation and Recovery Act

Pursuant to 42 U.S.C. §§ 6907(a), 6944(a) and 6945 of RCRA, EPA promulgated criteria for sanitary landfills and open dumps. RCRA provides that citizens may commence a citizen suit against any person who violates any prohibition in effect under that statute. 42 U.S.C. § 6972(a)(1)(A).

RCRA prohibits the open dumping of solid waste and the operation of open dumps. *Id.*, § 6945(a). The criteria for determining what constitutes an open dump are set forth in 40 C.F.R. Part 257. Waste disposal practices not in compliance with sanitary landfill criteria constitute the operation and maintenance of an open dump. 40 C.F.R. § 257.1. An open dump is defined as “a facility for the disposal of solid waste that does not comply with [40 C.F.R. Part 257].” 40 C.F.R. § 257.2.

RCRA and EPA regulations define “disposal” as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” 42 U.S.C. § 6903(3); 40 C.F.R. § 257.2. “Solid waste” is defined as “any garbage ... and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations....” 42 U.S.C. § 6903(27); 40 C.F.R. § 257.2. Concrete ties, concrete pilings, rusted pipes, tires, construction debris, and other assorted objects have been dumped into the Canal’s waters, have fallen on what remains of the parking lot’s deteriorated bulkhead, and are lying on the banks of the Canal. These substances qualify as solid and/or hazardous wastes whose “disposal” is regulated under RCRA.

In order to be in compliance with 40 C.F.R. Part 257, a solid waste disposal facility must meet certain criteria. First, EPA regulations provide that “[f]acilities or practices in floodplains shall not restrict the flow of the base flow, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.” 40 C.F.R. §257.3-1(a). Sixth Street and J. Corp’s properties are located in a floodplain, regularly cause a reduction in the water storage capacity of the floodplain due to the garbage and debris located on the banks of the Canal, and its practices result in the washout of solid and or hazardous waste in a hazardous manner.

Second, “[t]he facility or practice shall not exist or occur unless the on-site population of disease vectors is minimized through the periodic application of cover material or other techniques as appropriate to protect public health.” 40 C.F.R. §257.3-6(a). There is no evidence that Sixth Street and J Corp. are using cover material or any other technique to prevent the spread of disease, which may be caused by its open dumping.

Lastly, the “facility shall not allow uncontrolled public access to as to expose the public to potential health and safety hazards at the disposal site.” 40 C.F.R. §257.3-7(d). There is no evidence that Sixth Street and J Corp. are restricting public access to the area, especially the waters, around the property, which thereby exposes the public to potential health and safety hazards at the site.

In sum, Sixth Street and J Corp are violating RCRA’s prohibition against open dumping. This disposal of solid waste poses a reasonable probability of adverse effects on human health and the environment. Sixth Street and J Corp are engaging in disposal of solid and/or hazardous waste by discharging, depositing, and placing discarded material into the Gowanus Canal, in violation of RCRA and EPA regulations. 42 U.S.C. § 6945(a); 40 C.F.R. Part 257.

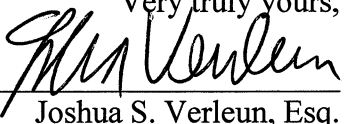
Riverkeeper intends to sue Sixth Street and J Corp as owner and operator of the contiguous “parking lot” parcels of property, for maintaining an open dump in violation of EPA regulations promulgated in accordance with RCRA. 42 U.S.C. § 6945(a); 40 C.F.R. Part 257. Liability under RCRA is retroactive, and Sixth Street and J Corp’s ongoing disposal of solid and/or hazardous waste is illegal and subject to liability. 42 U.S.C. §§ 6972(a)(1)(b); 40 C.F.R. Part 257.

### Summary

Riverkeeper, Inc., believes that this Notice of Intent to Sue sufficiently states grounds for filing suit. Sixth Street and J Corp.’s failure to obtain a required Army Corps permit constitutes ongoing violations of the CWA. Each day that the Canal is filled without a permit comprises a series of separate violations of the CWA. Sixth Street and J Corp. will remain in violation of the Act until they cease all filling of waters of the United States or obtain permits therefore. As noted in 33 U.S.C. §1319(d) and 40 C.F.R. §19.4, violators of the CWA are subject to a civil penalty of up to \$32,500 per day for each such violation, and penalties of up to \$37,500 for each violation occurring after January 12, 2009. In addition, as noted in 42 U.S.C. § 6928(g) and 40 C.F.R. §19.4, RCRA authorizes penalties of up to \$32,500 per day for each such violation of the act, and up to \$37,500 for each violation occurring after January 12, 2009. At the close of the 60-day CWA notice period and the 60-day RCRA notice period, we intend to file a citizen suit against Sixth Street and J Corp. as owners and operators of the above-referenced properties for the violations discussed herein and for **all similar violations that occur after your receipt of this notice letter**. We intend to seek penalties and injunctive relief, as well as attorney’s fees and costs, for these CWA and RCRA violations.

During the 60-day notice period, we will be willing to discuss effective remedies for the violations noted in this letter. If you wish to pursue a settlement, we suggest that you initiate those discussions within ten (10) days of receiving this notice so that a meeting can be arranged and negotiations may be completed before the end of the 60-day notice period. Please do not hesitate to contact the undersigned at 914-478-4501 x 247 if you wish to discuss these matters further.

Very truly yours,

  
Joshua S. Verleun, Esq.  
Staff Attorney/Investigator

Michael Hill,  
Legal Intern

/Michael Hill/

Cc (all via certified mail- return receipt requested)

Lisa P. Jackson, Administrator  
United States Environmental Protection Agency 1101A  
USEPA Headquarters  
Ariel Rios Building  
1200 Pennsylvania Ave. N.W  
Washington, DC 20460

Eric H. Holder, Jr., Attorney General  
United States Department of Justice  
950 Pennsylvania, Ave. N.W.  
Washington, DC 20530-0001

George Pavlou, Acting Regional Administrator  
United States Environmental Protection Agency, Region 2  
290 Broadway  
New York, NY 10007-1866

Alexander "Pete" Grannis, Commissioner  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-1011

Andrew M. Cuomo, Attorney General  
New York State Office of the Attorney General  
The Capitol  
Albany, NY 12224-0341

Suzanne Y. Mattei, Regional Director  
New York State Department of Environmental Conservation  
Region 2  
1 Hunter's Point Plaza  
47-40 21<sup>st</sup> Street  
Long Island City, NY 11101-5407