Hudson River Sloop Clearwater
Natural Resources Defense Council
Riverkeeper
Scenic Hudson

November 22, 2010

Honorable Lisa P. Jackson
Administrator, USEPA
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Re: Hudson River PCBs Superfund Site

Dear Administrator Jackson:

We write to follow-up on our October 8, 2010 letter, in which we urged EPA to reject General Electric Company's (GE) request to retain, for another year, the right to abandon the historic cleanup of the Hudson River under EPA's 2006 settlement with the company. After decades of delay, study, negotiation, and legal maneuvering, EPA must not allow GE to put off its day of reckoning. As you know, over the last 8 weeks more than 10,000 individual members of the public have contacted you and delivered this same message.

Today, we emphasize that EPA must also ensure that Phase 2 of the cleanup proceeds to completion using sound science, and in compliance with the 2002 Record of Decision (ROD), which states that protecting human health and the environment requires "[r]emoval of all PCB-contaminated sediments within areas targeted for remediation, with an anticipated residual of approximately 1 mg/kg Tri+ PCBs (prior to backfilling)."[1]

To achieve this goal, <u>EPA must design technical standards for Phase 2 that will maximize the amount of PCBs safely and permanently removed from the river, and minimize the amount of contaminant left behind under "caps"</u>, which may or may not remain in place over the long-term.[2] As explained below, we strongly urge EPA to adopt technical standards that do <u>not</u> utilize a "one-pass" approach to dredging, <u>unless GE demonstrates that this approach will remove virtually all PCBs from the areas targeted for dredging</u>, as required by the ROD.

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[1] ROD, pp. iii and p. 95.

[2] In the ROD (p. 108), EPA rejected a 'capping' remedy because it "is less permanent and reliable than the selected remedy" and "does not effectively eliminate long-term risks for target areas that are capped because of long-term effectiveness and maintenance concerns associated with the cap, and it would also require certain Site use restrictions in the capped areas."

We understand that EPA is developing technical standards for Phase 2 that will be issued near the end of November. This will trigger a 30-day deadline for GE to "opt-in" or "opt-out" of completing the PCB cleanup – a cleanup that EPA, the U.S. Department of the Interior, National Oceanic and Atmospheric Administration, New York State Department of Environmental Conservation, and a Peer Review Panel ("Panel") of independent experts have all concluded can and should be completed successfully.[3]

We are hopeful that EPA's ongoing work is a sign of its resolve not to accede to GE's demands for delay. We also commend EPA for taking seriously the Panel's recommendations, including the idea that dredged areas should be closed more quickly to reduce potential re-suspension of PCBs. However, improving efficiency in this way must not come at the expense of large quantities and concentrations of PCBs being left behind. The Panel did not recommend any such trade-off – notwithstanding GE's suggestions to the contrary – and EPA must not acquiesce to GE's demands for less dredging and more capping of PCBs in Phase 2.

During Phase 1, many core samples, including those believed to be "high confidence," failed to accurately predict depth of contamination ("DoC"). This resulted in large amounts of PCB-contaminated sediment left in the river and excessive capping. Accordingly, the Panel stressed that its recommendation to do a single pass of dredging in any given location during Phase 2 is contingent on retrieval of better samples that more accurately define the DoC.[4] In other words, to provide a high level of confidence for a successful cleanup, the Panel identified the following essential pre-requisites for using the "one-pass" approach:

- "All sampling must be performed to attain at least 80 percent recoveries of all soft sediments either to bedrock or Glacial Lake Albany Clay (GLAC). . . . All cores should be analyzed until 2 6-inch layers have Total PCBs below 1 ppm." (Panel Report, p. vi; emphasis added)

- "Remodel the DoC based on the 1 ppm Total PCBs cleanup level using all high-confidence elevation-based cores." (Panel Report, p. vii; emphasis added)

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[3] At least 67 municipalities also passed resolutions in support of, or otherwise formally endorsed, a full cleanup when EPA was considering the draft ROD.

[4] See, for example, the following passages from the Peer Review of Phase 1 Dredging, Final Report (Sept, 10, 2010) (hereinafter "Panel Report"):

> "The Panel's proposed modifications are predicated on the Panel's belief—based on our evaluation of the Phase 1 information and our collective experience—that if the DoC is better characterized and a focus is placed on quick closure of CUs, the bulk of PCB inventory can be removed during Phase 2." (p. 6, emphasis added)

> "Phase 2 can remove the bulk of the PCB inventory if coring data and the resulting DoC model results are improved and focus is placed on quick closure of CUs." (p. 84, emphasis added)

Based on initial results of the coring conducted this fall, it appears GE may not be able to characterize the DoC with sufficient accuracy to allow for use of the one-pass approach at the start of Phase 2 in the spring.[5] Rather than proceed with that approach under circumstances that make it unlikely to succeed, EPA should design technical standards to ensure that, from the outset of Phase 2, an additional pass will be conducted when needed to achieve the targeted cleanup level of 1 ppm Tri+ PCBs. A one-pass approach should only be allowed later, if a single pass has consistently achieved the 1 ppm standard.

If GE is permitted, nonetheless, to use a one-pass approach at the start of Phase 2, EPA must ensure that the technical standards (i) apply significantly higher "confidence levels" to interpolate the DoC from the incomplete core data than were used in Phase 1; and (ii) provide that, if early results show a single pass does not consistently achieve the targeted cleanup level , further adjustments (including the use of a second dredging pass) will be made rapidly, before sizeable areas have been capped and high levels of PCBs left behind unnecessarily, in violation of the ROD. EPA must also ensure that any capped areas are covered over with backfill and receive full habitat replacement, and that GE is bound to monitor and maintain the caps in perpetuity.

Additionally, although not specifically noted by the panel, a new (pre-dredging) determination of DoC has implications for delineation of the area targeted for dredging. A deeper DoC, reflecting a greater mass of PCBs, alters the calculation of PCB mass per unit area ("MPA"), which the ROD established as a key determinant of the dredge area delineation. Therefore, , in order to faithfully implement the ROD, EPA must ensure that the best available information about DoC (and therefore about MPA) is used to establish the boundaries of targeted dredging areas in Phase 2.

Finally, we wish to highlight two further considerations relating to the Phase 2 technical standards. First, the cost to GE to process "extra" sediment – a potential effect of using higher confidence levels to interpolate the DoC – should not play a role in EPA's decision-making. Any argument for cost-cutting rings hollow, as GE has inflicted enormous environmental and economic damage on the Hudson and its communities, while growing to a $170 billion company, during its decades of delay and posturing on the cleanup. By law, EPA must base the Phase 2 standards on protection of public health and the environment, not protection of GE's bottom line.[6]

Second, field data and modeled projections of PCB levels in fish, newly available since the Panel's final report, undermine GE's contention that Phase 1 results show dredging should be scaled back to avoid undermining the benefits of the cleanup. The fish samples collected

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[5] Preliminary data from EPA show that, in the first month of field work, more than half of the 315 core samples failed to satisfy the Panel's 80% recovery criterion.

[6] *See* 42 U.S.C. 9621(b)(1), (d)(1) ("Remedial actions selected under this section…shall attain a degree of cleanup…at a minimum which assures protection of human health and the environment."); 40 C.F.R. § 300.430(f)(1)(i)(A) ("Overall protection of human health and the environment and compliance with [other environmental laws, unless waived] are threshold requirements" for Superfund remedies.).

and processed by GE and the New York State Department of Environmental Conservation during the spring and fall of 2010 show that re-suspension from Phase 1 caused no meaningful change in PCB levels in fish tissues due to the Phase 1 dredging. Further, GE's own modeling predicts that, if Phase 2 is completed with re-suspension levels similar to those observed in Phase 1, it would succeed in reducing PCBs in Upper Hudson River fish to levels safe for human consumption – and that if the cleanup does not proceed, contaminant levels would remain poisonous to humans for untold decades into the future, beyond 50-year horizon of GE's modeling. This underscores the urgency of completing a full cleanup, not scaling it back.

GE says it wants decisions on the cleanup to be guided by sound science – but its actions don't match its rhetoric. The company, yet again, is ramping up its public relations machine and distributing the company's incomplete and misleading version of the facts among local, state, and federal elected officials, hoping to borrow their voices to sway EPA.

The people of New York are counting on your agency to stand up to GE's tactics, which serve only the company's financial self-interest. EPA must vigorously exercise its duties in service of the *public* interest and the natural resources of the United States it is chartered to protect.

We would welcome the opportunity to meet with you this month, and will follow-up with your office shortly to schedule a meeting. In the meantime, we urge you to issue technical standards for Phase 2 that ensure removal of all PCBs to the level required by the ROD, and to take all steps available to EPA to ensure that GE is legally bound to resume dredging in Spring 2011 and continue until the cleanup is properly completed.

Sincerely,

Frances Beinecke
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Jeff Rumpf
Executive Director, Hudson River Sloop Clearwater

Paul Gallay
Executive Director, Hudson Riverkeeper

Ned Sullivan
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cc: Robert Sussman, Senior Policy Counsel, EPA
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