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January 14, 2005

VIA FACSIMILE

The Honorable Michael O. Leavitt
Administrator
U.S. EPA
Ariel Rios Building
1200 Pennsylvania Avenue N.W.
Washington, DC 20460

Dr. John Graham
Administrator,
Office of Information and Regulatory Affairs
1725 17th Street, NW
Washington, D.C. 20503

**Re: Regulated Industries' Petition for Disclosure and
Correction of Information Regarding EPA's
Proposal of Devil's Swamp Lake to National
Priorities List, RFC 04023**

Dear Administrator Leavitt and Dr. Graham:

We write today to ask that you take three actions to protect the health of vulnerable, African American families near Baton Rouge, Louisiana, who are putting poisoned fish on their dinner tables several times a month with no relief in sight: 1.) immediately finalize the listing of Devil's Swamp Lake on the Superfund National Priorities List; 2.) issue an Order requiring the companies responsible for polluting the Devil's Swamp to provide groceries to the surrounding communities, as a substitute for their contaminated food source; and 3.) issue immediate guidance barring the application of the Information Quality Act (IQA) to rulemakings. Today we are also calling upon the Chief Executive Officers of ExxonMobil Corporation, Dow Chemical Company, Ethyl Corporation, Shell Chemical LP, and Clean

Harbors Environmental Services, Inc. to voluntarily provide groceries to the residents of communities surrounding Devil's Swamp Lake as a humanitarian gesture pending the full cleanup of the pollutants currently contaminating the watershed, for which they are responsible.

Years of industrial activities in the area surrounding Devil's Swamp Lake in East Baton Rouge, Louisiana have left the lake heavily polluted with hexachlorobutadiene (HCBD), hexachlorobenzene (HCB), polychlorinated biphenyls (PCBs), lead, mercury and arsenic.¹ Tissue samples of fish taken almost twenty years ago by the Louisiana Department of Environmental Quality (LDEQ) and the Louisiana Department of Health and Hospitals (LDHH) revealed that levels of HCBD and HCB exceeded the guidelines of both departments.² In fact, HCBD and HCB levels exceed the levels the government says is safe by sixty (60) to ninety (90) times.³ Bioaccumulation of PCBs was also detected in fish samples almost two decades ago.⁴

Last March, in a long-overdue attempt to start the clean up of PCBs in Devil's Swamp Lake (which lies within Devil's Swamp), the Environmental Protection Agency (EPA) proposed to add the lake to the Superfund National Priorities List (NPL). Although specifically excluded as responsible parties under the proposed listing of Devil's Swamp Lake, NPC Services, Inc. (NPC) and its member companies again elected to pull out all the stops to oppose the listing – not only by submitting comments but also by filing a baseless substantive attack on the listing cloaked as an IQA “Petition for Disclosure and Correction of Information.” NPC is a non-profit corporation formed by Exxon Corporation, Exxon Chemical Corporation, USS Chemical Company, Copolymer Rubber & Chemical Corporation, Dow Chemical Company, Ethyl Corporation, Shell Chemical Company, American Hoechst Corporation, Allied Chemical Corporation, Rubicon Chemical Company, and Petro Processors of Louisiana Inc. to clean up, among other things, the HCB and HCBD they generated from the nearby Petro Processors Superfund site. Nearly a decade ago, NPC fought attempts to add Devil's Swamp Lake to the National Priorities List (NPL).

¹ Louisiana Department of Environmental Quality (LDEQ) and Department of Health and Hospitals, Office of Public Health (LOPH), *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, available at: <<http://www.oph.dhh.state.la.us/environmentalepidemiology/healthfish/docs/other%20chemical%20Advisories%20Complete%20List.pdf>> (site visited 01/13/2005).

² Louisiana Department of Health and Hospitals Under Cooperative Agreement With Agency for Toxic Substances and Disease Registry (ATSDR), *Public Health Assessment, Petro-Processors of Louisiana, Incorporated, Baton Rouge, East Baton Rouge Parish, Louisiana*, Environmental Contamination and Other Hazards, § B. Off-Site Contamination, Brooklawn Area, Fish, available at <http://www.atsdr.cdc.gov/HAC/PHA/petro/pet_p2.html> (site visited 01/12/2005).

³ *Id.* (stating that HCB concentration in fish fillets ranged from 0.02-5.4 ppm and HCBD from 0.014-3.6 ppm, and identifying 0.06 ppm as comparison value (LA health guideline)).

⁴ EPA, *HRS Documentation Record*, *supra*, n. 3, p. 32.

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On December 16, 2004, EPA responded to NPC's IQA petition.⁵ We are relieved that EPA did not retract the proposed listing as requested by NPC. But EPA's response, which states only that the issues raised in NPC's IQA petition will be considered as an addendum to its comments on the proposed listing, does nothing to protect the vulnerable communities forced to continue eating fish contaminated by the activities of, among others, NPC's member companies. Moreover, since it has been eight months since the close of the comment period on the proposed listing, EPA's decision to treat NPC's request as additional comments in effect reopens the comment period. While we think that now is the time for action, not additional comment, we write to respond to NPC's allegations, none of which have merit, as we explain below.

More than ten years has passed since EPA first tried to list Devil's Swamp Lake, but EPA and NPC act as though there were no cost associated with delaying cleanup of the lake—as if time were not of the essence—people living around Devil's Swamp Lake face serious health risks on a daily basis, as they have now for decades. As detailed in this letter, HCB, HCBd and PCBs all cause significant adverse health effects. The fish consumption advisory currently posted is a woefully inadequate remedy to the problem because the low incomes of persons in this area force them to eat substantial amounts of fish from the lake in order to have enough food. The household income in the Council District surrounding Devil's Swamp Lake is 73 percent of the median household income for the state of Louisiana, and a mere 59 percent of the median household income for the nation. Moreover, the health risks associated with eating fish contaminated with HCB, HCBd and PCBs are borne disproportionately by communities that are not only low-income, but also predominantly African-American.

As you are aware, Executive Order 12,898, which was issued by President Clinton and is still in effect, directs all federal agencies to identify and address disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations.⁶ In August 2001, then EPA Administrator Christine Todd Whitman reaffirmed the Agency's commitment to environmental justice, stating that:

Environmental statutes provide many opportunities to address environmental risks and hazards in minority communities and/or low-income communities. Application of these existing statutory provisions is an important part of this Agency's effort to prevent those communities from being subject to disproportionately high and adverse impacts, and environmental effects.⁷

⁵ Letter from Michael B. Cook, Director, Office of Superfund Remediation and Technology Innovation, USEPA, to Reed Rubinstein, Esq., Counsel for NPC Services, Inc. (December 16, 2004), available at: <<http://www.epa.gov/quality/informationguidelines/documents/04023-response.pdf>>.

⁶ *Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order 12,898, § 1-101, 59 Fed. Reg. 7,629 (1994).

⁷ Memorandum from Administrator Christine Todd Whitman, USEPA to EPA Assistant Administrators, General Counsel, Inspector General, Chief Financial Officer, Associate Administrators, Regional Administrators and Office Directors, p. 2 (August 9, 2001), available at: <<http://www.epa.gov/oswer/ej/pdf/>>.

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Indeed the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides EPA with the opportunity to address the significant environmental risks and hazards posed to the communities living in the Devil's Swamp Lake area. Finalizing the site's listing on the NPL is an absolutely necessary step in getting the cleanup process started. Accordingly, we call on EPA to live up to its commitment to environmental justice and finalize Devil's Swamp Lake's status as an NPL site immediately.

Moreover, we call upon EPA to issue an Order requiring NPC's member companies, as well as Clean Harbors Baton Rouge, LLC to provide groceries for the populations living near Devil's Swamp Lake pending cleanup of the lake that provides their current source of food. Rather than focusing on cleaning up the HCB and HCBd in Devil's Swamp, NPC has chosen to focus its energies on obstructing efforts to list the site. Accordingly, its member companies, as well as the party identified by EPA as being responsible for the PCB contamination (Clean Harbors Baton Rouge, LLC) should be required to act immediately to protect the area's residents from the hazards their industrial processes have wrought. EPA possesses such power pursuant to CERCLA Section 104, which authorizes EPA⁸ to provide for "remedial action" to protect the public health, welfare and the environment whenever a hazardous substance is released into the environment.⁹ "Remedial action," in turn, is specifically defined to include, among other things, "provision of alternative water supplies."¹⁰ Since the pathway of human exposure in Devil's Swamp Lake is the food chain rather than drinking water, requiring the parties responsible for its contamination to provide substitute groceries is both appropriate and authorized by law.

Finally, we call upon Dr. Graham and the Office of Management and Budget (OMB) to issue immediate guidance barring application of the IQA to rulemakings. NPC's petition, and EPA's response, do nothing to advance the "quality of information disseminated by federal agencies," but ensure only that the objections of a conglomeration of corporate giants, submitted months after the close of the comment

ejmemo.pdf> (site visited 01/13/2004).

⁸ Technically, Congress delegated authority under CERCLA to the President, who has subdelegated the authority to EPA. See *Mead Corp. v. Browner*, 100 F.3d 152, 153 n. 1 (D.C. Cir. 1996) (citing Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987)).

⁹ 42 U.S.C. § 9604(a)(1), CERCLA § 104(a)(1). PCBs are present in sediment samples from the Devil's Swamp watershed at a level that meets the criteria for an observed release. EPA, *HRS Documentation Record*, *supra*, n. 3 at 50.

¹⁰ 42 U.S.C. § 9601(24), CERCLA § 101(24). The list of remedial actions contained in the definition is illustrative rather than exhaustive, the statute specifically states that:

the term "remedy" or "remedial action" means "those actions taken consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term *includes* but is *not limited to* . . . provision of alternative water supplies

Id.

period on the listing proposal, will further delay initiation of badly overdue cleanup of Devil's Swamp Lake. Thus the IQA petition prejudices poor, minority communities already subjected to decades of health risks. In short, NPC's petition is but another attempt by industry to use the IQA to stall long overdue regulatory action. Congress never intended that the IQA apply to rulemaking,¹¹ and NPC's petition indicates why Congress's judgment was entirely correct. Indeed, the Petition provides further evidence in the case for repeal of the IQA. To avoid further threats to the health of these vulnerable communities, we hope you will give these requests your immediate attention.

Overview

Congress set forth a broad strategy for dealing with inactive hazardous waste sites such as Devil's Swamp Lake in CERCLA.¹² The statute provides EPA the authority to either compel responsible parties to clean up contaminated sites,¹³ or to perform cleanup itself using funds from the Hazardous Substances Superfund Trust Fund ("Superfund"),¹⁴ which costs it may later recover from parties responsible for the contamination.¹⁵ To ensure EPA's response to the sites most urgently in need of cleanup, CERCLA requires the agency to compile the NPL, a list of sites where there have been known or threatened releases of hazardous substances.¹⁶ EPA decides which sites are placed on the NPL based on the site's score according to the Hazard Ranking System (HRS) a complex, multi-factor formula.¹⁷ EPA proposes sites receiving a score of 28.5 or higher to the NPL by informal notice and comment rulemaking.¹⁸

Using the HRS, EPA assigned Devil's Swamp Lake a score of 50, in large measure because it has poisoned the human food chain by contaminating fish in the area.¹⁹ In accordance with established rulemaking procedures, NPC submitted comments in opposition to the proposed listing. However, rather than wait for EPA's decision, NPC threw up a preemptive procedural obstacle not available last time EPA sought to list Devil's Swamp Lake: an IQA challenge. The Petition does not assert that any

¹¹ See Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform By Appropriations Rider*, 28 WM. & MARY ENV. & POLICY REV. 339, 363-67 (2004) (documenting Congress' intent not to apply the IQA to rulemaking).

¹² Pub.L. No. 96-510, 94 Stat. 2767 (codified in pertinent part at 42 U.S.C. § 9601 et seq.), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613.

¹³ 42 U.S.C. § 9606(a).

¹⁴ 42 U.S.C. § 9611.

¹⁵ 42 U.S.C. § 9607(a).

¹⁶ *City of Stoughton, Wisconsin v. EPA*, 858 F.2d 747, 750 (D.C. Cir. 1988).

¹⁷ *Board of Regents of the Univ. of Washington v. EPA*, 86 F.3d 1214, 1217 (D.C. Cir. 1996). The HRS methodology is set forth as Appendix A to the National Contingency Plan, 40 C.F.R. Pt. 300, App. A, and was revised in 1990. See *Hazard Ranking System, Final Rule*, 55 Fed. Reg. 51532 (Dec. 14, 1990).

¹⁸ *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1322 (D.C. Cir. 1991).

¹⁹ EPA, *HRS Documentation Record for Devil's Swamp Lake* (LAD981155872), February 2004, p. 6, available at: <<http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d48023eb15&docIndex=0>>, document no. SFUND-2004-0004-019 (site visited 10/15/04).

information disseminated by EPA about Devil's Swamp Lake is flawed. Rather, it argues that because EPA calculated the site's HRS score on the basis of a Site Inspection (as required by applicable regulations), but did not rely on a more recent Risk Assessment (not required by applicable regulations), the Documentation Record fails to meet information quality requirements.

Further, perhaps in recognition of the fact that the very Risk Assessment that NPC contends should have been included would support – not undercut – EPA's proposed listing of Devil's Swamp Lake, NPC asserts that even that report would not comport with the IQA. Ultimately, the Petition does not seek correction of specific information as envisioned by the IQA, but instead requests that EPA: 1.) produce various "underlying data and methods" to NPC for evaluation; and 2.) retract the HRS Documentation Record and associated information pending various reviews that NPC asserts the agency should perform. The IQA does not provide either remedy. Accordingly, and because NPC's Petition is wrong on the law, wrong on the facts, and wrong in principle, EPA should have denied NPC's petition outright.

Public Health Implications

Devil's Swamp Lake

Devil's Swamp covers a seven-square mile area on the east bank of the Mississippi River, north of Baton Rouge, Louisiana.²⁰ Prior to the 1950s, the area consisted of agricultural farms, pasture and timber land.²¹ During the 1960s and 70s, numerous industrial facilities were constructed in the area²² in accordance with applicable zoning, which allowed heavy industrial uses in close proximity to residential communities.²³ In 1973, a crescent shaped area was excavated from the east-central portion of Devil's Swamp as a source of borrow material for levee construction around the Baton Rouge Harbor.²⁴ The remaining man-made lake, known as Devil's Swamp Lake, divides the surrounding swamp into northern and southern halves.²⁵

Although the larger Devil's Swamp area contains two other hazardous waste disposal facilities that comprise the separate Petro Processors Superfund site,²⁶ a construction and demolition dump and multiple petrochemical plants,²⁷ EPA's March 2004 proposal of the Devil's Swamp Lake site identifies the commercial hazardous waste disposal facility formerly operated by Rollins Environmental Services (LA), Inc.

²⁰ EPA, *HRS Documentation Record for Devil's Swamp Lake*, *supra*, n. 3, p. 30.

²¹ *Id.* at 1.

²² *Id.*

²³ See *North Baton Rouge Environmental Assoc. v. Louisiana Dep't of Environmental Quality*, 805 So.2d 255, 263 (La. App. 2001).

²⁴ *HRS Documentation Record*, *supra*, n. 3 at 30.

²⁵ *Id.*

²⁶ See *MSOF Corp. v. Exxon Corp. et al.*, 295 F.3d 485, 488 (5th Cir. 2002).

²⁷ Mike Dunne, *Alsen Residents Contesting Permit*, THE ADVOCATE (Baton Rouge, LA), April 25, 2000, p. 1-B.

(Rollins) as the source of the lake's PCB contamination. Specifically, PCB-contaminated sediments remain in portions of an outfall ditch from the Rollins facility, now owned and operated by Clean Harbors Baton Rouge, LLC, which ends at Devil's Swamp Lake.²⁸ PCB contamination has been documented in wetlands and fisheries located downstream of the site.²⁹

PCBs

PCBs are composed of mixtures of up to 209 individual chlorinated compounds.³⁰ They have no smell or taste, and although they are predominantly either oily liquids or solids, some PCBs can exist as a vapor in air.³¹ There are no known natural sources of PCBs.³² The compounds were manufactured (under the trade name Aroclor)³³ for use as coolants and lubricants in transformers, capacitors and other electrical equipment because they don't burn easily and are good insulators they were manufactured.³⁴ The same stability that made them useful as coolants and lubricants prevents them from readily breaking down once released into the environment, where they may remain for long periods of time.³⁵ They can travel long distances in the air and be deposited far from where they were released, and, in water (such as Devil's Swamp Lake), bond strongly to soil, organic particles and bottom sediments.³⁶

In 1977, the manufacture of PCBs was stopped in the United States due to evidence that the compounds build up in the environment and cause harmful health effects.³⁷ People exposed to large amounts of PCBs can experience health effects ranging from skin conditions such as acne and rashes to liver damage.³⁸ Babies born to women who ate PCB-contaminated fish demonstrate adversely affected immune systems and abnormal responses in tests of infant behavior, including problems with motor skills and

²⁸ *HRS Documentation Record*, *supra*, n. 3 at 17.

²⁹ EPA, *NPL Site Narrative for Devil's Swamp Lake*, p. 1, available at: <<http://www.epa.gov/superfund/sites/npl/nar1717.htm>> (site visited 10/15/2004).

³⁰ Agency for Toxic Substances and Disease Registry (ATSDR), *ToxFAQs for PCBs*, February 2001, available at <<http://www.atsdr.cdc.gov/tfacts17.html>> (site visited 10/14/2004).

³¹ *Id.*

³² *Id.*

³³ The chemical composition of specific PCB compounds are indicated by their trade name: the last two digits in the name Aroclor 1254, for example, indicates that the mixture contains approximately 54 percent chlorine by weight. ATSDR, *Public Health Statement for PCBs* (November 2000), p. 2, available at: <<http://www.atsdr.cdc.gov/toxprofiles/phs17.html>> (site visited 10/14/2004). PCBs detected at the Rollins Outfall Ditch adjacent to Devil's Swamp Lake include: Aroclor 1242, Aroclor 1248, Aroclor 1254 and Aroclor 1260. *HRS Documentation Record*, *supra*, n. 3 at 20.

³⁴ ATSDR, *ToxFAQs for PCBs*, *supra*, n. 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

a decrease in short-term memory.³⁹ Moreover, the Department of Health and Human Services (DHHS) has concluded that PCBs may reasonably be expected to cause cancer, while EPA and the International Agency for Research on Cancer (IARC) have determined that PCBs probably cause cancer.⁴⁰

When in water, PCBs are consumed by small organisms and fish, where they are stored in fatty tissue and slowly released into the blood stream.⁴¹ Even at low environmental exposure levels, PCB concentrations in fatty tissue can accumulate to levels that may be many thousands of times higher than in water.⁴² When consumed by animals higher in the food chain (such as people), PCB accumulations in the fatty tissue of organisms low in a food chain (such as aquatic microorganisms and fish) are further magnified.⁴³

In addition, and as noted earlier, Devil's Swamp and its fish are contaminated with HCB and HCBd, attributable to the nearby Petro Processors site and NPC's member companies.⁴⁴ HCB's health effects include high death rates in young children of mothers who ingest the chemical, liver and thyroid disease, as well as adverse effects on kidneys, bones, and the endocrine and nervous systems.⁴⁵ DHHS has determined that HCB may reasonably be anticipated to be a human carcinogen, the IARC has concluded HCB is a possible human carcinogen, and EPA has classified HCB as a probable human carcinogen.⁴⁶ The health effects of HCBd include compromised liver and kidney function, and EPA has classified the chemical as a possible human carcinogen.⁴⁷

Subsistence Fishing in Devil's Swamp Lake

The communities surrounding Devil's Swamp Lake are contained principally within Council District 2, East Baton Rouge Parish.⁴⁸ Council District 2 includes the

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ EPA, Region 10, *PCBs and You*, available at: <<http://yosemite.epa.gov/R10/OWCM.NSF/0/a9578719c73ad1de882569ed00782e89?OpenDocument>> (site visited 10/15/2004).

⁴² *Id.*; ATSDR *ToxFAQs for PCBs*, *supra*, n. 31.

⁴³ EPA, Region 10, *PCBs and You*, *supra*, n. 42.

⁴⁴ EPA, *HRS Documentation Record*, *supra*, n. 3 at 32. NPC, a Louisiana non-profit corporation, was formed in 1984 by a variety of industrial generators to clean up the Petro Processors of Louisiana, Inc. Superfund site (Petro), adjacent to the proposed Devil's Swamp Lake site. *MSOF Corp. v. Exxon Corp., et al.*, 295 F.3d 485, 488 (5th Cir. 2002).

⁴⁵ ATSDR, *Public Health Statement for Hexachlorobenzene* (September 2002), § 1.5, available at: <<http://www.atsdr.cdc.gov/toxprofiles/phs90.html>> (site visited 01/13/2005).

⁴⁶ *Id.*

⁴⁷ ATSDR, *Public Health Statement for Hexachlorobutadiene* (May 1994), § 1.5, available at: <<http://www.atsdr.cdc.gov/toxprofiles/phs42.html>> (site visited 01/13/2005).

⁴⁸ See "Map: Devil's Swamp Lake Area of Investigation," *NPL Site Narrative*, p. 4, *supra*, n. 30; cf. Map of Council District 2, Parish of East Baton Rouge, Louisiana, available at: <<http://brgov.com/dept/council/mc02.asp>> (site visited 09/15/2004).

small community of Alsen,⁴⁹ located near Devil's Swamp and established by freed slaves who settled there after the Civil War.⁵⁰ Historically, Devil's Swamp and its waterways were an important source of fish and crawfish for residents of Alsen and northern East Baton Rouge Parish.⁵¹ As industrial facility after industrial facility was constructed in the area, however, the swamp (and lake contained therein) became increasingly contaminated. In 1987, the Louisiana Department of Environmental Quality (LDEQ) and the Department of Health and Hospitals, Office of Public Health (LOPH) posted warnings against eating fish taken from the Devil's Swamp area.⁵²

Today the applicable health advisory warns against eating more than two meals per month of fish caught in the seven square mile Devil's Swamp Area.⁵³ The advisory warns those who read it of the area's contamination by PCBs, HCB, HCBd, lead, mercury, and arsenic.⁵⁴ Yet, as noted in Louisiana Governor Foster's letter in support of adding Devil's Swamp Lake to the NPL, surrounding communities continue to use the site for gathering food.⁵⁵ Why would people continue to eat food caught in the Devil's Swamp area? The answer is simple: many of the people that live in and near the swamp must hunt and fish to feed themselves and their families.⁵⁶ According to the 2000 Census, the median household income in 1999 for East Baton Rouge Parish's Council District 2 was \$23,909 – as noted earlier, 73 percent of the median household income for the state of Louisiana, and a mere 59 percent of the median household income for the nation.⁵⁷ Stated simply, many who live near the area face “a choice between having nothing on the table and not hunting and fishing in the swamp.”⁵⁸

⁴⁹ *Id.*

⁵⁰ See Florence Robinson, *5th Annual Heinz Award Recipient*, <<http://www.heinzawards.net/recipients.asp?action=detail&recipientID=32>> (site visited 10/15/2004).

⁵¹ *Id.*; Bob Anderson, *Most Louisiana Waterways Untested*, THE ADVOCATE, January 2, 1994, at 6A.

⁵² *Polluted Crawfish Being Sold*, THE TIMES-PICAYUNE (New Orleans, LA), June 12, 1993, at B4 (advisory posted in “mid-1980s”); See *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, available at: <<http://www.oph.dhh.state.la.us/environmentalepidemiology/healthfish/docs/other%20chemical%20Advisories%20Complete%20List.pdf>> (site visited 09/09/2004) (noting that initial advisory issued 10/87).

⁵³ *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, *supra*, n. 1. A “meal” is defined to be ½ pound of fish. *Id.*

⁵⁴ *Id.*

⁵⁵ Letter from M. J. “Mike” Foster, Jr., Governor, State of Louisiana, to Lawrence E. Starfield, Regional Administrator, EPA Region VI (March 18, 2003), available at <<http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d48023eb15&docIndex=0>>, document no. SFUND-2004-0004-020 (site visited 10/19/04). Governor Foster's letter further notes that people also continue to use the site for recreation. The health advisory warns not only against consuming more than 2 meals per month of fish caught in the area, but also prohibits swimming and water contact sports in the area. See *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, *supra*, n. 1.

⁵⁶ *EPA Considering Devil's Swamp for Superfund*, The Associated Press State & Local Wire (March 8, 2004), quoting Wilma Subra, chemist and representative of the Louisiana Environmental Action Network on the Louisiana Superfund Committee.

⁵⁷ Census 2000, U.S. Census Bureau. Median household income figures for 1999 contained in table DP-3: *Profile of Selected Economic Characteristics*. Data available through American Factfinder, <<http://>

An Issue of Environmental Justice

The health risks associated with eating PCB-contaminated fish from the Devil's Swamp Lake area are borne disproportionately by communities that are not only low-income, but also predominantly African-American. Specifically, 86 percent of the population in Council District 2 describe themselves as Black or African-American.⁵⁹ The fact that poor, African-American communities bear the majority of the risk associated with the PCB contamination in Devil's Swamp Lake is but another example of what one of the community's leading activists has called, in no uncertain terms, environmental racism.⁶⁰ As noted above, multiple industrial facilities surround the area. No less than twenty (20) sources in the area reported environmental releases of toxic compounds in 2002.⁶¹ The Court of Appeals of Louisiana has noted that the area is zoned for industrial use, and located adjacent to a state highway, a railroad and the

www.factfinder.census.gov> (site visited 10/14/2004). For geographic area District 2, East Baton Rouge Parish, Louisiana, median household income was \$23,909 for the state of Louisiana, median household income was \$32,566, and for the United States, median household income was \$41,944.

⁵⁸ *EPA Considering Devil's Swamp for Superfund*, *supra*, n. 57 (quoting Wilma Subra).

⁵⁹ Census 2000, U.S. Census Bureau. Table DP-3, *Profile of General Demographic Characteristics* for geographic area District 2, East Baton Rouge Parish, Louisiana, available through American Factfinder, <<http://www.factfinder.census.gov>> (site visited 10/14/2004).

⁶⁰ See *North Baton Rouge Environmental Assoc. v. Louisiana Dep't of Environmental Quality*, 805 So.2d at 262. The case involved a challenge by North Baton Rouge Environmental Association (NBREA) to the Louisiana Department of Environmental Quality's issuance of an operating permit to a new polypropylene production plant in the Alsen area. The court's opinion recounted the testimony of Florence Robinson, Professor of Biology at Southern University and member of NBREA, at the public hearing regarding the permit:

Alsen is probably one of the best examples of environmental racism in the nation. The problem here goes far beyond mere environmental justice concerns. It is a case of outright discrimination. Many do not like to hear the term racism brought up today, claiming that that is all in the past. Unfortunately, Alsen has been forced to continue to endure the racist actions of the past.

Id.

⁶¹ <http://www.scorecard.org/community/who.tcl?fips_county_code=22033&name=EAST%20BATON%20ROUGE&zip_code=70807> (site visited 10/21/2004). The Environmental Defense Fund created the www.scorecard.org page using data from EPA's Toxic Release Inventory (TRI) to permit persons to obtain information about sources of pollution in their communities. Information about the Alsen community and the area surrounding Devil's Swamp Lake can be obtained by entering zip code 70807 (the zip code associated with the Devil's Swamp Lake Clean Harbors Baton Rouge, LLC facility) to obtain the area's pollution report card.

The sources identified, in order of pounds of compounds released are: 1.) ExxonMobil Refining & Supply Baton Rouge Refinery; 2.) ExxonMobil Chemical Baton Rouge Chemical Plant; 3.) Honeywell International, Inc. – Baton Rouge Plant; 4.) Georgia Pacific Corp. Port Hudson Ops.; 5.) Baton Rouge Plastics Plant; 6.) DSM Copolymer Inc.; 7.) Exide Techs. Baton Rouge Smelter; 8.) Formosa Plastics Corp. Louisiana; 9.) Rhodia Inc.; 10.) Deltech Corp.; 11.) ExxonMobil Chemical Co. Baton Rouge Polyolefins Plant; 12.) Ferro Corp. Baton Rouge Site; 13.) Edo Specialty Plastics; 14.) ExxonMobil Chemical Co. Baton Rouge Resin Finishing Plant; 15.) Albemarle Corp.; 16.) PPG Grow Baton Rouge; 17.) Clean Harbors Baton Rouge LLC; 18.) Great Lakes Carbon Corp.; 19.) Schering-Plough Veterinary Ops. Inc.; and 20.) Driscoll Management L.L.C. *Id.*

Mississippi River, so although it is unfortunate that Alsen is “also situated in the general area, that fact alone does not constitute environmental racism.”⁶²

Even assuming that the multiple facilities operating in the area chose to locate there for no other reason than to take advantage of nearby transportation routes and appropriate zoning, the end result is the same: minority, low-income people bear a disproportionate share of the negative environmental consequences of the area’s industrial character. One such consequence, eating fish poisoned by PCBs, HCB and HCBd, raises an important issue of environmental justice, defined by EPA as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁶³ As noted earlier, in 1994, President Clinton formally recognized the need to advance environmental justice by directing federal agencies to identify and address, as appropriate, disproportionately high adverse human health or environmental effects on minority and low-income populations.⁶⁴

Cleaning up Devil’s Swamp Lake is a necessary step in addressing the many environmental justice concerns faced by Alsen and other communities in the area. The posted health advisory falls far short of being a sufficient protection for the surrounding community. Not only do income constraints prevent many from heeding the advisory, the warning itself is insufficient. In a January 1996 Public Health Assessment concerning the Superfund site adjacent to the proposed Devil’s Swamp Lake site, LOPH responded to public comments regarding the inadequacy of the 1993 advisory.⁶⁵ In response to a suggestion that the advisory include crawfish and other animals in addition to finfish, LOPH responded that the data did not then warrant expanding the advisory to include

⁶² *North Baton Rouge Environmental Assoc. v. Louisiana Dep’t of Environmental Quality*, 805 So.2d at 263. As Florence Robinson has argued, the area was designated as an industrial zone in the 1950s, a time when African-Americans were effectively shut out of public life. See John McQuaid, *Unwelcome Neighbors: How the Poor Bear the Burdens of America’s Pollution: The Reluctant Warriors*, THE TIMES-PICAYUNE, May 22, 2000, at A06.

⁶³ See <<http://www.epa.gov/compliance/environmentaljustice/index.html>> (site visited 10/21/2004).

⁶⁴ Exec. Order 12,898, 59 Fed. Reg. 7,629 (1994). The order recognizes the risk posed to minority and low-income populations that rely on fish and/or wildlife for subsistence, and instructs agencies to consider such consumption patterns in their environmental justice strategies. *Id.*, §§ 4-401 – 4-402, at 7631-32. Counsel for NPC has written that the Executive Order is “a classic example of top-down, command-control regulation, and is badly flawed.” Reed D. Rubinstein, *Rethinking Environmental Justice*, THE CONNECTICUT LAW TRIBUNE (December 12, 1994), p. 6. The article notes that Order 12898 will “make environmental permitting significantly more costly and more difficult,” and suggests re-energizing common-law nuisance and trespass doctrine as a potential solution to environmental justice concerns. *Id.*

⁶⁵ Louisiana Department of Health and Hospitals Under Cooperative Agreement With ATSDR, *Public Health Assessment, Petro-Processors of Louisiana, Incorporated, Baton Rouge, East Baton Rouge Parish, Louisiana*, Appendix F, Response to Public Comments, available at <http://www.atsdr.cdc.gov/HAC/PHA/petro/pet_p4.html#APPENDIX%20F> (site visited 10/21/2004).

crawfish.⁶⁶ Yet in the subsequent response, to a request that subsistence fishing be addressed since people cannot live on two meals per month, LOPH noted that:

Usually, chemicals are concentrated more in the fatty tissue. The risk of exposure to theses [sic] chemicals can be reduced by following the methods of preparing and cooking the fish provided in the advisory. *For crawfish*, fatty tissue includes the head portion.⁶⁷

The current advisory contains no such guidelines for preparing and cooking fish, nor does it contain a warning against eating crawfish heads,⁶⁸ which, for many, remains part of Louisiana culinary tradition.⁶⁹ In addition to local subsistence fishing, EPA has documented that up to 500 pounds of crawfish per day are harvested by commercial fisheries in the Devil's Swamp Lake, Devil's Swamp, and Bayou Baton Rouge areas, though the agency could not say where the contaminated crawfish ended up.⁷⁰

In short, posting an inadequate health advisory in an area where many people must continue to eat fish, crawfish and other wildlife to survive fails to protect against the serious health consequences of exposure to PCBs, HCB and HCBd, and thus fails to address the significant environmental justice concerns posed by the site's contamination. Meaningful cleanup is badly needed and long overdue, and an opportunistic procedural hurdle thrown up by a party specifically excluded from the regulatory action cannot be allowed to delay remediation of Devil's Swamp Lake.

Wrong in Principle

NPC, Having Held Up Listing of Devil's Swamp Lake Nearly a Decade Ago to Ensure it Would Not Be Liable for PCB Cleanup Costs, Is Again Attempting to Derail Urgently-Needed Cleanup Despite Being Specifically Excluded by EPA's Action.

⁶⁶ *Id.*, Response to Comment 15. The Response further noted, however, that "further sampling and analysis is recommended by LOPH/SEE [(Section of Environmental Epidemiology)] and ATSDR for crawfish consumption." *Id.*

⁶⁷ *Id.*, Response to Comment 16 (emphasis added).

⁶⁸ See *Louisiana Health/Fish Consumption Advisories (Other Chemical Contaminants)*, *supra*, n. 1.

⁶⁹ See, e.g., Dale Curry, *Jazzfest Cooks Thrive Under Pressure*, TIMES-PICAYUNE (April 29, 2004) (somewhere between 8,000 and 10,000 crawfish heads to be stuffed by single vendor for bisque served at 2004 Jazzfest in New Orleans); Sarah Crooks Clancy, *Boiling Crawfish Not a Difficult Process to Master*, ALEXANDRIA DAILY TOWN TALK (Alexandria, LA) (April 25, 2004) (noting that connoisseurs of crawfish "eat the fat out of the head").

⁷⁰ EPA, *HRS Documentation Record*, *supra*, n. 3 at 52. See also Bob Anderson, *EPA Eyes Devil's Swamp as Superfund Site*, THE ADVOCATE (Baton Rouge, LA), p. 1A (February 4, 1994) (noting that state and federal environmental officials have provided evidence that commercial crawfishing goes on in the swamp); *Polluted Crawfish Being Sold*, *supra*, n. 53 (quoting letter from EPA to FDA, which stated that EPA did not know whether the market for the 500 pounds per day of fish and crawfish harvested from the area is restricted to the state of Louisiana); see also *HRS Documentation Record*, *supra*, n. 3, p. 52 (noting that EPA has documented that up to 500 pounds of crawfish per day are harvested from the areas).

NPC, a Louisiana non-profit corporation, was formed in 1984 by the eleven industrial generators previously identified to clean up the Petro Processors of Louisiana, Inc. Superfund site (Petro), adjacent to the proposed Devil's Swamp Lake site.⁷¹ The Petro site consists of two locations, Scenic Highway and Brooklawn.⁷² The Scenic Highway area originated as a borrow pit used for petrochemical waste disposal from 1961-1974, while the Brooklawn location was opened in 1969 to accept petrochemical wastes after the Scenic area was filled to capacity.⁷³ Contaminants present in the Petro locations are chlorinated hydrocarbons, predominantly HCB and HCB, polycyclic aromatic hydrocarbons, heavy metals, and oils.⁷⁴

NPC has long endeavored to prevent addition of the Devil's Swamp Lake site to the NPL. Over a decade ago, EPA retained PRC Environmental Management, Inc. to perform an expanded site inspection for Devil's Swamp Lake.⁷⁵ During that period of investigation, the president of NPC opined that the area "shouldn't fall under the Superfund category," and noted that he didn't think the data for the southern part of Devil's Swamp indicates "as big a pollution problem as some people have feared."⁷⁶ NPC and its parent companies were concerned that they would be billed for cleanup of the second Superfund site.⁷⁷ NPC asserted that the two areas of contamination that exist in Devil's Swamp have different origins, with waste from Petro Processors extending only a short distance into the swamp.⁷⁸ According to NPC, a second contaminated site further into the swamp contained PCBs and other contaminants, which did not come from the waste disposal that occurred at Petro Processors.⁷⁹

On February 22, 1995, NPC's parent companies filed a motion in federal court, seeking an injunction against EPA, and asking the court to construe the consent decree under which the companies are obligated to cleanup the Petro site.⁸⁰ NPC and its parents

⁷¹ *MSOF Corp. v. Exxon Corp., et al.*, 295 F.3d 485, 488 (5th Cir. 2002). As noted in the introductory portion of this letter, NPC was formed by: Exxon Corporation, Exxon Chemical Corporation, USS Chemical Company, Copolymer Rubber & Chemical Corporation, Dow Chemical Company, Ethyl Corporation, Shell Chemical Company, American Hoechst Corporation, Allied Chemical Corporation, Rubicon Chemical Company, and Petro Processors of Louisiana Inc. *Id.*

⁷² EPA, *NPL Site Narrative for Petro Processors of Louisiana, Inc.*, p. 1, available at: <<http://www.epa.gov/earth1r6/6sf/pdf/0600442.pdf>> (site visited 10/22/2004).

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 2.

⁷⁵ EPA, *HRS Documentation Record*, *supra*, n. 3 at 10.

⁷⁶ Anderson, *EPA Eyes Devil's Swamp as a Superfund Site*, *supra*, n. 71 (quoting Bob Bolger, head of NPC Services, Inc.).

⁷⁷ Bob Anderson, *Group Fights Creation of La. Superfund Site*, *The Advocate* (Baton Rouge, LA) (March 5, 1995), p. 1B.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *USA v. Petro Processors LA*, Case No. 3:80cv00358, Docket Entry No. 796, *MOTION by Petro Processors LA, Dow Chemical Company, Ethyl Corporation; and Exxon Corporation Construing Terms of Consent Decree, and for Injunctive Relief* (M.D. La. February 22, 1995).

argued that the consent decree does not apply to a fixed geographic site, but rather allows NPC to move as far into Devil's Swamp as necessary to complete the cleanup of the wastes released from the Scenic Highway and Brooklawn locations.⁸¹ NPC therefore sought to prevent EPA from including in the second proposed Superfund site the portions of the swamp containing contaminants originating from the Petro site.⁸²

Nine years later, EPA proposed the second Superfund site, Devil's Swamp Lake, to the NPL.⁸³ In so doing, EPA specifically excluded releases from the existing Petro site.⁸⁴ As NPC and the Petro industrial generators had argued should be the case in the mid-nineties, EPA excluded not only the Scenic Highway and Brooklawn sites themselves, but also the areas in the Devil's Swamp Lake watershed to which the Petro characteristic chemicals (such as HCB and HCBD) had migrated.⁸⁵ EPA explicitly stated that Petro was not evaluated as a potential source for the Devil's Swamp Lake HRS package "because it has been determined in Federal Court that investigation and remediation of waste originating from the Petro site is addressed under the existing Consent Decree."⁸⁶ Finally, EPA expressly stated that the "PCB contamination found in the sediment in Devil's Swamp, Devil's Swamp Lake, and Bayou Baton Rouge is not attributable to processes at the Petro Processors facility."⁸⁷

Apparently, despite EPA's explicit exclusion of NPC's member companies as potential sources of contamination and any areas to which Petro characteristic wastes have migrated, as well as its unambiguous statement that the PCB contamination in Devil's Swamp Lake is not attributable to the Petro site, NPC still fears its member companies will be held liable for the PCB cleanup.⁸⁸ In its comments to EPA on the proposed listing, NPC states that it concurs with EPA's determination that the Devil's Swamp Lake site specifically excludes any releases from the existing Petro site, but makes the conclusory assertion that "[n]evertheless, NPC would be aggrieved by an NPL listing" of Devil's Swamp Lake.⁸⁹ Though its IQA Petition fails to acknowledge EPA's specific exclusion of NPC's member companies' releases, NPC makes a similarly unsupported statement therein: "[a]ctions taken by EPA regarding [Devil's Swamp Lake]

⁸¹ Anderson, *Group Fights Creation of La. Superfund Site*, *supra*, n. 78.

⁸² *Id.*

⁸³ 69 Fed. Reg. 10646 (March 8, 2004); *See also* EPA, *NPL Site Narrative for Devil's Swamp Lake*, available at: <<http://www.epa.gov/superfund/sites/npl/nar1717.htm>> (site visited 09/07/2004).

⁸⁴ EPA, *HRS Documentation Record*, *supra*, n. 3 at 4.

⁸⁵ *Id.* at 5.

⁸⁶ *Id.* at 25.

⁸⁷ *Id.* at 25.

⁸⁸ Marty Coyne, *Companies Seek Retraction of Study on Contaminated La. Lake*, GREENWIRE, September 3, 2004 (reporting that official with Louisiana Attorney General's Office said NPC fears member companies will be held liable for cleaning up PCBs in Devil's Swamp Lake if site is added to NPL).

⁸⁹ Letter from Reed D. Rubinstein, Esq., Counsel for NPC Services, Inc., to Docket Coordinator, US EPA (May 7, 2004) (the "NPC Comments"), p. 1, available at: <<http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d48023eb15&docIndex=1>>, Document No. SFUND-2004-0004-0055 (site visited 10/29/2004).

directly affect [NPC].”⁹⁰ Weighed against the manifest risks to health and well-being faced by communities in the area on a day-to-day basis, NPC’s dubious concerns about cleanup liability seem all the more marginal.

Wrong on the Merits

NPC is fully entitled to submit comments to EPA to protect its perceived interest, dubious or not, against the listing decision in accordance with the right of the public to participate in the NPL listing process.⁹¹ NPC was not content to wait for EPA’s response to its comments, however, opting instead to inappropriately invoke the IQA to seek retraction of the proposed listing. Seizing upon one of the myriad of comments it submitted on the proposed listing, NPC’s IQA Petition requests that EPA retract the listing on the basis that:

EPA failed to reference or rely on a 1999 Techlaw, Incorporated Risk Assessment Report . . . relying instead on data collected and reported over a decade ago, in a study known as the PRC Risk Assessment.⁹²

Both by its characterization of the PRC study as a “Risk Assessment” and by its charge that “EPA . . . failed to rely or report the more recent risk data,” NPC implies that there are two studies that cover the same topical material, one of which is older than the other, and that had the newer study been included, Devil’s Swamp Lake would not have met the listing criteria. Both implications are wrong.

The PRC Site Inspection Is the Appropriate Analysis Upon Which to Assign the HRS Score for Devil’s Swamp Lake

As noted *supra*, EPA’s primary tool for determining whether to list a site on the NPL is the HRS.⁹³ The mathematical model serves as a screening device for evaluating relative risks to health or the environment posed by releases of hazardous substances.⁹⁴ In order to derive the numerical score for any given site, the agency performing the evaluation (in this case, EPA Region 6), must perform a site inspection (SI) to collect or

⁹⁰ Letter from Reed D. Rubinstein, Esq., Counsel for NPC, Inc., to Information Quality Guidelines Staff, US EPA (August 30, 2004) (the “NPC Petition”), p. 2, available at: < <http://www.epa.gov/quality/informationguidelines/documents/04023.pdf> > (site visited 10/29/2004).

⁹¹ Regulations require that to place sites on the NPL, EPA must publish the proposed rule in the Federal Register and solicit public comments. 40 C.F.R. § 300.425(d)(5)(i). EPA published the proposed Devil’s Swamp Lake listing on March 8, 2004, *see supra*, n. 84. Publication of the final rule must be accompanied by response to significant public comments. 40 C.F.R. § 300.425(d)(5)(ii). EPA has not yet finalized listing of Devil’s Swamp Lake.

⁹² NPC Petition, *supra*, n. 91 at 6. NPC presented its objection to EPA’s use of the PRC study in its comments on the proposed listing, there asserting that “in failing to cite or include the most recent data,” EPA had acted arbitrarily, capriciously and contrary to law because “making an NPL listing without relying or referencing the most recent scientific data” would “violate IQA objectivity, utility and transparency requirements.” NPC Comments, *supra*, n. 90 at 6-7.

⁹³ *See* 40 C.F.R. § 300.425(c).

⁹⁴ *RSR Corp. v. EPA*, 102 F.3d 1266, 1268 (D.C. Cir. 1997).

develop data necessary to evaluate the release pursuant to the HRS.⁹⁵ While NPC refers to one of several studies conducted by PRC Environmental Management, Inc. as a “Risk Assessment,” the PRC analyses are in fact site inspections.⁹⁶

In contrast to a site inspection, a risk assessment is a study used at a later stage of the cleanup process, once the site is already listed on the NPL, namely the remedial investigation/feasibility study (RI/FS), the purpose of which is to “assess site conditions and evaluate alternatives to the extent necessary to *select a remedy*.”⁹⁷ As has been consistently recognized by the U.S. Court of Appeals for the D.C. Circuit, the “NPL is simply the first step in a process – nothing more – nothing less.”⁹⁸ Listing a site on the NPL “does nothing more than identify it as sufficiently contaminated to warrant potential remedial action.”⁹⁹ Therefore, EPA’s exploration of response options through the RI/FS process is unrelated to the HRS Site Score.¹⁰⁰

The distinctness of the two processes (listing and exploration of response options) derives from the narrow purpose of the NPL, which is to “identify, quickly and inexpensively, sites that warrant further action under CERCLA.”¹⁰¹ The determination of whether response action will be taken depends on the subsequent, more detailed studies of the risk posed by the site during the RI/FS stage.¹⁰² Though EPA amended the HRS in 1990 pursuant to Congressional direction that the HRS “accurately assesses the relative degree of risk to human health and the environment,” Congress did not intend that the HRS include the equivalent of detailed risk assessments such as are performed during the RI/FS.¹⁰³ Rather, Congress intended that the HRS perform “with a degree of accuracy appropriate to its role in expeditiously identifying *candidates* for response actions.”¹⁰⁴

⁹⁵ 40 C.F.R. § 300.424(c)(iii). A Site Inspection is defined as:

an on-site investigation to determine whether there is a release or potential release and the nature of the associated threats. The purpose is to augment the data collected in the preliminary assessment and to generate, if necessary, sampling and other field data to determine if further action or investigation is appropriate.

40 C.F.R. § 300.5.

⁹⁶ See *HRS Documentation Record*, *supra*, n. 3 at 10. The PRC analyses of the area are clearly identified as Site Inspections. Reference No. 6 is an Expanded Site Inspection (ESI) of Devil’s Swamp Lake; Reference No. 7 is an ESI of Devil’s Swamp; and Reference No. 8 is a Site Inspection for Bayou Baton Rouge.

⁹⁷ 40 C.F.R. § 300.430(a)(2). “Developing and conducting an RI/FS generally includes the following activities: project scooping, data collection, *risk assessment*, treatability studies, and analysis of alternatives.” *Id.*

⁹⁸ See, e.g., *Honeywell Internat’l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (quoting *Eagle-Picher Indus. v. EPA*, 759 F.2d 922, 932 (D.C. Cir. 1985) (*Eagle-Picher II*)).

⁹⁹ *Id.* (citing *Wash. State Dep’t of Transp. v. EPA*, 917 F.2d 1309, 1310 (D.C. Cir. 1990)).

¹⁰⁰ See *id.* (quoting EPA Response to Comments on the Proposed Listing of the Quanta Resources site).

¹⁰¹ *Id.* (quoting *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985) (*Eagle-Picher I*)).

¹⁰² See *Eagle-Picher I*, 759 F.2d at 919-20.

¹⁰³ *Hazard Ranking System, Final Rule*, *supra*, n. 18 (citing H.R. Rep. No. 962, 99th Cong., 2nd Sess. at 199-200 (1986)).

¹⁰⁴ *Id.* (emphasis added).

What NPC refers to as the “Techlaw Report” is one of two risk assessments performed by an EPA contractor in 1999.¹⁰⁵ NPC’s argument that EPA should have incorporated risk assessments in its HRS score confuses two separate and distinct steps in the remediation process set forth in the applicable regulations. EPA’s discretionary performance of risk assessments for the Devil’s Swamp Lake site prior to listing does not change the different purpose and nature of the risk assessments from the PRC Site Inspection, nor does it obligate EPA to assign an HRS score on the basis of studies used to evaluate alternatives for possible remedial action.

The listing of Devil’s Swamp Lake itself “does not require any action by any party, and does not determine any party’s liability for the cost of cleanup at the site.”¹⁰⁶ If EPA later decides, after the RI/FS process, to propose remedial action for Devil’s Swamp Lake that—contrary to its explicit exclusion of releases by NPC’s member companies—imposes cleanup liability on NPC, such proposal would be subject to all appropriate procedural safeguards, including public notice and opportunity to comment.¹⁰⁷

The Techlaw Report Would Not Have Changed EPA’s Decision to List Devil’s Swamp Lake on the NPL

Even ignoring the distinct and differing purposes of the PRC Site Inspection and the Techlaw Risk Assessments, NPC’s IQA challenge still fails on the merits. EPA specifically stated in the Devil’s Swamp Lake HRS Documentation record that:

EPA completed Human Health and Ecological Risk Assessments in 1999 for this site. *The human health assessment concluded that unacceptable risks to human health exist[] in three areas.* The ecological risk assessment concluded that the sediments pose a risk to fish and crawfish in the north swamp, south swamp, and Devil’s Lake.¹⁰⁸

Contrary to NPC’s implication, therefore, had EPA assigned an HRS score based on the studies performed to enable it to evaluate remediation alternatives, the result would have been the same: the PCB contaminated sediments in Devil’s Swamp Lake pose unacceptable risks to human health and the environment.

Perhaps in recognition of that very inevitability, NPC, while arguing that the HRS Documentation record and associated documents are flawed in their failure to consider the Techlaw risk assessment, simultaneously argues that even the risk assessment does not comport with an OMB guideline discussed more fully below, or “meet quality

¹⁰⁵ See *HRS Documentation Record*, *supra*, n. 3, at 1 (stating that EPA completed Human Health and Ecological Risk Assessments in 1999 for Devil’s Swamp Lake).

¹⁰⁶ See *Kent County, Delaware Levy Court v. EPA*, 963 F.2d 391, 394 (D.C. Cir. 1992) (citing *Eagle Picher I*, 759 F.2d at 920).

¹⁰⁷ See 42 U.S.C. § 9617; 40 CFR § 300.430(f)(3)(i)(A).

¹⁰⁸ *HRS Documentation Record*, *supra*, n. 3 at 1. NPC did not object to EPA’s failure to include the Ecological Risk Assessment in its HRS scoring analysis.

standards.”¹⁰⁹ Stated simply, NPC puts EPA in a classic no-win situation: EPA’s listing was flawed because it didn’t include the risk assessment, but the risk assessment also falls short of NPC’s standards, so the listing would fail NPC’s test even had the risk assessment been explicitly considered.

Any Implicit Challenge to the HRS Raised by NPC’s Petition is Time-Barred.

Although NPC’s Petition never explicitly challenges the HRS, in each of its six “requested disclosures,”¹¹⁰ the company seeks information about not only the data, but also the methods used to determine various conclusions set forth on EPA’s *Worksheet for Computing HRS Site Score* and *Surface Water Overland/Flood Migration Component Scoresheet*. The “methods” EPA used to compute the information set forth on those worksheets are taken from the HRS itself.¹¹¹ Accordingly, NPC’s requests to evaluate those methods in order to “test the objectivity and reproducibility” of the site score suggests that the HRS itself may not, in NPC’s estimation, satisfy IQA standards. Such a challenge to the HRS is over thirteen years too late. The HRS was last revised on December 14, 1990.¹¹² Pursuant to CERCLA, any challenge to the HRS must have been made within ninety days from the date the revised HRS regulation was promulgated, *i.e.* by March 14, 1991.¹¹³ Accordingly, any implicit challenge to the HRS raised in NPC’s Petition is time-barred.¹¹⁴

¹⁰⁹ NPC Petition at 6. Immediately after asserting that neither the PRC site inspection nor Techlaw risk assessment “appear to comport with either the letter or the spirit of § V(3)(ii)(C) of the OMB Guidelines, or meet quality standards,” NPC argues that the releases in question were federally permitted. This argument, raised by NPC in its comments to EPA, is strictly a legal argument, based on an exclusion under CERCLA. *See* 42 U.S.C. § 9607(j), NPC Comments at 5. While properly raised in the NPL rulemaking process provided under CERCLA, such a legal argument is wholly inappropriate in a Petition for Correction of Information filed under the IQA.

¹¹⁰ Although seven (7) requests are set forth in the Petition, Request numbers 4 and 5 are identical. *See* NPC Petition at 5-6. Neither the IQA nor implementing guidelines issued by either OMB or EPA provide the public with a mechanism to request disclosure of information. The public, including NPC, may gain access to agency information by filing a Freedom of Information Act request. *See* 5 U.S.C. § 552.

¹¹¹ The formula set forth on lines 5 and 6 of the *Worksheet for Computing HRS Site Score* (*See HRS Documentation Record, supra*, n. 3 at 6) referred to in Request No. 1 of NPC’s Petition is explicitly set forth in 40 CFR pt. 300 App. A. § 2.1.1, *Calculation of Site Score*:

Scores are first calculated for the individual pathways as specified in sections 2 through 7 and then are combined for the site using the following root-mean-square equation to determine the overall HRS site score, which ranges from 0 to 100: $S = \sqrt{(S_{gw}^2 + S_{sw}^2 + S_s^2 + S_a^2)/4}$.

The next three Requests by NPC seek information about the methods set forth in Table 4-1, the *Surface Water Overland/Flood Migration Component Scoresheet* (*See HRS Documentation Record, supra*, n. 3 at 7-9), which follows exactly the template set forth in 40 CFR pt. 300 App. A. § 4.1.1.3, *Evaluation of Overland/Flood Migration Component*, Table 4-1.

¹¹² *Hazard Ranking System, Final Rule*, 55 Fed. Reg. 51532 (Dec. 14, 1990).

¹¹³ *See* 42 U.S.C. § 9613(a).

¹¹⁴ *See, e.g., RSR Corp. v. EPA*, 102 F.3d 1266, 1269 (D.C. Cir. 1997) (finding challenge to HRS time-barred).

Wrong on the Law

The IQA was passed as an appropriations rider amending the Paperwork Reduction Act, without debate or the creation of any legislative history.¹¹⁵ Its stated purpose is to ensure that the “quality” of information disseminated by the government is “maximized.”¹¹⁶ Congress instructed the Executive Branch to determine how this seemingly benign goal is to be met, requiring OMB and the agencies to establish procedures for ensuring the “objectivity, utility, and integrity of information . . . disseminated by” the federal government.¹¹⁷ The public remedy that Congress provided in the Act is the ability of “affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued” *by that particular agency*, here EPA.¹¹⁸ OMB issued its final guidelines in February 2002, directing the agencies to issue their own implementing guidelines.¹¹⁹

¹¹⁵ Shapiro, *The Information Quality Act and Environmental Protection*, *supra*, n. 12 at 345 (citing *Treasury and General Government Appropriations Act for Fiscal Year 2001*. Pub. L. No. 106-554, § 515(a), (b)(2)(A), 114 Stat. 2763A-125, 2763A-154 (2001)).

¹¹⁶ *Id.* at 344.

¹¹⁷ *Id.* at 339, 345. The IQA states in its entirety:

- (a) In General. The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.
- (b) Content of Guidelines. The guidelines under subsection (a) shall
 - (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
 - (2) require that each Federal agency to which the guidelines apply
 - (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
 - (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
 - (C) report periodically to the Director
 - (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency and;
 - (ii) how such complaints were handled by the agency.

Treasury and General Government Appropriations Act for Fiscal Year 2001. Pub. L. No. 106-554, § 515, 114 Stat. at 2763A-153 to 2763A-154 (2001), 44 U.S.C. § 3516.

¹¹⁸ *Id.*, § (b)(2)(B).

¹¹⁹ Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies; Republication*, 67 Fed. Reg. 8452 (February 22, 2002) (the “OMB Guidelines”).

EPA issued its Information Quality Guidelines (EPA Guidelines) in October 2002.¹²⁰

NPC's Petition does not seek the only remedy provided by the IQA, namely correction of information. Rather it seeks two remedies not provided by the IQA: production of information, and ultimately retraction of a proposed regulatory action. Further, while NPC argues that the HRS information for Devil's Swamp Lake is flawed because a more recent risk assessment was not explicitly used in computing the HRS score, nowhere in its Petition does the company point to a provision of either the IQA or implementing agency guidelines that requires the use of data gathered, or analyses conducted, within a specified time frame.

NPC Repeatedly Refers to an OMB Guideline that Specifically Allowed for Adaptation by Individual Agencies, and Consistently Ignores EPA's Adaptation

While failing to point to any provision that requires the use of the latest scientific analyses (whether appropriate for use in the context under review or not), NPC does point to a specific guideline to attack both the maligned PRC site inspection and more recent Techlaw risk assessment: § V(3)(ii)(C) of the OMB Guidelines.¹²¹ However, an EPA Guideline issued pursuant to OMB's direction controls in the context of that Agency's proposed listing of Devil's Swamp Lake.

The OMB Guideline upon which NPC relies to challenge the proposed listing of Devil's Swamp Lake states, in relevant part, that:

With regard to analysis of risks to human health, safety and the environment maintained or disseminated by the agencies, agencies shall adopt *or adapt* the quality principles applied by Congress to risk information used and disseminated pursuant to the Safe Drinking Water Act Amendments of 1996 [(SDWAA)].¹²²

Although NPC never explicitly argues as much, its reliance on the OMB Guideline suggests that the scientific analysis underlying EPA's decision to propose Devil's Swamp Lake to the NPL must comport with the quality principles set forth in the SDWAA. Those standards require EPA, in its implementation of the Safe Drinking Water Act, to "use . . . the best available, peer-reviewed science and supporting studies conducted in

¹²⁰ See *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency* (October 2002) (the "EPA Guidelines"), available at <http://www.epa.gov/quality/informationguidelines/documents/EPA_InfoQualityGuidelines.pdf> (site visited 11/02/2004).

¹²¹ NPC invokes § V(3)(ii)(C) of the OMB Guidelines in: 1.) four of its Requests for Disclosure, as the standard against which NPC demands to measure the information sought; 2.) its Basis for Correction, as the provision with which both the PRC site inspection and Techlaw Risk Assessment fail to comply; and 3.) its request that EPA retract the proposed listing of Devil's Swamp Lake, as the guideline with which the underlying analyses must comply in order for the site to be proposed to the NPL. See NPC Petition at 5-6. Since there is no § V(3)(ii)(C) of the OMB Guidelines, this letter assumes NPC refers to § V(3)(b)(ii)(C), which addresses analyses of risks to human health, safety and the environment disseminated by agencies. See OMB Guidelines, *supra*, n. 120.

¹²² OMB Guidelines, *supra*, n. 120, § V(3)(b)(ii)(C).

accordance with sound and objective scientific practices”¹²³ However, Congress established different – and less prescriptive – evidentiary standards in other environmental and health and safety standards.¹²⁴

Where evidentiary standards for science-based decision-making are not explicitly defined, they are the same as the substantive statutory standards.¹²⁵ In CERCLA, Congress granted EPA the authority to respond to an “imminent and substantial endangerment to the public health or welfare or the environment because of an actual or *threatened* release from a facility.”¹²⁶ EPA would be violating its mandate under CERCLA if, instead of acting proactively to respond to actual or threatened releases in order to protect public health and the environment, it adopted the rigid principles set forth in the SDWAA.¹²⁷ Accordingly,

EPA adapted the SDWA[A] principles by adding the phrase ‘*consistent with Agency statutes and existing legislative regulations*, the objectivity of such information disseminated by the Agency’ . . . to explain EPA’s intent regarding these quality principles and their implementation consistent with our statutes and existing legislative regulations.¹²⁸

While NPC repeatedly implies that EPA must ensure that the risk analyses used to compute the HRS score for Devil’s Swamp Lake comply with SDWAA standards, it consistently ignores EPA’s adaptation of the standards, which clarifies that standards set forth in existing statutes and regulations still control. NPC’s reliance on the OMB Guideline is misplaced – EPA Guidelines control the analysis of whether information disseminated by EPA complies with the IQA, and EPA Guidelines refer back to existing statutes and regulations. NPC’s Petition does not argue that the scientific analyses fail to comply with CERCLA or its implementing regulations, instead it attempts to impose a new standard, one not mandated by the IQA, OMB or EPA.

¹²³ 42 U.S.C. § 300g-1(b)(3)(A). The SDWAA also requires EPA to use “data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data).” *Id.*

¹²⁴ Shapiro, *The Information Quality Act and Environmental Protection*: *supra*, n. 12 at 355.

¹²⁵ *Id.*

¹²⁶ 42 U.S.C. § 9606(a) (emphasis added). Technically, Congress delegated authority under CERCLA to the President, who has subdelegated the authority to EPA. *See Mead Corp. v. Browner*, 100 F.3d 152, 153 n. 1 (D.C. Cir. 1996) (citing Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981); Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987)).

¹²⁷ *See Shapiro, The Information Quality Act and Environmental Protection*, *supra*, n. 12 at 356. “Given that other statutes set out different evidentiary standards, it would be illegal for EPA or another agency to adopt the SDWAA principles in another context.” *Id.*

¹²⁸ EPA Guidelines, *supra*, n. 121, § 6.4, p. 23 (emphasis added).

The Petition Seeks to Hold EPA to a Much Stricter Level of Scrutiny for its Proposed Addition of Devil's Swamp Lake to the NPL Than a Court Would Apply Under Appropriate Avenues for Judicial Review of a Final Listing.

If EPA, after considering and responding to public comments submitted concerning its proposed addition of Devil's Swamp Lake to the NPL, decides to finalize the site's place on the NPL, NPC's remedy lies in a petition under CERCLA and/or the federal Administrative Procedure Act for judicial review of the EPA's listing decision.¹²⁹ However, the NPC's petition sought to convert the IQA into a vehicle that would allow those disgruntled with regulatory *proposals* to bypass established remedies and stop EPA's regulatory process before it starts.¹³⁰ The reason for the attempt is clear: if NPC sought judicial review of the EPA's final listing pursuant to the CERCLA and/or the APA, the reviewing court would seek to determine only whether the EPA's actions are arbitrary and capricious.¹³¹ Under such a standard of review, a court would review the record as a whole to ensure that the EPA's actions in adding Devil's Swamp Lake to the NPL were reasonable.

By NPC's desired construction of the IQA, however, before EPA may issue even a proposed rule, the Agency must first disclose endless information to all potentially affected entities so that they may make individualized determinations of whether the scientific information that underlies EPA's proposed action meets data quality standards of their own invention. Though regulated entities may well prefer such a standard to the established "arbitrary and capricious" standard of review for agency action, the IQA falls far short of supporting such a construction. Members of the public have ample opportunity to contest the validity of information relied upon by regulators during the rulemaking process associated with additions to the NPL, in both the administrative and judicial contexts. NPC has already availed itself of its right to participate in that process and has voiced its concerns in comments.¹³² Its IQA Petition strains the letter and spirit of the IQA beyond recognition. "Congress could not have meant IQA to apply to rulemaking because the requirement that an agency establish an 'administrative mechanism' to hear information quality complaints is entirely superfluous or redundant."¹³³

Conclusion

Protection of the public health, in this case the vulnerable communities who use Devil's Swamp for subsistence fishing, must be EPA's paramount concern. EPA should

¹²⁹ See 42 U.S.C. § 9613(a); 5 U.S.C. § 702.

¹³⁰ Judicial review under CERCLA and/or the APA would not be available until EPA had actually issued a final rule adding Devil's Swamp Lake to the NPL. NPC's attempted use of the IQA avoids the judicial requirement that a dispute be ripe for review and seeks to cut off EPA's regulatory actions at the pass.

¹³¹ See 5 U.S.C. § 706(2)(A) (stating that reviewing courts shall find unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law).

¹³² See NPC Comments, *supra*, n. 90.

¹³³ Shapiro, *The Information Quality Act and Environmental Protection*, *supra*, n. 11, at 365.

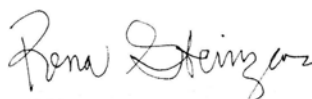
The Honorable Michael O. Leavitt
Dr. John Graham
January 14, 2005

have denied NPC's IQA Petition outright rather than consider its arguments as part of the comments on the listing proposal. We now ask that EPA finalize listing of Devil's Swamp Lake immediately, and in conjunction with its final listing, reject the arguments raised by NPC in its IQA petition for the reasons set forth herein. Final listing will begin to address the significant environmental justice issues associated with Devil's Swamp Lake, and we urge EPA to further address those issues by ordering NPC's member companies and Clean Harbors Baton Rouge, LLC to provide groceries to those affected by the poisonous fish in the lake and surrounding swamp. Finally, we call upon OMB to promptly discourage such irresponsible use of the IQA by clarifying that the Act does not apply to rulemakings.

Sincerely,



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