



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Angus Macbeth, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Re: Hudson River PCBs Superfund Site

Dear Mr. Macbeth:

This is in response to your November 6, 1997 letter to Richard Caspe of EPA, which has been referred to me for reply. In your letter, you raise a number of issues concerning EPA's definition of the Hudson River PCBs Superfund Site ("Site"). Your letter was occasioned by statements made by EPA's Remedial Project Manager for the Site, Douglas Tomchuk, at an October 16, 1997 meeting with the New York State Department of Environmental Conservation. At the October 16 meeting, Mr. Tomchuk indicated that the Site encompasses the entire 200-mile stretch of the Hudson River between Hudson Falls and the Battery in New York City.

Mr. Tomchuk's description of the Site is consistent with how EPA has defined the Site since at least April 1984, when the Agency issued its Feasibility Study ("FS") for the Site and before the Site was finally listed on the National Priorities List ("NPL", codified at 40 CFR Part 300, App. B). As stated in EPA's April 1984 FS:

The environment affected by the Hudson River PCB problem includes all waters, lands, ecosystems, communities and facilities located in or immediately adjacent to the 200-mile stretch of river from Fort Edward to the Battery. This project focuses on, *but is not limited to*, the most heavily contaminated reach between Albany and Fort Edward (Upper Hudson River) (emphasis added). FS at ES-4.

Similarly, in EPA's September 25, 1984 Record of Decision ("ROD"), the Site is defined by reference to three figures which, together, depict the Site as the entire 200-mile stretch of the River from Hudson Falls to the Battery in New York City, plus the remnant deposits. See ROD, "Site Location and Description" at p.1 and Figures 1 through 3, referenced therein. We also note that in two consent agreements between EPA and GE pursuant to which GE conducted response activities with regard to the remnant deposits (Administrative Order on Consent, Index No. II-CERCLA-90224 and the July 23, 1990 consent decree entered in U.S. v. General Electric Company, Inc., Civ. No. 90-CV-575), the Site was described as being "located in New York State in and adjacent to the Hudson River, from Fort Edward, New York to New York Bay in New York City." In addition, as acknowledged in your letter, during the Reassessment EPA has consistently defined

the Site as including the Upper and Lower River. See, e.g., EPA's August 1991 *Phase I Report for the Reassessment RI/FS*, and the *Scope of Work for Hudson River Reassessment RI/FS* (December 1990). Thus, the claim that GE somehow did not have notice that the Site encompasses the Lower River strains credulity.

EPA's NPL listing documents for the Site, one of which describes the Site as "a 40-mile stretch of the Hudson River between Mechanicville and Fort Edward, New York," do not, as you assert, preclude the Agency from including the Lower Hudson as part of the Site without further notice and comment rulemaking.¹ The NPL does not - and is not intended to - describe releases in precise geographic terms; defining sites in such a restrictive manner would be inconsistent with the NPL's limited purpose of identifying releases which are appropriate for further evaluation. See Preamble, National Priorities List for Uncontrolled Hazardous Waste Sites, Proposed Rule No. 23, 62 Fed. Reg. 50,450 (September 27, 1997) (the geographic area used to identify a site on the NPL does not necessarily define the boundaries of the site, which "consists of all contaminated areas within the area used to identify a site, as well as any other location to which contamination from that area has come to be located, or from which that contamination came." 62 Fed. Reg. 50451). The NPL is simply a "tool for identifying quickly and inexpensively those sites meriting closer environmental scrutiny." Washington State Dept. of Transp. v. EPA, 917 F.2d 1309, 1310 (D.C. Cir. 1990). See also Eagle-Picher Industries v. EPA, 759 F.2d 922, 932-933 (D.C. Cir. 1985) ("Eagle-Picher II") (Court agrees with EPA's characterization of the NPL as a "rough list of priorities, assembled quickly and inexpensively to comply with Congress' mandate for the agency to take action straightaway...The NPL is simply the first step in a process - nothing more, nothing less.").²

The D.C. Circuit has held that site boundaries are not circumscribed by the geographic description of a site appearing on the NPL, and that EPA may expand the boundaries of a site if further investigation reveals a wider scope of contamination. In Washington State Dept. of Transp. v. EPA, the Washington State Department of Transportation ("WSDOT") challenged an EPA decision to include property owned by WSDOT within the previously identified Commencement Bay Nearshore/Tideflats site. EPA placed the Commencement Bay site on the NPL in 1983 on the basis of a hazard ranking score derived from two non-WSDOT facilities. During the next several years, EPA investigated property acquired by WSDOT located approximately three miles from one of the facilities and five miles from the other. As a result of its investigations, EPA determined that the WSDOT property also was a source of contamination, and designated the WSDOT property as part of the Commencement Bay site. Washington State Dept. of Transp., 917 F.2d at

¹ It should be noted that EPA's Hazard Ranking System ("HRS") package for the Site, in which the Agency calculated the Site's HRS score that was the basis for listing the Site on the NPL, was prepared in September 1982, well prior to issuance of the final FS and the ROD.

² Limiting a site to the geographic area identified in the NPL listing documents would also be inconsistent with Section 101(9) of CERCLA, which defines a "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located..." 42 U.S.C. § 9601(9).

WSDOT challenged EPA's inclusion of its property as part of the site, claiming that EPA designated the property as part of the Commencement Bay site without first affording WSDOT notice and an opportunity to comment on the inclusion, and that EPA did not follow its own regulations in determining the site's geographic scope. Washington State Dept. of Transp., 917 F.2d at 1309-1310. The D.C. Circuit upheld EPA's inclusion of the WSDOT property within the site boundaries, citing EPA's policy that the Agency "need not specify precise geographic boundaries in designating a[n] NPL site, and that *if boundaries are initially defined they may be enlarged later if additional study reveals a wider scope of contamination.*" Washington State Dept. of Transp., 917 F.2d. 1310 n. 1 (emphasis added). The court stated that the "nametag assigned to the NPL site did not suggest that it was limited to a particular industrial facility, but used the name of a broader region..." Washington State Dept. of Transp., 917 F.2d at 1312. Therefore, the court held that the WSDOT property was within the "broad compass of the 1983 Commencement Bay listing" and that WSDOT had received adequate notice that its property might be considered part of the Commencement Bay site. *Id.* See also Eagle-Picher Industries v. EPA, 822 F.2d 132 (D.C. Cir. 1987) ("Eagle-Picher III") (Addressing EPA's expansion of an NPL site's boundaries from 15 to 115 square miles after EPA obtained additional information about the extent of contamination, the court said, "Standing alone, the change in the Agency's description of the site's size does nothing more than indicate the Agency's acquisition of more accurate information on the scope of the contamination." Eagle-Picher III, 822 F.2d at 144 n. 59).³

The Lower Hudson clearly is within the "broad compass" of the Hudson River PCBs site listing, because it is within the "areal extent of contamination" resulting from the discharge of PCBs to the Upper Hudson River. The fact that there are other sources of PCBs to the Lower Hudson does not change this fact. In addition, consistent with the D.C. Circuit's holding in Washington State Dept. of Transp., the fact that EPA's HRS score for the Site was derived from an investigation that focused on PCB-contaminated sediments in the Upper Hudson does not restrict the Agency from defining the Site boundaries to include contaminated areas in addition to those used to derive the HRS score.

For the reasons stated above, we cannot agree with your statement that "EPA must accept the constraints that are imposed as a result of having limited the geographical reach of the Site and, consequently, limiting its review of potential response actions to the Upper River." Likewise, while it is premature now for EPA to be able to say precisely how, and to what extent, the issue of benefits to Lower River fish and those who consume them will be factored into our decision-

³ The Mead Corp. v. Browner, 100 F.3d 152 (D.C. Cir. 1996) does not require a different result. In Mead, the court addressed the issue of whether EPA's Aggregation Policy, 48 Fed. Reg. 40,658 (Sept. 8, 1983), could be used to include as part of an NPL site a noncontiguous parcel where there has been no migration of contaminants between the parcel and the NPL site and where the listing of the parcel otherwise could not be justified by EPA's risk-related criteria or by state designation. EPA is not using the Aggregation Policy to include the Lower Hudson as part of the Site.

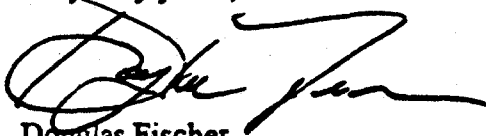
making, we do not agree with your categorical statement that it would be unreasonable to consider benefits that remedial alternatives for the Upper River may have on the Lower River, or that an expansion of the scope of the Reassessment would need to precede any consideration of benefits to the Lower River. The Reassessment will include an assessment of the effects that the contaminated Upper River sediments are having on the Site, including the Lower River. Further, if the Thomann Model is available within an appropriate time frame, the Reassessment will include a human health risk assessment for the reach of the River between the Troy Dam and Poughkeepsie.

In part because of the aforementioned case law, we also do not agree with your claim that, unless the Agency's inclusion of the Lower River as part of the Site is accompanied by notice and comment rulemaking, an investigation of other sources of PCBs to the River, and an investigation of the impacts that hazardous substances other than PCBs are having on the River, GE would be unfairly prejudiced in the Reassessment because the company has focused its data collection and factual analysis on the Upper River. Again, EPA has consistently defined the Site to include the Upper and Lower River since before the 1984 ROD was issued. Throughout the Reassessment, EPA has maintained - and continues to maintain - that the purposes of the Reassessment include an evaluation of the impacts that PCB-contaminated Upper River sediments have on the Site, and an evaluation of remedial options for the Upper River in light of those impacts, among other factors. Moreover, and as we have stated on a number of occasions, EPA is not at this time evaluating remedial options for the Lower River.

Since the Hudson River PCBs NPL Site includes the Upper and Lower River, it is academic that EPA need not, as you request, "segregate and clearly label any expenditures associated with any area outside" the Upper River. In any event, even if we were to accept your argument that the Lower River is not part of the Hudson River PCBs NPL Site, please bear in mind that Fund-financed RI/FS's (e.g., the Reassessment RI/FS) are not limited to NPL sites, and a site's inclusion on the NPL is "not a precondition to action by [EPA]...under CERCLA section 107 for recovery of...Fund-financed costs..." See 40 C.F.R. §§ 300.425(b)(1) and (b)(4).

I trust this letter addresses the concerns raised in your November 6 correspondence to Mr. Caspe. If you wish to discuss these issues further, you may call me at (212) 637-3180.

Very truly yours,



Douglas Fischer
Assistant Regional Counsel
Office of Regional Counsel

cc: John Haggard, GE