To: David Bridgers[David.Bridgers@wallerlaw.com]; Sivak, Michael[Sivak.Michael@epa.gov]
Cc: Tom Schadt[tschadt@anchorqea.com]; David Haury[dhaury@anchorqea.com]; Vaughn, Stephanie[Vaughn.Stephanie@epa.gov]
Bcc: Kwan, Caroline[kwan.caroline@epa.gov]; Schmidt, Mark[schmidt.mark@epa.gov]
From: Mintzer, Michael
Sent: Mon 3/20/2017 5:39:44 PM
Subject: RE: Newtown Creek: BERA Dispute Resolution/NYC's Friday Afternoon Memo

We are available at 2:30 PM today. We will also ask Stephanie to participate in the call. Please send a call-in number.

Michael A. Mintzer

Assistant Regional Counsel

U.S. Environmental Protection Agency, Region 2

212-637-3168

From: David Bridgers [mailto:David.Bridgers@wallerlaw.com]
Sent: Monday, March 20, 2017 12:42 PM
To: Mintzer, Michael <Mintzer.Michael@epa.gov>; Sivak, Michael <Sivak.Michael@epa.gov>
Cc: Tom Schadt <tschadt@anchorqea.com>; David Haury <dhaury@anchorqea.com>; David Bridgers <David.Bridgers@wallerlaw.com>
Subject: Newtown Creek: BERA Dispute Resolution/NYC's Friday Afternoon Memo

Michael and Michael,

The NCG is writing to express our significant concerns with respect to recent developments on the BERA dispute process. Based on an e-mail from Ron Weissbard of NYCDEP on March 16, 2017, USEPA agreed to consider a submittal from NYCDEP on various issues under dispute, even though a number of these items are no longer under dispute based on agreements between USEPA and the NCG. With respect to the six topics included in the City's submittal, four of the topics are no longer under dispute. Specifically, for Items 1 and 2 in the City's submittal, USEPA has agreed that the NCG can include a discussion of confounding factors, including a consideration of physical effects on sensitive test organisms in the risk characterization section if the NCG also includes a robust discussion of other potential causes of toxicity, including bulk sediment concentrations, etc. The NCG has agreed to do so and USEPA will be the final arbiter of the adequacy of that additional discussion. For Item 4, the NCG has also agreed to include a comparison of the wildlife risk results to NOAELs and LOAELs.

Finally, for Item 6, the NCG also has agreed to evaluate whether the BSAFs developed from the paired polychaete tissue and sediment data should be calculated on a Study Area-wide basis vs. a segment-specific basis. There is nothing more to discuss on these four items.

The City distributed a 16-page submittal late on Friday afternoon March 17, 2017, less than 2 business days before the final BERA dispute wrap-up meeting on March 21, 2017. The NCG filed its dispute letter on December 22, 2016; NYCDEP has had 3 months to raise these concerns in the context of the technical discussions the parties have been engaged in but basically has said nothing of substance during the six meetings or phone calls that have occurred during the dispute process to date. Two days before the end of the dispute process, however, it feels compelled to raise these concerns. In addition, and more importantly, a number of the issues raised by the City in its submittal were originally included in its initial comments on the draft BERA in June 2016 and were responded to by the NCG to USEPA's satisfaction. This is just another attempt by the City to get another round of comments in on the BERA. Finally, and most importantly, NYCDEP has now included in its submittal an analysis of its own at-risk benthic toxicity data in an attempt to discredit NCG's analysis.

This process is unacceptable to the NCG, and although we are willing to discuss the agenda as you originally developed it, the NCG will not engage in a discussion on topics that had been previously addressed by USEPA and are now being called back into question via a submittal by the City within 2 days of our meeting.

It is also important to note that as a general matter, we are required to provide presentations and information at a minimum 2 weeks in advance of meetings, and during the dispute process we have been required to provide information to USEPA well in advance of any discussion of that information in order to give USEPA adequate time to review the information, yet USEPA entertains detailed memos containing at-risk data within just 2 days of a final dispute meeting. We request that all items in the memo raised by NYC be held out of this call to allow the NCG a 2□week time period to review only those items that are still in dispute with USEPA and furthermore excludes all items permanently that are supported by the City's at-risk data. We expect USEPA to hold all parties to the same standard/timing for comments and as stated by USEPA in the past and only rely on data within the USEPA approved work plan.

Tom, David Haury, and I would like to speak with you all this afternoon if you are available to further discuss these issues and logistics for tomorrow's meeting. Please let us know your availability.

Thanks,

David

W. David Bridgers
Partner
waller
Waller Lansden Dortch & Davis, LLP
511 Union Street, Suite 2700
Nashville, TN 37219
615.850.8529
David.Bridgers@wallerlaw.com
vCard

The information contained in this message and any attachments is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you have received this message in error, you are prohibited from copying, distributing, or using the information. Please contact the sender immediately by return e-mail and delete the original message.