

New York State Department of Environmental Conservation

Office of the Executive Deputy Commissioner, 14th Floor

625 Broadway, Albany, New York 12233-1010

Phone: (518) 402-8560 • Fax: (518) 402-9016

Website: www.dec.ny.gov



Peter M. Iwanowicz
Acting Commissioner

December 2, 2010

Robert Sussman, Deputy Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Hudson River Dredging

Dear Deputy Administrator Sussman:

On behalf of the New York State Department of Environmental Conservation (DEC), I want to thank you for hosting Tuesday's meeting among EPA, DEC, and the federal Natural Resource Trustees to discuss the Hudson River dredging project. Given DEC's multiple roles – as a support agency to EPA under the National Contingency Plan, Natural Resource Trustee under CERCLA, and steward of New York State's natural resources under state law – we are particularly grateful for the time you spent with us.

At the conclusion of the meeting you invited the participants to let you know if we believe EPA is heading in the wrong direction as it addresses the design and scope of the remainder of the dredging project in Phase 2. In most respects we agree with EPA's approach, and some of what we learned on Tuesday – particularly with respect to requiring more than one pass and determining the depth of each pass – was very welcome and reassuring. Our primary remaining concern, however, is the extent to which "otherwise dredgeable inventory" will be left in the river, and capped instead of removed. For a number of reasons, New York State does not support any amount of capping to contain PCB contaminated sediment that has been targeted for dredging where it is feasible to remove the targeted sediment.

There is no environmental, technical, legal or sound policy basis for leaving PCB inventory in the river that could otherwise be removed. From an environmental and technical perspective, capping the PCB contaminated sediments in the upper Hudson River presents significant issues given its inherent lack of permanence and extended monitoring and maintenance requirements. These problems are exacerbated by the nature of the PCB contamination in this case, as well as the high energy Hudson River water flows. We are also concerned about the lack of data and evaluations needed to determine if the caps will effectively contain the PCB proposed to be left behind; the need to account for climate-change caused increases in storm intensity driving higher flows which could compromise caps; and the need to accurately understand the movement of water between the river water column and the capped sediments, a major factor in contaminant migration through caps. Because of these concerns, modifying the remedial plan to include capping of otherwise dredgeable inventory would cause a fundamental change in the performance of the remedy.

Apart from our reliability concerns, we also believe an increased amount of capping will negatively impact on future habitat quality in the upper Hudson River. The stone layer used on top of the cap provides little habitat for aquatic and benthic organisms compared with a more fine grained bottom. Any needed maintenance and repair of caps will disrupt habitat succession for both plants and benthic animals. By effectively resetting the clock on habitat restoration, cap repair delays recovery of riverine habitats and leads to permanent loss of natural resource quality.

From the legal perspective, we see very significant issues if capping beyond what is contemplated in the ROD is permitted. As we pointed out at the meeting, the capping alternative was rejected when the ROD was finalized, and the state's support for the ROD was at that time, and continues to be, based upon the removal of PCB inventory through dredging consistent with EPA's assurances. Permitting significantly more capping than is contemplated in the ROD is tantamount to a "de facto" adoption of a rejected remedy. It would also represent a fundamental change in the scope of the remedy which could not, consistent with the NCP, be adopted without amending the ROD. Capping was found by EPA to be not as permanent or reliable as removal, and also does not fulfill the statutory requirement for permanent remedies to the maximum extent practical. Accordingly, all contaminated sediments within areas targeted for remediation should be removed.

From a public policy standpoint, there is absolutely nothing to be gained by permitting a greater percentage of capping than contemplated in the ROD. In fact, given the continuing river impairment resulting from PCB contamination and the clear advantages of dredging over capping, public policy strongly supports requiring the maximum amount of technically feasible dredging. We understand that there may be other circumstances where capping may be considered a viable option for large contaminated sediment sites. Based upon the specific river conditions here, the history and express terms of the ROD, and the unusually high concentrations of PCB contaminated sediments, we do not believe that conforming to the dredging remedy in this ROD will create an undesirable precedent for EPA.

We also have concerns from a policy perspective that increased capping will impose an unanticipated obligation on the state for operation, monitoring, and maintenance. Even with an agreement from GE that it will maintain the site in perpetuity (which we appreciate EPA put on the table), there is a level of unacceptable risk for the state – we have unfortunately seen a number of examples of corporate entities failing despite historic strength.

In the absence of good environmental, technical, legal, or policy reasons for more capping, the only remaining possible rationale is financial. We do not believe that GE's desire to save money is an appropriate basis for departing from the ROD, and surely does not justify an unacceptable environmental result. Our expectation and hope is that as a matter of corporate and legal responsibility GE will commit to maximize its cleanup efforts to meet the goals of the ROD. Even if GE is concerned that it may be erring on the side of dredging and disposing too much material in order to get at the PCB inventory, the incremental additional cost is an appropriate price to pay to ensure that it is adequately cleaning up the mess it created, which is continuing to significantly impair the Hudson River to this day.

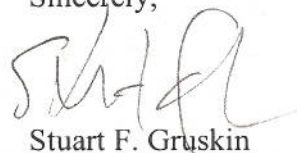
For all of these reasons, the answer to your question is that EPA will be heading in the wrong direction if it permits GE to leave PCB inventory in the river that can and should otherwise be dredged. We are worried that providing a "ceiling" percentage of permissible capping beyond what is technically infeasible or true residual will have the unintended consequence of ensuring that PCBs to that level will in fact be left in the river and capped. We accordingly respectfully urge that EPA maintain the remedial approach set forth in the ROD, and require that dredging take place pursuant to the already issued guidance, with only very limited, strictly construed exceptions for capping as laid out under the existing residuals performance standard established by EPA for this remedial program.

This is a defining moment for the Hudson River, and by extension a defining moment for the EPA, GE, and New York State. We have proudly partnered with EPA for the decades that it has taken to get to this point, and the continuation of that partnership is extraordinarily important to us. In order to ensure that we are able to support and collaborate with EPA as this project moves forward, we would like to take full advantage of the opportunity to present our views and concerns to you. Toward that end, if you have any questions, or if DEC's technical staff can be helpful as you move toward a final decision, please let me know and we will dedicate whatever resources are needed to provide assistance.

I began my presentation when we met by pointing out the many ways in which the Hudson River shaped our past, and said that it is now up to us to shape its future. For centuries the Hudson River has fed us, transported us, and inspired our state and nation in many ways. At the dawn of the modern environmental movement – even as EPA was being formed -- the Hudson River served as a national symbol of the need for environmental protection. We are finally at the point where the long-awaited and eagerly anticipated cleanup will be implemented, and it is up to us collectively to do it right.

Again thank you for your time and consideration, and please do not hesitate to call me if we can be helpful as EPA moves toward making its determination.

Sincerely,



Stuart F. Gruskin

cc: Judith Enck
Wendi Weber
Tom Brosnan
P. Iwanowicz
A. Crocker
A. Gugliemi
K. Farrar
E. Leff