

October 27, 2017

Patrick Davis  
Senior Advisor to the Regional Administrator for Public Engagement  
Environmental Protection Agency  
1595 Wynkoop Street  
Denver, CO 80202-1129

Dear Mr. Davis,

I am writing to urge EPA not to issue a Certificate of Completion (COC) to General Electric Company (GE) for its cleanup of the Hudson River Superfund Site pursuant to CERCLA Section 122(f)(3), 42 U.S.C. 9622(f)(3), and the 2006 Consent Decree between EPA and GE. I also request a meeting at your earliest convenience to discuss this matter.

My understanding is that the EPA Region 2 office received a request from GE on December 23, 2016 to issue the COC, and is currently considering this request. I further understand that EPA intends to issue a response to GE by the end of December 2017. The Office of the Attorney General of New York State sent EPA a letter on September 16, 2016 asserting that EPA cannot issue a COC until the remedy is protective, and submitted this letter as a comment on the Proposed Second Five Year Review for the Hudson River Superfund Site (Second FYR).

For all the reasons explained below, and those set forth in the Office of the Attorney General's letter, EPA should not and cannot issue the COC until it is demonstrated that the remedy is protective of human health and the environment and that no further remedial action is necessary.

Under the terms of the Consent Decree, issuance of the COC will give rise to a covenant not to sue and release of liability for GE for contamination in the Upper Hudson.<sup>1</sup> As a practical matter, this means that once the COC is issued, it will be very difficult for EPA to ever compel GE to conduct further cleanup. Therefore, to comply with Superfund's overarching purpose to protect human health and the environment, EPA cannot certify the remedial action as complete until it is fully demonstrated that the remedy is protective of human health and the environment.

Section 122(f)(3) of CERCLA 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 a covenant."<sup>2</sup> A fundamental requirement of CERCLA is that Superfund cleanups must assure protection of human health and the environment.<sup>3</sup> Demonstrable accomplishment of

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<sup>1</sup> Consent Decree ¶99(b).

<sup>2</sup> 42 U.S.C. 9622(f)(3).

<sup>3</sup> 42 U.S.C. 9621(d).

the remedial goals set forth in the Record of Decision (ROD) drive whether the remedy is protective. Without a fully supported finding that the ROD's remedial objectives have been achieved and no further action is necessary, EPA cannot issue a COC consistent with Section 122(f).

The primary goal of the Hudson River Superfund cleanup is the reduction of PCB concentrations in fish to specific levels within specific timeframes. As discussed in detail in our comments on EPA's Proposed Second Five Year Review for the Hudson River PCBs Superfund Site (Second FYR), as well as the comments of the National Oceanic and Atmospheric Administration and the New York State Department of Environmental Conservation, it is clear that the cleanup will not meet these targets. Therefore, EPA cannot conclude that the remedy is protective of human health and the environment. In fact, the Second FYR agrees that the remedy is not currently protective of human health and the environment, though it does claim the remedy "will be protective" at some point 55 years or more in the future.

EPA cannot credibly contend that the remedial objectives in the ROD have been met. Because the remedial goals have not been met and the remedy is not protective of human health and the environment, it is impossible to conclude that the remedial action has been completed in accordance with CERCLA's requirements as Section 122(f)(3) mandates.

Moreover, the Second FYR states that the remedial action is not complete, and will not be complete until all remedial objectives are met—by EPA's estimate, some 55+ years into the future.<sup>4</sup> In fact, the Second FYR claims that construction of the remedy is not even complete. This is a contention that we strongly dispute (see our comments on the Second FYR at 13-15), but it would be completely inconsistent with Section 122 to issue the COC while simultaneously claiming that construction of the remedy is ongoing.

Issuance of the COC based solely on completion of the engineering aspects of the dredging project would be contrary to CERCLA's express intent to ensure Superfund cleanups are protective of human health and the environment. Granting GE a COC would leave EPA with limited recourse to compel GE to conduct further cleanup of the Upper Hudson and would be in violation of CERCLA's statutory mandates. EPA must not issue the COC until the remedy is fully protective of human health and the environment.

Thank you for your attention to this matter, and I look forward to discussing it with you in the near future.

Sincerely,



Ned Sullivan, President  
Scenic Hudson, Inc.

Cc:

Peter Lopez, Region 2 Administrator, Environmental Protection Agency  
Walter Mugdan, Director of Emergency and Remedial Response, Environmental Protection Agency

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<sup>4</sup> See 2017 Proposed Five Year Review at 8, 20.

Albert Kelly, Senior Advisor to the Administrator, Environmental Protection Agency  
Senator Kirsten Gillibrand  
Senator Charles Schumer  
Representative Eliot Engel  
Representative John Faso  
Representative Nita Lowey  
Representative Sean Patrick Maloney  
Representative Paul Tonko  
Representative Elise Stefanik  
Aurelia Skipwith, Deputy Assistant Secretary, Dept. of Interior  
Paul Doremus, Acting NOAA Administrator  
Wendi Weber, Northeast Regional Director, U.S. Fish and Wildlife Service  
New York State Attorney General Eric Schneiderman  
Basil Seggos, Commissioner, New York State Department of Environmental Conservation

Encl:

9.16.16 Letter from NYSOAG