BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
GENERAL ELECTRIC COMPANY	)	RCRA Appeal No. 16-01
Modification of RCRA Corrective Action Permit No. MAD002084093	)	

GENERAL ELECTRIC COMPANY'S RESPONSE TO EPA REGION 1'S MOTION FOR LEAVE TO FILE A SUR-REPLY

The General Electric Company ("GE") does not oppose EPA Region 1's April 12, 2017 motion for leave to file a sur-reply. However, in considering EPA's Motion, GE respectfully submits that it is important for the Board to understand that what the Region claims are "new contentions" by GE are no such thing, and can be found in both GE's Comments and its Petition for Review.

1. **Both GE's Comments and its Petition Raised the Consent Decree Distinction Between Modifications to a Remedial Action and Additional Remedial Actions.**

The Region seeks to file a sur-reply on the ground that GE's Reply to the Region's Response is "the first time" that GE has raised the fact that the Consent Decree ("CD") makes a distinction between EPA's authority under Paragraph 39.a of the CD to *modify* a remedial action specified in the Modified Permit and its authority to require GE to perform *additional* remedial actions. EPA Sur-reply at 1-2. This is not true.

In its comments on EPA's draft permit modification, GE stated that "EPA's authority under Paragraph 39.a to require ***modifications*** of the Rest of River work does not extend to requiring ***additional*** remediation actions later to meet the Downstream Transport Standard,

because that would not be 'consistent with the scope of the [Rest of River] response action." GE Comments at 62 (emphases added). Rather, "EPA's authority under the CD to require GE to conduct ***additional*** response actions beyond the actions required by the initially selected remedy is limited to the situation in which the covenant reopeners are met …." *Id*. at 61 (emphasis added).

Again, in its Petition, GE made clear:

> "The CD does not authorize EPA to reserve the ability to require ***additional*** remedial actions in the future except when it has determined, on the basis of new information or conditions, that the Rest-of-River Remedial Action is no longer protective of human health or the environment. CD ¶¶162, 163.
>
> "EPA claims that it can nevertheless order the 'additional work' contemplated by these open-ended provisions under Paragraph 39 of the CD….. That provision is inapplicable ….. First, Paragraph 39 says that, under certain circumstances …, EPA can ***modify*** the work specified in the Rest-of-River Statement of Work ('SOW') and in the work plans developed thereunder. CD ¶39.a. However, EPA can demand ***modifications*** only of work already 'specified in the … Rest of River SOW" and work plans, and it can demand only those modifications that are "consistent with the scope of the response action for which the modification is required…..' *Id.* The Modified Permit exceeds this very limited authority because it is not restricted to ***modifications*** of existing corrective measures, but purports to give EPA the ability to require *any* '***additional actions***' it deems necessary to achieve and maintain the Performance Standards. That is not 'consistent with the scope' of the Rest-of-River Response Action specified in the Modified Permit."

GE Pet. at 45 (emphases added).

Indeed, the ***Region*** itself repeated GE's assertion in its Response to GE's Petition, stating that "GE argues that Paragraph 39.a … is inapplicable to this stage of the remedy selection process because allegedly 'EPA can demand modifications only of work already "specified in the … Rest of River SOW."'" EPA Response at 47. The Region responded to GE's assertion with the claim that "any additional work required to achieve and maintain these Performance Standards will be a modification of the Rest of River SOW …." *Id*. The Region contended further that "to the extent that GE argues that the Performance Standards cannot require

'additional actions' because of limitations in Paragraph 39.a, achievement of the Performance Standards is part of the response actions; …." *Id*. at 47 n.26.

The Region doesn't reference these prior GE assertions, or its own prior responses to those assertions, that it now suggests appear for "the first time" in GE's Reply to the Region's Response.

2. GE's Comments and Petition Explained That the Consent Decree Does Not Grant EPA the Authority to Require GE to Conduct Response Actions for Future Third-Party River and Floodplain Projects.

The Region also asserts that "GE claims for the first time" in its Reply that the Modified Permit's Future Work requirements would unlawfully impose on GE liability for future river and floodplain projects, EPA Sur-reply at 3; and it claims that GE's position is "reneging" on its agreement in the CD and CD-Permit that it would not claim that PCBs in the Rest-of-River area did not migrate from the GE facility. *Id*. at 4. This is not only untrue, but fundamentally unfair. GE never has attempted to avoid its commitments in the CD or CD-Permit, and it isn't doing so now. But in GE's Comments, its Petition, and its Reply, GE has explained that the CD does not authorize EPA to require GE in the Modified Permit to undertake whatever response actions EPA considers necessary in connection with future third-party projects without either analyzing the response actions under the CD-Permit remedy-selection criteria prior to the selection of the Rest-of-River Remedial Action or later going through the CD covenant-reopener process.

In its Comments, GE stated that while a third party undertaking a river or floodplain project with PCB-related costs could assert a claim against GE for recovery of those costs, "[i]t is not within EPA's authority to make a unilateral administrative determination, by inserting a requirement into a cleanup remedy, that GE is liable to the third party and responsible for 100% of that party's PCB-related costs." GE Comments at 69.

In its Petition, GE challenged the Future Work requirements of the Modified Permit on the grounds that: (a) "they would give EPA unfettered discretion to impose whatever response actions it eventually decides to require from GE … without requiring the Agency ever to evaluate its selection under the Permit criteria"; (b) "GE did not broadly agree [in the CD] to conduct unspecified future response actions in connection with any 'Legally Permissible Future Project or Work' anywhere in the Rest of River"; and (c) the CD covenant reopeners "make clear that EPA can require GE to perform 'additional actions' only in limited circumstances …, and then only in limited ways …." GE Pet. at 49, 50.

The Region's Response contains the same response to GE's position that the Board will find in the Region's Sur-reply: that "GE is seeking a free pass on its responsibility for addressing the hundreds of acres of contaminated river and floodplain." EPA Response at 51. Putting aside the unwarranted and misleading suggestion that "GE is seeking a free pass" in light of the hundreds of millions of dollars that GE has spent and will spend on remediation in Pittsfield and the Housatonic River, the fact that the Region responded to this argument in its Response makes clear that GE's concerns were not raised "for the first time" in its Reply, as the Region now suggests.

Conclusion

Even though the record is clear that the Region saw the contentions that it now claims are "new" in both GE's Comments and GE's Petition, and that the Region has already responded to those same contentions, GE does not oppose the Region's motion to make substantively identical responses again.

Respectfully submitted,

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Dated: April 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2017, I served one copy of the foregoing General Electric Company's Response to EPA Region 1's Motion for Leave to File a Sur-reply on each of the following:

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