Appendix I

Potentially New and Significant Information
Ms. Tracy Delaney  
City of Hudson  
520 Warren St  
City Hall  
Hudson, NY 12534

Re: Significant Coastal Fish and Wildlife Habitats along the Hudson River

Dear Ms. Delaney:

New York State coastal policy, implemented through law, calls for the designation of coastal fish and wildlife habitats which are significant due to ecosystem rarity, vulnerable species, benefit to humans, and wildlife population levels. Areas so designated are to be protected, preserved, and where practical, restored so as to maintain their viability as habitats.

This letter is to notify you that the following habitats have been revised, modified, or proposed within your municipality:

South Bay Creek and Marsh  
Stockport Creek and Flats

The Significant Coastal Fish and Wildlife Habitats along the Hudson River, originally designated in 1987, are currently being updated to include current information and data. A total of 35 previously designated Significant Coastal Fish and Wildlife Habitats areas have been revised to 33 Significant Coastal Fish and Wildlife Habitats and 7 new habitat areas have been recommended for designation by the Department of Environmental Conservation. Boundary extensions have been proposed for 14 habitats and four habitats have been combined into two.

Enclosed is a copy of the public notice regarding two public meetings and one public hearing that the Department of State will be holding to seek comments relevant to the accuracy of the information contained in proposed revisions. We are asking municipalities to post this notice in an appropriate location in the Town/Village/City Hall.

Copies of the draft narratives and maps describing and depicting boundaries for the habitats can be viewed online at http://www.nyswaterfronts.com/index.asp (click on ‘Department of State Hudson River Significant Coastal Fish and Wildlife Habitats Updates’ under New Stories), and will be available for review and comment at the information meetings.

Please contact Stephanie Wojtowicz, New York State Department of State, 99 Washington Ave, Suite 1010, Albany, NY 12231, (518) 474-6000 with any questions.
Legal Notice

The New York State Department of State’s Division of Coastal Resources will hold two informational meetings in July regarding Significant Coastal Fish and Wildlife Habitats along the Hudson River. The meetings are intended to share with the public and other federal and state agencies the efforts of the Department of State (DOS) and the Department of Environmental Conservation (DEC) to revise existing documentation for designated areas and to identify any new areas for designation as Significant Coastal Fish and Wildlife Habitats.

The first meeting will be held Wednesday, July 6, 2011 from 2:00 – 4:00 p.m. in conference room 126B in DEC’s Region 3, New Paltz Office. The second meeting is scheduled for Monday, July 11, 2011 from 6:00 - 9:00 p.m. at the Catskill Town Hall. The meetings will provide an unofficial forum for discussion of the proposed amendments.

In late July, the DOS will hold a public hearing to obtain formal comments relevant to the accuracy of the information contained in proposed revisions to the 35 designated Significant Coastal Fish and Wildlife Habitats. Fourteen of the 35 have draft boundary changes and seven are new proposed habitats. The public hearing will take place on Wednesday, July 27, 2011, from 6:00 - 9:00 p.m. at the Norrie Point Environmental Center in the Hamlet of Staatsburg in Dutchess County.

The DOS is presently considering:

1) Draft revisions to 17 designated Significant Coastal Fish and Wildlife Habitats in Albany, Rensselaer, Greene, Columbia, Ulster, Dutchess, Orange, Putnam, Rockland, and Westchester counties.

Normans Kill (Town of Bethlehem); Papscanee Creek and Marsh (Towns of East Greenbush, Schodack); Schodack and Houghtaling Islands and Schodack Creek (Towns of Schodack, Stuyvesant, New Baltimore); Mill Creek Wetlands (Town of Stuyvesant); Coxsackie Creek (Town of New Baltimore); Vosburgh Swamp and Middle Ground Flats (Towns of Coxsackie, Athens); Catskill Creek (Town of Catskill); Germantown-Clermont Flats (Towns of Germantown, Clermont); Rondout Creek (Towns of Esopus, Kingston, Ulster); Esopus Meadows (Town of Esopus); Fishkill Creek (Towns of Fishkill, Beacon); Moodna Creek (Towns of Cornwall, New Windsor); Iona Island Marsh (Town of Stoney Point); Haverstraw Bay (Towns of Clarkstown, Haverstraw, Stoney Point); Hook Mountain (Town of Clarkstown); Piermont Marsh (Town of Orangetown).

In addition, the DOS is considering draft revisions and boundary modifications for 14 designated Significant Coastal Fish and Wildlife Habitats in Albany, Columbia, Greene, Ulster, Dutchess, Putnam, Rockland, and Westchester counties.

Shad and Schermerhorn Islands (Towns of Bethlehem, Coeymans); Coxsackie Island Backwater (Towns of Coxsackie, New Baltimore); Stockport Creek and Flats (Towns of Stuyvesant, Stockport, Greenport); Roger’s Island (Town of Greenport); Ramshorn Marsh (Town of Catskill); Inbocht Bay and Duck Cove (Town of Catskill); Roeliff-Jansen Kill (Towns of Germantown, Livingston, Clermont); Esopus Estuary (Towns of Saugerties, Red Hook); North
Via Email and Hand Delivery

Stephanie Wojtowicz
New York State Department of State
Division of Coastal Resources
99 Washington Ave., Suite 1010
Albany, New York 12231

Re: O&G Industries, Inc.

Comments on Proposed Designation of “South Bay Creek and Marsh” as a Significant Coastal Fish and Wildlife Habitat

Dear Ms. Wojtowicz:

This office represents O&G Industries, Inc. (“O&G”). O&G is a privately owned company in its third generation of family management and is one of the most diversified construction material and services companies in the Northeast. O&G has a contractual relationship with Holcim(US), Inc., (“Holcim”), the owner of the property that comprises the South Bay, that grants it among other things certain land use rights to the South Bay, including the use of the South Bay causeway for transportation and other purposes.

Please accept this letter as O&G’s formal objection to the New York State Department of State Division of Coastal Resources’ (“DOS”) proposed designation of the “South Bay Creek and Marsh” as a significant coastal fish and wildlife habitat (“Proposed Designation”). These comments are being submitted in addition to those offered by Kevin Brown of this office at the July 27, 2011 public hearing. As an initial matter, O&G is committed to the ecology of the South Bay based upon sound objective scientific investigation and analysis and the application of these principles and findings to O&G’s and the current and previous property owner’s historical and lawful land use rights. However, as fully discussed below, based on our review of the publicly available information provided by DOS and the New York State Department of Environmental Conservation (“DEC”), including DOS’ “Draft Supporting Narrative” and “Rating Form”, it is clear that the Proposed Designation mischaracterizes the ecology of the South Bay, is not supported by any reliable and objective analysis, data or evaluation and on that basis the designation of the South Bay would be arbitrary and capricious. Moreover, the designation of the South Bay simply is not consistent with DOS’ statutory mandate (Executive
Law, Article 42) and does not satisfy the regulatory criteria for listing as a significant coastal fish and wildlife habitat. As a result, the Proposed Designation should not be adopted.

By way of background, for nearly a century, the property that comprises the South Bay has been devoted to commercial and industrial uses. Specifically, for decades, the South Bay causeway, an earthen causeway that bisects the South Bay, has been used for the transportation of industrial materials and goods to the dock and deep water port that exists on the Hudson waterfront, which has been used to transport industrial materials by barge. The ecology of the South Bay has been influenced by these historical uses, as well as the presence of several historical fills, including the former Hudson dump site and the railroad bed that has existed at the site since the 1880s.

In fact, in the Draft Narrative, DOS acknowledges the historical commercial and industrial use of the South Bay and the influences that these uses have had on the present ecology of the South Bay. In particular, DOS notes that “[d]isturbance and impacts in this habitat are the result of a previously open embayment, construction of an earthen causeway that bisects Hudson South Bay Marsh, and upland runoff. Impacts associated with past industrial and transportation development have resulted in reduced tidal influence throughout the habitat, and in particular north of the causeway where an invasive strain of the common reed (Phragmites australis) is dominant” (Draft Narrative at 2). This is hardly the narrative that one would associate with a significant coastal habitat, and in fact, the documents that purportedly support the Proposed Designation demonstrate conclusively that the South Bay does not meet the regulatory criteria for listing.

According to DOS' regulations, a significant coastal fish and wildlife habitat are those areas which “exhibit to a substantial degree one or more of the following characteristics”:

(i) the habitat is essential to the survival of a large portion of a particular fish and wildlife population (e.g., feeding grounds, nursery areas);

(ii) the habitat supports a species which is either endangered, threatened or of special concern as those terms are defined at 6 NYCRR Part 182;

(iii) the habitat supports fish or wildlife populations having significant commercial, recreational or educational value; or

(iv) the habitat is of a type which is not commonly found in the State or a coastal region of the State.
See, 19 NYCRR § 602.5(a)(1)-(2).

In addition to these requirements, the habitat area must also be “difficult or even impossible to replace in kind” (*id.*).

The narrative and rating form does not satisfy the regulatory criteria and does not support the Proposed Designation. Specifically, the Draft Supporting Narrative does not demonstrate that the habitat is “essential to the survival of a large portion of a particular fish and wildlife population” (emphasis supplied). While the narrative states that the South Bay provides habitat for certain unprotected species, there is no supporting study, data or analysis for the proposition that the habitat is “essential to the survival” of any species. In fact, DOS' own narrative states conclusively that “no endangered, threatened or special concern species reside in the area”. The DOS narrative also does not state that the habitat supports fish or wildlife populations having significant commercial, recreational or educational value. Finally, the supporting narrative is devoid of any analysis or study supporting the contention that the habitat is not commonly found in the State or is otherwise “difficult or even impossible to replace in kind.”

The “rating form” is similarly flawed. It contains “assessment criteria” for five areas: ecosystem rarity; species vulnerability; human use; population level; and replaceability. Without lending any credence to what appears to be an arbitrarily applied rating system, it is significant that for three of the five areas DOS assigned a rating score of zero. For ecosystem rarity, DOS assigned a “25” again without any supporting analysis whatsoever, solely based on DOS’ unsupported assertion that the South Bay is a freshwater tidal wetland. It is not. As discussed above, as a result of the historical development of the site, the South Bay is more appropriately classified as an estuarine impoundment marsh which is commonly found south of the site along the entirety of the Hudson coastal zone as a result of the historical rail line. Therefore, the replaceability “score” is simply incorrect. The incorrect presumption that the South Bay is a freshwater tidal wetland is, in and of itself, fatal to the Proposed Designation since apparently it forms the sole basis for the Proposed Designation.

Further evidence that the rating system is being applied arbitrarily and capriciously is demonstrated through review of the rating form for other areas proposed to be designated by DOS. Even a cursory review of the other rating forms establishes that there is no consistency and no explanation for how DOS arrived at the different rating scores. By way of example, the rating form for the “Papoose Marsh and Creek” states that the ecosystem rarity “score” was reduced by “human disturbance” at the site. Without lending any credence to the scoring system, it is significant that despite acknowledging historical man-made changes that influence the ecology of the South Bay that, without any explanation, the rating score for South Bay’s ecosystem rarity was not similarly reduced.
Due to the lack of any supporting analysis in DOS’ narrative, this office submitted a Freedom of Information Law (“FOIL”) request to DEC Region 4 and Central Office and DOS requesting the regulatory required DEC “recommendation for designation”, and any other supporting analysis justifying the designation. The FOIL request also asked DOS to provide all reference materials and publications used by DOS to designate a significant coastal habitat so that we can try to at least make some sense of the rating criteria scoring system used by DOS. To date, we have only received a substantive response to the FOIL requests from DEC Region 3 Hudson River National Estuarine Research Reserve, who we understand to be the DEC coordinating office for the Proposed Designation. Not only did the FOIL not contain the regulatory required DEC “recommendation for designation” but it also did not contain any independent review and analysis from DEC staff supporting the designation even though we were informed that Region 3’s position is that the designation is a “no brainer”. In fact, the FOIL response revealed that the extent of DOS’ and DEC’s “independent” review and analysis in carrying out its statutory mandate was to ask Scenic Hudson if they had “reports or materials” to support the Proposed Designation. It should go without saying that groups such as Scenic Hudson and others, whose stated goal is to eventually eliminate all industrial uses on the Hudson River, can hardly be relied upon to provide an objective scientific analysis of the ecology of the South Bay. The FOIL request also contained the Hudsonia study, a document prepared on behalf of Scenic Hudson, which does not support the Proposed Designation.

We have not received a FOIL response from DOS and they have indicated that the response will be provided by August 30, 2011 at the earliest, which disturbingly is two weeks after the comment period on the Proposed Designation ends. Since our FOIL request, in part, requested DOS to provide the documents and explanation of its rating system supporting the designation, it is inappropriate for the South Bay to be designated until we obtain a copy and fully evaluate these documents especially given the potentially significant impact on O&G’s historical land use rights.

According to the Proposed Designation narrative, the designation, if adopted, would impose a “habitat impairment test” on any activity, whether inside or outside the designated area, that is subject to coastal consistency review. That “test” purports to prohibit any action that would “destroy the habitat” or “significantly impair the viability of a habitat”, which would essentially prohibit any future activity since it could always be argued that any action, regardless of scope, could impair habitat. Given the potential substantial impact on any future development as a result of the “test” especially given O&G’s vested constitutionally protected property rights, the Proposed Designation should only be adopted based upon sound scientific analysis and the application of those principles. Based on what we have seen to date in the publicly available documents, no support for the Proposed Designation exists.
Finally, we understand that DOS, through these designations, is attempting to support State Coastal Policy 7 to protect coastal habitats. DOS is not properly carrying out its statutory mandate to protect the coastal resources of the State if it simply designates the entire Hudson River coastal zone as a significant coastal habitat regardless of whether the designations are supported by objective scientific analysis or whether the designation satisfies the regulatory criteria for designation. Moreover, DOS should not be attempting to advance certain State coastal policies which unnecessarily create tension with other coastal policies especially where as here there is no support for the designation. By way of example, the continued use of the South Bay, dock and deep water port to support barging of materials and products in an environmentally sound manner is consistent with other New York State Coastal Zone Management Policies. For example, State Coastal Policy 2 promotes the siting of water-dependent uses and facilities on or adjacent to coastal waters such as “uses that rely heavily on the waterborne transportation of raw materials or products which are difficult to transport on land, thereby making it critical that a site near to shipping facilities be obtained (for example, coal export facilities, cement plants, quarries). The use of the port for shipping is also consistent with the State’s Climate Action Plan that encourages alternative means of transportation such as bargeing.

For all of these reasons, the Proposed Designation should not be adopted since the Proposed Designation does not satisfy the statutory and regulatory criteria for designation, does not comply with all other applicable laws and regulations and is otherwise arbitrary and capricious. At the very least, the public comment period should be extended further until we receive a complete response to our FOIL request from DOS and DEC and until this information can be reviewed and supplemental comments can be developed and submitted to DOS and DEC.

Thank you for your attention to this matter and please include these comments in the record of your decision on the Proposed Designation.

Very truly yours,

GILBERTI STINZIANO HEINTZ & SMITH, P.C.

Michael A. Fogel

MAF/dmm
Stephanie Wojlowicz
New York State Department of State
August 15, 2011
Page 6

cc:
O&G Industries, Inc.
Betsy Blair, DBC Region 3, Marine Habitat Program Manager
George Stafford, Director, DOS Division of Coastal Resources
To: City of Hudson Common Council as State Environmental Quality Review [SEQR] Lead Agency
c/o Don Moore,
Common Council President

New York State Department of State, Division of Coastal Resources
c/o George Stafford
Director

From: South Bay Task Force, Hudson, NY

Date: May 17, 2011

Subject: Notification of newly discovered information on the fish of the Hudson South Bay

To the Hudson SEQR Lead Agency, and to the Division of Coastal Resources [DCR]:

At this time we are writing to notify both agencies of newly discovered information concerning the ecology of the Hudson South Bay [hereafter, “South Bay”]. This information confirms a hypothesis initiated by our earlier discovery of a state-listed species of pearly mussel (Anodonta implicata), the subject of our “Newly Discovered Information” letter of March 6, 2011.

(For the full meaning of the statutory phrase, “newly discovered information,” see the State Environmental Quality Review Act at 617.9 (a)(7)(i)(b).)

We submit that this new information may substantively affect the City's Proposed Action, which is defined as including “the adoption by the City of Hudson of the LWRP and associated amendments to the City Code and Charter, including amendments to the Zoning Code and Official Zoning Map and the adoption of Local Consistency Review Laws” (draft GEIS, p. 1-2).

Depending on the nature of the necessary changes to a final GEIS, potential adverse impacts to aquatic fauna which perhaps escaped a “hard look” in a generic EIS - such as changes in hydrology, sediment loading, contaminants in run-off and other water quality issues - may become the required subjects of a supplemental EIS before either the Lead Agency or the Secretary of State contemplates the issuance of positive findings statements.

Hudson South Bay, May, 2011

In recent weeks, South Bay has been host to the previously undocumented anadromous Blueback Herring (Alosa aestivalis) and the catadromous American Eel (Anguilla rostrata). (Attached, see photo-documentation of both species from South Bay.)

In 2006, The National Marine Fisheries Service listed river herring (both alewife and blueback herring) as "species of concern."

A 2008 ecological survey of the South Bay by Hudsonia Ltd., "deemed adequate for purposes of SEQR" by BFJ Planning's ecological consultant, did not conduct a fish survey. Hudsonia
recommended that "a fish survey should be conducted in the South Bay complex" (p. 49).

(Announcement of the survey's adequacy for SEQR review was stated in two contract addenda listing "additional services," January 14 & February 17, 2009, from BFJ Planning - the draft GEIS authors - to the Mayor of the City of Hudson.)

South Bay Task Force Public Comments, 2010

Our South Bay Task Force public comments on the draft GEIS, submitted March, 2010, predicted the presence of anadromous fish in the South Bay. At the time we urged the Lead Agency and the DOS DCR to pay close attention to the likelihood that the bay is an anadromous fish nursery:

"South Bay freshwater habitats should first be assessed for their fisheries potential. These habitats would provide nurseries for American shad, as well as all of the diadromous fish species [i.e., anadromous fish plus eels] of the Hudson River estuary" (LWRP Task Force Comment, p. 8).

The Atlantic States Marine Fisheries Commission [ASMFC]

In 2009, the ASMFC implemented Amendment 2 to the Interstate Fishery Management Plan for Shad and River Herring. (An ASMFC assessment of American eel is expected to be complete in 2011.)

"River herring stocks along the Atlantic Coast are greatly diminished compared to historic levels. Much of this reduction is related to spawning and nursery habitat degradation brought on by effects of human population increase (sewage and storm water runoff, industrialization, dam construction), increased erosion, sedimentation and nutrient enrichment associated with agricultural practices, and losses of riparian forests and wetland buffers" (Amend. 2, p. 93).

Amendment 2 requires states to submit sustainable fishery plans for approval (p. 93). Failing to win ASMFC approval, a moratorium will be imposed on all river herring fisheries in a state's waters, effective January 1, 2012. (As of this writing, New York state has not yet submitted for approval a management plan for river herring.)

"Promot[ing] improvements in degraded or historic alosine [herring] critical habitat throughout the species' range," is one of five "goals and objectives" of Amendment 2 (p. 81).

The amendment posits that "[e]ach state should develop a plan to improve the quality of and restore adequate access to river herring habitat within its area of jurisdiction" (2, p. 94).

The ASMFC calls upon itself to "designate important shad and river herring spawning and nursery habitat as Habitat Areas of Particular Concern," a development which ASMFC Technical Committee Chair Kathryn Hattala reports is underway (personal communication; T. O'Connor; 2/25/11).

Under "Permitting," "[a]l]l state and federal agencies responsible for reviewing impact statement for projects that may alter anadromous alosine spawning and nursery areas shall ensure that those projects will have no impact or only minimal impact on those stocks. Of special concern are natal rivers of newly established stocks or stocks considered depressed or severely depressed" (p. 100).
Of immediate concern to previously unrecorded anadromous and catadromous species present in the South Bay, we ask the Lead Agency to reexamine all proposed permitting and zoning schemes in the City of Hudson's LWRP/GEIS which concern the South Bay (including the No Action Alternative).

**State Environmental Quality Review Act [SEQRA]**

From SEQRA:

“The Lead Agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; or (b) newly discovered information; or (c) a change in circumstances related to the project” (SEQRA, 617.9 (a)(7)(i)(a-c)).

We trust that the SEQR Lead Agency will appreciate the magnitude of these discoveries, and will not lose any time in ordering a supplemental environmental impact statement for proposals which are not adequately addressed in the final GEIS.

Thank you for your prompt and serious attention.

Timothy O'Connor

For: South Bay Task Force:
Jennifer Arenskjold
Meg Carlson
Patrick Doyle
Peter Meyer
Timothy O'Connor
Michael O'Hara
Christopher Reed
American Eel (Anguilla rostrata) and Northern Watersnake (Nerodia s. sipedon)
Hudson South Bay, May 12, 2011
South Bay Task Force
July 7, 2011

Mr. Steve Rosenberg, Senior Vice President  
Scenic Hudson, Inc.  
1 Civic Center Plaza, Suite 200  
Poughkeepsie, NY 12601-3157

RE:  O & G Industries Inc.  
DEC # 4-1006-00060/00001  
Maintenance and Repair of Roadway  
Holcim (US) Inc. Property  
City of Hudson, Columbia County

Dear Mr. Rosenberg:

I am writing in response to your letter of June 29, 2011 regarding the recent work to maintain the existing roadway by O & G Industries on property owned by Holcim (US) Inc. Your letter requested that DEC investigate the activities involving the existing roadway to determine if any of those activities violated the conditions of the Freshwater Wetlands permit (issued on October 30, 2009) and revoke the permit. The area in which work was conducted runs from the west side of NYS Route 9G to Front Street in the City of Hudson and is considered to be adjacent area of Freshwater Wetland HS-2.

Prior to receiving your letter Environmental Conservation Officer Peter Brinkerhoff inspected the site on June 24, 2011, in response to a telephone complaint. Officer Brinkerhoff reported that the work conducted appeared to be routine maintenance and he observed no environmental problems.

On June 30, 2011, Nancy Heaslip, Wetland Biologist, and Michael Higgins, Deputy Permit Administrator also inspected the site and met with representatives of O & G Industries. They were informed that filter fabric and #4 stone was placed, graded and rolled on the existing roadway from the west side on NYS Route 9G to Front Street for the purposes of repairing, maintaining and stabilizing the existing gravel/stone roadway and they confirmed that work by their inspection. They also observed that roadway silt fencing had been placed along various sections of the roadway. Although the permit authorized the construction of asphalt aprons along NYS Route 9G, as of the date of their inspection, no asphalt aprons had been constructed.

Based on the site inspections, it was clear that the wetlands had not been impacted nor were there any indications of any sediment and/or erosion on the wetland side of any of the silt fencing. Staff further did not observe any contamination of waters by any substances. It was also very evident that the width of the roadway is the same width as it previously was and there was no encroachment toward the wetland or expansion beyond the existing roadway boundaries.
The roadway work observed is considered maintenance and repair of an existing road and therefore is an exempt activity as set forth in 6 NYCRR Part 663.4(d). The roadway work is therefore not a violation of the permit nor does it violate the Freshwater Wetland regulations. In addition, the Department staff have again reviewed the permit and file documents and find that roadway maintenance and repair work, while exempt from permitting, was covered in the application and approved plans.

The Department has determined that none of the grounds for revocation under 6NYCRR Part 621.13 cited by Scenic Hudson are applicable here. The permittee: (1) didn’t exceed the scope of the permitted activities; (2) complied with all permit conditions; and (3) made no materially false or inaccurate statements in the application documents. The revocation request is hereby rejected pursuant to 6NYCRR Part 621.13.

In summary, the Department finds no basis to justify a Department initiated revocation of the Freshwater Wetlands permit issued to O & G Industries nor do we find any basis or evidence to consider this work a violation or require any restoration work.

If you have any questions or would like to discuss this further, please do not hesitate to contact either Michael Higgins at 518-357-2454 or mthiggin@gw.dec.state.ny.us or myself at 518-357-2455 or wjclarke@gw.dec.state.ny.us.

Sincerely Yours,

William J. Clarke  
Regional Permit Administrator  
Region 4

cc via email:  Nancy Heaslip, Wetland Biologist  
Michael Higgins, Division of Environmental Permits  
ECO Peter Brinkerhoff  
Gene Kelly, Regional Director  
Richard Ostrov, Regional Attorney  
George Casey, USACOE NY District  
Mayor, City of Hudson  
Ken Faroni, O & G Industries  
Patrick J. Prendergast, P.E.