

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Violations of Articles 17, 19, 25, 37, 40
and 71 of the New York State Environmental Conservation
Law, Article 12 of the New York State Navigation Law, and
Titles 6 and 17 of the Official Compilation of Codes, Rules
and Regulations of the State of New York,

ORDER ON CONSENT

**NYSDEC File No.
R2-20121011-637**

-by-

THE BROOKLYN UNION GAS COMPANY d/b/a
NATIONAL GRID NY,

Respondent.

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WHEREAS:

1. The New York State Department of Environmental Conservation (“NYSDEC” or the “Department”) is an executive department of the State of New York authorized under Article 3 of the New York State Environmental Conservation Law (“ECL”) to provide for prevention and abatement of all water, land and air pollution within the state;

2. It is the responsibility of the Department to conserve, improve and protect New York State’s natural resources and environment, and control pollution in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being;

3. The Department is authorized to regulate discharges into the waters of the state pursuant to Article 17 of the ECL and 6 NYCRR Part 700, *et seq.*;

4. The Department is authorized to enforce the containment and remediation of petroleum spills and discharges pursuant to Article 17 of the ECL, Article 12 of the New York State Navigation Law (“NL”), and Titles 6 and 17 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“NYCRR”);

5. The Department has jurisdiction over the management of tidal wetlands and adjacent areas of the State and thus regulates, among other activities, the placement of fill and other materials therein by requiring permits for such activities pursuant to ECL Article 25 and 6 NYCRR Part 661;

6. The respondent, The Brooklyn Union Gas Company d/b/a National Grid NY (“National Grid”), is an active New York corporation licensed to do business in the State of New York, with corporate offices at One Metrotech Center, Brooklyn, New York, 11201, and is a “person” as defined in ECL §§ 17-0105 and 25-0103;

7. National Grid owns two retired 24-inch natural gas mains running beneath Paerdegat Basin, Brooklyn, New York (the “Retired Mains”);

8. Paerdegat Basin is a tidal wetland/littoral zone of the State of New York regulated under ECL Article 25, located on tidal wetlands (shoal mudflat, intertidal marsh, and littoral zone) and/or tidal wetland adjacent area;

9. National Grid does not have, nor did it have at any relevant time, a Department tidal wetlands permit pursuant to ECL Article 25 for Paerdegat Basin or the Retired Mains; and

10. National Grid does not have, nor did it have at any relevant time, a State Pollutant Discharge Elimination System (“SPDES”) permit pursuant to ECL Article 17 for discharges from the Retired Mains.

LAW

Petroleum Spill Provisions (Navigation Law)

11. NL § 173 prohibits the discharge of petroleum.

12. NL § 175 and 17 NYCRR § 32.3 requires that any person responsible for a prohibited discharge of petroleum notify the Department within two hours of the discharge.

13. NL § 176 and 17 NYCRR § 32.5 require any person discharging petroleum in a prohibited manner to immediately undertake to contain the discharge.

14. NL § 192 provides for civil penalties of up to \$25,000 per day for each violation of Article 12 of the NL or any regulation issued thereunder.

Water Pollution Control Provisions (ECL Article 17)

15. ECL § 17-0501 prohibits any person from directly or indirectly discharging organic or inorganic matter into the waters of the state that shall cause or contribute to a condition in contravention of the standards adopted by the Department pursuant to ECL § 17-0301, as set out at 6 NYCRR Part 700, *et seq.*

16. ECL § 17-0503 prohibits the discharge of sewage, industrial waste or other wastes into the waters of the state in the marine district.

17. ECL § 17-0505 prohibits the making or use of an outlet or point source discharging into the waters of the state without a valid SPDES permit.

18. ECL § 17-0511 prohibits the use of an outlet or point source to discharge sewage, industrial waste or other wastes into the waters of the state unless such discharge is in

compliance with all standards, criteria, limitations rules and regulations promulgated pursuant to ECL Article 17.

19. ECL § 17-0701 prohibits the discharge of sewage or other wastes to the waters of the state from any outlet or source until a written SPDES permit therefor has been granted.

20. ECL § 17-0803 prohibits the discharge of pollutants to the waters of the state from any outlet or point source without a SPDES permit issued pursuant thereto, or in a manner other than prescribed by such permit.

21. ECL § 17-0807 prohibits any discharge into the waters of the state not permitted by the provisions of Article 17 of the ECL, the rules and regulations adopted or applicable pursuant thereto, the Federal Water Pollution Control Act, or provisions of a permit issued pursuant to ECL Article 17.

22. ECL § 71-1929 provides for civil penalties of up to \$37,500 per day for each violation of the cited provisions of ECL Article 17 (Water Pollution Control) or any regulation issued thereunder.

23. 6 NYCRR § 750-1.4 (a) prohibits any discharge not permitted by, *inter alia*, 6 NYCRR Part 750, ECL Article 17, or the provisions of a SPDES permit.

24. ECL § 17-1743 requires that any person in actual or constructive possession or control of more than 1,100 gallons, in bulk, of any liquid, including petroleum, which, if released, discharged or spilled, would or would be likely to pollute the lands or waters of the state shall, as soon as he has knowledge of the release, discharge or spill of any part of such liquid onto the lands or into the waters of the state, immediately notify the Department.

Air Pollution Control Provisions (ECL Article 19)

25. 6 NYCRR § 211.1 provides, “No person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others.”

26. ECL § 71-2103 provides for civil penalties of up to \$18,000 per violation of the cited provisions of ECL Article 19 (Air Pollution Control) or any regulation issued thereunder, and an additional penalty of up to \$15,000 per day for each day the violation continues.

Tidal Wetlands Act Provisions (ECL Article 25)

27. ECL § 25-0401.1 provides, in part, that “no person may conduct any of the

activities set forth in subdivision 2 of this section unless he has obtained a permit from the commissioner to do so.” In turn, ECL § 25-0401.2 provides, in part, that “activities subject to regulation hereunder include any form of draining...and any other activity within or immediately adjacent to inventoried wetlands which may substantially impair or alter the natural condition of the tidal wetland area.”

28. 6 NYCRR § 661.8 provides, in part, that “no person shall conduct a new regulated activity on or after August 20, 1977 on any tidal wetland or any adjacent area unless such person has first obtained a permit pursuant to this Part.”

29. 6 NYCRR § 661.4 (ee) (1) defines “regulated activity” to include “any form of pollution;” and “any other new activity within a tidal wetland or on an adjacent area which directly or indirectly may substantially alter or impair the natural condition or function of any tidal wetland.”

30. ECL § 71-2503 (1) (a) provides for civil penalties of up to \$10,000 per day for each violation of Article 25 (the Tidal Wetlands Act) and 6 NYCRR Part 661, as well as criminal sanctions and injunctive relief.

Hazardous Substances Provisions (ECL Articles 37 and 40)

31. ECL § 37-0107 prohibits the release to the environment of substances hazardous or acutely hazardous to the public health, safety or the environment in contravention of the rules and regulations at 6 NYCRR Part 595.

32. 6 NYCRR § 595.2 prohibits the release of any hazardous substance which is required to be reported pursuant to 6 NYCRR § 595.3 (a) below.

33. 6 NYCRR § 595.3 (a) requires that, among other things, any person in actual or constructive control or possession of a hazardous substance prior to its release must report the release of a reportable quantity of such substance, or the release of a lesser quantity of a hazardous substance where such release causes, or may reasonably be expected to cause, a contravention of air quality standards; such release results, or may reasonably be expected to result, in vapors, dust and/or gases that may cause illness or injury to persons, not including persons in a building at the facility where a release originates; or runoff from fire control or dilution waters may cause or contribute to a contravention of water quality standards. All reports of releases must be made to the Department hotline within two hours of the release.

34. ECL § 71-3703 provides that any person who violates any of the provisions of, or who fails to perform any duty imposed by, section 37-0107 or any rule or regulation promulgated pursuant thereto, shall be liable for a civil penalty not to exceed \$2,500 dollars for each such violation and an additional penalty of not more than \$500 dollars for each day during which such violation continues.

35. 6 NYCRR § 375-6.8 sets forth the unrestricted use soil cleanup objective for PCBs of 0.1 part per million.

Miscellaneous Provisions

36. ECL § 71-1941 provides for civil penalties for the owner or possessor of liquids stored in amounts over 1,100 gallons, released to the lands or waters of the state, causing or contributing to a condition in contravention of the standards adopted by the water pollution control board, of up to \$3,750 for the initial incident plus an additional \$750 for each day that such contravention or contribution thereto continues, and in addition liability to the people of the state of New York for the actual costs incurred by or on behalf of the people of the state for the removal or neutralization of such liquid and for any and all reasonable measures taken or attempted to reduce, limit or diminish the extent or effect of such contravention.

37. ECL § 71-3501 prohibits the deposition of a noisome or unwholesome substance on or near a highway, either on the land or on the water.

38. ECL § 71-3503 prohibits the deposition of the refuse of a gas house or gas factory, refuse, or any other noxious, offensive or poisonous substance into any public waters, or into any sewer or stream running or entering into such public waters.

FACTS

39. On September 27, 2012, in the process of decommissioning the Retired Mains by filling them with a grout mixture, National Grid discharged approximately 2,020 gallons of natural gas condensate, containing a petroleum-contaminated and PCB-laden liquid residue, from a standpipe at Seaview Avenue, near Paerdegat Avenue North, Brooklyn (the "Spill").

40. On September 27, 2012, the New York City Fire Department ("FDNY") began receiving citizen odor complaints at or before 3:49 p.m.

41. FDNY responded, opening hydrants to flush the Spill. Approximately 820 to 1,420 gallons of contaminated residue entered Paerdegat Basin, impacting soil, sediment and surface water, including protected tidal wetland and wetland adjacent area, with free-phase petroleum product and PCBs in concentrations of up to 10,900 parts per million detected in samples taken for the Department on October 1, 2012.

42. National Grid failed to report the Spill to the Department until 8:28 p.m., when the Department assigned the Spill NYSDEC spill number 1206391.

43. National Grid failed to immediately contain or clean up the Spill.

44. From September 27, 2012 through November 21, 2012, the Department expended approximately \$28,139.74 in staff costs attributable to the Spill.

VIOLATIONS

45. By discharging approximately 2,020 gallons of natural gas condensate, containing

a petroleum-contaminated and PCB-laden liquid residue on September 27, 2012, National Grid violated NL § 173, ECL §§ 17-0501, 17-0503, 17-0505, 17-0511, 17-0701, 17-0803, 17-0807, 37-0107, 71-3501 and 71-3503, and 6 NYCRR §§ 595.2 and 750-1.4 (a) – \$75,000 penalty.

46. By failing to immediately report the discharge on September 27, 2012, National Grid violated NL § 175, 6 NYCRR § 595.3 and 17 NYCRR § 32.3 – \$20,000 penalty.

47. By failing to immediately undertake to contain the discharge of petroleum on September 27, 2012, National Grid violated NL § 176 and 17 NYCRR § 32.5 – \$20,000 penalty.

48. By causing or allowing emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property, National Grid violated ECL Article 19: 6 NYCRR § 211.1 – \$15,000 penalty.

49. By discharging petroleum on September 27, 2012, National Grid violated ECL Article 25 (the New York State Tidal Wetlands Act) in two counts, both of which are continuing: ECL § 25-0401 and 6 NYCRR § 661.8 – \$200,000 penalty.

50. Pursuant to ECL § 71-1941, National Grid is liable to the people of the state of New York for the spill response costs incurred by or on behalf of the people of the state, in the amount of \$28,139.74.

CONSENT

51. In settlement of its civil liability for the aforesaid violations, National Grid admits the violations set forth herein, waives its right to a hearing herein as provided by law and consents to the issuing and entering of this Order on Consent pursuant to the provisions of Articles 17, 19, 25, 37, 40 and 71 of the ECL, and Article 12 of the NL, and agrees to be bound by the provisions, terms and conditions herein.

NOW, being duly advised and having considered this matter, it is hereby ORDERED that:

I. Civil Penalty: In settlement of the violations set forth above, National Grid is assessed a total civil penalty in the amount of three hundred thirty thousand dollars (\$330,000). Of that amount, one hundred sixty thousand dollars (\$160,000) shall be payable as follows, and submitted with the signed and notarized original of this order to John K. Urda, Assistant Regional Attorney, New York State Department of Environmental Conservation, 47-40 21st Street, Long Island City, New York, 11101-5407:

- i) one check in the amount of fifty thousand dollars (\$50,000) made payable to **Environmental Protection and Spill Compensation Fund;**
- ii) one check in the amount of ninety-five thousand dollars (\$95,000) made payable to **NYSDEC Marine Resources Account;** and

- iii) one check in the amount of fifteen thousand dollars (\$15,000) made payable to NYSDEC.

The remaining one hundred and seventy thousand dollars (\$170,000) shall be suspended contingent on the respondent's compliance with all terms and conditions of this order.

II. Environmental Benefit Project: National Grid shall fund, in an amount no less than \$200,000, an Environmental Benefit Project(s) (the "EBP") in compliance with the Department's EBP Policy: CP-37. If the EBP is completed for less than \$200,000, National Grid shall pay the balance to the Department as penalty. Within 30 days of the effective date of this Order, unless the Department grants an extension in writing, National Grid shall submit to the Department for approval a description of and plan for the EBP that includes a schedule for implementation and a detailed breakdown of costs (the "EBP Implementation Plan"). National Grid shall make such changes to the EBP Implementation Plan as the Department may require. Upon the Department's approval, the EBP Implementation Plan shall be an enforceable part of this Order. If the EBP Implementation Plan has not been approved by the Department within one year of the effective date of this Order, National Grid shall pay \$170,000 to the Department as additional penalty for the violations set forth herein. Within thirty days of completion of the EBP, National Grid shall complete and submit to the Department an affidavit of completion, as set forth in Attachment A, together with an accounting of costs. The Department shall be the sole judge of whether National Grid has complied with the terms of this Order as it relates to satisfactory implementation of the EBP. Any statements, whether oral or written, that National Grid (or a third party at the request of National Grid) makes with respect to the EBP will include language stating that the project was undertaken as part of the resolution of a Department enforcement action for applicable violations.

III. Response Costs: National Grid shall submit payment of the Department's response costs in the amount of twenty-eight thousand, one hundred thirty-nine dollars and seventy four cents (\$28,139.74) by check made payable to **Environmental Protection and Spill Compensation Fund**.

IV. Access: For the purpose of monitoring compliance with this Order, authorized representatives of NYSDEC shall be permitted access to the Site and to relevant records without prior notice during reasonable hours at such times as may be desirable or necessary in order to inspect and determine the status of the Site.

V. Violation of this Order: The Department reserves the right to initiate actions based upon the violation of this Order on Consent, and also to seek penalties for additional violations, including continued violations, which occur after the date of this Order.

VI. Binding Effect: The provisions of this Order on Consent shall be deemed to bind National Grid, its successors and assigns, and all persons, officers, directors, employees and agents acting under or for National Grid, including, but not limited to, any successor in title to the Site or any interest therein.

VII. Indemnification: National Grid shall indemnify and hold harmless New York State, NYSDEC, and any of their employees, agents or contractors for all claims, actions, damages and costs resulting from National Grid's acts in fulfillment or attempted fulfillment of the provisions of this Order by National Grid and/or any of National Grid's directors, officers, employees, servants, agents, successors, and assigns.

VIII. Reservation of Rights: The Department reserves the right to require National Grid to take any additional measures required by law to protect human health and the environment. Nothing in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights, remedies, or authorities, including, but not limited to, the right to require performance of further investigations and/or response action(s), and/or to exercise any summary abatement powers provided to the Department in the ECL with respect to any person, including National Grid, and including the assessment of natural resource damages.

IX. Satisfaction of Liability: Compliance with all the material terms of this Order on Consent shall satisfy National Grid's outstanding liability for the violations described above.

X. Entire Agreement: This Order constitutes the entire agreement of the parties. No informal advice, guidance, suggestions, plans, schedules or any other writing submitted by National Grid shall be construed as relieving National Grid of its obligations to obtain such formal approvals as may be required by this Order. No changes or modifications to this Order shall be binding upon the Department unless such changes are authorized in writing by the NYSDEC Region 2 Director.

XI. Miscellaneous:

A. This Order resolves only those violations specifically described herein and does not relieve National Grid of liability for any acts, omissions or violations not articulated herein, nor does it relieve National Grid of any liability pursuant to the jurisdiction of any other local, state or federal agency.

B. National Grid and National Grid's successors and assigns shall be bound by this Order. Any change in ownership or corporate status of National Grid including, but not limited to, any transfer of assets or real or personal property shall in no way alter National Grid's obligations under this Order. National Grid shall cause its officers, directors, employees, servants, agents, contractors and subcontractors to comply with the relevant provisions of this Order, and National Grid shall be solely responsible for ensuring that its employees, servants, agents, contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

C. The paragraph headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

D. Except as the parties may both otherwise approve, in the event of an inconsistency between the provisions of this Order and any term, condition or provision contained in any other agreement between National Grid or its representative and the Department, the term, condition or provision contained in this Order shall control.

E. Notwithstanding anything to the contrary in this Order, National Grid shall not be deemed in breach of this Order due to an unforeseeable disaster arising exclusively from natural causes which the exercise of ordinary human prudence could not have prevented, a war, hostilities, an invasion, an embargo, a blockade, an epidemic, an insurrection, a riot, mob violence, malicious mischief, sabotage, an injunction, or other similar cause beyond the control of National Grid and not caused by the action, omission or delay of National Grid; provided that National Grid shall have notified the Department in writing not later than five days after National Grid had actual notice of the occurrence which has the effect of delaying the performance of its obligations under this Order, which delay shall be deemed reasonable only so long as National Grid shall be using best efforts to minimize the effects thereof. National Grid shall include in such notice the measures taken and to be taken by National Grid to prevent or minimize any delay, and shall request an appropriate extension or modification of this Order. Failure to give such notice within such five-day period constitutes a waiver of any claim that a delay is not subject to penalties. National Grid shall have the burden of proving that an event is a defense to compliance with this Order.

F. The effective date of this Order shall be the date it is signed on behalf of NYSDEC.

DATED: Long Island City, New York
June 28, 2013

JOSEPH J. MARTENS
Commissioner, NYSDEC

By: _____
VENETIA A. LANNON
Regional Director
NYSDEC - Region 2

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Violations of Articles 17, 19, 25, 37, 40
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Law, Article 12 of the New York State Navigation Law, and
Titles 6 and 17 of the Official Compilation of Codes, Rules
and Regulations of the State of New York,

**AFFIDAVIT OF
COMPLETION**

-by-

**NYSDEC File No.
R2-20121011-637**

THE BROOKLYN UNION GAS COMPANY d/b/a
NATIONAL GRID NY,

Respondent.

-----X
STATE OF NEW YORK)
 ss:
COUNTY OF _____)

_____, being duly sworn, deposes and says:

1. I am employed by National Grid NY and hold the title of _____.

I have held this position with National Grid NY since _____. My general job duties
include _____.

2. I am authorized to make this affidavit on behalf of National Grid NY.

3. I hereby certify that:

a. National Grid NY was not otherwise legally required to perform the
Environmental Benefit Project(s) required under Order on Consent R2-20121011-637 (the
"EBP").

b. National Grid NY did not already intend to perform the activities that
comprise the EBP.

c. Documentation of the expenditures for implementation of the EBP is attached hereto.

d. National Grid NY has fulfilled the requirements of the Order.

BY: _____

Sworn to before me this

_____ day of _____, 2013.

NOTARY PUBLIC