

Cc: Mitch Butler[mitchbutler@naturalresourceresults.com]; david anderson[danderson@naturalresourceresults.com]
To: Jackson, Ryan[jackson.ryan@epa.gov]; Davis, Patrick[davis.patrick@epa.gov]
From: Ned Sullivan
Sent: Tue 5/30/2017 12:44:23 PM
Subject: Hudson River Superfund Site Update - Time Sensitive

Dear Mr. Jackson and Mr. Davis,

I recently spoke with Acting Deputy Regional Director Walter Mugdon at the suggestion of Mr. Davis and am deeply concerned to learn that he has prepared the Five-Year Review of the Hudson River Superfund Site for release with the conclusion that the remedy “will be protective.” We believe this finding is both unsupported by current data and not an allowable finding under EPA guidance at this phase of remediation.

While we at Scenic Hudson believe the correct conclusion is “not protective” -- a view shared by New York State, the entire environmental community, leading business representatives, and state, federal, county and local elected officials -- I write at this time to make a plea for a FYR conclusion that “protectiveness cannot be determined.”

Alternatively, I recommend you delay the decision and convene a group including New York State and the federal trustees and charge it to come to consensus on whether the cleanup is protective. (It is our understanding that there are no legal or regulatory repercussions to delaying issuance of the FYR beyond the June 1st date.) If the Administrator’s office is reluctant to second-guess the recommendation of the regional office, this multi-agency working group would provide a solution. This would be a particularly helpful approach, given the disagreement between EPA and the federal and state Natural Resource Trustees, each with relevant responsibilities under CERCLA. If these agencies cannot come to consensus, then the inevitable conclusion, we believe, should be “protectiveness cannot be determined.”

Following are our reasons for this recommendation:

1. EPA guidance states that a determination that a remedy “will be protective” is only appropriate for a remedy that is “under construction”. Active construction of the Hudson River remedy ended with the conclusion of habitat restoration in 2016. Therefore, given the fact that risks to human health and the environment from Hudson River PCBs remain at unacceptable levels, the only possible FYR conclusions are that the remedy is “not protective” or “protectiveness cannot be determined”.
2. In contrast to the many risks associated with a finding that the remedy “will be protective,” there is no down-side whatsoever to a finding that “protectiveness cannot be determined.” In view of New York’s imminent sampling program, a more definitive conclusion regarding the state of the river’s health can await those results, also allowing for delegation of the lead on further action to NYS. Stakeholders will cheer the decision.
3. While Walter emphatically takes the position that the Five-Year Review and the

Certificate of Completion are completely separate and unrelated, a position disputed by New York State (September 16 letter), a FYR finding that the cleanup will be protective will inevitably be used to justify and complement the Certificate of Completion to relieve GE of further remedial obligations. Once the Certificate of Completion is issued, it will become far more difficult to hold General Electric liable for additional cleanup in the upper Hudson, even if subsequent sampling shows the remedy is not protective.

4. Further, state and federal agencies believe the goals of the ROD will not be reached for decades longer than EPA predicted, as stated in a peer-reviewed study by NOAA. One of the points of disagreement between NOAA and EPA is the rate of natural attenuation. Given the persistent nature of PCBs, this is largely a measure of how quickly the contaminants will flow downriver and contaminate the lower Hudson and the New York-New Jersey Harbor, continuing to cause as much as a 30-fold increase in the cost of navigational dredging. The New York-New Jersey Harbor Estuary has among the highest PCB concentrations in the water, sediment, and biota along the coastal United States. PCBs travel from the Upper Hudson Superfund Site throughout the estuary, including New York Harbor-Newark Bay. Three-quarters of the PCB load in the Harbor comes from this source.

5. Virtually all of Administrator Pruitt's relevant and explicitly stated policy goals can be achieved by a finding that "protectiveness cannot be determined." EPA would be embracing a state's position, opening the door for delegation on a river the Administrator has publicly stated he wants to see cleaned up. The upper Hudson, and the entire 200-mile site, could be set on a road to environmental and economic recovery and job creation -- a win-win solution.

I send my sincere appreciation for the time you have taken to listen to the views expressed by various stakeholders and me and remain hopeful that the agency will come to a decision that opens the door to full restoration of the Hudson and the region's economy.

Sincerely,

Ned Sullivan

Ned Sullivan
President

Scenic Hudson, Inc.

Tel: 845 473 4440 Ext 224
Fax: 845 473 2648
nsullivan@scenichudson.org

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