

MEMORANDUM

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RE: PROPOSED HUDSON RIVER CONSENT DECREE

DATE: December 5, 2005

The proposed Hudson River Remedial Action Consent Decree (the Decree) is an important step toward the cleanup of the Hudson River, but it contains elements that significantly detract from the achievement of that goal and the purposes of the federal Superfund law, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.

The Decree faithfully applies both the criteria based on PCB mass in an area and the criteria based on PCB surface concentrations in shallow sediments (see Decree Appendix B, Attachment A, at 2.5). That fidelity to those portions of the ROD will ensure a more effective cleanup.

However, the following aspects of the Decree and its attachments conflict with the ROD and will likely result in more PCBs remaining in the Hudson River than either the State of New York or the public reasonably contemplated when the ROD was issued nearly four years ago:

The GE Opt-out Provision

First, we strongly object to the unprecedented right accorded by the Decree to GE to opt out of the performance of the selected remedy altogether after only the first of six years of work. During this time GE will dredge only ten percent of the PCBs to be removed by the remedy as described in the ROD (Decree, para. 15(c)). The ROD did not contemplate a right to opt out. Although it specified that the performance of the dredging project would be reviewed after one year in order to make technical adjustments, if necessary (ROD, at iii), it called for a complete dredging project, projected to last six years (id., at 100-01). A GE decision to opt out of conducting the second phase will delay the rest of the project, unless EPA has the funds to carry out the project itself and has contractors mobilized to step in immediately. It is unlikely that EPA has sufficient funds readily available; thus, GE's unilateral decision to opt out could lead to still further delay and further transport of PCBs throughout the Hudson River system. Moreover, it is likely that litigation will result under the Decree's reservation of rights provision.

DOJ and EPA have a clear policy that potentially responsible parties such as GE conduct the entire remedial project as a condition for resolving their liability under CERCLA. See, e.g.,

Memorandum dated June 17, 1999 re: Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites from Barry Breen, Director, U.S.E.P.A. Office of Site Remediation Enforcement (at 10). This longstanding policy was reflected in EPA's February 4, 2002 Special Notice Letter to GE upon the issuance of the ROD, which asked GE to perform the remedial action and said that "EPA will consider a proposal to be a good faith offer only if it . . . includes . . . [among other things] an unambiguous statement of your willingness to conduct or finance the [remedial design and remedial action] consistent with the ROD" The GE opt-out provision represents an unjustified and apparently unprecedented concession to the party that without question polluted the River and many of the biological resources dependent on it by discharging its hazardous wastes into the River, for the most part illegally.

To be approved, a CERCLA settlement must be reasonable, fair, adequate and consistent with the purposes that CERCLA is intended to serve. See generally United States v. Cannons Eng'g Corp., 899 F.2d 79, 85 (1st Cir. 1990), and United States and State of Michigan v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1435 (6th Cir. 1991). The statutory purposes of facilitating the cleanup of hazardous waste and ensuring that those responsible bear the costs of their actions would be disserved by granting GE an opt-out provision. That provision should be removed from the Decree.

In any event, the inclusion of the GE opt-out provision fails to comply with EPA's procedures under the National Oil and Hazardous Substance Contingency Plan (NCP), 40 C.F.R. Part 300. The NCP requires EPA to publish an Explanation of Significant Differences when the differences between a consent decree and a ROD significantly change the remedy selected in the ROD with respect to scope, performance, or cost. 40 C.F.R. § 300.435(c)(2)(i). As EPA itself has acknowledged, "Changes that result in a significant difference to a basic feature of the selected remedial action (e.g., timing, . . .), with respect to scope, performance, or cost may be addressed in an explanation of significant differences." (EPA Interim Guidance on Administrative Records for the Selection of CERCLA Response Actions, dated March 1, 1989 (at 35) (emphasis added)). By creating the potential for extensive delay in implementation of the ROD, the opt-out provision constitutes a significant difference to be explained.

Maintenance of Fish Consumption Advisories to Protect Public Health

An important health-related area in which EPA has relinquished its discretion and agreed to limit GE's obligations is the maintenance of the State's fish consumption advisories for the Hudson River. Current fish consumption advisories, issued by the New York State Department of Health (DOH) because of PCB contamination in Hudson River fish, advise women of child-bearing age and children under 15 to eat no fish from the Hudson River. In addition, DOH advises all adult males and women over child-bearing age to avoid consuming any fish from the Upper Hudson River down to the Troy Dam and most fish species from Troy to Catskill, and to restrict consumption to one meal a month for more than a dozen species below Catskill. Maintaining and communicating these advisories to the public is critical to protecting the health of anglers and those with whom they share their catch.

The ROD requires the implementation and maintenance of fish consumption advisories by state agencies as a component of the selected remedy (ROD, at iii - iv). Despite this requirement, GE's obligation to carry out the sampling necessary to support appropriate fish advisories is significantly limited under the Decree. If GE elects not to implement Phase 2, the Decree allows GE also to abandon any further sampling in spite of the ROD's unconditional requirement that DOH continue to issue advisories until the remediation goals set out in the ROD are met.

Even if GE does implement Phase 2, the Decree would limit its post-dredging sampling obligations. In the Upper River, GE's obligations can be reduced at GE's request after three years of sampling; in the Lower River, GE's obligations to conduct supplemental sampling in support of the advisories automatically terminate after three years.

Even though the responsibility for developing and disseminating these advisories, critical to the protection of the health of those who fish the Hudson River, falls to State agencies, the Decree affords the State no decision-making role in determining the scope of the required sampling. The State may make a request, but if GE and EPA do not agree, the sampling that the State identifies as necessary will either not be conducted, to the detriment of the advisory process, or the cost of that sampling will fall to the State. GE, as the entity responsible for the need for fish consumption advisories in the first instance, should not be allowed to escape its obligation to carry out this critical aspect of the ROD throughout the entire time that fish advisories are necessary.

Arbitrary Limit on the Amount of Backfill for Habitat Replacement

Under the ROD, one foot of backfill is generally required wherever dredging occurs, except in the navigational channel. However, the ROD also calls for backfill to be placed in many areas to facilitate the restoration of fish and wildlife habitat, primarily areas of submerged aquatic vegetation. (ROD at iii). The ROD and associated documents clearly call for a robust habitat replacement program. See, e.g., Feasibility Study Appendix F, Habitat Replacement Program Description. However, the Critical Phase 1 Design Elements (Attachment A to Appendix B to the Decree) (the CDE Attachment) arbitrarily limits the volume of backfill to be used for habitat replacement and restoration (Section 2.7: Habitat Replacement and Reconstruction Design) to 15 percent beyond the volume estimated to be needed to place one foot of backfill over the entire dredged area.

Many areas containing significant beds of aquatic vegetation will be dredged during implementation of the remedy. After dredging, such areas must be restored; these areas are important habitats for many species of fish and other biota in the Hudson River and provide essential feeding, nesting, and refuge functions. Because aquatic plants can only exist where water depth is sufficiently shallow for them to receive sunlight (known as the "photic zone"), some areas may require more than one foot of backfill after dredging. Thus, if dredging in areas of submerged aquatic vegetation results in water depths below the photic zone, more backfill than required under the CDE Attachment may be needed in order to restore the vegetation.

At this time, it is impossible to know whether the proposed 15 percent allocation will suffice to replace and restore the habitat structure and functions adversely affected by the remedy. An arbitrary ceiling on the amount of backfill to be used in habitat replacement, therefore, could prove to be inconsistent with the ROD.

The CDE Attachment should contain no volumetric limit on the backfill needed for the project. EPA should determine the amount of backfill required on a case-by-case basis.

Insufficient Dredging Equipment to Respond to Contingencies

GE's Phase 1 Intermediate Design Report provides for virtually no contingency equipment to control sediment resuspension, as recognized by EPA in its comments on that report. However, the Performance Standard Compliance Plan Scope (PSCP Scope) (Attachment C to Appendix B to the Decree) limits EPA's ability to require GE to bring on-site extra equipment when it is "not reasonably available from a schedule or cost standpoint." (PSCP Scope, at 2-7). Without such equipment, dredging might need to be suspended and more delay might ensue.

The equipment provision in the PSCP Scope should be modified to ensure that adequate equipment is always available on a contingency basis.

Excessive Residual Contamination in Near-Shore Areas

The CDE Attachment departs significantly from the ROD and the Residuals Performance Standard previously adopted by EPA by creating a special limit on dredging in near-shore areas (specifically, Section 2.4: Dredge Prism Development: Element 9). This limit could result, without justification, in significant amounts of PCBs being left behind and should be revised.

Under the limit, contaminated shoreline areas need only be dredged to a maximum depth of two feet, regardless of the depth of contamination. Dredging would continue outwards towards the center of the River, subject to a requirement that the slope of the riverbed after dredging be no steeper than 3:1, *i.e.*, three feet horizontally to one foot vertically, until the dredged area intersects the relatively flat riverbed near the center of the River. The CDE Attachment provides for further near-shore dredging if post-dredging surface sediments, after establishment of a stable slope, contain PCBs at a concentration of more than 50 parts per million (ppm), and for some further dredging or installation of an engineered cap (at GE's discretion) if surface sediment contamination is less than 50 ppm.

By contrast, the ROD mandates that, in all areas targeted for dredging because of PCB contamination, the extent of dredging will be controlled by numerical PCB concentration standards developed in the Residual Performance Standard. For near-shore areas, the CDE Attachment supersedes the PCB-driven dredging criteria of the ROD and the Performance Standard with a set of criteria based on engineering considerations, which are primarily based on cost considerations.

While the Phase 1 Dredge Area Delineation Report (Phase 1 DAD) indicates that the average depth of contamination in areas to be dredged in Phase 1 is approximately two feet, this is relatively unimportant because there are still many areas in which contamination near the shore extends to a depth greater than two feet. The Phase 1 DAD also indicates that approximately four miles of shoreline are targeted for dredging, which multiplies the detrimental effect of this CDE provision considerably.

The net result of these provisions is that significant amounts of PCBs will likely remain in a band of contaminated sediment along the shoreline. The vagueness of the CDE language raises uncertainty about the precise width of that band. We understand that EPA has reached what it considers to be a satisfactory agreement with GE on how the provision will be applied, but even under that recent agreement excessive contaminants will be left behind. Moreover, the recent agreement on this point has not been incorporated into binding guidelines for the entire project.

The Decree also gives GE the option to either re-dredge or cap these areas. As capping may be less expensive to GE, these provisions could result in leaving a large volume of PCBs in the River. In contrast, the ROD establishes a clear preference for removal as opposed to capping, and the Residuals Performance Standard is the means to ensure that contaminated sediment will be capped only after several attempts at removal.

In addition to reducing the overall volume of PCBs removed from the River, this departure from the ROD's dredging criteria threatens particular harm to shallow near-shore areas, which are more prone to erosion and redistribution of contaminated sediment than are deeper areas and represent the most important areas of the River in terms of habitat value and biological productivity. PCB contamination left behind in near-shore areas has the greatest potential to be carried into the biological food chain – including into fish consumed by people. Moreover, the adoption of these provisions was procedurally defective because, as in the case of the Phase 2 opt-out concession, EPA failed to publish an Explanation of Significant Differences for this departure from the ROD. See generally, 40 C.F.R. § 300.435(c)(2)(i).

We believe EPA should seek a modification of the CDE Attachment that harmonizes its approach to near-shore dredging with the ROD and the peer-reviewed Residuals Performance Standard.

The Phase 1 Peer Review Process

The Decree's provisions regarding the peer review to be undertaken after the first year of work generate additional uncertainty. Here again, the Decree provides an overly generous role to the polluter. Normally, peer review is conducted to provide independent, outside guidance to a government agency, while allowing input from the public and the polluter. Here, the Decree authorizes GE to submit its own Phase 1 Evaluation Report to the peer review panel, competing with and apparently receiving the same standing as EPA's Phase 1 Evaluation report (Decree,

paras. 13 & 14(a)). Normally, as the polluter, GE would enjoy only the right to make comments on EPA's report for EPA to consider.

The Decree provides GE further unusual benefits. These include a two- to four-hour session in front of the peer review panel to present a "review and summary of the Phase 1 data and of Settling Defendant's experience during Phase 1...", two hours on the charge questions and one hour to express its views to the panel before the panel formulates its response to the charge questions. (Decree, para. 14(h)(1), (4) & (5)). The GE report to the panel should be removed from the Decree.