



RIVERKEEPER.

April 30, 2009

Sarah H. Evans
NYSDEC Region 4 Headquarters
1130 North Westcott Rd
Schenectady, NY 12306

Re: Riverkeeper's Comments on the US Army Corps of Engineers' Clean Water Act Section 401 Water Quality Certification Request for the Proposed Federal Navigation Project Maintenance Dredging With Upland Dredge Spoil Placement at Houghtaling Island, New Baltimore, NY (Application Id. No. 4-9904-00001/00012)

Dear Ms. Evans:

Riverkeeper submits the following comments regarding the U.S. Army Corps of Engineers' ("the Army Corps") Section 401 Water Quality Certification request (Application Id. No. 4-9904-0001/00012) for the proposed Albany Turning Basin and North Germantown Reach federal navigation project maintenance dredging, with spoil disposal at Houghtaling Island, New Baltimore, NY. The project, as described in Army Corps Public Notice HR-AFO-09, proposes that the Army Corps will remove approximately 147,000 cubic yards of dredge material and dispose of this spoil on Houghtaling Island with a resultant discharge of effluent into Schodack Creek. Houghtaling Island and Schodack Creek support rare and diverse ecological habitats, including extensive floodplain forests, tidal creeks, mudflats, littoral zones, and emergent marshes.¹ Furthermore, Schodack Creek is a significant spawning, nursery, and feeding area for American shad, white perch, alewife, blueback herring, black bass, and other freshwater fish species.²

I. Introduction

Riverkeeper is an independent, member supported, not-for-profit environmental organization with offices in Tarrytown and White Plains, New York. Our mission is to protect the

¹ New York State Coastal Management Plan, Designated Habitat: Schodack and Houghtaling Islands and Schodack Creek, November 15, 1987. Available at: http://www.nyswaterfronts.com/downloads/pdfs/sig_hab/hudsonriver/Schodack_Houghtaling_Islands_Schodack_Creek.pdf.

² New York State Coastal Management Plan, Designated Habitat: Schodack and Houghtaling Islands and Schodack Creek, November 15, 1987. Available at: http://www.nyswaterfronts.com/downloads/pdfs/sig_hab/hudsonriver/Schodack_Houghtaling_Islands_Schodack_Creek.pdf.

environmental, recreational, and commercial integrity of the Hudson River and its tributaries and to safeguard the New York City drinking water supply. We carry out this mission through litigation, advocacy, and public education. Our members and constituents include a diverse array of Hudson Valley citizens: from urban dwellers in New York City, to local Hudson River fishermen, to residents of cities and towns along the Hudson, many of whom may be adversely affected by the proposed project.

Riverkeeper supports necessary and appropriate dredging of the Hudson as well as restoration projects that protect and enhance the Hudson River and its waterfront and provide adequate means for commercial and recreational activities. However, Riverkeeper strongly opposes spoil disposal at Houghtaling Island and effluent discharge into Schodack Creek and believes these activities directly contravene the Clean Water Act's Section 401 requirements for the following two reasons. First, New York State's approved water quality standards for Schodack Creek prohibit the discharge of pollutants that would inhibit the best uses of the receiving waters³ as a habitat for the propagation and survival of fish and wildlife. Second, New York State Water Quality Standards specifically prohibit discharges of toxic polychlorinated biphenyl's ("PCBs") in excess of one part per million.⁴ For the reasons stated above and set forth in detail below, Riverkeeper strongly opposes section 401 water quality certification for the Army Corps' proposed dredge spoil disposal and effluent discharge.

II. The Army Corps' Proposed Dredge Spoil Disposal at Houghtaling Island and Effluent Discharge into Schodack Creek Violate New York State's Approved Water Quality Standards

Pursuant to Section 401 of the Clean Water Act, the Army Corps must seek certification from New York State that spoil disposal and the resultant discharge into Schodack Creek will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of the Clean Water Act⁵ – including the requirements that the activity complies with the State's anti-degradation policy and water quality standards. The Clean Water Act established a national policy to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."⁶ Furthermore, New York's Environmental Conservation Law established a State policy to "maintain reasonable standards of purity...consistent with public health and... protection of fish and wildlife."⁷

New York's water quality standards establish classifications and designated uses for the waters of the State of New York.⁸ These standards establish the general requirement that "the discharge of sewage, industrial waste or other wastes shall not cause impairment of the best usages of the receiving water."⁹ The water quality standards also include requirements that limit the discharge of "toxic or deleterious substances" and "suspended solids" to "none in amounts" that

³ 6 NYCRR 701.1.

⁴ 6 NYCRR 703.5 Table 1.

⁵ The Clean Water Act, 33 U.S.C. §1341(a)(1).

⁶ Clean Water Act, 33 U.S.C. § 1251(a).

⁷ New York Environmental Conservation Law, NYECL § 17-0101.

⁸ 6 NYCRR § 701.

⁹ 6 NYCRR § 701.1

will “impair the waters for their best usages.”¹⁰ Moreover, the New York water quality standards designate Schodack Creek as a Class C surface water¹¹ best used for “fish, shellfish, and wildlife propagation and survival” and “suitable for primary and secondary contact recreation.”¹² Finally, PCBs are designated as a “toxic and deleterious substance” for Class C surface waters with a maximum allowable concentration of one part per million.¹³

Here, the Army Corps’ proposed actions will likely violate New York’s water quality standards by impairing Schodack Creek’s best use as a habitat for wildlife propagation. According to the water quality standards, Army Corps’ should not be certified to discharge “waste”, “toxic or deleterious substances” or “suspended solids” into Schodack Creek that would impair its best use as a habitat for fish, shellfish, and wildlife propagation”. Schodack Creek supports large populations of “fish, plankton and rooted plants” and plays host to a “major nursery area for post larval and young-of-the-year fish.”¹⁴ This diverse and productive fish spawning area could be seriously impaired in violation of State water quality standards by the Army Corps’ proposed dredge spoil disposal and discharge activities that allow for discharges to Schodack Creek containing turbidity, total suspended solids, oil and grease, and PCBs. Thus, the Department of Environmental Conservation should deny the Section 401 Water Quality Certification.

Furthermore, the Army Corps’ proposed dredge spoil disposal and discharge into Schodack Creek may violate the State Water Quality standards for maximum PCB concentration. Recent sediment testing revealed that past dredge spoil disposed on Houghtaling Island from the Kingston dredge project registered PCB levels as high as 22 parts per million¹⁵, well in excess of New York’s water quality standard. In addition the DEC has acknowledged that during the disposal of spoil from the Kingston dredge project the Army Corps discharged water that “far exceeded the permit limits [for PCBs] for discharge over the weir....”¹⁶ These higher than expected values are of great concern to Riverkeeper, because they suggest that future dredge spoil will contain concentrations of PCBs that will again cause the violation of water quality standards. Moreover it appears that Army Corps cannot accurately predict, through limited sampling, the levels of PCBs present in dredge spoil until after it is deposited on Houghtaling Island.

Riverkeeper is also concerned that dredge spoil from Kingston and other earlier dredging projects may be contaminating groundwater and the Hudson River, and that higher than predicted concentrations of PCBs from the proposed dredging project would do the same. The DEC itself has raised similar concerns with the Army Corps regarding the potential impact to

¹⁰ 6 NYCRR § 703.2

¹¹ 6 NYCRR § 863.5

¹² 6 NYCRR § 701.8

¹³ 6 NYCRR § 703.5

¹⁴ New York State Coastal Management Plan, Designated Habitat: Schodack and Houghtaling Islands and Schodack Creek, November 15, 1987. *Available at:*

http://www.nyswaterfronts.com/downloads/pdfs/sig_hab/hudsonriver/Schodack_Houghtaling_Islands_Schodack_Creek.pdf.

¹⁵ Data Report: Hudson River – Albany Turning Basin & Germantown Reach (Upland), January 5, 2009. Prepared for U.S. Army Corps of Engineers New York District. Contract Number w912DS-07-D-0009.

¹⁶ September 12, 2008 letter from Sarah Evans (DEC) to Monte Greges (Army Corps), Re: Maintenance Dredging Port of Albany and Germantown Reach DEC # 4-99040001/00012 Albany County/Rensselaer County.

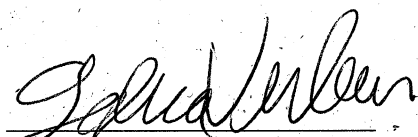
groundwater and the Hudson River of the disposal of PCB contaminated spoil from the Kingston dredge project.¹⁷ Any contamination of groundwater or the Hudson River would constitute additional violations of water quality standards. Clearly, these past violations, combined with the demonstrated uncertainty regarding PCB concentrations in dredge spoil provide the DEC with sufficient grounds to deny the requested 401 Water Quality Certification.

III. Conclusion

For the reasons discussed above, Riverkeeper strongly opposes Section 401 Water Quality Certification for Army Corps' dredge spoil disposal on Houghtaling Island and Schodack Creek. New York Water Quality Standards require that Schodack Creek be maintained in a condition sufficient to support its best use as a vital and productive fish spawning habitat. Moreover, New York Water Quality Standards specifically prohibit PCB discharges in excess of one part per million, and Army Corps has unfortunately been unable to demonstrate compliance with this standard, based on the contamination detected in the Kingston dredge spoil disposal. Riverkeeper appreciates this opportunity to submit comments. If I may provide any clarification regarding the above comments, or additional information, please contact Josh Verleun at jverleun@riverkeeper.org or 914-478-4501 x 247.

Respectfully Submitted,

/Michael Pesa-Fallon/
Michael J. Pesa-Fallon
Legal Intern



Joshua S. Verleun, Esq.
Staff Attorney/ Investigator

¹⁷September 12, 2008 letter from Sarah Evans (DEC) to Monte Greges (Army Corps), Re: Maintenance Dredging Port of Albany and Germantown Reach DEC # 4-99040001/00012 Albany County/Rensselaer County.