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By Electronic Mail

Judith Enck, Regional Administrator
United States Environmental Protection Agency
290 Broadway
New York, New York 10007-1866

Walter Mugdan, Director
Emergency and Remedial Response Division
United States Environmental Protection Agency
290 Broadway
New York, New York 10007-1866

Re: *Hudson River Superfund Site: EPA's Five Year Review
and Certificate of Completion of Remedial Action*

Dear Administrator Enck and Mr. Mugdan:

Please accept this letter on behalf of the New York Attorney General's Office as a part of our ongoing dialogue with EPA regarding the Hudson River Superfund Site. We believe that additional steps are necessary to assure that the remedial action objectives set forth in EPA's 2002 Record of Decision ("ROD") are timely met and that the remedy is fully protective of human health and the environment. Completion of those steps is necessary before EPA issues a certificate of completion of the remedial action to GE pursuant to 42 U.S.C. § 9622(f)(3) and the November 2006 Consent Decree between EPA and GE.

EPA's issuance of the certificate of completion must comply with the statutory requirements of CERCLA Section 122(f), 42 U.S.C. § 9622(f), insofar as it will give rise to a covenant not to sue and a release from liability for GE. EPA should not predicate the certificate of completion solely upon completion of the technical engineering performance tasks undertaken pursuant to the Consent Decree. Rather, it should be issued only upon completion of the remedial action in accordance with CERCLA and only upon EPA's finding after a comprehensive review that the remedy is protective of human health and the environment, as contemplated by the ROD. The covenant that arises upon issuance of the certificate of completion is in direct conflict with CERCLA's intent absent compliance with the remedial action objectives in the ROD and completion of the remedy contemplated, and absent a fully

supported finding that the remedy is protective of human health and the environment. 42 U.S.C. § 9622(f).

Accordingly, we request that EPA, at a minimum, ensure that the remedial action objectives of the ROD and the requirements of CERCLA are met by taking the following actions:

- (1) Defer issuance of a certificate of completion of the remedial action until EPA finds that the remedy is completed and is fully protective of human health and the environment in compliance with 42 U.S.C. § 9622(f)(3), (5);
- (2) Determine with reasonable certainty how long it will take for the PCB concentrations in fish to drop to the levels necessary to achieve those objectives and to enable lifting human consumption health advisories for PCBs in all contaminated River reaches for all affected species;
- (3) Undertake a comprehensive fish consumption survey along all contaminated reaches of the River, from Hudson Falls to the Battery, to quantify present and future human exposure to PCBs from the consumption of contaminated fish; and
- (4) Define in writing the scope and objectives of the Five Year Review and the participation and respective roles of the review team members, including non-EPA members.

These issues are discussed in detail below.

- (1) *Defer Issuance of a Certificate of Completion of the Remedial Action until EPA Finds that the Remedy is Protective of Human Health and the Environment in Compliance with 42 U.S.C. § 9622(f)*

We understand that EPA is considering issuing to GE a certificate of completion of the remedial action, notwithstanding evidence establishing the ineffectiveness of the remedy in achieving the ROD's remedial action objectives, and despite EPA's on-going Five Year Review to determine the effectiveness of the remedial action. It is inconsistent with the requirements of CERCLA Section 122(f)(3) to issue the certificate of completion without finding that the ROD's remedial action objectives have been achieved and that the remedial work necessary to achieve those objectives is complete. 42 U.S.C. § 9622(f)(3). That provision prohibits a covenant not to sue from taking effect unless EPA "certifies that the remedial action has been completed in accordance with the requirements of this chapter at the facility that is the subject of such covenant." 42 U.S.C. § 9622(f)(3). The question presented here is whether EPA can certify that the Hudson River remedial action has been completed in accordance with the requirements of CERCLA.

EPA's issuance of a certificate of completion is contrary to CERCLA's statutory scheme in the absence of a finding that the remedial action objectives of the ROD have been achieved and the remedy is protective of human health and the environment. For the Hudson River, the preeminent remedial action objective in the ROD is the reduction of the concentration of PCBs in fish within specific time-frames. *See* ROD, p. 73. It is now clear that the ROD's express remedial action objective to reach 0.4 mg/kg of PCBs in fish by 2016 has not been achieved. Based on the most recent data available, the 2014 PCB fish concentration is 2.71 mg/kg, which is more than 600% greater than the remedial objective of 0.4 mg/kg for 2016. No reasonable observer expects the upcoming 2015 or 2016 data to demonstrate that the 0.4 mg/kg concentration has now been achieved. The ROD's objective of achieving more dramatic reductions (0.05 mg/kg) later also is questionable, as EPA recognized in its 2012 Five-Year Review. *See* "First Five Year Review Report for Hudson River PCBs Superfund Site," p. 34 (2012).

In addition to the ROD's remedial action objective for PCB fish concentrations not being met, EPA has failed to provide a revised projected time-frame by which they will be met. EPA has not publicly amended the ROD or explained the significant difference between its objectives and the current status of PCB concentrations in fish. Because EPA cannot conclude that the ROD's remedial action objectives have been met, it cannot conclude that the remedial action has been completed in accordance with CERCLA's requirements. 42 U.S.C. § 122(f)(3). Consequently, a certification of completion and the associated covenant not to sue would be improper.¹

Furthermore, a certificate of completion is premature before EPA completes its Five Year Review, which is presently underway. If EPA finds that the remedy is not protective (or if it improperly defers a protectiveness finding because of the absence of data showing declining PCBs in fish),² EPA may have limited recourse against GE once the certificate is issued. Indeed, EPA's finding that the remedial action has not met the ROD's standard of "protective" would be

¹ Unlike numerous other consent decrees for Superfund sites, the 2006 Hudson River Consent Decree does not specify that certification of the remedial action shall be issued in compliance with CERCLA Section 122(f), 42 U.S.C. § 9622(f)(3). *See, e.g., U.S. v. Atlantic Richfield Co.*, CV-83-317-HLN-SHE (D. Montana, 2008), Consent Decree, Clark Fork River Operable Unit (p. 16) ("Certification of Completion of the Remedial Action' shall mean EPA's certification, in consultation with the State, pursuant to Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3), that the Remedial Action . . . have been completed . . . in accordance with the requirements of CERCLA, the NCP, and the ROD . . . including certification that Performance Standards have been attained."); *U.S. v. NCR Corp., et. al.*, CV-10-C-910 (E.D. Wisc. 2010), Notice of Lodging of Consent Decree (p. 14) (" . . . these covenants shall take effect upon certification of completion of the remedial action by EPA pursuant to 42 U.S.C. § 9622(f)(3)"). The 2006 Hudson River Consent Decree, however, must be read as incorporating that statutory requirement.

² EPA's guidance indicates that deferral of a protectiveness finding in the Hudson River's Five Year Review is not appropriate because exposure pathways are well-known, no new exposure pathways have been identified, no new contaminants have been identified, and an ecological risk assessment has been done. *See* OSWER Memo 9200.2-111: "Clarifying the Use of Protectiveness Determinations for CERCLA Five-Year Reviews," p. 4 (Sept. 13, 2012).

well-supported because there continues to be human exposure to PCBs from fish consumption and the migration of PCBs down-River.

The Five Year Review is intended to assure the protectiveness of the remedy in situations where contamination remains. 42 U.S.C. § 9621(c). The purpose of the Review is directly related to determining whether a responsible party may be granted a covenant not to sue. A remedy that is not protective of human health and the environment may not be deemed by EPA as complete, and granting a covenant not to sue in those circumstances is not appropriate under the statute.

Moreover, GE has not met a fundamental requirement for a covenant not to sue under CERCLA Section 122(f). As required by CERCLA Section 122(f)(5), 42 U.S.C. § 9622(f)(5), GE has not completed all outstanding obligations under the 2006 Consent Decree including, but not limited to, work related to (1) successfully restoring all River habitat damaged during implementation of remedial work, and (2) decommissioning and decontaminating the contaminated sediment processing facility.

A certification of completion of the remedial action should not issue to GE absent EPA's finding that the ROD's remedial action objectives have been met, that the remedy is *protective*, and that GE is in compliance with, and has *completed*, all obligations under the Consent Decree within the meaning of CERCLA Section 122(f), 42 U.S.C. § 9622(f).

- (2) *EPA Should Determine with Reasonable Certainty the Time-Frame Necessary to Achieve the Remedial Action Objectives for the Reduction of PCB Concentrations in Fish*

As discussed above, it is now clear that the remedy has not met the remedial action objective of reducing PCB concentrations in fish to 0.4 mg/kg by 2016, and may not reach the ROD's more dramatic reductions to 0.05 mg/kg. Accordingly, EPA must determine with reasonable certainty the time-frame by which there will be a reduction of PCB concentrations in fish so that fish consumption advisories for PCBs may be lifted in all contaminated River reaches of the Hudson River for all species.

New York's concurrence in the ROD was premised upon timely achieving the stated remedial action objectives for reducing PCB concentrations in fish. The State has been prejudiced not only by the failure to achieve those objectives timely, but by the current lack of certainty regarding when they will be achieved so that Hudson River fish can be safely consumed. We request that as a part of the Five Year Review process, EPA clearly define the time-frame for achieving the remedial action objectives set forth in the ROD.

In evaluating that time-frame, EPA must take into account the change in fish tissue sampling that occurred during GE's implementation of the baseline and remedial fish monitoring. The consequence of the fish data being collected in a manner that was inconsistent with what New York believed was required is important to answering the question of the time-frame for achieving the remedial objectives. This issue requires credible review by EPA.

(3) *EPA's Determination of the Remedy's Protectiveness Must Be Supported By a Comprehensive Fish Consumption Survey to Quantify Current and Potential Future Human Exposure*

The short- and long-term effectiveness of fish consumption advisories as an institutional control of human exposure to PCBs in edible fish is questionable. Despite the New York Department of Health's ("NYSDOH's") annual issuance of the advisories, the public is still consuming fish from the Hudson River, a circumstance of which EPA is aware. Human consumption and exposure need to be quantified and evaluated for all contaminated River reaches in order to determine whether the advisories are sufficiently protective over both the short- and long-term. In addition, the localized effects of human exposure in certain more contaminated areas of the River also should be evaluated as part of EPA's Five Year Review and protectiveness determination.

In 1996, the NYSDOH conducted a survey and found that the public was still consuming Hudson River fish in significant amounts despite extensive public outreach and widespread knowledge of the levels of PCB contamination in fish (Survey Report attached). The public's level of fish consumption and exposure that is documented in NYSDOH's Survey Report may be greater today in light of the public's understandable - but incorrect - perception that the River has been cleaned up and that the fish may safely be eaten.

An updated survey of fish consumption along all contaminated reaches of the River from Hudson Falls to the Battery should be undertaken to accurately assess current and future human exposure and the efficacy of fish consumption advisories as short- and long-term institutional controls to protect human health.

(4) *The Scope and Objectives of the Five-Year Review*

Presently, EPA is undertaking a second Five Year Review for the Hudson River remedy in which it is required to make a finding that human health and the environment are being protected. CERCLA § 121(c) provides:

If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action *to assure that human health and the environment are being protected by the remedial action* being implemented.

42 U.S.C. 9621(c) (emphasis added). Thus, fundamental to the Five Year Review is EPA's required finding that the remedy is protective.

Under applicable guidance, a protectiveness determination requires EPA to find that the remedy is functioning as intended by the ROD; that the exposure assumptions, toxicity data, cleanup levels, and remedial action objectives used at the time the remedy was selected are still valid; and that no information has come to light that could call the protectiveness of the remedy

into question. *See* EPA's "Comprehensive Five Year Review Guidance," p. 4-1 (June 2001). Given this criteria, EPA cannot make those findings now because of the flaws in the models on which the ROD was based, and because of the lack of data quantifying current human exposure.

We understand that EPA expects to complete its Five Year Review by April 2017. However, the contemplated schedule does not provide sufficient time for EPA to make the necessary finding that human health and the environment are protected, particularly in the absence of (1) fish data showing current, post-dredging PCBs levels in fish, and (2) results of a fish consumption survey quantifying current human exposure. EPA should issue the Five Year Review only if it can be well-supported. EPA's Guidance indicates that the Five Year Review team be a multi-disciplinary team with relevant technical expertise to properly review the protectiveness of the remedy. *Id.* at p. 3-1, 3-2. Rather than issue a determination that lacks sufficient data and information, EPA should expedite the generation of necessary information, such as post-dredging fish and sediment data, should immediately initiate a fish consumption survey, and should involve independent experts in evaluating the flawed models.

EPA's Five Year Review process would benefit from greater formality, such as a written scope of work identifying objectives, the participants in the process and their areas of expertise, the tasks to be undertaken, areas of responsibility, a timetable for completing the tasks, and criteria for transparency in the process. We suggest that EPA's scope of work be issued for public comment so that interested parties understand how the process will proceed.

Thank you for your consideration of the foregoing. We look forward to your response and to continuing our discussions regarding the Hudson River.

Very truly yours,

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Attachment

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