

OFFICE OF THE COMMISSIONER

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April 5, 2019

Peter D. Lopez
Regional Administrator
United States Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007

Re: Hudson River PCBs: Remedial Action Completion Report and Certificate of Completion

Dear Regional Administrator Lopez:

DEC has received and reviewed the information provided by the United States Environmental Protection Agency (EPA) by letters of March 18 and March 29, 2019, in response to DEC's comments on the March 2019 revised Remedial Action Completion Report ("the Report"), submitted by General Electric (GE) for the Hudson River PCBs site. EPA's March 18 letter states that EPA believes the letter narrative and attachments address DEC's comments on the Report. DEC is not interested in refuting or agreeing with EPA's statements. Further engagement with EPA on the Report will only serve to cloud the substantive issue of concern for New York State and various other stakeholders.

While EPA believes the Report is now complete, EPA has yet to address DEC's more important concern that the remedy for the upper Hudson is far from complete. As DEC has stated to EPA on several occasions over the past few years: DEC believes that the remedy is not protective of human health and the environment; it will likely not be protective for many decades; and EPA should not certify the remedy as complete unless and until EPA can say with confidence that the remedy is protective of human health and the environment. To issue such a certification prematurely will trigger a release of liability for GE which could represent a significant legal impediment to EPA, hindering any further needed remedial work.

As you know, EPA did not modify the scope of the remedial action when significantly more PCBs were identified during project design, during project implementation, and even after more data became available after remedy implementation. EPA's stubborn refusal to do so has not been adequately explained.

Based upon recent EPA public statements, DEC now estimates that over 40% extra PCB mass (or more than 15 tons of PCBs) now remains in the upper Hudson, much more than EPA believed would remain after remediation. This extra, remaining PCB mass was never addressed by EPA and it has effectively been ignored by the agency, even when the information and the opportunity to act has been an option for EPA since designing the remedy over a decade ago. The remaining PCB mass is almost certainly the cause of the continued elevated PCB concentrations in fish in the upper Hudson.

DEC has also identified to EPA concerns about the fish PCB concentrations measured after dredging. EPA's Record of Decision (ROD) identified specific Remedial Action Objectives (RAOs) which included achieving specific rapid reductions in fish PCB concentrations in the upper Hudson, to achieve the needed reductions in human health and ecological risks. As DEC has pointed out to EPA several times, the first specific ROD target for the average fish PCB concentrations, 0.4 parts per million (ppm) total PCB five years after dredging (completed in 2015), will very likely not be met. The most recently measured (2017) average fish PCB concentrations remain three times the target to be reached in 2020, as the rate of decline in fish PCB concentrations is much too slow. It also appears unlikely that the remedy will achieve the second specific target, 0.2 ppm total PCB in fish sixteen years after dredging. The only remaining controls on human health and ecological risk during the monitored natural recovery phase of the remedy is the State Department of Health fish consumption advisories, which EPA admits are not completely effective for protecting the public and do not address ecological risk.

DEC urges EPA to continue to apply the rationale which formed the basis for selecting the dredging remedy in 2002. While the long-term goal of 0.05 ppm total PCB in fish was not going to be reached for many decades whether or not the dredging work was performed, EPA specified in the ROD that the remedy would achieve the rapid reductions in risk represented by the specific targeted reductions in fish PCB concentrations by conducting the dredging remedy. It appears that EPA is now disavowing these Remedial Action Objectives set in the ROD, focusing solely on the long-term goal.

DEC also again points out to EPA an additional failure of the remedy. GE has failed to complete its obligations to reconstruct habitat that it destroyed during implementation of the dredging remedy. Before EPA can issue a certificate of completion, the EPA is obligated pursuant to law to ensure that aquatic habitat affected by the remedial program is fully reconstructed and restored as part of implementing the dredging remedy. As detailed in DEC's November 22, 2017 letter, EPA is required to comply with applicable, relevant and appropriate requirements (ARARs) and monitor the effectiveness of the remedy to affirm that it is meeting the goals set by the ROD.

As this department and the New York State Office of the Attorney General have conveyed to EPA on multiple occasions, certifying a remedy as complete, which EPA has itself acknowledged in the last version of its five-year review is not protective of human health and the environment, violates federal law and regulation, is arbitrary and capricious, and is not in the best interests of the public.

To avoid potential litigation, and to retain EPA's ability to require GE to perform additional remedial work in the upper Hudson, we again urge EPA to enforce its Consent Decree with GE consistent with its plain meaning and a plain reading of CERCLA. Current information demonstrates that the remedial objectives set forth ROD have not been met, and further data gathering over the next several years will only confirm what all can already predict: that additional remedial actions are necessary to protect human health and the environment in the upper Hudson.

DEC renews its request that EPA refrain from certifying the PCB remedy for the upper Hudson River as complete. EPA should instead move forward with gathering the data and performing the evaluations necessary to determine how much additional sediment removal is necessary to meet the ROD goals, as well as ensuring habitat reconstruction is performed properly. DEC remains prepared to work with and support EPA in accomplishing these tasks.

Sincerely,

A handwritten signature in black ink, appearing to read 'Basil Seggos', written over a horizontal line.

Basil Seggos
Commissioner

c: Lauren Charney, EPA
Gary Klawinski, EPA