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FRIENDS OF A CLEAN HUDSON

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Ms. Christine Todd Whitman
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

October 12, 2001

Dear Administrator Whitman:

Friends of a Clean Hudson would like to thank Eileen McGinnis, Michael Shapiro, Jessica Furty from your office and Sai Prakash from the Office of Management and Budget for meeting with us on Tuesday, October 2, 2001. We share your commitment to the goal of ensuring the best cleanup possible for the Hudson River.

Friends of a Clean Hudson is deeply concerned about any attempt to include specific or numeric performance standards in the Hudson River Superfund Site's (Site) Record of Decision (ROD). Recent discussions between EPA headquarters and General Electric regarding incorporation of performance standards into the ROD, which took place without the benefit of public participation and scrutiny, are premature and inappropriate.

Friends of a Clean Hudson's position on performance standards is uniform and unequivocal. We fully support the use of performance standards for the Hudson River cleanup but categorically reject specific or numeric standards being included in the ROD. Friends of a Clean Hudson believes that, consistent with longstanding Agency practice and guidance, EPA's regional project managers, working with others with the necessary technical expertise, should develop credible performance standards during the design phase. Such standards must be based on sound science and technical information related to the specific details of the cleanup plan - details that cannot be known or sufficiently understood until the design phase is underway.

During the October 2nd meeting, Ms. McGinnis articulated three goals as rationales for inclusion of performance standards in the ROD. Based on her presentation, we understand those three goals to be:

- (1) Meet EPA's responsibility to ensure that the cleanup is done correctly, especially given the project's magnitude;

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- (2) Develop measurable standards of performance to guide the project's implementation (as recommended by the NAB study);
- (3) Address upriver community concerns about project-related disruptions such as odor, noise, truck traffic, etc.

These are all laudable goals which Friends of a Clean Hudson whole-heartedly endorses. The trouble is that none of these goals address the issue of timing - i.e., why EPA needs to develop performance standards now, before the ROD is issued, as opposed to later during the design phase, as is customary. None of these goals therefore succeed in justifying in any way your seeming rush to include performance standards in the ROD. Friends of a Clean Hudson believes that inclusion of numeric performance standards at this time will only frustrate and divert from your enumerated objectives.

Specifically, there are four fundamental problems with including performance standards in the ROD: (1) EPA does not yet have sufficient information on the details of the cleanup to develop meaningful performance standards; (2) inclusion of performance standards in the ROD would only serve to delay and confound the project; (3) development of performance standards before the ROD is finalized will subvert the public participation component necessary for a successful cleanup; (4) the issuance of a ROD with specific performance standards will establish a dangerous precedent that will be used by Potentially Responsible Parties (PRPs) to escape their cleanup responsibilities on toxic waste sites around the country.

Performance criteria, when used appropriately, allow for project adjustments which protect public health and the environment and provide a mechanism for oversight and accountability. These indicators, when clearly linked to the individual characteristics of the site and specific treatment technologies, provide the flexibility necessary to achieve cleanup targets. However, including specific or numeric performance standards at this time is neither legally required nor advised by Agency guidance or practice. Relevant guidance in fact cautions against such specificity so as not to hamstring a project unnecessarily.

During our meeting, Ms. McGinnis sought to engage Coalition members in a discussion of two of the performance standards you are apparently considering including in the ROD. The first was one for production rates which would attempt to ensure the project's completion at the end of five years - presumably a way to reassure upriver community residents more directly affected by the cleanup that the government is committing itself to an endpoint.

There is significant controversy as to what realistic production rates are. One only has to look at the EPA Feasibility Study (FS) and GE's own comments to realize that "acceptable" production rates are a point of contention. GE in its comment on EPA's FS, states that "dragging production rates assumed by EPA are unrealistic and unprecedented...and are unachievable." In addition, Congress mandated in CERCLA Section 121 that any remedy must be protective of human health and the environment. Doing the cleanup correctly is

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our mutual goal, and stopping any cleanup before it is completed to meet an arbitrarily chosen endpoint controverts the legal requirements of the law you are enforcing.

Ms. McGinnis also revealed that EPA Headquarters is considering the inclusion of a resuspension performance standard in the ROD. As those involved in other dredge projects around the country have repeatedly confirmed, the key issue regarding the establishment of resuspension rates is determining what is 'acceptable.' Many factors influence this determination, including: immediate needs of closest affected parties; downstream impacts; existing 'natural' or 'background' resuspension levels; and, the risks, if any, of missing short term targets as compared to the long term benefits associated with removal. While developing performance standards for acceptable resuspension rates is extremely difficult at any time, a useful resuspension standard would be impossible to determine at this time - again, until you have the benefit of knowing project specifics.

While Friends of a Clean Hudson would not necessarily be opposed to EPA considering the development of either production rate or resuspension rate standards during the design phase, the pairing of the two seems ominous indeed. Production rates and resuspension rates can work to contradict and undermine each other. High resuspension rates may be used to try to shut down a project. An attempt to reduce those rates may lead to a need to curtail production rates, thereby offering another opportunity for killing or delaying the project.

If inclusion of specific or numeric performance standards is perceived as a significant change to the draft ROD, the Agency risks having to issue a revised proposed plan and undergo an additional public review and comment process, thereby significantly delaying issuance of a final ROD. Should your performance standards require revision during the actual design or implementation of the project, EPA will need to undertake a ROD amendment or an Explanation of Significant Differences (ESD). Reopening the ROD will lead to extremely lengthy delays, serious cost overruns, and worst of all, an erosion or complete loss of public confidence in the remedy.

Including performance standards in the ROD will not further your goal of addressing the need for full public participation process at this Site. Not only has there been no public review and comment of the standards you are considering, but there is no stakeholder support for your position on this issue. In addition to Friends of a Clean Hudson, key New York State officials, including Governor Pataki, Attorney General Spitzer, and DEC Commissioner Crotty, oppose the drive to integrate performance standards in the ROD - as do your own Agency's regional and hired technical experts. None of the above mentioned, outside EPA staff, have been included in recent discussions you have had with GE on performance standards. Thus, the only interested party that supports this approach is GE - the same PRP that has yet to accept EPA's proposed cleanup plan and is most recently on record as vowing to commit whatever resources necessary to stop it.

There is no precedent to support the approach you are contemplating. In fact, such action, which Ms. McGinnis acknowledged would be "groundbreaking," would establish an

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expressly dangerous precedent as you would effectively hand deliver to PRPs a powerful tool to thwart environmental cleanups nationwide. This unnecessary action could create impossible hurdles for your regional staff in overseeing completion of successful projects, thereby leaving communities vulnerable to hazardous health conditions.

Finally, Ms. McGinnis acknowledged that you are contemplating a decision to have EPA Headquarters - instead of EPA Region 2 - sign the ROD. To justify such a move, you cite the significance of this particular cleanup. We agree that the Hudson River clean up is tremendously important. However, part of its significance is derived from the complexities posed by a cleanup of this magnitude. Accordingly, EPA Headquarters should allow the Regional staff, with its formidable expertise and years of experience dealing with the Site, to continue to manage the project and make the key decisions regarding how the cleanup progresses. We believe that Region 2's Hudson River Team has done a very thorough and professional job to date and is best equipped to see the project through to completion.

Friends of a Clean Hudson fully supports performance standards but remains unaware of a single compelling or rational justification for including such standards in the ROD.

We welcome your invitation to provide, at the appropriate time, input on performance standards and on the creation of an effective public participation plan, and look forward to working with you during the critical design phase.

Friends of a Clean Hudson sincerely hopes to be able to continue supporting EPA's efforts to bring about the cleanup for which Hudson Valley residents have waited twenty-five years. Thank you again for giving us the opportunity to share our views on this critical issue.

Sincerely, & on behalf of Friends of a Clean Hudson,

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