

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

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.