

NLWJC - Kagan

DPC - Box 023 - Folder 010

Environment - Port Dredging

January 29, 1997

NOTE TO Elena Kagan
FROM: Diane Regas *Diane*
SUBJECT: NY - NJ Dredging issue

I have attached the key documents on NY-NJ dredging. The July 24 letter was the centerpiece of an announcement by the Vice-President. Now-senator Torricelli, Reps. Pallone and Menendez, environmentalists and labor representatives joined the announcement. Companies and the Port were also supportive. While we talked to the states in advance we did not try to bring them to the announcement. The basic deal we announced was to get dredging moving by allowing use of the ocean site, and to close the ocean site to contaminated material after September 1997.

The most challenging problem in delivering on our commitments in the deal is that the regional EPA and Corps of Engineers staff are used to fighting with each other, and they have a very hard time producing quality work on a tight schedule. This interagency problem stands out in my 10 years of government experience.

Because of this issue, the White House staff (CEQ and DPC) and political leadership at EPA have remained engaged since the announcement. Even with our full attention, it will be very challenging to meet the Administration's commitments. We have been encountering issue after issue that slows down the process, and we will likely continue to get complaints from all sides through the summer. As we move forward I will keep you up to date.

*Diane -
Thanks. Do update me
from time to time, and
of course let me know
if/when we reach a
decision point of some kind.
Elena*

THE WHITE HOUSE
WASHINGTON

May 31, 1996

MEMORANDUM FOR HAROLD ICKES

FROM: Bradley M. Campbell *BM*
Diane Regas *Diane Regas*

SUBJECT: Summary of the Healthy Port Initiative for New York Harbor

I. Summary

Inadequate dredging of the channels and berthing areas serving the Port of New York and New Jersey, and the lack of leadership to solve the problem, have caused several major port companies to announce that they may relocate their hub operations to Halifax, Nova Scotia, or to other U.S. ports. Company decisions are expected in June or July. Fearful of job losses to Canada, the longshoremen have focused pressure to resolve dredging issues on Governors Pataki and Whitman. Concurrently, concern about disposal of contaminated dredged material off New Jersey's coast has prompted Governor Whitman to criticize the Administration's disposal policies as environmentally unsound. Her message has been lauded and reinforced by environmental groups and New Jersey shore communities, but it has further impeded needed dredging.

The primary obstacle to full-scale dredging is the lack of acceptable disposal alternatives. Disposal alternatives are primarily a state responsibility, but require federal action. On May 24, in an agreement with labor leaders, Governor Whitman promised that limited dredging of berthing areas would begin in June. We understand that Governor Whitman is planning a press conference on June 6 to announce the start of dredging, but port companies and unions remain highly skeptical. A visible, credible signal is therefore still needed to persuade the unions, port companies, and state governments that the Administration is ready to get dredging moving as soon as the states do their part. We also must disarm possible criticism on the environmental issues. Thus, the initiative proposed here is in large measure preemptive: we are increasing pressure on Whitman and Pataki to make tough decisions about local disposal options while protecting the President from blame either for imminent job losses or for potential harm to the oceans. At the same time, we must take care not to suggest too much Federal "ownership" of a problem that inherently must stay on the governors' doorsteps. The governors, not the Administration, must resolve politically divisive decisions about local disposal sites, and must negotiate between themselves the relative benefits New York and New Jersey receive from Port Authority monies earmarked for dredging.

Congressmen Menendez and Torricelli, along with Senator Lautenberg, would like to announce this initiative with us and to introduce a complementary bill to implement elements of the initiative.

This initiative is likely to receive support from port companies, the unions, and most of the Democrats in the New Jersey and New York delegations. A vocal segment of the environmental community, possibly joined by Representative Pallone, is likely to be critical or unsupportive at best, although we are hoping that the environmental elements of the initiative will win over Pallone and a few of the more mainstream environmental groups. Criticism also is possible from Representative Nadler, who has been pushing an ambitious (and probably impracticable) plan to require more dredging (and thus generate more development) for long-idle wharves in Brooklyn.

Delegations from states that compete with New York may raise questions of favoritism. In particular Norfolk, Virginia stands to gain from New York's losses, and Baltimore has competitive disadvantages of its own. To a lesser degree, Connecticut is concerned that any action we take in New York has the potential to raise the visibility of similar challenges in Connecticut ports. Several elements in the initiative (such as cost-sharing upland disposal) will benefit these other ports as well as New York and New Jersey, however, so we currently expect affirmative support for the initiative from these other ports as well as national port organizations.

II. Timing

House members feel strongly that an announcement needs to occur before the June 11 markup of the water resources development authorization bill. Before any announcement we need to consult with Members of Congress, labor leaders, moderate environmental interests. We may then adjust the elements of the initiative, to ensure strong support from those groups.

III. Recommendation

We recommend that you approve a five-point plan for the Port that would be announced before House markup of the water resources development authorization bill. The five points of the plan would be as follows, and are detailed in the attachment:

- 1. Federal resources will be ready when the States choose their disposal sites.*
- 2. We will keep the federal rules clear, and make decisions quickly and protectively*
- 3. We will restore and protect significant coastal habitats and resources.*
- 4. We will seek alternatives to ocean and estuary dumping.*
- 5. We will help prepare the port for the 21st century.*

In developing this recommendation we have consulted closely with the Departments of Transportation and the Army and with the Environmental Protection Agency. The Secretaries concur with this recommendation, with the exception that EPA reserves its judgment on two of the detailed elements pending the outcome of our consultations with environmental

interests, and one element is undergoing separate legal and policy review. All agree that whether this announcement should be made by the President or by the Secretaries will depend on the outcome of the consultation process.

IV. Decision

Approve Disapprove Let's Discuss

DRAFT May 31, 1996

CLINTON ADMINISTRATION'S INITIATIVE FOR
A HEALTHY PORT IN NEW YORK HARBOR

A Five Point Plan for a Healthy New York-New Jersey Harbor

- Federal resources will be ready when disposal alternatives are chosen*
- We will keep the federal rules clear, and make decisions quickly and protectively*
- We will protect and restore significant coastal habitats and resources*
- We will find alternatives to ocean and estuary dumping*
- We will help prepare the Port for the 21st century.*

1. *Federal resources will be ready when disposal alternatives are chosen*

- > The Secretary of the Army shall prepare, within 60 days, a plan for restoring and maintaining the highest priority channels necessary to support the economic viability of the New York-New Jersey Harbor, provided that the states approve disposal alternatives. The President has requested, and upon appropriation the Secretary of the Army will make available, adequate resources available to ensure that necessary dredging can occur. At a minimum, the plan will ensure maintenance dredging for 10 high-priority federal channel projects before the end of 1997.
- > The federal agencies will continue to work closely with state and local officials to develop and support environmentally sound decisions that keep the port thriving. The Dredged Material Management Forum, established by EPA in 1993, has solidified important partnerships with States and others. The President directs EPA, in coordination with other federal agencies, to report to the Council on Environmental Quality quarterly on the progress of the Forum.
- > The Administration endorses the National Dredging Policy to guide federal agencies in fulfilling their responsibilities under existing laws and regulations, including the formation of a North Atlantic Division Regional Dredging Team. The team, under the leadership of the Corps and EPA will look at multi-state, cross-cutting issues throughout the North Atlantic area to assure coordination among agencies responsible for maintaining waterborne navigation and regulating resource protection in the region.

2. *We will keep the federal rules clear, and make decisions quickly and protectively*

- > The Administrator of EPA will take appropriate action by August 1, 1996, on a testing rule that restores certainty to the permit process and ensures protection of the marine environment. [EPA reserves judgment on this issue.]
- > The Secretary of the Army shall complete an interim dredged material

management plan by August 1, and a final dredge material management plan by September, 1998. The interim plan shall identify short-term disposal alternatives adequate to sustain dredging through 1997.

- > The Secretary of the Army will issue public notices of dredging permits within 15 days of an application or will have requested any additional information necessary to make the application complete. Within 90 days, the Corps will either issue a permit or commit in writing to a deadline for the permit decision.
- > The Chair of the Council on Environmental Quality, in coordination with the Secretaries of the Army and Transportation and the Administrator of EPA, shall report to the President by September 30, 1996, on any continuing obstacles to dredging the Port or to effective environmental protection, and shall recommend appropriate steps for removing those obstacles.

3. We will protect and restore significant coastal habitats and resources

- > By executive order, the President is extending the authority to issue administrative cleanup orders under Superfund to NOAA and other federal agency trustees for natural resources in the watershed.]
The above is still in separate inter-agency review.
- > Stop the sources of toxics to the New York-New Jersey Harbor. EPA and other federal agencies will work with the States to track down and control the significant sources of toxic chemicals into the Harbor. Actions will include revising water discharge permits, eliminating discharges, and requiring pollution prevention plans.
- > The Department of Justice, the EPA and NOAA have decided to develop a joint strategy to compel responsible parties to perform or pay for cleanup of toxics affecting the Harbor area.
- > EPA will seek to minimize polluted runoff by funding and supporting local and region-wide watershed planning and implementation activities. By September 1996 EPA will invest \$100,000 to facilitate pollution reduction in the Arthur Kill.
- > The Administration will seek appropriate additional funding in 1997 and 1998 for the implementation of the Federal commitments in the Harbor-Estuary Comprehensive Conservation and Management Plan.
- > The Fish and Wildlife Service in cooperation with EPA, the Corps of Engineers, and the States shall identify and promote habitat restoration projects to enhance the coastal habitats within the harbor. Potential projects will be identified for the public before June 1997.
- > Within twelve months after completion of the project list, the Secretary of the Army shall conduct a pilot habitat restoration project for the beneficial use of dredge material within the harbor, and report on the results.
- > EPA will expedite action to remediate the historic contamination at the Diamond Alkali Superfund site.

4. We will invest in alternatives to ocean and estuary dumping

- > The Administrator of the EPA will seek additional resources for each of fiscal years 1997-99 to further develop environmentally sound alternatives to ocean and estuary disposal of dredged material, such as decontamination technology and restoration of historical contamination around the Mud Dump site. At a minimum, the Administrator will seek \$** million in 199** (** to be determined before June 10).
- > The Administration will continue to press legislative proposals to authorize cost-sharing of upland and confined disposal facilities.
- > To promote wetlands restoration and other beneficial uses of dredged material, the Secretary of the Army is directed to propose changes to the Corps of Engineers' regulations to include the benefits of beneficial use of dredged material in choosing the least costly alternative.
- > The Administrator shall make a decision concerning the phase-out of ocean disposal of material at the Mud Dump site. Such decision shall be made by January 31, 1997, and shall include consideration of the availability of environmentally sound and practicable alternatives that are acceptable to the States. **[EPA reserves judgment on this issue.]**
- > The Administration will seek enactment of proposals by Senator Lautenberg and Representative Franks for cost-sharing and disposal management strategies, with such changes as are necessary to render these proposals consistent with Administration policies.

5. We will help prepare the Port for the 21st Century.

- > The Secretary of the Army shall begin an expedited feasibility study of a 50 foot deep Port. The Secretary shall seek Congressional authorization and take steps to reprogram funds to allow the study to begin in 1996, and the study shall be designed for completion in 1999.
- > The Secretary of Transportation, in consultation with appropriate agencies, shall study the causes and extent of diversion of cargo from ports on the east coast of the United States to North American ports outside the United States. The Secretary shall report to the President within six months, and recommend any changes necessary to enhance the competitiveness of U.S. east coast ports.
- > The Administration will immediately seek authorization to begin the necessary studies for an environmentally sound confined containment facility or facilities, in anticipation that this step will be recommended in the final Dredge Material Management Plan. The cost sharing will be consistent with the Administration's proposed 1996 Water Resources Development legislation.

June 17, 1996

MEMORANDUM FOR HAROLD ICKES

THROUGH: Jennifer M. O'Connor

FROM: Bradley M. Campbell
Diane Regas

SUBJECT: New York-New Jersey Harbor Dredging - Status

We have discussed the draft "Healthy Port Initiative" with labor unions; port operators and shipping interests; moderate environmentalists; Representatives Menendez, Pallone, and Torricelli; and Senator Lautenberg's staff. Below is a summary of the remaining issues and our recommended next steps. We have consulted with EPA and OMB in making our recommendation, and they agree.

Summary

While there is consensus on most elements of the initiative, there remains a sharp divide between Rep. Menendez (joined by the ports and the unions), and Congressmen Pallone and Torricelli (joined by environmental groups and possibly Governor Whitman) over two central issues:

- The Mud Dump Site (MDS): A dredge material disposal site offshore but near Pallone's district. Federal law and policy now allows disposal of category 1 and category 2 dredge material at this site. (Category 1 is clean; category 2 passes tests but has some contamination; category 3 is not suitable for disposal in the ocean.) Governor Whitman has pledged not to put category 2 in the ocean, and that pledge has been strongly endorsed by environmental groups and shore newspapers, but there are very few alternatives for category 2 disposal in the short term. Our initiative proposed a decision by January 31, 1997 concerning the phase out of the Mud Dump Site, with the consideration of the alternatives for disposal.
- The EPA testing rule. This is a proposed rule revising the regulations governing how and when to test for contamination in dredge material. A New Jersey federal court opinion argues that EPA's technical manuals conflict with its underlying regulation -- rendering permits legally vulnerable. Environmentalists have derided EPA's rule as a "rollback" of ocean protection. Unions and port operators want the rule finalized as soon as possible, believing the rule change essential if permits to dispose material at the MDS are to survive court challenges. Our initiative proposed

EPA action on the rule by August 1, 1996.

Positions

- *Menendez*: Wants continued use of the MDS for both category 1 and 2 material, and continued ocean disposal of category 2 generally. Wants EPA to finalize its rule in August, to provide certainty to permit applicants.
- *Pallone-Torricelli*: Want closure of MDS after an additional 300,000 cubic yards of category 2, or alternatively after category 2 capacity needs have been met through 1997. Want EPA to postpone its rule indefinitely. In offering these proposals, Torricelli and Pallone are negotiating, in part, on behalf of the environmental groups whose support they need in the coming elections. (Representative Zimmer, Torricelli's opponent in the current Senate race, reportedly has prepared advertisements castigating Torricelli for supporting ocean dumping.)

Recommendation

We recommend that the Administration make a counter-proposal to Pallone and Torricelli, with the following elements:

- We would immediately begin administrative action to close the MDS to category 2 at the end 1997. This action would require a public proposal (this summer), a comment period, and a final decision (early 1997). We would make the proposal and indicate our intention to close the site, but would not pre-judge the final outcome of this process.
- We would insist that the MDS be available as necessary until the end of 1997 for disposal of category 1 and 2 material. This may require an increase in elevation at the site.
- We would agree to delay the EPA rule until all of the issues have been discussed with environmentalists and other stakeholders, including a process to examine scientific issues related to the rule. We anticipate that this process will take six to ten months.
- We would require, as a condition of these commitments, that key environmental groups agree to not challenge permits to dispose of category 1 and 2 material at the MDS (using the existing testing rule) until the end of 1997.

Pros: This proposal is very close to that outlined by Pallone and Torricelli, except that we would use an appropriate administrative process to decide on closure of the MDS rather than announcing closure by fiat, and we would reject the strict volume limitation they propose in the interim. We would expect that this will disarm environmental criticism and help move short-term dredging, but we would want to elicit an understanding with New York and New Jersey that they will not be criticize short-term use of the MDS.

Cons: It will be difficult to convince Representative Menendez that this approach makes sense. Our position will be that this approach will accomplish what he needs by ensuring that dredging can go on for the next year, while allowing continued use of the MDS for the very short term. In addition it will allow the EPA rule issues to be resolved in a less contentious climate, after further work with affected interests, thereby reducing the likelihood of litigation over the rule itself. We will need to work closely with Menendez and his staff to help them understand the merits of delaying the rule, and enlist their help in persuading the unions and port companies that this is the right course. We propose to have those discussions in the next day or two.

July 24, 1996

The Honorable Frank Pallone
United States House of Representatives
Washington, D.C. 20510

Dear Congressman Pallone:

Your leadership and support have been essential in advancing our shared goals of protecting the ocean environment, while ensuring the competitiveness of the Port of New York and New Jersey and the economic health of the region. We are writing to announce our commitment to several substantial new steps to provide additional Administration support for those goals. We believe the three-point plan outlined below demonstrates this Administration's commitment to the continued growth and vitality of the port, to protective regulation of ocean disposal, and to a stronger partnership with the states in protecting regional commerce and the marine environment.

1. We will close the Mud Dump Site by September 1, 1997

After years of contention, this Administration is prepared to help resolve the controversy over disposal at the Mud Dump Site (MDS) off the New Jersey coast.

Environmental, tourism, fishing, and other community groups have long contended that the MDS should be closed immediately. These views reflect the important environmental values that New Jersey's communities identify with their coastal environment. Community concerns have been heightened by the unhappy history of other environmental threats that these communities have had to endure -- ranging from oil spills to the littering of shorelines with medical waste. This history warrants sensitivity to concerns about the MDS, including concerns about continued use of the site for so-called "category 2" material. When these concerns are coupled with the limited category 2 disposal capacity we expect the site to provide, we must conclude that long-term use of this site for disposal activity is not realistic.

Accordingly, the Environmental Protection Agency (EPA) will immediately begin the administrative process for closure of the MDS by September 1, 1997. The proposed closure shall be finalized no later than that date. Post-closure use of the site would be limited, consistent with the management standards in 40 C.F.R. Section 228.11(c). Simultaneous with closure of the MDS, the site and surrounding areas that have been used historically as disposal sites for contaminated material will be redesignated under 40 C.F.R. Section 228 as the Historic Area Remediation Site. This designation will include a proposal that the site be managed to reduce impacts at the site to acceptable levels (in accordance with 40 C.F.R. Section 228.11(c)). The Historic Area Remediation Site will be remediated with uncontaminated dredged material (i.e. dredged material that meets current Category I standards and will not cause significant undesirable effects including through bioaccumulation). Our ongoing environmental assessment activities at the site will be

modified to reflect these new commitments. We also will seek to reinforce this approach in appropriate legislation.

Although we recognize that eventual closure of the MDS, followed by remediation, is appropriate, immediate closure could jeopardize the Port, which may need short-term use of the site to dispose of category 2 material. To strike the appropriate balance, use of the site for category 2 material will have to be supported with certifications by the permit applicant, and a finding by the Corps of Engineers that: 1) the affected states or ports were asked to provide alternative sites for disposal of the material identified by the permit, and that the states or ports failed to provide a reasonable alternative site; and 2) the disposal of category 2 material at the MDS will not increase the elevation at the MDS higher than 65 feet below the surface. Any elevation limits will be designed to contain material within the current lateral limits of the MDS, and will be set based on scientific evidence.

2. We will help remove the immediate obstacles to dredging the Port

The Port Authority of New York and New Jersey, terminal operators, shipping lines, and labor groups have identified numerous ways in which we can help expedite dredging in the Port. We have heard, and are responding to, their concerns.

Making the MDS available for category 2 material for the next 12 months, and allowing the elevation at the site for category 2 material to increase, would remove the most immediate and major federal obstacles to dredging. The designation of the Historic Area Remediation Site will assure long-term use of category 1 dredge material.

Our outreach to the companies, longshoremen, harbor pilots, and others whose livelihood depends on the Port, has identified many additional steps our agencies can take to further facilitate adequate dredging in the Port. A major source of concern and potential cost for permit applicants has been uncertainty surrounding the testing that must support permit applications. Accordingly, by the end of August, EPA will finalize its proposal that tests of only two species, not three, will be required of permit applicants. EPA then will invest at least nine months in a process for all affected groups -- industry, labor, and environmental groups -- to help the Agency review the ocean disposal testing requirements and ensure that any further revision reflects both sound policy and sound science.

The Corps of Engineers will expedite the processing of dredging permit applications and completion of its own dredging projects. The Corps will issue public notices for dredging permits within 15 days after a completed application is submitted, or will have requested any additional information necessary to make the application complete. Within 90 days, the Corps will either issue the permit, deny the permit, or commit in writing to a deadline for the permit decision. The Corps responsibility for the federal channels will also be met: with cooperation from the states and the funding requested by the President, the Corps will ensure maintenance dredging for 10 high-priority federal channel projects before the end of 1997.

In addition, the Corps and EPA will accelerate their work with the affected state and local governments on a sound dredge material management plan, and complete the interim plan by August 30, 1996. This interim plan will identify any steps that are necessary to sustain dredging through 1997. The final plan will be completed by September, 1998.

Most importantly, we expect that our commitments concerning the MDS will diminish or eliminate the possibility of litigation challenging permits and the EPA rule change during the period prior to September 1, 1997. This proposal is predicated on that result.

3. We will help ensure the health of the Port and the environment for the 21st Century

The short-term efforts identified here cannot truly help the Port without effective long-term strategies to ensure that dredge material is managed properly. We recognize the significant efforts and commitments that New York and New Jersey have made with us to put those strategies in place. We will reinforce those efforts, so that long-term growth of the Port is sustained and sustainable.

Recognizing that a vital Port should be able to accommodate the full range of world-class ships, the Corps will soon begin an expedited feasibility study of alternatives for a 50 foot deep Port, including recent legislative proposals on this issue. The Corps will seek Congressional authorization and take steps to reprogram funds to allow the study to begin in 1996, and the study will be designed for completion in 1999. Recognizing that dredging is not the only issue affecting the future of this and other Ports, the Department of Transportation is committed to a six-month study of the causes of cargo diversion from our East Coast ports. This study, which will be developed in consultation with other affected agencies, will recommend any additional measures that are needed to enhance the international competitiveness of our East Coast ports.

Continued growth of the Port must be coupled with aggressive development of disposal alternatives and expanded efforts to reduce toxic pollution in the harbor. The Administration will continue to support legislation and appropriations to support cost-sharing of upland disposal alternatives. The Administration will also seek support for the range of continuing efforts to develop acceptable alternatives. For example, EPA is today announcing \$1.2 million in contract awards to support development of decontamination technologies for dredge material. In addition, the Corps will immediately seek necessary authorization and funding to begin the technical design and feasibility studies needed for environmentally sound confined containment facilities, in anticipation that such facilities may be part of the final dredge material management plan. We also will pursue additional steps to reduce and address toxic pollution in the estuary. We will seek to minimize polluted runoff by funding and supporting local and region-wide watershed planning and implementation activities. By September 1996, EPA will invest \$100,000 to facilitate pollution reduction in the Arthur Kill. All of these efforts will be coordinated with the Harbor-Estuary Comprehensive Conservation and Management Plan, which is the blueprint for working cooperatively with

The Honorable Frank Pallone
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state and local governments, businesses, and citizens to reduce toxic pollution in the watershed.

We will be calling upon every member of the New Jersey and New York delegations, as well as the affected state and local governments, to continue our constructive and cooperative efforts to sustain port growth and environmental protection. We will also be submitting periodic reports to the President on our success in implementing this plan and on any continuing obstacles to harbor dredging.

We appreciate your continuing leadership and advice as we work together to ensure a healthy economy and a healthy environment for the region.

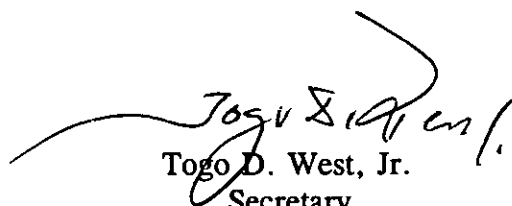
Sincerely,



Carol M. Browner
Administrator
United States Environmental
Protection Agency



Federico F. Pena
Secretary
United States Department
of Transportation



Togo D. West, Jr.
Secretary
United States Department
of the Army