

November 5, 2005

Stephen L. Johnson, Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

- Notification regarding the persistent failure of the New Jersey Department of Environmental Protection to enforce federal environmental laws and to respond adequately to a public health emergency created by widespread chromium contamination;
- Request for USEPA to assert federal jurisdiction; enforce federal environmental laws; conduct federal oversight of federally delegated programs; and investigate New Jersey Department of Environmental Protection's failed response to a public health emergency created by widespread chromium contamination.

Dear Administrator Johnson:

The enclosed Report and formal requests are submitted by Zoe Kelman, an employee of the New Jersey Department of Environmental Protection (NJDEP). New Jersey Public Employees for Environmental Responsibility (NJ PEER) joins Ms. Kelman in making this request for federal intervention in New Jersey.

Enclosed for your review and action please find:

“REPORT TO THE NJDEP COMMISSIONER ON NJDEP’S CHROMIUM CLEANUP CRITERIA” (Kelman, October 2005. hereafter “Report”).

The Report demonstrates that documented releases of hazardous substances are causing direct exposure of thousands of residents in densely populated urban areas. These exposures constitute an unacceptable risk, an imminent and substantial threat to human health and environment, and a public health emergency. The Report finds that:

- 1) NJDEP conducted sampling that shows actual individual cancer risks as high as **one in ten** (1×10^{-1}) at sites that have been certified by NJDEP as clean pursuant to State remedial laws;

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- 2) federal Courts and NJDEP scientists have concluded that NJDEP has approved chromium site remedies that have documented failures and off-site releases;
- 3) federal courts have ruled that NJDEP has failed to enforce the Resource Conservation and Recovery Act (RCRA);
- 4) offsite releases have resulted in direct human contact with chromium and have violated Clean Water Act requirements;
- 5) NJDEP's chromium soil cleanup criteria are scientifically flawed and were derived by undue and improper influence of responsible parties and regulated industry;
- 6) NJ's regulatory framework and remedial approach are inconsistent with federal requirements; are not adequately protective of human health and the environment; and are not based on the best available current science; and
- 7) NJDEP continues to fail to act and to enforce state laws and federally delegated programs as required to protect public health and the environment.

We hereby request that the U.S. Environmental Protection Agency initiate immediate action in connection with the imminent and substantial threat to public health presented by the release of hazardous substances from NJ chromium sites.

We request that EPA immediately assert primary jurisdiction over chromium sites and, with full public participation, take action to comprehensively assess and mitigate the imminent and substantial threat to public health caused by the chromium releases pursuant to EPA's response authority under Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604, and its imminent hazard authority under RCRA, 42 U.S.C. 6973. Furthermore, we request that EPA initiate enforcement action for violations of the Clean Water Act (CWA), 33 U.S.C. 1251 et seq, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 et seq., in connection with chromium releases and illegal discharges to waters of the United States.

We are submitting this urgent request because USEPA has jurisdiction pursuant to federal laws; because the New Jersey Department of Environmental Protection (NJDEP), the state agency with delegated authority to enforce clean water, hazardous waste, and toxic cleanup laws, has failed to enforce delegated federal requirements; and because NJ State remedial laws are less protective of public health and environment than, and inconsistent with, federal requirements.

I) Background

As a participant in the New Jersey Department of Environmental Protection (NJDEP) Chromium Workgroup, Ms. Kelman recently filed the enclosed Report to alert the NJDEP Commissioner to serious errors and omissions in NJDEP's "**Chromium Workgroup Report**" (March 2004, hereafter "NJDEP Workgroup") and warn of the harmful effects that adoption of the recommendations would have on the health of New Jersey residents in areas of the state with chromium contamination.

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At the request of NJDEP Commissioner Campbell, a team of NJDEP scientists headed by Robert Hazen, Ph.D., recently conducted a review of NJDEP's chromium cleanup criteria. This review team (Hazen et al. 2004) wrote a memorandum to the Commissioner in March 2004 summarizing its findings and making recommendations. **The Hazen report identified that the actual risk at a site (based on monitoring results) far exceeded the predicted risk of the model. The excess cancer risk based on monitoring data was calculated to be 1 out of 10.** The predicted risk based on the model is 1 out of a million. These actual risks far exceed NJ and EPA requirements. NJ laws establish a one in a million individual excess cancer risk level, while EPA has established an acceptable individual excess cancer risk range of 1×10^{-4} – 1×10^{-7} .

Hazen et. al. 2004 documented serious flaws in NJDEP's chromium cleanup criteria and recommended stricter standards to protect public health. Commissioner Campbell's response was to convene a second internal review panel – the NJDEP “Chromium Workgroup.” As a chemical engineer in NJDEP's Hazardous Site Remediation Program, Ms. Kelman served on this panel.

Early in the panel's deliberations, the NJDEP supervisor of the “Workgroup” effort informed Ms. Kelman that Commissioner Campbell had called her at home to discuss the direction of the panel, and to discuss his concerns regarding any findings that would require the Department to substantially tighten its chromium cleanup criteria. Among these concerns was the fear that the Department would be exposed to potential litigation risk if it admitted significant flaws in its cleanup criteria, which had been used to certify dozens of chromium sites as “clean.”

Soon after this conversation, members of the “Workgroup” received a written directive from an Assistant NJDEP Commissioner articulating a shift in the Workgroup's mission. The original “charge” given to the Workgroup, and announced to the public, was “to review the 1998 cleanup criteria.” The new directive expressly instructed the “Workgroup” members **NOT** to review the 1998 criteria – only to examine new information. The subsequent discussion and debate among “Workgroup” members was dominated by NJDEP managers, who ultimately wrote a “final report” that omitted dissenting views and disregarded the Hazen et. al. report.

Despite prohibiting the “Workgroup” from reviewing the 1998 criteria, the managers who wrote the “final workgroup report” took the extraordinary liberty of stating that the report showed that “the 1998 criteria are based on existing science.” This is a falsification.

Ms. Kelman's purpose in compiling the enclosed Report was to alert Commissioner Campbell to the extensive scientific evidence omitted from the “final workgroup report” showing that the 1998 criteria and NJDEP's overall remedial approach fail to protect the public from a significant risk of cancer due to exposure to chromium.

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II) Federal Courts find “imminent and substantial threat to human health or the environment” and a “substantial breakdown” in NJDEP’s remedial program

The unacceptable human health risks documented in the Kelman and NJDEP Workgroup Reports are consistent with US District Court and Third Circuit Court of Appeals decisions in “Interfaith Community Organization v. Honeywell International, Inc.” 619 F. Supp. at 1994, which found an “imminent and substantial threat to human health or the environment,” and ordered Honeywell, the responsible party in the case, to excavate and remove all of the chromium waste from the property. The Court also ordered the remediation and cleanup of the groundwater at the site, as well as the sediments in the Hackensack River that had been contaminated with chromium from the site.

At the case trial, Honeywell argued for “the right to continue to work with the DEP,” and reminded the judge that “we have an agreement with the DEP.” The court rejected this “right,” finding that NJDEP had permitted 20 years of “dilatory tactics” by the company. The court ruled that the capping remedy proposed by Honeywell would not protect public health and the environment, and that a complete excavation was the only adequate remedy.

Honeywell appealed this ruling to the Third Circuit U.S. Court of Appeals, arguing that the District Court erred in ordering the excavation remedy, that capping was an adequate remedy, and that the court overstepped its authority in removing the case from NJDEP’s jurisdiction. The Appeals Court strongly and unanimously upheld the District Court ruling, and again found that NJDEP had failed to protect public health and the environment:

“Honeywell’s final argument is that the District Court improperly overrode an ongoing administrative process. ...[A] fair reading of the record casts strong doubt as to whether there is a process to override in this case.”

...[T]he court finds that the evidence demonstrates a substantial breakdown in the agency process that has resulted in twenty years of permanent clean-up inaction.”

This same continuous and longstanding pattern of failure by NJDEP has resulted in long-delayed or incomplete cleanups of as many as 200 known chromium dump sites in Hudson County, New Jersey.

III) Federal jurisdiction triggered

Documented releases and unauthorized discharges of hazardous substances and hazardous wastes from as many as 200 known sites in Hudson County have triggered EPA jurisdiction under CERCLA and RCRA. The Report also reveals that NJDEP has not enforced various violations of EPA delegated RCRA and the Clean Water Act program requirements.

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We believe that the State of New Jersey is not prepared to assume and enforce various responsibilities under delegated and non-delegated federal laws, including CERCLA, RCRA/HSWA and the Clean Water Act. We further believe that current state environmental laws provide inadequate legal authority to respond to these threats, and that NJ lacks the political will and institutional ability to enforce state laws in a manner that is protective of public health and the environment.

IV) NJ State remedial laws less protective & inconsistent with federal requirements

NJ's remedial laws and regulatory framework are inconsistent with applicable federal requirements and are insufficiently protective of human health and environment. Specifically, NJ's remedial laws, regulations; and NJDEP regulatory practices:

- fail to provide public notice, opportunity for public comment, and meaningful public participation in remedial decisions;
- strip NJDEP of authority to compel responsible parties to implement protective permanent remedies;
- prohibit NJDEP from requiring that a responsible party conduct a feasibility study that identifies alternatives, and to subject these alternatives to public review;
- vest selection of the remedial action solely in the hands of the responsible party
- allow economic compliance costs considerations to over-ride permanent remedies required to protect public health and the environment;
- deregulate and privatize certain soil cleanups; and
- fail to enforce CERCLA, Clean Water Act and RCRA requirements in cleanup decisions

V) Request for USEPA intervention

Based upon documented unacceptable risks and a longstanding and continuing pattern of failure by the NJDEP, we request that EPA:

- assume federal jurisdiction and control of the remedial process at certain chromium sites pursuant to CERCLA, RCRA, and the Clean Water Act;
- conduct necessary and appropriate CERCLA emergency removal actions to control chromium exposures;
- notify and warn the public of these unacceptable risks and provide assistance in community response to chromium remediation;
- refer the matter to EPA and Department of Justice for appropriate criminal and civil enforcement action;
- refer NJDEP's handling of the chromium matter to the EPA Inspector General for investigation;
- request that the Agency for Toxic Substances and Disease Registry conduct a community health study and impact assessment of chromium contamination; and

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- conduct site assessments and initiate the NPL listing process for certain chromium sites.

We do not believe that the State of New Jersey is prepared to assume and enforce various responsibilities under delegated and non-delegated federal laws, including CERCLA, RCRA/HSWA and the Clean Water Act, with respect to these chromium sites. We strongly recommend that EPA review this matter fully and promptly.

Sincerely,

Zoe Kelman

Bill Wolfe, Director
NJ Public Employees for Environmental Responsibility (NJ PEER)

Enclosure: **REPORT TO THE NJDEP COMMISSIONER ON NJDEP's CHROMIUM CLEANUP CRITERIA**" (Kelman, October 2005)

c: USEPA Region II Administrator

