

Message

From: Kelly, Albert [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=08576E43795149E5A3F9669726DD044C-KELLY, ALBE]
Sent: 10/5/2017 10:17:18 PM
To: rich.gold@hklaw.com
Subject: FW: Portland Harbor - Sample Locations Issue

So where are we on the agreement?

Albert Kelly
Senior Advisor to the Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202 306 8830

From: Opalski, Dan
Sent: Thursday, October 5, 2017 4:50 PM
To: Peter Saba <psaba@schn.com>
Cc: Kelly, Albert <kelly.albert@epa.gov>; Woolford, James <Woolford.James@epa.gov>; Mackey, Cyndy <Mackey.Cyndy@epa.gov>; Gustavson, Karl <Gustavson.Karl@epa.gov>; Sheldrake, Sean <sheldrake.sean@epa.gov>; Cora, Lori <Cora.Lori@epa.gov>; Ebright, Stephanie <EBRIGHT.STEPHANIE@EPA.GOV>; Bilbrey, Sheryl <Bilbrey.Sheryl@epa.gov>; Zhen, Davis <Zhen.Davis@epa.gov>; Ingemansen, Dean <Ingemansen.Dean@epa.gov>; Loren R. Dunn (LDunn@bdlaw.com) <LDunn@bdlaw.com>; greg.christianson (greg.christianson@morganlewis.com) <greg.christianson@morganlewis.com>; richard.george (richard.george@pgn.com) <richard.george@pgn.com>; Karen TRAEGER (karen.traeger@external.total.com) <karen.traeger@external.total.com>; J.W. Ring (JWRing@ringbenderlaw.com) <JWRing@ringbenderlaw.com>; Christine L. Hein (CHein@ringbenderlaw.com) <CHein@ringbenderlaw.com>; Pirzadeh, Michelle <Pirzadeh.Michelle@epa.gov>
Subject: RE: Portland Harbor - Sample Locations Issue

Peter,

Thank you for discussing the issue of sample locations with me on the phone earlier today. As I conveyed to you, our key concern about your proposal is not really about using transects versus grids, per se, but about the moving of sample locations after they are randomly generated. To forego further debate, EPA would accept your proposal for grid-based sampling as long as the random generated samples are not "relocated" or moved (to the 2004 sample locations or otherwise) per the "and then shifted" language of Step 4 in Appendix B of the draft work plan. EPA believes the additional step of purposefully moving the random-generated locations introduces bias in the dataset. In order for EPA to achieve our objectives, as outlined in the Record of Decision, we believe that the 424 unbiased samples must be collected.

I also appreciated your brief but positive update regarding today's AOC discussion among the legal teams. I have also now have heard from our team that it was a constructive discussion and that there was agreement to exchange draft language on remaining, unresolved issues within the next week.

Lastly, EPA will be providing our comments on the work plan tomorrow, including comments on the unbiased sampling location methodology, and we will be available to discuss on Wednesday as you propose. I think we will be wise not to underestimate the effort that may be needed to work through the work plan comments in order to get to an approvable work plan.

Dan Opalski

From: Peter Saba [<mailto:psaba@schn.com>]
Sent: Wednesday, October 4, 2017 3:16 PM
To: Pirzadeh, Michelle <Pirzadeh.Michelle@epa.gov>
Cc: Kelly, Albert <kelly.albert@epa.gov>; Woolford, James <Woolford.James@epa.gov>; Mackey, Cyndy <Mackey.Cyndy@epa.gov>; Gustavson, Karl <Gustavson.Karl@epa.gov>; Sheldrake, Sean <sheldrake.sean@epa.gov>; Cora, Lori <Cora.Lori@epa.gov>; Ebright, Stephanie <EBRIGHT.STEPHANIE@EPA.GOV>; Bilbrey, Sheryl <Bilbrey.Sheryl@epa.gov>; Zhen, Davis <Zhen.Davis@epa.gov>; Ingemansen, Dean <Ingemansen.Dean@epa.gov>; Opalski, Dan <Opalski.Dan@epa.gov>; Loren R. Dunn (LDunn@bdlaw.com) <LDunn@bdlaw.com>; greg.christianson (greg.christianson@morganlewis.com) <greg.christianson@morganlewis.com>; richard.george (richard.george@pgn.com) <richard.george@pgn.com>; Karen TRAEGER (karen.traeger@external.total.com) <karen.traeger@external.total.com>; J.W. Ring (JWRing@ringbenderlaw.com) <JWRing@ringbenderlaw.com>; Christine L. Hein (CHein@ringbenderlaw.com) <CHein@ringbenderlaw.com>
Subject: Portland Harbor - Sample Locations Issue

FOR SETTLEMENT PURPOSES ONLY – SUBJECT TO Rule 408, FRE

Michelle,

This is to follow up on the conversation between the EPA and Pre-RD Group on Monday. The Pre-RD Group is very disappointed to learn that we still have a “threshold” issue with respect to surface sediment sampling – this time relating to specific sampling locations. As summarized in the attached bullet points prepared by Geosyntec, we believe that the grid-cell approach will provide better spatial coverage in this dynamic river system and that use of the grid-cell approach had been substantially agreed to by EPA in August.

The chart with the proposed comprehensive package that had been in play since September 5 and the chart of the agreement-in-principle provided on September 20 and on which EPA commented on September 22 consistently identified this issue as “Surface Sediment Sample Numbers” and the Pre-RD Group’s position as “Willing to accept EPA’s position on number of unbiased sample locations” (emphasis added). Accordingly, we were very surprised to learn on Monday that EPA had interpreted this to mean that Pre-RD Group had somehow agreed to the specific EPA sampling locations in EPA’s June 2017 plan and that EPA was no longer in agreement with the grid-cell approach to placement of randomized samples.

Even when the sampling location issue first surfaced at the end of last week, we thought that this was just a misunderstanding relating to updating the Figures attached to the Work Plan and as to timing for finalization of the specific locations, not a change in EPA’s position on the acceptability of the grid-cell approach. Accordingly, we were very surprised on Monday to learn that EPA’s position was that you had somehow understood that the Pre-RD Group had agreed to the specific sample locations in EPA’s June 2017 plan and that EPA did not agree with the grid-cell approach. If that was EPA’s position on this threshold issue, it had not been previously discussed or conveyed (and was not reflected in EPA’s 9/22 mark-up of the agreement-in-principle).

This issue has raised significant concerns among the Pre-RD Group regarding back-tracking and our ability to reach agreement on final documents within the limited time remaining to get in the water to start work this year and stay on the two-year schedule. Moreover, we believe that the transect approach proposed by EPA will limit the ability to use the dataset for critical objectives such as SWAC calculations, comparisons to prior (e.g., 2004) data for analysis of recovery potential, and optimization for future monitoring designs. EPA’s response that we could just add additional samples if we want to achieve these important objectives is not acceptable as we have already added hundreds of additional samples compared to the group’s initial proposal, and adding more samples would have significant cost and timing implications. Adding even more samples is not the answer - particularly, where our technical team and consultants advise that use of a grid-cell pattern is a better approach in this dynamic river system and is being used or considered at other large, complex Region 10 Superfund sediment sites.

Rather than losing valuable time running the randomization process and preparing new maps based on an approach that we are unsure whether EPA is in agreement with and then negotiating specific sample placements, we believe that the best way forward on this issue is to determine whether there is agreement on use of the grid-cell approach as compared to transects and on the specifics of the sample placement and design process as detailed in Appendix B of the draft Work Plan. In parallel, we are prepared to press ahead to resolve any other remaining issues and finalize the documentation.

We understand that EPA will provide comments on the Work Plan on Friday, October 6, 2017. Based on that schedule, the Pre-RD Group plans to review these comments internally and meet on Tuesday and proposes to have a call with EPA on Wednesday to discuss those comments. We will adjust our schedule for whatever time on Wednesday is convenient for the EPA team.

We would hope to have a response from EPA on the grid-cell approach and further discussion on the issue of surface sample placement this week.

Peter

Peter B. Saba

Senior Vice President, General Counsel* & Corporate Secretary | SCHNITZER STEEL INDUSTRIES, INC.

299 S.W. Clay Street, Suite 350 | Portland, Oregon | 97201

Mailing Address: Post Office Box 10047 | Portland, Oregon | 97296

Tel: 503.323.2809 | psaba@schn.com | Fax: 503.471.4417

** Member New York State and D.C. Bar. Not admitted in Oregon State*

