

OFFICE OF THE COMMISSIONER

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Judith Enck
Regional Administrator, Region 2
United States Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

RE: Hudson River PCBs

Dear Regional Administrator Enck:

I am writing in regard to our agencies' joint mission as stewards of the Hudson River, one of our nation's most significant ecological, recreational, historic, and commercial resources. While EPA's work overseeing the General Electric (GE) remedial dredging project has improved the Hudson River, the work is not done. We must ensure that the remedial program was effective and that all necessary actions are taken to protect human health and the environment.

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the National Contingency Plan (NCP), EPA is required to monitor effectiveness of the remedy to affirm that it is meeting the goals set by the Record of Decision (ROD). EPA has committed to perform a robust five-year review of the remedy, which EPA expects to issue in the spring of 2017. EPA is required under the NCP to coordinate with the Department on this review and on monitoring and maintaining the remedy--and EPA must take additional remedial action if the remedy fails to meet the goals required by the ROD.

As will be explained in greater detail below, the Department has concerns about the amount of PCB-contaminated sediment left behind in portions of the Upper Hudson River, the inadequacy of EPA's 2012 review in quantitatively predicting when projections in the ROD will be met, and EPA's over-reliance on institutional controls instead of active remediation to address contamination left behind. Consequently, it is imperative that the five-year review process be conducted in the most expeditious manner possible, and that the study include a comprehensive, independent, and objective analysis of all available data.

I. The Five-Year Review Process

It is not sufficient for EPA to simply declare that the remedy is adequately protective of human health and the environment. EPA is required to perform a quantitative evaluation to determine whether the remedial work that has been performed to date will achieve the human health and environmental risk reductions in the timeframes anticipated in the ROD. Consequently, the five-year review must include objective analysis of all available data, including the National Oceanic and Atmospheric Administration (NOAA) analysis, and an opportunity for full participation by the Department, the Department of Health (DOH), the federal natural resource trustees, and other interested stakeholders. Through its participation in the five-year review, the Department will demand an open and transparent process for this review that includes an objective analysis of all available data. The Department will work with EPA to refine the scope of the Operations, Maintenance, and Monitoring (OM&M) Plan and ensure that all appropriate data are collected to allow for a quantitative understanding of the performance of the remedy.

II. Significant PCB-Contaminated Sediment Will Be Left Behind

As EPA acknowledged in its first five-year review in 2012, the remedial action selected by EPA and implemented by GE resulted in a significant amount of contaminated sediments being left behind. These remaining contaminants are beyond what was anticipated by EPA during the remedy selection. While EPA stated in the 2012 five-year review report that it did not have the requisite data to determine whether the remedy was functioning as intended, there is now additional data available to draw more reasoned conclusions.

By leaving greater than anticipated surface and near-surface sediment PCB concentrations in large portions of the Upper Hudson River, the remedy as implemented may not achieve the targeted reductions in water and fish PCB concentrations in the timeframes anticipated by EPA. Additionally, the identification of both fish tissue and sediments in the Lower Hudson with significantly elevated PCB concentrations, also suggests that the remedial work in the Upper Hudson is less likely to achieve the targeted reductions in PCB concentrations in the estuarine portion of the river than anticipated by EPA in the ROD. The five-year review process must definitively answer this point at issue. Moreover, following NOAA's recent publication suggesting that updated estimates of fish flesh PCB recovery rates may be longer than EPA anticipated in the Lower Hudson, NOAA recommended the establishment of a robust, statistically designed post-remedial sediment, water, and fish monitoring program to improve future estimates of recovery rates for PCB levels in sediments and fish tissue. Monitoring is critical, but EPA must not use the establishment of a more comprehensive monitoring program to supplant the expansion of the remedy.

III. Reliance on Fish Consumption Advisories

EPA's position in its first five-year review was that institutional controls, in the form of Fish Consumption Advisories (FCAs), will adequately protect public health even if the ROD's projections are not met in the timeframe predicted by the ROD. FCAs are simply guidelines for anglers on consumption of contaminated wildlife, and may not adequately protect certain populations along the Hudson River that do not understand or follow the guidelines.

EPA's reliance on FCAs as the sole control for current and future risk, in both the upper Hudson and in the estuarine portion of the River downstream of the Troy Dam, ignores EPA's primary duty and obligation to protect the environment. It is not enough to simply avoid human consumption of impacted wildlife, EPA must ensure that the remedy effectively protects the

Hudson River's natural resources. Even if an assessment of FCAs at the Hudson River shows that human exposure to PCBs is adequately limited, FCAs do not protect the multitude of environmental receptors that could be exposed to PCBs left behind by the remedy. Exposures to significant levels of PCBs will continue in fish, birds, small mammals, and benthic organisms if they remain unaddressed by the remedy. EPA's first five-year review wholly ignored these environmental impacts, and seemingly left that job to the State and federal natural resource trustees. As the environmental agency charged with implementing this remedy and assuring its protectiveness to both human health and the environment, EPA must quantify the impacts to environmental receptors in the current five-year review.

Moreover, EPA's dependence on institutional controls that have been in place since the mid-1970s is contrary to the NCP's preference for permanent remedies. The long-term effectiveness of these advisories has not been demonstrated on the Hudson River, as no comprehensive studies of FCA compliance or effectiveness have been performed for over 20 years. The State is encouraged that, as part of the five-year review, EPA has requested the assistance of DOH in evaluating the performance of the existing FCAs and the efficacy of the outreach program. EPA will likely need to incorporate a survey or creel study into its five-year review to ensure that FCAs are truly preventing exposure to humans and protecting public health. This critical information is necessary for EPA to document in the five-year review process whether or not there are uncontrolled risks to human health. If EPA continues to use FCAs as the sole control on human health risks until the risk-based remedial action objectives are met, their effectiveness is an essential element to a complete review of the remedy's protectiveness.

Conclusion

The Department's concurrence with the 2002 ROD was conditioned on the removal of highly-contaminated PCB sediment in large sections of the Upper Hudson River, which was expected to result in lower fish flesh PCB concentrations, a reduction of human health and environmental risk, and a quicker removal of FCAs than if no action was taken. That has not happened. Because the remedial work has left behind sufficient contaminated sediments that will delay the recovery in fish PCB levels, conditions may exist such that the State can no longer concur that the remedy abates the significant threat to human health and the environment posed by GE's disposal of PCBs in the river.

To that end, the Department urges EPA to evaluate the sufficiency of the remedy selected in the ROD. EPA's current five-year review must thoroughly quantify the trends based on all available fish, water, and sediment data, and make reasonable and conservative assumptions regarding future trends. Independent and objective quantitative analyses, as opposed to the qualitative discussion in EPA's 2012 five-year review, are essential in order to determine whether the remedy is protective of human health and the environment. DEC is prepared and available to work with EPA on these analyses as the review progresses over the next several months.



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And
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