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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of:	
Grand Street Mercury Site Hoboken, New Jersey	
The General Electric Company, Respondent.	**United States Environmental Protection Agency**
Petition for Reimbursement Under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9601 et seq.)	**Unilateral Administrative Orders** **Docket No. II-CERCLA-97-0108** **Docket No. II-CERCLA-98-0108**

PETITION FOR REIMBURSEMENT UNDER SECTION 106(b)(2) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

The General Electric Company ("GE") submits this petition for reimbursement under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(b)(2). The petition should be granted for the reasons set forth in the attached Memorandum in Support of Petition for Reimbursement Under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

In accordance with the requirements set forth in the Environmental Appeals Board's revised guidance on the reimbursement procedures of 42 U.S.C. § 9606(b), GE submits the following background information. *See* Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions ("Revised Guidance"), Nov. 10, 2004, at 3.

1. The petitioner is:

General Electric Company
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Fairfield, CT 06431

2. The attorneys authorized to represent the General Electric Company ("GE") in this matter are Samuel I. Gutter, Samuel B. Boxerman, and James A. Moss. Their titles and contact information are:

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3. The name and address of the facility that was the subject of the UAOs is:

Grand Street Mercury Superfund Site
720, 722-32 Grand Street
Hoboken, New Jersey 07030

4. The U.S. EPA docket numbers for this matter are:

Docket No. II-CERCLA-97-0108 ("Site Maintenance UAO")
Docket No. II-CERCLA-98-0108 ("Remedial Action UAO")

A complete copy of the Site Maintenance UAO, No. II-CERCLA-97-0108, which was issued on February 24, 1997 and amended on May 6, 1997, is attached to the Declaration of Samuel I.

Gutter, executed March 1, 2005 ("Gutter Declaration" or "Gutter Decl.") as Exhibit 1.[1] A complete copy of the Remedial Action UAO, No. II-CERCLA-98-0108, which was issued on April 1, 1998 and amended on June 18, 1998, is attached to the Gutter Declaration as Exhibit 2.

The Revised Guidance specifies that a petitioner must meet four statutory requirements to seek reimbursement from the Superfund. GE satisfies all of them. First, GE has fully complied with both UAOs. As the United States itself recognized more than a year ago, "[t]o date, GE is in compliance with the Order and it appears that clean up at the Site is largely complete." United States' Memorandum in Support of Motion to Enter Consent Decree, Civil No. 96-3774 (HAA) (D.N.J.), dated Dec. 22, 2003, at 14 (Ex. 3). GE continued to comply with these UAOs over the past year until completion of the work. By December 21, 2004, the only remaining task that EPA could identify was GE's submission of the Final Report. *See* Letter from Jack Harmon, EPA, to Roy S. Blickwedel, GE, dated Dec. 21, 2004 (Ex. 4). As the Agency recently acknowledged, GE completed this remaining step on December 31, 2004. *See* Letter from Jack Harmon, EPA, to Roy S. Blickwedel, GE, dated Feb. 9, 2005 (Ex. 5); Letter from Margaret A. Carillo-Sheridan to Jack Harmon, dated Dec. 31, 2004, encl. at 1-1 ("The response actions required by the UAO for Removal Response Activities and the UAO for Remedial Design and Remedial Action were completed on December 31, 2004") (Ex. 6). Accordingly, GE has now completed its obligations under both UAOs.[2] *See* 42 U.S.C. § 9606(b)(2)(A).

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[1] All exhibits in this petition and the accompanying Memorandum are attached to the Gutter Declaration.

[2] Although GE has not yet submitted the Final Report for the Remedial Action UAO, No. II-CERCLA-98-0108, GE has completed all of the "response actions required by . . . the UAO for Remedial Design and Remedial Action." Letter from Margaret A. Carillo-Sheridan to Jack D.

GE's petition also meets the requirement that petitions for reimbursement be submitted "not later than the 60th day after the date of completion of the required action." Revised Guidance at 3. GE completed the work for both the Site Maintenance UAO and the Remedial Action UAO on December 31, 2004. See Carillo-Sheridan Letter, dated Dec. 31, 2004 (Ex. 6). Accordingly, this petition has been submitted within the requisite time period.

Finally, GE has incurred costs complying with the UAOs for the Grand Street Site. Specifically, GE incurred approximately $2,286,000 in costs in its implementation of the Site Maintenance UAO, No. II-CERCLA-97-0108. *See* Declaration of Roy Blickwedel, executed February 24, 2005, ¶ 4 ("Blickwedel Decl.") (Ex. 7). Likewise, GE will incur a total of approximately $13,346,000 in costs under the Remedial Action UAO. *Id.* ¶ 5. GE's total estimated costs from these UAOs thus stands at $15,632,000, plus accrued interest.

Harmon, dated Dec. 31, 2004, encl. at 1-1 (Ex. 6). GE submits this petition now because of the uncertainty about which specific event "complet[es] the required action" and thus triggers the 60-day petition period. EPA's regulations implementing CERCLA do not discuss this issue, nor does the Board's guidance on the procedures for submitting petitions for reimbursement. *See* 40 C.F.R. § 300, *et seq.*; Revised Guidance. The relevant authorities also suggest conflicting answers. *See, e.g., In re: Findley Adhesives, Inc.*, 5 E.A.D. 710 (Feb. 10, 1995) (indicating that completion under § 9606 occurred "upon completion of the review of the analytical data, with no further excavation being required"); *In re: CoZinCo, Inc* , 7 E.A.D. 708 (July 7, 1998) (noting that "as a practical matter, the analysis [of when the UAO was completed] will usually focus on the actual work that is required, which ordinarily is described in the order's Statement of Work"); *cf. Employers Ins. of Wausau v. Bush*, 791 F. Supp. 1314, 1319 (N.D. Ill. 1992) (suggesting that completion occurred when "Wausau submitted to the EPA a Response Action Report"). Because GE has completed "the actual work that is required," *CoZinCo, supra,* GE's petition for reimbursement of the Remedial Action UAO is timely.

Respectfully submitted,

GENERAL ELECTRIC COMPANY

By: _____

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March 1, 2005

MEMORANDUM IN SUPPORT OF PETITION FOR REIMBURSEMENT UNDER SECTION 106(b)(2) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

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	)	**United States Environmental Protection Agency**
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	)	**Unilateral Administrative Orders** **Docket No. II-CERCLA-97-0108** **Docket No. II-CERCLA-98-0108**
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MEMORANDUM IN SUPPORT OF
PETITION FOR REIMBURSEMENT UNDER SECTION 106(b)(2)
OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE,
COMPENSATION, AND LIABILITY ACT OF 1980

The General Electric Company ("GE") petitions for reimbursement, under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9606(b)(2), of approximately $15.6 million in response costs, plus interest. GE incurred these costs in complying with two unilateral administrative orders ("UAOs") that the U.S. Environmental Protection Agency ("EPA," or "the Agency") issued for the Grand Street Mercury Superfund Site ("Grand Street Site," or "the Site"). GE is entitled to reimbursement, *first*, because the release of hazardous substances and the resulting response actions addressed in the UAOs were caused solely by the intervening, illegal acts of other parties, whose unlawful acts and omissions did not occur in connection with any contractual relationship with GE. As a result, GE has a defense to liability under section 107(b)(3) of

CERCLA, 42 U.S.C. § 9607(b)(3). In the alternative, even *if* GE has any liability with respect to this matter, its liability is divisible, and thus GE would only be liable for a small portion of the $15.6 million in response costs it incurred pursuant to the UAOs.

Second, these UAOs violate the Due Process Clause and Takings Clause. By reaching back to impose liability on GE, a party that had no connection to the Site for nearly 50 years, the UAOs have imposed "a severe, disproportionate, and extremely retroactive burden" contrary to the Fifth Amendment. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998) (O'Connor, J.) (plurality opinion). Regardless of the standard employed – the due process test articulated by Justice Kennedy or the takings analysis of the plurality – these UAOs fall short. As applied to the Grand Street Site, section 106(a) of CERCLA unconstitutionally "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Id.* at 528-29.

Third, and finally, the remedy selected by EPA was arbitrary and capricious. EPA's remedial decision is unsupported by the record and, instead, was a result-oriented decision based on bad science, inappropriate judgments, and an indefensible misconstruction of the National Contingency Plan. In addition, EPA arbitrarily and unlawfully expanded the boundaries of the Grand Street Site so as to compel GE to remediate off-site soils. In so doing, EPA violated the NCP as well as the rules governing an NPL listing.

GROUNDS FOR REIMBURSEMENT

I. GE IS ENTITLED TO REIMBURSEMENT OF ITS COSTS BECAUSE GE IS NOT LIABLE UNDER CERCLA.

A. Factual Background

The Grand Street Mercury Superfund Site (the "Grand Street Site" or "Site"), a factory in which mercury vapor lamps were manufactured for more than 50 years, would be safe to occupy today had it not been improvidently – and illegally – converted into a *residential* facility. Every mercury vapor test conducted at the Site up until the very time that EPA ordered the residents to evacuate the building has produced readings comfortably within the Occupational Safety and Health Administration ("OSHA") mercury standard for industrial occupation.

The *sole* reason that response costs were incurred at this Site is because later owners violated New Jersey's environmental disclosure laws and fraudulently withheld critical information from State regulators. Partners in the Grand Street Artists Partnership ("GSAP"), which had purchased the factory from those owners, then set about to convert it into residential condominiums. But when they encountered mercury during that work, they deliberately withheld those facts from local health authorities and, instead, pushed forward their plans to convert the factory into condominiums. All of these events were the proximate and sole cause of the remedy selected by EPA – demolition of the building and relocation of the residents – none of which would have occurred but for the unlawful acts and malfeasance of those parties.

1. GE's Safe Operation Of The Grand Street Site.[3]

The Grand Street Site is a former industrial plant located at 720 and 722-32 Grand Street, Hoboken, New Jersey, comprised of a five-story brick factory building and an adjoining four-story structure (collectively, "the Factory"). Beginning in approximately 1910, the Cooper Hewitt Electric Company ("Cooper Hewitt I") owned and operated the Factory to produce lighting equipment and other products, including Cooper Hewitt mercury vapor lamps. In approximately 1919, GE acquired a majority interest in Cooper Hewitt I. By approximately 1940, GE had acquired all of Cooper Hewitt I's business and had become the owner and operator of the Factory. During World War II, GE operated the Factory in support of the war effort. *See* Record of Decision, Grand Street Mercury Superfund Site, Sept. 30, 1997 ("ROD"), at 2 (Ex. 9);[4] Comments of the General Electric Company on the Focused Feasibility Study and Proposed Remedial Action Plan for the Grand Street Mercury Site, Hoboken, New Jersey, dated Sept. 8, 1997 ("Comments"), at 4-5 (Ex. 10).

Information gleaned from discovery in lawsuits related to the Grand Street Site demonstrates that, during GE's involvement at the Factory, operations were conducted safely and cleanly, and in accordance with the prevailing commercial practices of the time. Significantly, knowledgeable former employees recalled no instances of employee health or safety problems because of exposure to mercury at the Factory. *See, e.g.*, Deposition Transcript of John J.

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[3] For purposes of background and completeness of the record, GE attaches as Exhibit 8 the comments (and exhibits) that it filed on September 8, 2003, in response to the Consent Decree proposed by the United States relating to this Site. *See* Comments of the General Electric Company on the Proposed Consent Decree for the Grand Street Mercury Superfund Site ("Consent Decree Comments"). A more complete history of the Hoboken factory and its improper conversion to residential use appears in the Consent Decree Comments at pp. 9-20.

[4] In order to avoid the attachment of voluminous and extraneous material, this petition only includes Attachments 1 through 3 of the ROD.

Pascale, dated February 12, 1997, at 105-06 (Ex. 11); EPA Admin. Deposition Transcript of Frances Chenel, dated April 16, 1996, at 30-31 (Ex. 12).

In 1948, GE discontinued its operations in Hoboken and sold the Factory. This is a date of significance to this petition – it marks the last time that GE owned or operated the Factory. The buyer of the property and business was a newly established corporation operating under the name Cooper Hewitt ("Cooper Hewitt II"). The new company had no connection to GE. Cooper Hewitt II continued the manufacture of mercury vapor lamps and other lighting products at the Factory. There is no evidence to suggest that Cooper Hewitt II continued to follow the safe industrial practices employed by GE.

2. The Intervening, Illegal Acts Of The Pascales.

In 1955, seven years after GE's sale of the Factory, Cooper Hewitt II sold the Factory to John Pascale. From 1948 to 1979, Pascale operated a tool and die business, Quality Tool & Die Company ("Quality"), at the Factory. Cooper Hewitt II remained on-Site, however. The company continued manufacturing mercury vapor lamps at the Factory as Pascale's tenant until 1964, when it moved its operations to Kentucky. Cooper Hewitt II is now defunct. *See* ROD at 2; Comments at 5.

In 1979, thirty-one years after GE's sale of the Factory, John Pascale transferred the Factory and the Quality business to his son, David Pascale, in a "fraudulent" effort to shield assets from his wife during a divorce. *See Pascale v. Pascale*, 549 A.2d 782, 785 (N.J. 1988); *see also id.* at 783 (describing John Pascale's scheme as a "fraud"). David Pascale continued to use the Factory for industrial purposes until a legal dispute with his father resulted in the temporary transfer of the property back to John Pascale.

In 1988 – forty years after GE sold the Factory – John Pascale ceased operating the Quality business and sold off virtually all of its assets. That cessation of operations triggered New Jersey's Environmental Cleanup Responsibility Act ("ECRA"), N.J. Stat. Ann. §§ 13:1K-6 *et seq.* (currently known as the Industrial Site Recovery Act ("ISRA")). Under ECRA, Quality had a duty to file an application with the New Jersey Department of Environmental Protection ("NJDEP") within 5 days of ceasing operations. But John Pascale shut down operations without making any effort to comply with ECRA. *See Grand Street Artists v. General Elec. Co.*, 19 F. Supp. 2d 242, 244 (D.N.J. 1998) ("*Grand Street Artists I*").

That same year, David Pascale was awarded control of the Factory and Quality. *See Pascale*, 549 A.2d 782. However, for two years David Pascale failed to file an application under ECRA to alert NJDEP to the cessation of operations in 1988. In 1990, David Pascale finally filed an ECRA application. *See* ECRA Submission for Quality Tool & Die Co., dated April 20, 1990 (Ex. 8, Tab C); Letter from David Pascale to NJDEP, dated April 23, 1990 (Ex. 8, Tab D); ROD at 3 (Ex. 9). As the owners of the Site, David Pascale and Quality had a legal duty to comply with ECRA, including investigating the property and cleaning up any contamination. *Id.* at § 13:1K-9, -13.

David Pascale's initial ECRA application provided no information at all about any operations in the building prior to 1950, and it failed to disclose the mercury manufacturing operations that took place there between 1950 and 1965. *See* Ex. 8, Tab D. When NJDEP directed him to supply history pre-dating 1950, *see* Ex. 8, Tab G, Pascale told NJDEP only that GE had made "light bulbs" in the building, not disclosing the truth that the Factory had been used to manufacture mercury vapor lamps and other products using mercury. *Id.*; *see also Grand*

Street Artists I, 19 F. Supp. 2d at 246 ("[t]he ECRA filing made no mention of any mercury contamination").

David Pascale's concealment of the facts from NJDEP was purposeful. There is no genuine dispute that both John and David Pascale knew from first-hand experience how extensively mercury had been utilized in the Factory. John Pascale had worked for GE at the Factory throughout the 1930s, and after buying the building in 1955 he leased space in the Factory for nine years to Cooper Hewitt II, which continued making mercury vapor lamps there. *See* Deposition Transcript of John J. Pascale (Ex. 8, Tab A). David knew the facts, as well. As a teenager David even played with a mercury vapor lamp that he knew came from the Factory. Deposition Transcript of John J. Pascale, Jr., dated July 7, 1998 (Ex. 13). In short, both John and David Pascale violated the State laws designed specifically to prevent the events that followed. When NJDEP later learned of David Pascale's fraud, it retroactively rescinded its approval, but by then it was too late. NJDEP determined that Pascale had withheld critical information about past use of mercury at the site and concluded that its failure to develop and implement an effective cleanup plan at the site was due to Pascale's non-disclosure.

3. The Conversion Of The Factory To Condominiums, And The Residents' Wrongful Concealment From Public Health Authorities Of The Mercury Problem.

Almost 50 years after GE sold the factory for continued industrial use, the later owners' fraud and deception caused the UAOs to be issued and hence GE's incurrence of response costs. Long before the ECRA process was completed – if not from the very beginning – David Pascale specifically intended to sell the Factory. In the summer and fall of 1992, the founding partners of what eventually became GSAP, Robert Schiffmacher and Matthew Schley (both of whom had previous experience developing property), saw a "For Sale" sign on the

Factory, inspected the building, and began negotiations with David Pascale for the express purpose of purchasing and converting the Factory into residential condominiums. Response of Grand Street Artists to § 104(e) Request For Information Relating to 722 Grand Street, Hoboken, New Jersey, dated Dec. 11, 1996 ("GSAP Response"), at 5-6 (Ex. 8, Tab J).

The direct and proximate result of David Pascale's fraud was that NJDEP was misled into permitting the sale of the Factory without any examination for the presence of mercury – an evaluation that would have stopped the sale in its tracks. GSAP purchased the Site from David Pascale and his wife, Sherrill Pascale, on August 4, 1993. *Grand Street Artists v General Electric Co.*, 28 F. Supp. 2d 291, 292 (D.N.J. 1998) ("*Grand Street Artists II*"). In mid to late 1994, the first residents began to move into their respective units under temporary certificates of occupancy. ROD at 4.

GSAP partners admitted to discovering mercury in the building as early as October 1993 and on several occasions thereafter in different locations within the building. GSAP Response at 23-25 (Ex. 8, Tab J). In January 1995, the renovation of a fifth floor unit revealed a "pool of mercury" under the floorboards. *Id.* at 24. By May 1, 1995, GSAP and its members "were aware of the mercury, its presence was discussed in at least five GSA partnership meetings, and GSA ha[d] hired [ ] ENPAK Services to investigate the presence of mercury on the premises prior to that date." *Grand Street Artists II*, 28 F. Supp. 2d at 293.

All the while, the partners made half-hearted attempts to address the mercury problem without notifying state health officials. The growing mercury problem was discussed openly at partnership meetings throughout the second half of 1995. *See, e.g.*, GSAP Minutes, Oct. 26, 1995 (Ex. 8, Tab AA). When one consultant suggested that the situation was serious

and would require additional investigation with further costs, the GSAP fired the consultant. Throughout this period, the partners did not divulge the contamination to public health authorities out of concern that they would lose their investments, showing little regard for the health and safety of the families living at the Site.

Instead, the partners pushed ahead with their plans, undertaking extensive renovations during which more and more mercury was found under floorboards. The partners disregarded their obvious remedies against David Pascale; New Jersey law specifically allows a buyer to sue for rescission when a seller conceals contamination. *See State Dep't of Envtl. Prot. v. Ventron Corp.*, 468 A.2d 150 (N.J. 1983). Instead, the partners stayed the course, buying their individual condominium units from the partnership with full knowledge that there was mercury in the building. *Grand Street Artists II.* One partner even bought two units, reselling one of them to a new owner without ever revealing the mercury problem. When the president of the partnership told the others that he had learned the building was once used by GE to make mercury lamps, another partner remarked that they could always just sue GE. Transcript, GSAP Meeting, Aug. 15, 1995, at 2 (Ex. 14).

Matters came to a head on November 4, 1995. At an emergency meeting called by the partners to address the mercury problem, one unit owner, Pam Weiner, introduced a motion, and argued that the full extent of the contamination should be disclosed to the state Board of Health. GSAP Minutes, Nov. 4, 1995 (Ex. 8, Tab CC); *see also* Consent Decree Comments at 19 (Ex. 8). Weiner's motion was defeated. *Id* In short, the partners affirmatively voted to withhold the presence of the contamination from public health authorities.

Days after the special meeting, the few disgruntled partners who had tried, unsuccessfully, to get GSAP to notify public health authorities, took matters into their own hands. Their attorney reported the presence of mercury in the Factory to the Hoboken Health Department ("HHD"). Letter from Steven R. Specter to Ira Karasick, dated Nov. 7, 1995 (Ex. 8, Tab DD). Their attorney also excoriated the partners who had voted to withhold the information from public health authorities:

> Apparently, notwithstanding your client's awareness of the possible catastrophic situation which exists at the building, the individual Partners have *deliberately and intentionally decided to withhold this information from the appropriate authorities* who have responsibilities for enforcement of the environmental laws of the State of New Jersey.

Id. (emphasis added).

4. The Temporary Relocation

In late December 1995, the HHD requested EPA assistance at the Factory, and EPA tested the building and the residents themselves for mercury. These tests showed that the building met all OSHA mercury standards for *industrial* occupation, but did not meet the stricter *residential* mercury standards fixed by the World Health Organization. On January 2, 1996, based on the presence of mercury in the urine of the residents, the NJDEP requested that EPA conduct a removal action under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). On January 4, 1996, EPA began a removal action, and HHD ordered the residents to leave the Factory. ROD at 5-6 (Ex. 9).

On January 8, 1996, GSAP's attorneys first contacted GE regarding the mercury situation and the impending evacuation. In view of the unusual circumstances confronting EPA – including the fact that the entire federal government was shut down over a Congressional

budget crisis, freezing EPA's access to funds – GE temporarily set aside its serious reservations as to liability, and within two days offered emergency funds to the former residents so they could afford to vacate the building immediately. All of the residents took advantage of this offer. On January 11, 1996, the last of the former residents left the Factory. After that time, EPA managed the relocation and paid for the housing and related expenses ("temporary relocation") of these former residents.

5. EPA's Issuance Of UAOs To GE, But Not To The Culpable Parties.

On August 12, 1996, EPA issued General Notices of Potential Liability only to GE, John Pascale and David Pascale, naming them as CERCLA potentially responsible parties ("PRPs") at the Site. EPA refused to name GSAP or any of the partners who then owned units in the Factory.

On February 24, 1997, EPA issued the Site Maintenance UAO only against GE and John Pascale. Despite their clear culpability and GE's requests, the Agency failed to name David Pascale, GSAP, or any of the partners or individual owners. EPA subsequently modified the UAO to delete all requirements pertaining to the temporary relocation of the former residents, taking on that obligation itself. The amended Site Maintenance UAO became effective on May 9, 1997. *See generally* Exhibit 1.

GE complied fully with the Site Maintenance UAO from its issuance until completion of the work.[5] John Pascale ignored the Site Maintenance UAO – just as he had

[5] GE's responsibilities under the Site Maintenance UAO, as amended, included the following: (1) maintaining security at the Site, including a wireless security system and 24-hour guard; (2) scanning and decontamination of the former residents' possessions to prevent mercury-contaminated materials from leaving the Site; (3) "[r]egular inspection, service, and maintenance of the building at the Site"; and (4) "sampling, analysis, transportation and disposal" of materials

ignored ECRA a decade earlier – and never complied with the UAO. Nonetheless, EPA never sought to enforce the UAO against Pascale, content to let GE, alone, conduct the work.

On September 25, 1997, EPA placed the Grand Street Mercury Site on the Superfund National Priorities List ("NPL"). *See* 62 Fed. Reg. 50442. EPA issued the ROD for the Grand Street Site on September 30, 1997. *See generally* ROD (Ex. 9). Despite GE's objections to EPA's plans, *see* discussion in Point III *infra*, EPA's selected remedy called for permanent relocation of the residents, demolition of the Factory, and remediation of on-site soils.

On April 1, 1998, EPA issued the Remedial Action UAO to GE, alone – again, despite GE's requests, refusing to name the truly culpable parties. EPA did not issue the UAO to John Pascale or David Pascale, despite their violation of State law that led the NJDEP to approve sale of the Factory. Nor did EPA issue the UAO to those who had discovered mercury and had "deliberately and intentionally decided to withhold this information" from the public health authorities. Ex. 8, Tab DD.

The Remedial Action UAO required GE to implement all phases of the remedial action other than those relating to relocation of the residents. *See generally* Remedial Action UAO (Ex. 2). EPA amended the Remedial Action UAO on June 18, 1998. Despite GE's genuine reservations regarding its liability and the company's belief that the selected remedy was arbitrary and capricious, GE at all times complied fully with the order.

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contaminated with mercury during earlier remediation/analysis efforts. Site Maintenance UAO at 14-15 (Ex. 1); *see also* First Amendment to Unilateral Administrative Order for Removal Response Activities, May 6, 1997, at 2-4 (eliminating GE's responsibility for the former residents' relocation costs) (Ex. 1).

6. EPA's Continued Refusal To Name The Partners As PRPs, *Even After* They Were Held To Be Liable Under CERCLA.

On August 7, 1996, GSAP and its individual partners filed tort and CERCLA contribution actions against GE, John and David Pascale, and other defendants, including GSAP's attorneys and the various environmental consultants who were retained in connection with the acquisition and assessment of the Factory. The complaints in the consolidated contribution actions sought, *inter alia*, a judgment declaring that the plaintiffs, including the then-current owners, were not liable under CERCLA and, alternatively, contribution under CERCLA from GE, John Pascale, and other defendants.[6]

As the litigation progressed, it became clear that mercury was a problem only because of the *residential* conversion of the building, and that the conversion had occurred due to the Pascales' fraud and the partners' wrongdoing. GE counterclaimed against GSAP and the partners for a declaratory judgment that the partnership and the current owners were liable under CERCLA and for contribution under CERCLA for any response costs incurred by GE. On GE's motion for summary judgment against twenty-three individual partner-owners, the court held that all were liable under CERCLA. based on the fact that they had bought their units from the partnership with full knowledge of the mercury contamination. *Grand Street Artists II*, 28 F. Supp. 2d at 295-97. On the partners' motion for reconsideration, the court reaffirmed its judgment that they were CERCLA-liable. *See Grand Street Artists v. GE*, 2000 U.S. Dist. LEXIS 7076 (D.N.J. April 27, 2000).

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[6] The partners filed multiple causes of action against GE, including for negligence and punitive damages. The court dismissed all of those claims other than for strict liability. *See Grand Street Artists v. General Electric Co.*, 1997 WL 33475074 (D.N.J. Feb. 11, 1997). Dismissing the count for negligence, the court held that "[a]n absolute ban on industrial processes using mercury

Even though the partners were – and are to this day – the *only* parties in this matter adjudged to be CERCLA-liable, EPA still refused to recognize their liability or name them to the UAOs. GE specifically asked the Agency to name the partners as PRPs, but to no avail. Letter from Kirk R. Macfarlane to Janet M. MacGillivray, dated Jan. 6, 1999 (Ex. 8, Tab FF); Letter from Kirk R. Macfarlane to Janet M. MacGillivray, dated May 12, 2000 (Ex. 8, Tab GG).

Despite GE's genuine reservations regarding its own lack of liability and its belief that EPA's selected remedy was arbitrary and capricious (*see* Point III, *infra*), GE complied fully with the Remedial Action UAO. Demolition of the building was dangerous and risky, given the dense urban setting in Hoboken.[7] Working cooperatively with EPA, GE had to sheath the entire building in plastic and demolish it using hand demolition techniques.[8] Following demolition of the Factory, GE excavated and disposed of soils on the property where the building had stood. On December 31, 2004, GE completed its work under the Remedial Action UAO. *See* Carillo-Sheridan Letter, dated Dec. 31, 2004, encl. at 1-1 (Ex. 6).

7. EPA's Continued Treatment Of GE As The Solely Culpable Party, Despite The Clear Liability Of Others And GE's Lack Of Involvement.

EPA steadfastly refused to name the Pascales and the partners as PRPs until years later, when EPA learned of insurance money held by the partners and their consultants. That insurance money came forward only because GE had successfully established the liability of the

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goes completely outside of the analysis of reasonable precaution, and such a duty will not be imposed in this case." *Id.* at 3.

[7] A copy of a representative photograph of the Grand Street Site prior to demolition is attached as Exhibit 15.

[8] Copies of representative photographs taken during building demolition are attached as Exhibit 16.

partners, triggering their homeowner policies. EPA then stepped in to take that money for itself, and to bar GE from pursuing any contribution claims against them. But by then, EPA had purchased the building and the partners were no longer current owners under CERCLA. Undeterred, EPA contrived to get money from them by inventing a new class of liability under CERCLA, naming the partners as owners "at the time response costs were incurred."[9]

The liability of the truly responsible parties is inescapable. The Pascales knew about the mercury operations in the building. But for their violations of ECRA and their failure to disclose an accurate history of the property to NJDEP, the sale and conversion of the building would never have occurred. The partners themselves bear substantial responsibility for having bought and renovated their units with full knowledge of the mercury problem, leading eventually to relocation.

GE, on the other hand, had absolutely no involvement in any of the events leading to the conversion of the factory to residential use – a conversion that took place 45 years after GE last owned the property. Nonetheless, GE has spent $15.6 million to remediate this Site, working closely with EPA to demolish the factory building and clean up soils at the Site and in neighbors' yards. GE is the only one that was called on to implement the work, and yet is the only one that bears *no* responsibility for the unlawful conversion of the property. GE repeatedly urged EPA to compel the truly responsible parties to join in the remedial action. EPA not only refused, it has improperly compensated the partners and sponsored a settlement that funnels

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[9] EPA's proposed settlement with the Pascales, the partners, and others is pending before the district court. GE has opposed that settlement. *See generally* Consent Decree Comments (Ex. 8).

millions more to the liable former residents and attempts to cut off all of GE's statutory and common-law contribution rights.

In a separate cost-recovery case, EPA has sued GE to recover EPA's unreimbursed response costs, primarily the money that EPA imprudently spent to buy the building and relocate the partners. *See United States v General Elec. Co.*, Civ. No. 03CV-4668 (D.N.J.). Among other issues, GE will prove in that case that EPA incurred excessive and unreasonable costs pursuant to its arbitrary relocation remedy, not only paying CERCLA funds to liable parties, but also paying *twice* the value of the condominium units. EPA even double-paid some of the partners, paying them for appliances and then letting them take the appliances out of the Factory. *See* Consent Decree Comments at 21. While those costs are at issue in the cost-recovery case, not this petition, EPA's pattern of dealings with the partners demonstrates that the Agency has ignored cost-effectiveness at this Site (*see, also,* Point III, *infra*), and is a manifestation of the political pressure that led EPA to demolish a useable Factory in the first place.

B. GE Meets The Statutory Requirements For Reimbursement Of All Of Its Costs Because GE Is Not Liable Under CERCLA. [10]

EPA must reimburse GE for all of GE's costs because GE is not liable for any of those response costs under section 107(a) of CERCLA. *See* 42 U.S.C. § 9606(b)(2)(C). GE is not liable because, based on a preponderance of the evidence, it is clear that the release and resulting costs were "caused solely by" the intervening and unlawful acts of third parties. *But for*

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[10] This claim arises under 42 U.S.C. § 9606(b)(2)(C). GE has a valid defense to liability under 42 U.S.C. § 9607(b)(3), and thus GE is "not liable for response costs under section 9607(a)." 42 U.S.C. § 9606(b)(2)(C). As such, GE challenges both UAOs in their entirety, and GE seeks full recovery of its costs incurred pursuant to both UAOs.

the unlawful acts and fraudulent schemes of the Pascales, the failed due diligence of GSAP, and the wholly unforeseeable conversion of the Factory to residential condominiums, the releases that caused the incurrence of response costs never would have occurred.

Section 107(b)(3) of CERCLA provides three defenses to liability for a release and resulting costs caused by matters outside the control of an otherwise liable party. Specifically, Congress excluded from liability releases and costs caused by an act of God, an act of war, and certain third parties. 42 U.S.C. § 9607(b)(1)-(3). Congress included this last defense – commonly referred to as the "third-party defense" – to help offset the otherwise strict liability regime that CERCLA imposes. In pertinent part, Section 107(b) provides:

> There shall be no liability under [CERCLA 107(a)] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of a release of a hazardous substance and the damages resulting therefrom were caused solely by –
>
> * * *
>
> (3) an act of omission of a third party other than . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . ., if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607(b)(3).

Each element of the third-party defense is present here. *First*, the releases and the building demolition and associated costs or "damages resulting therefrom" are exclusively attributable to the intervening, unlawful acts of the subsequent owners of the Factory. When GE

sold the Factory, it sold an ongoing industrial operation to an industrial buyer. "But for" the intervening illegal acts by later owners who violated State law and wrongfully withheld information from regulatory and public health authorities, the Factory would never have been converted to residential use and no response costs would have been incurred by anyone in connection with the Site.

In fact, a series of deliberately fraudulent, intervening acts and omissions by the Pascales broke any conceivable nexus between GE and the later releases and associated response costs. As discussed above, both John Pascale and David Pascale violated ECRA. David Pascale, in particular, intentionally misled NJDEP by his deliberate omission of material information about the use and presence of mercury in the Factory and about its industrial history, including the mercury manufacturing operations that took place between 1950 and 1965. In fact, when NJDEP asked Pascale about the Factory's earlier history, he deliberately omitted the fact that GE had made products containing mercury. Had *either* Pascale simply followed the law and properly disclosed the history of the Factory under ECRA, there would have been no conversion of the Factory to residential use, and none of the subsequent releases and *resulting* response costs would have been incurred.

At the most, had either John Pascale or David Pascale filed a truthful ECRA application, NJDEP would have required them to exercise their obligations as building owners to remediate their property pursuant to ECRA. Even under ECRA, it is likely that no remediation would have been required, because the Factory remained suitable for industrial use. But even if remediation had been required, either Pascale could have pursued his rights against GE, and the case would be resolved *before* the Factory could possibly have been converted to another use.

Compounding the Pascales' illegal and fraudulent acts, the partners' own acts and omissions were further intervening acts that in fact were "but for" causes of the "release or threat of release" and resulting response costs. But for their failure to meet prevailing due diligence standards, the Factory would never have been converted to residential use. Moreover, but for the partners' decisions to press ahead with the purchase of their condominium units while withholding evidence of contamination from state health authorities, instead of stopping the process and seeking rescission of their purchase from David Pascale – a *second* intervening act – the response costs would not have been incurred.

It was the acts of these third parties – the Pascales and the partners – *almost 50 years after GE owned the Factory* that resulted in the partners' relocation and the later demolition of the building. Indeed, GE had no direct or indirect "contractual relationship" with either the Pascales or the partners, within the meaning of section 107(b)(3). The "contractual relationship" limitation on the third-party defense only applies where the third party's "act or omission occurs *in connection with* [the] contractual relationship." 42 U.S.C. § 9607(b)(3) (emphasis added). The "contractual relationship" thus must be in some way related to the conduct that resulted in a release. *See United States v Cordova Chem. Co.*, 113 F.3d 572, 583 (6th Cir. 1997), *rev'd on other grounds, United States v. Bestfoods*, 524 U.S. 51 (1998) ("The 'in connection with' language of the defense appears to have been designed to preclude a person from escaping liability by contracting for a third party to do his dirty work for him"). Sharing a common chain of title is simply not the type of contractual relationship that defeats the defense. To hold otherwise would completely wipe out the third-party defense for every prior owner of a Superfund site no matter what happened in the intervening years, because each owner would *always* have an "indirect" contractual relationship with a subsequent owner and thus could not

raise the defense. Such a broad construction of the statute would eviscerate a valid defense and render Congress's words meaningless for prior owners.

Second, not only were these damages solely[11] caused by third parties, but GE "exercised due care with respect to the hazardous substance concerned" and "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b)(3). When GE sold the building to Cooper Hewitt II in 1948, it was selling the Factory to another *industrial* manufacturer of mercury vapor lamps. Mercury-related manufacturing both pre-dated and followed GE's period of ownership. ROD at 2 (Ex. 9); Comments at 4-5 (Ex. 10). Throughout the duration of its ownership, GE conducted operations safely and cleanly, consistent with the prevailing commercial practices of the time. *See, e.g.*, EPA Admin. Deposition Transcript of Frances Chenel at 30-31 (Ex. 12). And when GE sold the Site to a subsequent *industrial* manufacturer, it could not have foreseen the fraudulent, intervening acts by later owners. It could not have imagined that other owners, some 45 years later, would (1) fail to comply with applicable law, (2) fraudulently sell the Site for *residential* use, (3) fail to conduct adequate due diligence and (4) intentionally fail to notify the authorities about what they had caused by converting the Factory. Accordingly, because GE has a valid third-party defense under 42 U.S.C. § 9607(b)(3), GE should be reimbursed for all of its costs under the UAOs, which total $15,632,000. *See* Blickwedel Decl. ¶ 6 (Ex. 7).[12]

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[11] GE recognizes that this is a novel case, in that "solely" is usually viewed in reference to the contamination itself. In this unusual case, the intervening and unlawful acts of third parties clearly break the chain of causation and warrant application of the third-party defense, for the reasons discussed in this petition.

[12] GE also seeks interest for these costs, and it further seeks interest for all of the other claims set

C. GE Is Entitled To Reimbursement Of Its Costs Of Demolishing The Factory, Because Those Costs Are Divisible.[13]

Assuming, *arguendo,* that GE could be liable for *any* of the costs under either UAO, GE still cannot and must not be liable for any contamination within the Factory building. Under CERCLA, if a party can demonstrate "that the harm is capable of reasonable apportionment, then it should be held liable only for the response costs relating to that portion of harm to which it contributed." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 271 (3d Cir. 1992). Thus, if multiple parties "cause distinct harms or a single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused." *Id.* at 268 (quoting Restatement (Second) of Torts § 881).

Here, regardless of whether the situation at the Site is considered a single harm or distinct harms, there is a reasonable basis for apportionment and, thus, GE is not jointly and severally liable for all costs. If the contamination at the Grand Street Site were construed to be a "single harm," GE would not be liable for harm within the Factory because "there is a reasonable basis for division" of that harm between GE and the Factory's successive owners. As discussed above, the *sole* cause of the problems which ultimately led to the Factory's demolition were the intervening acts of the Pascales and the partners. Thus, given the unique factual circumstances at this Site, apportionment is clearly "reasonable." *Alcan*, 964 F.2d at 269. Where there are successive owners of an industrial property, a seller "is not liable for response costs incurred by [the buyer] that result from its own post-sale pollution or inaction and is divisible from harm

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forth in this petition. *See* 42 U.S.C. § 9606(b)(2)(A).

[13] This claim arises under 42 U.S.C. § 9606(b)(2)(C). GE challenges that portion of the Remedial Action UAO that required GE to demolish the Factory.

occasioned by the disposal of hazardous substances during [the seller's] ownership of the site." *Hatco Corp. v. W.R. Grace & Co.—Conn.*, 801 F. Supp. 1309, 1330 (D.N.J. 1992). *Hatco* appropriately recognizes that a single harm can be apportioned temporally, based on the distinct conduct of successive owners.[14] Thus, even if GE's acts contributed to the soil cleanup (which GE disputes)[15], GE did not in any way contribute to the Factory's wrongful conversion to residential use, and "but for" that wrongful conversion there would never have been any need for a building demolition and these UAOs.

Furthermore, any liability is also divisible because "there are distinct harms" at the Grand Street Site. *Id.* (quoting Restatement (Second) of Torts § 443A). Here, there is a clear distinction between the mercury found inside the Factory, which led EPA to order its demolition, and any residual mercury or other materials found in the soils outside the Factory. Again, but for the wrongful acts and omissions of the Pascales and the partners almost fifty years after GE sold the Factory, there would have been no harm inside the building at all. Thus, assuming GE would be assigned any harm at all, it would be entirely rational to allocate the liability associated with the Factory's fraudulent conversion, i.e., the demolition costs, to those parties, only.

Indeed, this is entirely consistent with the line Congress has drawn between releases to the environment and those that remain wholly within a structure like the former factory. Response costs under CERCLA can only be incurred if there was a release or threatened

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[14] *See also Matter of Bell Petroleum Services*, 3 F.3d 889 (5th Cir. 1993) (finding apportionment of liability to be appropriate for successive owners of a business).

[15] In the face of the clear evidence that GE took great pains to avoid mercury contamination, and lacking any evidence demonstrating that Cooper Hewitt II exercised such extraordinary care, it is reasonable to conclude that Cooper Hewitt II, and not GE, is responsible for leaving mercury residue in the building.

release of a hazardous substance from a facility "into the environment.," 42 U.S.C. §§ 9607(a), 9601(22), and the "environment" does not extend to an area within a building or structure.

Rather, CERCLA defines "environment" to mean various waters of the United States, and "surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States." 42 U.S.C. § 9601(8). For this reason, courts "have concluded that the 'environment' referred to in the statute includes the atmosphere, external to the building, but not the air within a building." *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1360 (9th Cir. 1990) (quotations omitted); *see also Electric Power Bd. of Chattanooga v. Westinghouse*, 716 F. Supp. 1069, 1079-81 (E.D. Tenn. 1988) (release from transformer "within the confines" of building is not "the type of release into the environment contemplated or intended by CERCLA") (internal citations omitted), *aff'd on other grounds*, 879 F.2d 1368 (6th Cir. 1989); *Prudential Ins. Co. v. U.S. Gypsum*, 711 F. Supp. 1244, 1255 n.3 (D.N.J. 1989) (suggesting that "the 'environment' referred to in the statute includes the atmosphere, external to the building, and hence does not encompass the release of a substance inside an enclosed building"); *cf. Amland Props. Corp. v. Aluminum Co. of America*, 711 F. Supp. 784, 793 (D.N.J. 1989) (finding a threatened release of PCBs from a plant because "the PCBs in the concrete flooring, if left unremedied, could eventually leach through to the soil under the Edgewater plant").

In fact, EPA has itself confirmed that there is no "release" into the "environment" where a hazardous substance remains "wholly contained within buildings or structures." *Notification Requirements; Reportable Quantity Adjustments*, 50 Fed. Reg. 13456, 13462 (April 4, 1985); *see also id.* ("hazardous substances may be spilled at a plant or installation but not enter the *environment*, e.g., when the substance spills onto the concrete floor of an enclosed

manufacturing plant") (emphasis added). Simply put, "CERCLA was not meant to provide a civil remedy whenever hazardous substances are found in a building's interior." *Cyker v. Four Seasons Hotels, Ltd.*, 1991 WL 1401 at *2 (D. Mass. Jan. 3, 1991). Thus, even if GE were liable for contamination on the external parts of the Site, it could not be found liable for the Factory itself. GE should thus be reimbursed for the demolition costs, which total approximately $12,178,000. *See* Blickwedel Decl. ¶ 6 (Ex. 7).

II. GE IS ENTITLED TO REIMBURSEMENT BECAUSE THE UNILATERAL ADMINISTRATIVE ORDERS ARE UNCONSTITUTIONAL.[16]

GE should also be reimbursed for all its response costs because the retroactive liability imposed by these UAOs violates the Fifth Amendment. In *Eastern Enterprises v. Apfel*, the Supreme Court unanimously agreed that severely retroactive legislation can breach the constitutional boundaries of the Fifth Amendment. *See* 524 U.S. 498, 528-29 (1998) ("legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience") (O'Connor, J.) (plurality opinion); *id.* at 548 ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership") (Kennedy, J., concurring in the judgment); *id.* at 556 ("the Due Process Clause can offer protection against legislation that is unfairly retroactive . . .[because] a law that is

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[16] Because application of CERCLA in this matter would impermissibly impose liability on GE, GE is "not liable for response costs under section 9607(a)." 42 U.S.C. § 9606(b)(2)(C). In addition, because the UAOs are "not in accordance with law," this ground for reimbursement arises under 42 U.S.C. § 9606(b)(2)(D). In accordance with its obligation to identify "the portions of EPA's order that it seeks to challenge," GE challenges both UAOs in their entirety. Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions ("Revised Guidance"), Nov. 10, 2004, at 5 n.4.

fundamentally unfair because of its retroactivity is a law that is basically arbitrary") (Breyer, J., dissenting). Because the UAOs for the Grand Street Site imposed "a severe, disproportionate, and extremely retroactive burden," *id.* at 538, CERCLA as applied in this case is unconstitutional, and GE is entitled to full reimbursement for the costs that it incurred.

A. Imposing Liability On GE Violates The Due Process Clause.

Although the opinions in *Eastern Enterprises* varied somewhat, all of the Justices agreed that the Due Process Clause protects against severely retroactive laws that are "fundamentally unfair and unjust." *Id.* at 559 (Breyer, J., dissenting).[17] As Justice Kennedy explained, "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Id.* at 549. The principles of due process are implicated by legislation like the Coal Act and CERCLA, because "[r]etroactive statutes raise special concerns." *INS v. St. Cyr*, 533 U.S. 289, 315 (2001); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994) ("statutory retroactivity has long been disfavored"). By "attach[ing] new legal consequences to events completed before its enactment,"[18] *id.* at 269-70, the liability scheme of CERCLA is indisputably retroactive. *See also Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 670 n.12 (3d Cir. 1999) (noting that CERCLA "has an unlimited

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[17] The plurality in *Eastern Enterprises* declined to address the petitioner's due process claim because it found the takings violation to be dispositive. Nevertheless, the plurality acknowledged that "[o]ur analysis of legislation under the Takings and Due Process Clauses is correlated to some extent, and there is a question whether the Coal Act violates due process in light of the Act's severely retroactive impact." 524 U.S. at 537 (internal citation omitted). Likewise, the dissent agreed with Justice Kennedy that a "fundamentally unfair or unjust" imposition of liability could breach the Due Process Clause. *Id.* at 558 (Breyer, J., dissenting).

[18] The Supreme Court also described a retroactive law as one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 269 (quoting *Society for the Propogation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767, No. 13,156 (C.C.D.N.H. 1814) (Story, C.J.)). CERCLA falls squarely within this definition.

retrospective temporal reach"). The application of that scheme to the Grand Street Site violates the Due Process Clause.

The courts have emphasized several factors in deciding whether retroactive application of a law violates the Due Process Clause. These include the temporal reach of the statute's retroactivity, the magnitude of the economic burden imposed by the retroactive legislation, and the proportionality between the liability imposed and the petitioner's conduct. *See Eastern Enterprises*, 524 U.S. at 536 (holding that the Constitution forbids "impos[ing] such a disproportionate and severely retroactive burden upon Eastern"); *see generally Unity*, 178 F.3d at 670-74. Each of these factors supports the conclusion that CERCLA's retroactive liability scheme, as applied to GE at the Grand Street Site, is unconstitutional.

First, CERCLA's temporal reach in this matter is unprecedented. As *Unity* recognized, "[t]he heart of retroactivity analysis is an evaluation of the extent of the burden imposed by a retroactive law in relation to the burdened parties' prior acts." 178 F.3d at 670; *see also Eastern Enterprises*, 524 U.S. at 549 (Kennedy, J., concurring) ("the degree of retroactive effect is a significant determinant in the constitutionality of a statute"). The Supreme Court accordingly struck down application of the Coal Act because "in creating liability for events which occurred *35 years ago* the Coal Act has a retroactive effect of *unprecedented* scope." *Id.* at 549 (Kennedy, J., concurring) (emphasis added); *cf. Pension Benefit Guar. Co. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (sanctioning "the enactment of retroactive statutes confined to *short and limited periods*") (internal quotations omitted) (emphasis added).

The Third Circuit in *Unity* thus considered an 11-year period to be "a close case" and suggested that a much greater time period could be "dispositive." 178 F.3d at 670; *see also*

Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1256 (D.C. Cir. 1998) (recognizing that the "crucial fact" compelling the result in *Eastern Enterprises* was Eastern's "departure from the coal industry in 1965"). The severe retroactivity in this matter is clearly dispositive. Here, the UAOs reach back *50 to 80 years* to impose millions of dollars of liability on GE. GE first acquired a property interest in the Grand Street Site in 1919, when it purchased a majority of Cooper Hewitt I's stock. ROD at 2 (Ex. 9); Comments at 4-5 (Ex. 10). Although GE continued to own the Grand Street Site until 1948, it moved the bulk of its mercury vapor lamp making operations to another property in Hoboken in 1928.[19] Response of the General Electric Company to 104(e) Request for Information Re: 722 Grand Street Site, Hoboken, New Jersey, dated March 8, 1996, at 8-9 (Ex. 8, Tab B). Thus, GE had not been involved in mercury vapor lamp manufacturing at the Site but for a brief period of the entire span of 70 years. More importantly, GE completely severed its ties to the Site in 1948 (32 years prior to enactment of CERCLA) when GE sold its entire Hoboken area operations to a separate company, Cooper Hewitt II. That company continued to produce mercury vapor lamps at the Grand Street Site until 1964. ROD at 2; Comments at 5. EPA has itself emphasized the long temporal reach between the events of the mid-90s and the Site's much earlier industrial past. In 1997, EPA noted that the GSAP "acquired the Site in 1993, 28 years after manufacturing activities involving mercury had ceased at the Site." *See* ROD, Attachment 3, Responsiveness Summary ("Responsiveness Summary"), at 18 (Ex. 9, Att. 3) (underscore in original). GE's connection to the Site ended *17 years* earlier than that.

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[19] At that property, the 8th Street facility, the owner went through the ECRA process and the building was remediated for continued *industrial* use.

By reaching back a half century to the only deep pocket that EPA could find in the chain of the title,[20] the liability imposed by the UAOs "destroy[s] the reasonable certainty and security which are the very objects of property ownership." *Eastern Enterprises*, 524 U.S. at 548 (Kennedy, J., concurring). When GE sold the property to Cooper Hewitt II in 1948, there were no national or New Jersey laws concerning the cleanup of hazardous substances like mercury.[21] CERCLA would not be enacted for another 28 years. Nor were these issues the subject of litigation at all. "[P]rior to CERCLA, liability for environmental contamination was a rarity." Alexandra B. Klass, *From Reservoirs To Remediation: The Impact of CERCLA On Common Law Strict Liability Environmental Claims*, 39 Wake Forest L. Rev. 903, 942 (2004). And of the few contamination cases that predated CERCLA, none of them even implied that a manufacturer could be liable for selling an industrial facility to another manufacturer. *Id.* at 940-42. Any such lawsuit would have been frivolous, because the doctrine of caveat emptor protected a seller from liability for risks associated with the property. *See, e.g.*, Restatement (Second) of Torts § 352 ("a vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession"); *Levy v. Young Constr. Co.*, 134 A.2d 717, 719 (N.J. App. 1957) (applying the doctrine of caveat emptor). In short, "the extent of [GE's] retroactive liability is substantial and particularly far reaching." *Eastern Enterprises*, 524 U.S. at 534.[22]

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[20] Besides GSAP, the former residents, and John and David Pascale, the only other potentially responsible party that owned the Site was Cooper Hewitt II, which is now defunct.

[21] Nonetheless, GE ran a clean operation and the Factory was safe for industrial use even at the time response actions began.

[22] New Jersey courts subsequently extended liability to a seller who willfully conceals contamination from a buyer. *Ventron Corp., supra.* Here, of course, GE sold its mercury lamp

Second, the disregard of GE's due process rights is further evinced by the magnitude of the economic burden. *See Eastern Enterprises*, 524 U.S. at 534 (noting that "[t]he distance into the past that the Act reaches back to impose liability on Eastern and the magnitude of that liability raise substantial questions of fairness") (O'Connor, J.). As previously mentioned, GE's total expenditures under these UAOs is approximately $15,632,000. Blickwedel Decl. ¶¶ 4-5 (Ex. 7). And "[a]s the total absolute burden imposed by a statute increases, it becomes simpler for a court to determine that the legislature has exceeded the bounds of rationality." *Unity*, 178 F.3d at 671. The liability imposed on GE far exceeds the burden imposed in *Unity*, which was nonetheless "certainly substantial." *Id.* at 672. Though the size of the financial burden might not be dispositive standing alone, consideration of this factor supports a finding of unconstitutionality.

Finally, imposing liability for the Grand Street Site violates the rule that "the liability actually imposed is not out of proportion to the claimant's prior experience with the object of the legislation." *Unity*, 178 F.3d at 672; *see also Eastern Enterprises*, 524 U.S. at 530. This proportionality requirement, which focuses on the reasonable expectations of the parties, was satisfied in *Unity* because "Congress could reasonably conclude that it would be fair to hold the coal companies to the implicit part of their promise." 178 F.3d at 672. In other words, the Coal Act was simply "Congress's attempt to do equity." *Id.* at 673. By contrast, GE's CERCLA liability fails this test because there were no such remedial expectations or promises when GE sold the Site to another mercury lamp manufacturer. GE sold and transferred the property in accordance with the prevailing commercial standards of the day. To impose millions of dollars of liability on GE, when it had made no promises like the coal companies in *Unity*, and had

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operations to a knowledgeable buyer that, in fact, continued the same business in the Factory.

followed all the rules in selling the property for continued industrial use, eviscerates the proportionality principle of *Eastern Enterprises* and *Unity*.

It is well-settled that "retrospective civil legislation may offend due process if it is particularly harsh and oppressive." *R.A. Gray*, 467 U.S. at 733 (quotations and internal citation omitted). The UAOs in this matter, which reach back a half century to impose millions of dollars of costs on an unsuspecting party whose conduct was blameless, clearly violate the Due Process Clause.

B. Imposing Liability On GE Violates The Takings Clause.

Application of CERCLA's retroactive liability scheme in this case also violates the Takings Clause. In *Eastern Enterprises*, a plurality of the Court concluded that "legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." 524 U.S. at 528-29. Courts focus on three factors to determine whether a taking has occurred: "[1] the economic impact of the regulation, [2] its interference with reasonable investment backed expectations, and [3] the character of the governmental action." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). Applying these factors to CERCLA, as the Supreme Court applied them to the Coal Act in *Eastern Enterprises*, demonstrates that GE has suffered an unconstitutional taking.

As to the first factor, it is evident that GE's costs of $15,632,000 represent a significant financial burden. Like the coal company in *Eastern Enterprises*, the UAOs "require [GE] to turn over a dollar amount established by the [EPA] under a timetable set by the Act, with the threat of severe penalty if [GE] fails to comply." 524 U.S. at 529; *see also* 42 U.S.C. §

9606(b)(1) ("Any person who, without sufficient cause, . . . fails or refuses to comply with, any order of the President . . . may. . . be fined not more than $25,000 for each day in which such . . . failure to comply continues"). Indeed, the penalties of noncompliance under CERCLA are substantially more severe than those under the Coal Act. *Cf.* 26 U.S.C. § 9707 (potential penalties of $100 per day per beneficiary). These onerous costs, backed up with the threat of severe penalties, are widely disproportionate to GE's actions, which were nothing more than the operation of an industrial plant in the first half of the last century. *Cf. Concrete Pipe & Prods. of Calif., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (denying takings challenge where plaintiff had "not shown its withdrawal liability here to be 'out of proportion to its experience with the plan'") (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226 (1986)).

The costs imposed by the UAOs also interfere with GE's reasonable investment-backed expectations. The plurality in *Eastern Enterprises* found it significant that the statutory "scheme reaches back 30 to 50 years to impose liability against Eastern based on the company's activities between 1946 and 1965." 524 U.S. at 532. The CERCLA liability scheme, as applied to this Site, is far more retroactive in temporal scope than the statute in *Eastern Enterprises*. These UAOs reach back 50 to 80 years to impose liability for lawful activities that occurred between 1919 and 1948. To pin the entire cost of site remediation on GE, solely because of its deep pockets, certainly "raise[s] substantial questions of fairness." *Id.* at 534; *see also Connolly*, 475 U.S. at 227 ("The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'") (quoting *Armstrong v.*

United States, 364 U.S. 40, 49 (1960)). The UAOs also violate the principle that "settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265.

Finally, the nature of EPA's action is objectionable. GE's potential liability under CERCLA is completely untethered from its own past actions at the site. As discussed *supra*, it was the later owners of the Grand Street Site – not GE – that unlawfully converted this industrial plant into residential condominiums, thereby exposing the former residents to mercury. GE played no role in those events, and should not be held liable for them. EPA improperly singled out GE "to bear a burden that is substantial in amount, based on [GE's] conduct far in the past, and unrelated to . . . any injury [GE] caused." *Eastern Enterprises*, 524 U.S. at 537. The UAOs thus "implicate[ ] fundamental principles of fairness underlying the Takings Clause" and must be held unconstitutional. *Id.*

Regardless of which Fifth Amendment clause is applied, it is clear that GE "stand[s] in a substantially identical position to Eastern Enterprises," *Unity*, 178 F.3d at 659, and therefore should be reimbursed for all of its costs under the UAOs.

III. GE IS ENTITLED TO REIMBURSEMENT BECAUSE THE REMEDY CHOSEN BY EPA WAS ARBITRARY AND CAPRICIOUS.[23]

A. EPA's Decision To Demolish The Building, Rather Than To Allow Its Continued Industrial Use, Was Arbitrary And Capricious, And Inconsistent With the NCP[24]

Even if GE were liable at this Site – which it is not – GE would still be entitled to reimbursement for a substantial portion of its costs incurred under the Remedial Action UAO

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[23] Because the Remedial Action UAO for the Grand Street Site is arbitrary and capricious, this ground for reimbursement arises under 42 U.S.C. § 9606(b)(2)(D).

[24] Pursuant to its obligation to identify the portions of the UAO being challenged, here GE specifically challenges those portions of the Remedial Action UAO which required GE to

because the remedy selected by EPA was arbitrary and capricious. *See* 42 U.S.C. § 9606(b)(2)(D).

After EPA issued its focused feasibility study ("FFS") and proposed remedial action plan ("Proposed Plan") for the Grand Street Site, GE submitted comments objecting to the Plan and explaining the inaccurate assumptions embedded in the Agency's proposal. *See* Comments, Ex. 10.[25] GE's Comments explained that the analyses underlying the Proposed Plan were inaccurate and riddled with errors, and that EPA's preferred alternative – building demolition – was wholly unsupported by the facts. Among other problems with EPA's analyses, GE explained that the industrial mercury exposure standard used in the FFS was unreasonably low. EPA's standard was calculated based on a *general population* exposure scenario that included sensitive subgroups, assumed an unreasonably high inhalation rate, and began with the incorrect assumption that occupational exposure to 25 $\mu g/m^3$ of mercury could cause adverse health effects. *See* Comments at 15-19.

The results of this error-ridden process are obvious when EPA's "standard" is compared with the occupational standards developed by OSHA, as well standards issued by the National Institute for Occupational Safety and Health ("NIOSH") and the American Conference of Governmental Industrial Hygienists ("ACGIH"). Whereas the federally enforceable OSHA standard is 100 $\mu g/m^3$, the NIOSH recommended standard was 50 $\mu g/m^3$, and the ACGIH standard was 25 $\mu g/m^3$, EPA's exposure standard – used *solely* and specifically for the Grand Street Site – stood at a mere *0.44 $\mu g/m^3$*. Comments at 19-20. Even though the 1993 ACGIH standard had been developed through an exhaustive review of the latest research on mercury

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implement the demolition remedy under the ROD. *See* Remedial Action UAO at 2 ¶ 7 (Ex. 2).

exposure, EPA somehow crafted a standard that was *50 times more stringent* than ACGIH's, and *more than 200 times more stringent* than the standard set by the U.S. agency charged with protecting worker exposure, OSHA. *Id.* at 21-23, 27-28. Indeed, EPA's *industrial* exposure standard was nearly identical to its *residential* exposure standard of 0.09 $\mu g/m^3$. *See* Responsiveness Summary at 20 (Ex. 9, Att. 3).

Both UAOs were also flawed in their estimates of the risk of mercury contamination in the event of fire at the Grand Street Site. *See* Site Maintenance UAO at 8, 12 (Ex. 1); *see also* Remedial Action UAO at 7 (discussing "the impact of a threatened release of mercury" in the event of fire). GE originally explained the flaws in EPA's analysis in comments provided with respect to the Site Maintenance UAO. *See* Letter from Jane W. Gardner, GE, to Catherine Garypie, EPA, dated April 1, 1997, at 12; *see also id.* at Attachment 1, at 5; *see also id.* at Attachment 2 ("Comments on U.S. EPA Fire Analysis for 722 Grand Street in Hoboken, New Jersey") (Ex. 14). Nevertheless, EPA repeated its error in the Remedial Action UAO, and GE incorporates these earlier comments as if fully set forth herein.

The Comments also demonstrated that if any remediation were deemed necessary, notwithstanding that the Factory was safe for continued industrial use, it was feasible and cost-effective to remediate the Factory even to the most stringent occupational exposure standards. GE explained that remediating the Factory to meet ACGIH's 25 $\mu g/m^3$ standard (assuming, *arguendo*, its applicability) would be much less expensive than demolishing the whole Factory. Comments at 31-33. GE estimated that remediation of the Site would have been $2.5 million less than the demolition costs estimated in the Proposed Plan. By refusing to use a realistic

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[25] The Comments are incorporated by reference into this petition as if fully set forth herein.

industrial exposure standard, EPA skewed the results to such a degree that the remediation option was effectively foreclosed. EPA's flawed methods generated an estimate that demolition would cost only $1 million more than remediation.[26] *See* Responsiveness Summary at 40.

These analytical flaws, standing alone, are sufficient to demonstrate that EPA's chosen remedy was arbitrary and capricious. But more fundamentally, even *if* EPA's figures are accepted at face value, EPA indisputably flouted the requirements of the National Contingency Plan ("NCP"). When selecting a remedy for clean-up of a site, EPA must make that decision by applying the nine criteria specified in the NCP. *See* 40 C.F.R. § 300.430(e)(9)(iii). Cost is one of these principal criteria, *id.* § 300.430(e)(9)(iii)(G), and the NCP specifically mandates that "[e]ach remedial action selected shall be cost-effective." *Id.* § 300.430(f)(1)(ii)(D); *see also United States v. Kramer*, 913 F. Supp. 848, 867 (D.N.J. 1995) (observing that "the NCP requires the EPA to evaluate the cost-effectiveness of competing remedies"). As one court explained:

> The feasibility part of the RI/FS process involves a detailed analysis of possible remedial alternatives. [40 C.F.R.] § 300.430(e). The alternatives must undergo a detailed evaluation against a set of criteria. *Id.* § 300.430(e)(9)(iii)(A)-(I). After evaluation, the RI/FS eliminates, with explanation, those alternatives that are not the most "cost-effective" or that are not "protective of human health" and the environment. *Id.* § 300.430(f)(ii)(A) & (D).

Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 478 (E.D. Mich. 1993).

During the feasibility study process, a remedial alternative must be disregarded if (1) it provides effectiveness and implementability similar to another alternative but at greater cost or (2) the costs associated with the alternative are "grossly excessive compared to the

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[26] EPA also substantially underestimated the cost of demolition. The estimate set forth by EPA in the ROD was $4,359,000, but GE's actual cost of demolition was approximately $12,178,000.

overall effectiveness." 40 C.F.R. § 300.430(e)(7)(iii); *see also The Role of Cost in the Superfund Remedy Selection Process*, OSWER Quick Reference Fact Sheet, Sept. 1996, at 4 (Ex. 18). Not long before issuing the Remedial Action UAO, EPA reaffirmed that "[c]ost is a critical factor in the process of identifying a preferred remedy. In fact, CERCLA and the NCP require that every remedy selected must be cost-effective." OSWER Quick Reference Fact Sheet at 5 (underscoring in original). Thus, even if EPA's estimate of a $1 million cost difference were accurate – it was not – by selecting the demolition remedy the Agency failed "to prospectively choose a remedial action that EPA believes will clean-up the site for the least cost." *United States v. Am. Cyanamid Co.*, 786 F. Supp. 153, 162 (D.R.I. 1992). Because the demolition remedy was chosen through a process that contravened the NCP, the Remedial Action UAO was arbitrary and capricious.

Even though GE fully explained these deficiencies in its Comments to EPA, the Agency went forward and selected the demolition remedy. *See* ROD at 27-29 (Ex. 9). Notably, EPA's response to the Comments conceded "that remediation of the building to industrial standards . . . [is] technically feasible." Responsiveness Summary at 28 (Ex. 9, Att. 3). Nonetheless, the Agency argued that remediation was "inappropriate for and cannot be implemented at the Site." *Id.* EPA did not seriously dispute that it rejected the most cost-effective remedy. The Agency candidly acknowledged that it was "not only the Risk Assessment which drove EPA to select building demolition, but the *reasonably anticipated residential end use* of the property which primarily drives the selection along with other considerations required by CERCLA and the NCP." *Id.* at 27, 30 (emphasis in original). Though EPA paid lip service to the NCP in its response, the scope of this concession is telling.

Compare ROD at 20 (Ex. 9) *with* Blickwedel Decl. ¶ 6 (Ex. 7).

EPA effectively admitted that its projection of future land use patterns in Hoboken – not the nine criteria mandated by the NCP – drove the ultimate decision to demolish the buildings. *See also id.* at 28 ("EPA believes that the future probability that the site will continue to support residential use is large"); *id.* at 34 ("EPA has concluded that the reasonable anticipated future use of the Grand Street Site is residential"); *id.* at 35 ("the zoning of the Grand Street Site supports residential use"). Were there any doubt that these land use projections were dispositive in selecting the remedy, EPA erased them by announcing that "the reasonably anticipated future residential use of the Site *precludes* remediation of the Site for industrial/commercial use." *Id.* at 38 (emphasis added); *see also id.* at 39 ("current and future land use considerations make an alternative which assumes industrial use of the Site *unimplementable*") (emphasis added).

EPA's sole authority for this unwarranted departure from the NCP was a 1995 guidance document from the Office of Solid Waste and Emergency Response ("OSWER") that sought to encourage consideration of land uses when making remedy selection decisions. *See Land Use in the CERCLA Remedy Selection Process*, OSWER Directive No. 9355.7-04, May 25, 1995, *available at* http://www.epa.gov/superfund/resources/landuse.pdf (Ex. 19). EPA wrongfully acted as if this guidance trumped the cost-effectiveness requirement of the NCP. After acknowledging that remediation to industrial/commercial standards was less costly than demolition, and having conceded that remediation was "technically feasible," EPA arbitrarily foreclosed that option with this conclusory statement: "*Irrespective of cost*, however are land use considerations, which *preclude* industrial/commercial remediation of the buildings in light of present zoning and population trends in the City of Hoboken." Responsiveness Summary at 28, 40 (emphasis added).

EPA's purported reliance on this guidance document fails, for three reasons. First, the guidance itself does not invite, much less mandate, Agency staff to jettison the NCP requirements, which are grounded in CERCLA, whenever "zoning and population trends" suggest otherwise. Indeed, the guidance was intended to clarify – not supplant – the remedial selection process of the NCP. *See* OSWER Directive No. 9355.7-04, at 4 (Ex. 19). Second, elsewhere EPA has recognized that the NCP criteria – including cost – "must *always* be used in selecting a remedy." *State of Ohio v. EPA*, 997 F.2d 1520, 1538 (D.C. Cir. 1993) (emphasis added). Finally, even assuming *arguendo* that the 1995 guidance suggested that NCP requirements could be disregarded, that departure would be impermissible because the NCP is a legislative rule promulgated through notice-and-comment rulemaking, and "[o]nly 'legislative rules' have the force and effect of law." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000); *see also United States v. Walter Dunlap & Sons, Inc.*, 800 F.2d 1232, 1244 (3d Cir. 1986) ("An interpretative rule, which does not have the force and effect of law, gives guidance to the staff of an agency and to affected parties regarding how the agency intends to administer a statute or regulation. In contrast, a legislative rule . . . actually implements that statute and, in so doing, creates new law affecting individual rights and obligations") (quotation marks and citation omitted). To the extent that the land use guidance conflicts with NCP criteria, the legislative rules of the NCP take precedence over that guidance.

At bottom, EPA's conclusion "that the site will continue to support residential use" suffers from circular reasoning. Responsiveness Summary at 28. According to EPA, the Grand Street Site's current use is residential, not industrial – even though the Site had been used for industrial purposes for 80 years, and even though the Site had never safely supported a residential population. *See id.* at 25 ("EPA has evaluated current land use and determined it to

be multi-family residential at the Site"). The Site's conversion to residential use was only effected by violating New Jersey's Environmental Cleanup Responsibility Act, N.J. Stat. Ann. §§ 13:1K-6 *et seq.* *See* GE's Comments at 6. Had ECRA been complied with, the former residents would have never been exposed to mercury. It strains credibility to claim that "the Site is currently used for residential purposes" while simultaneously concluding that the Site is too dangerous for human habitation. Responsiveness Summary at 28. The only appropriate use of the Grand Street Site has always been industrial or commercial, and the Factory continued to be appropriate for these purposes up until the EPA-ordered demolition.

Responding to GE's Comments, EPA also tried to defend its methods used to derive an industrial exposure standard of 0.44 $\mu g/m^3$, a standard far removed from the ACGIH standard of 25 $\mu g/m^3$, which ranks among the most stringent in the world. *See* GE's Comments at 20-23. EPA first suggested that its unconventional methods were justified because "workers covered under OSHA standards are afforded various ancillary protective measures." Responsiveness Summary at 32. This argument is specious; presumably, the future occupants of the Grand Street Site would be protected under the same federal laws that protected the workers in those studies. Moreover, EPA failed to explain the relevance of these protections to its decision to ignore the 25 $\mu g/m^3$ standard. To the extent that EPA was implying that "ancillary protective measures" somehow skewed the data in these peer-reviewed studies, it offered no support for that claim. In any event, the 25 $\mu g/m^3$ ACGIH standard was based on studies from around the world, not merely those conducted in OSHA-compliant workplaces.

EPA further sought to distinguish the 25 $\mu g/m^3$ standard by asserting that "since it would be beyond the scope of the Superfund program to dictate the specific commercial usage of the Site . . ., an occupational cleanup goal was derived that was consistent with risk assessment

methodologies for protecting the general public. . ., including sensitive sub-populations." Responsiveness Summary at 32. In other words, EPA's "industrial" exposure standard was, in fact, a generic standard that would have been equally appropriate for gauging residential exposure. It is no accident that the industrial and residential standards were virtually identical. *See* Responsiveness Summary at 20. EPA failed to justify its use of this unreasonably low exposure standard, and the Agency's unrealistic assumptions further precluded an honest and fair assessment of the remedial alternatives for the Site.

Because EPA's chosen remedy was arbitrary and capricious, GE is entitled to reimbursement for the difference in cost between the chosen remedy and the cost of remediating the Grand Street Site to meet industrial/commercial standards. The estimated cost of remediation, if any, was $2,276,400. Comments at 33. And since the total cost of implementing EPA's preferred alternative at the Site came to approximately $12,178,000, GE should be reimbursed $9,901,600. *See* Blickwedel Decl. ¶ 6 (Ex. 7).

B. EPA's Expansion Of The Hoboken "Site" To Include Off-Site Soils Was Arbitrary And Capricious, Not In Accordance With Law, And Inconsistent With The NCP.

Years after EPA included the Grand Street Site on the National Priorities List ("NPL") and issued the ROD for the Site, EPA decided to expand the Site, and then the remedy, to include nearby residential properties. In comments to GE's final remedial design, EPA mandated the excavation of backyard soils containing mercury and other substances. Letter from Carole Peterson, EPA, to David Thompson, GE, dated July 20, 2000 (Ex. 20). EPA specifically directed GE to revise all references to the "Site boundary" to include "all known areas where contamination is present above EPA Remedial Actions Objectives (RAOs)." *Id.*, encl. ¶ 2. Thus, EPA expanded, by administrative fiat, the pre-existing Grand Street Site, which had been

defined as 720-732 Grand Street by the NPL listing, *see National Priorities List for Uncontrolled Hazardous Waste Sites*, 62 Fed. Reg. 50442, 50444 (Sept. 25, 1997), the subsequent ROD, and the Remedial Action UAO itself.[27]

EPA's action violated the law and the NCP for several reasons. First, the off-site areas do not qualify for listing on the NPL. Second, EPA cannot simply expand the Site boundaries to include these off-site areas because the Agency did not provide notice to affected parties that expansion was possible. Third, expansion is inappropriate in this case because EPA had previously issued a ROD for the Site and a UAO to implement the ROD that defines these areas as "off-site." Even putting aside the NPL description, the ROD and Remedial Action UAO clearly define the scope of the Site and the remedy, which did not include remediation of the off-site properties. EPA's *post hoc* Explanation of Significant Difference ("ESD"), amending the ROD purportedly to authorize remediation of off-site soils, was a transparent attempt to paper over the Agency's prior unlawful acts, and only highlights the violations that occurred. Before ordering the cleanup of the off-site properties, EPA was required to amend the ROD and the UAO, which would have entailed complying with the CERCLA and NCP requirements for selecting a response action.

EPA could not lawfully expand the NPL Site boundaries to include new, off-site properties without complying with the NCP's requirements for listing a Site. *See* 40 C.F.R. § 300.425. As an initial matter, EPA could not rely on its earlier finding that the Grand Street Site

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[27] Because this aspect of the Remedial Action UAO for the Grand Street Site is arbitrary and capricious, this ground for reimbursement arises under 42 U.S.C. § 9606(b)(2)(D). Pursuant to its obligation to identify the portions of UAO being challenged, GE identifies the requirements of the Remedial Action UAO insofar as they were applied to require GE to conduct remediation of off-site soils.

met the criteria for listing to support the inclusion of the off-site properties. 62 Fed. Reg. at 50444-45. EPA listed the Grand Street Site under the third criterion set out in the NCP, which requires, *inter alia*, that the Agency for Toxic Substances and Disease Registry ("ATSDR") have issued a public health advisory recommending dissociation of individuals from the release. 40 C.F.R. § 300.425(c)(3). But the off-site properties were not the subject of an ATSDR advisory, and thus they could not qualify for NPL listing based on this criterion. Nor did EPA even try to establish that the mercury levels in those off-site soils would score sufficiently high on the Hazard Ranking System to warrant listing independently. Because EPA has "no authority for listing a site on criteria other than those specified by statute," the off-site areas cannot be included within the Site. *Mead Corp. v. Browner*, 100 F.3d 152, 156 (D.C. Cir. 1996).

Nor did EPA have authority simply to "expand" the listing to include the off-site properties. CERCLA makes clear that "EPA can add a site to the NPL only after providing interested parties notice and an opportunity for comment." *Montrose Chem. Co. of Calif. v. EPA*, 132 F.3d 90, 92 (D.C. Cir. 1998). EPA is permitted to make modest enlargements to a pre-existing site *if* the affected parties (*e.g.*, property owners) are already "on notice that [their] property might be considered part of the [NPL] listing." *Washington State Dep't of Transp. v. U.S. EPA*, 917 F.2d 1309, 1312 (D.C. Cir. 1990); *see also Honeywell Int'l Inc. v. EPA*, 372 F.3d 441, 451 (D.C. Cir. 2004) (finding that "the Listing Notice, the HRS Documentation Package, and the RSI Report, taken together, put [the owner] on notice that its property might be included within the [ ] NPL site"); 62 Fed. Reg. at 50443 (discussing EPA's policy of expanding site boundaries without further rulemaking). But EPA cannot "expand preexisting NPL sites without satisfying CERCLA's procedural and substantive requirements for listing new sites." *Montrose Chem.*, 132 F.3d at 92. And that is precisely what EPA did here, when it directed GE to change

all references to the "Site" to include properties that were clearly "off-site." EPA never provided notice to the neighboring property owners that the Agency intended to expand the boundaries of the Grand Street Site to include their backyards. In addition, EPA's generic description of its policy in the NPL final rule, 62 Fed. Reg. at 50422, and the Grand Street listing package itself did not provide notice that these off-site properties might be force-fit within the boundaries of the Site – to the contrary, EPA's prior statements all confirmed that the Site was limited to the property boundaries of the Factory.

Moreover, the permitted expansion of an NPL site is based on the assumption that an NPL listing in and of itself imposes no legal obligations. *National Priorities List for Uncontrolled Hazardous Waste Sites – Final Update No. 5*, 54 Fed. Reg. 13296, 13297-98 (March 31, 1989); *see also Honeywell Int'l*, 372 F.3d at 443 ("Listing a site . . . neither requires the owner or operator to take any action nor assigns liability to any party"); *United States v. ASARCO, Inc.*, 214 F.3d 1104, 1106 (9th Cir. 2000) (explaining basis for policy); 62 Fed. Reg. at 50443 (justifying site expansion policy on the grounds that "NPL listing does not assign liability to any party or to the owner of any specific property"). Thus, as long as a site simply exists on the NPL, EPA argues that there is no practical impact from altering site boundaries.

In this case, however, EPA has done more than list the Site on the NPL. Soon after listing the Site, EPA issued the ROD for the "Site," defined as 720-732 Grand Street and specifically described as two buildings and a parking lot. ROD at 1 (Ex. 9). Once EPA selected the remedy for the Site, legal implications attached to the scope of the Site boundaries, and those boundaries became established for purposes of the remedy. *See ASARCO*, 214 F.3d at 1106 n.3 (differentiating between site boundaries in NPL listing and boundaries described for purposes of remedial action, which has "legal significance"). Coupled with the Remedial Action UAO,

which imposed on GE the legal obligation to implement the ROD for the "Site," *id.*, EPA could not justify a site expansion without a rulemaking to amend the listing.

On April 17, 2003, almost three years *after* EPA directed GE to redefine the Site boundaries, EPA then executed an after-the-fact amendment to the ROD. Without soliciting public comments, EPA issued the amendment as an "Explanation of Significant Difference." *See* Explanation of Significant Difference, dated April 17, 2003 ("ESD") (Ex. 21). The ESD amended the ROD to require GE to excavate and dispose of soils in neighboring properties containing more than 23 mg/kg of mercury. *Id.* at 4.

Even assuming, *arguendo*, that EPA could expand the NPL site, EPA could not amend the ROD by administrative fiat to expand the definition of the Site for purposes of the remedy. The ROD is based on a Remedial Investigation and Feasibility Study ("RI/FS") that was only conducted for the property known as 720-732 Grand Street, and the ROD so defines the "Site." Indeed, the ROD specifically differentiates between the "Site," where sampling and possible soil removal is required, and "off-site" properties, for which only soil sampling is required. ROD at 21, 29 (Ex. 9). The ROD is the product of public notice and comment, including notice and comment on the scope of the Site and the selected remedy. 40 C.F.R. § 300.430(f)(3). In order to expand the scope of the Site or the remedy, a ROD amendment based on public notice and comment was required. *Id.* § 300.435(c)(2)(ii). To include newly identified, separate parcels of property, some not even contiguous to the Site, within the scope of the Site and the cleanup is a significant change in the ROD, requiring a ROD amendment after notice and an opportunity to comment.

EPA's April 17, 2003, ESD was too little, too late. It was too little, because EPA took this significant action without providing GE or other parties formal notice and an opportunity for comment, as required by CERCLA and the NCP. As EPA's own guidance recognizes, a post-ROD change that is "appreciable . . . in [ ] scope, performance, and/or cost" requires an amendment to the ROD. *Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents*, OSWER 9200.1-23P, July 30, 1999, at 7-2, *available at* http://www.epa.gov/superfund/resources/remedy/rods (Ex. 22). In those circumstances, the Agency "must conduct the public participation and documentation procedures" mandated by the NCP. *Id.* at 7-5; *see also* 40 C.F.R. §§ 300.435(c)(2)(ii), 300.825(a)(2). The ESD was too late, because EPA had already directed GE, nearly three years before, to take the very action that the Agency was reaching to justify. *See generally* ESD (Ex. 21).

Just as EPA could not amend the ROD in this fashion to include off-site areas, it certainly could not order GE to take additional response actions with respect to off-site areas *before* amending the ROD, without overstepping its authority under CERCLA Section 106 and violating the NCP. Yet that is exactly what EPA did. EPA's authority under Section 106 is limited to cases where an "imminent and substantial endangerment" may exist. *See* 42 U.S.C. § 9606(a). EPA's purported expansion of the definition of Site for purposes of the UAO would bootstrap all potential response activities at the off-site areas onto the highly questionable finding of an "imminent and substantial endangerment" based on EPA's inappropriate risk assessments and exposure assumptions, discussed *supra*. EPA cannot use a section 106 order to circumvent CERCLA's statutory and regulatory scheme for issuing orders and selecting appropriate response actions.

Moreover, EPA's attempt to redefine the Site to include the off-site areas was an unlawful attempt to require remediation of those areas without complying with the NCP requirements for selecting a response action. The NCP requires that remedial designs/remedial actions "be in conformance" with the ROD for the Site. 40 C.F.R. § 300.435(b)(1). As discussed above, the ROD did not specify that the "off-site" properties were part of the Site or that they warranted remedial action. Indeed, CERCLA and the NCP require EPA to conduct an RI/FS prior to performing or ordering remedial work pursuant to a section 106 order. 42 U.S.C. §§ 9604(a), 9621; 40 C.F.R. § 300.430. With respect to the off-site properties, however, EPA did not conduct a new or supplemental RI/FS. Thus, EPA could not order GE to perform remedial activities at the off-site areas unless and until it conducted an additional RI/FS.

Finally, EPA's attempt to expand the Site boundaries and GE's obligations was inconsistent with the UAO itself, which accords separate treatment to the Site and off-site areas (no removal of soils is required from the latter). Having issued the UAO requiring remediation only of on-Site soils, EPA could not simply amend it through comments to a work plan. EPA's remedial project manager does not have the delegated authority to issue or amend a UAO, yet that is the effect of the Agency's action.

Even though EPA had no authority to order soil remediation of these off-site property, GE worked cooperatively with the Agency to successfully complete the work.[28] Because GE incurred an estimated $515,000 in off-site soil removal and property restoration costs, Blickwedel Decl. ¶ 7 (Ex. 7), GE should be reimbursed for that amount.

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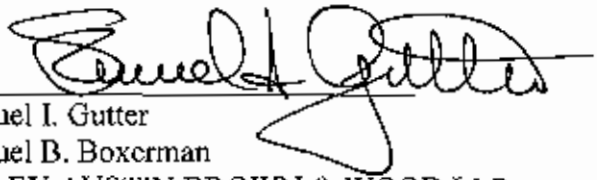
[28] Copies of representative photographs showing the remediation of off-site soils are attached as Exhibit 23.

CONCLUSION

For the foregoing reasons, GE's petition for reimbursement should be granted.

Respectfully submitted,

GENERAL ELECTRIC COMPANY

By: 

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