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

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

GENERAL ELECTRIC COMPANY'S REPLY TO THE STATE OF CONNECTICUT'S RESPONSE BRIEF

Of Counsel:
Roderic J. McLaren
Executive Counsel – Environmental Remediation
GENERAL ELECTRIC COMPANY
159 Plastics Avenue
Pittsfield, MA 01201

Jeffrey R. Porter
Andrew Nathanson
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000
JRPorter@mintz.com

James R. Bieke
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jbieke@sidley.com

Attorneys for Petitioner General Electric Company

Dated: March 24, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Statutes

Federal Regulations

State Regulations

Consent Decree in *United States et al. v. General Electric Company* (October 27, 2000) ("CD")

GLOSSARY OF TERMS

A.R.	Administrative Record
CD	Consent Decree in *United States et al. v. General Electric Company*, Civil Action No. 99-30225-MAP *et seq*. (Oct. 27, 2000)
CD-Permit	Reissued RCRA Permit (reissued by EPA in October 2001 and again effective December 7, 2007), incorporated into Consent Decree
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CT.Resp.	State of Connecticut Response Brief (Feb. 14, 2017)
EPA	U.S. Environmental Protection Agency
EPA.Resp.	EPA Region 1's Response to General Electric Company's Petition for Review (Feb. 14, 2017)
FERC	Federal Energy Regulatory Commission
GE	General Electric Company
GE Comments	Comments of General Electric Company on Draft Permit Modification and Statement of Basis (Oct. 27, 2014)
GE.Pet.	Petition of General Electric Company for Review of Final Modification of RCRA Corrective Action Permit Issued by EPA Region 1 (Nov. 23, 2016)
GE.Reply-to-EPA	General Electric Company's Reply to EPA Region 1's Response to General Electric's Petition for Review (Mar. 24, 2017)
mg/kg	Milligrams per kilogram, (equivalent to parts per millison)
PCBs	Polychlorinated biphenyls
RCRA	Resource Conservation and Recovery Act
RTC	EPA's Response to Comments (Oct. 2016)
SOP	Statement of Position
SOW	Rest of River Statement of Work

INTRODUCTION

On February 14, 2017, the State of Connecticut submitted a response ("CT.Resp.") to the petition for review filed by the General Electric Company ("GE") on November 23, 2016 ("GE.Pet.") of a final permit modification issued to GE by EPA under the Resource Conservation and Recovery Act ("RCRA") on October 24, 2016 (the "Modified Permit") and pursuant to a Consent Decree ("CD") approved by a United States District Court.[1]

Connecticut addresses three of the groups of permit conditions challenged by GE – the Downstream Transport and Biota Performance Standards, the requirements to conduct response actions for future third-party river and floodplain projects, and the requirement to ensure proper inspection and maintenance of non-GE-owned dams in Massachusetts. On these three issues, GE submits this reply to Connecticut's response, with cross-references to GE's petition and to its reply to EPA's response ("GE.Reply-to-EPA") as appropriate.

ARGUMENT

I. The Downstream Transport and Biota Performance Standards Violate the Consent Decree and Exceed EPA's Authority.

In response to GE's challenge to the Downstream Transport and Biota Standards, Connecticut correctly points out that where, as here, the issue turns on the meaning of the CD, it is evaluated and resolved according to "contract law principles," with the "primary goal … to honor the intent of the parties…." CT.Resp. at 9. Yet, as GE has demonstrated, because the Downstream Transport and Biota Standards conflict with the agreed-to language of the CD, those "contract law principles" require that they be set aside.

[1] Relevant provisions of key documents referenced herein are provided in Attachments to GE's Petition or EPA's Response, with cross-references to the Administrative Records ("A.R.").

These Performance Standards, unlike the others in the Modified Permit, are inappropriately open-ended; they provide that if the specified numerical values are exceeded for a specified period in the future, EPA can direct GE to conduct additional response actions, not currently identified, as EPA deems necessary to achieve and maintain the numerical values. GE has shown that this interpretation conflicts with the terms of the CD and the associated CD-Permit, which provide two, and only two, avenues for EPA to require GE to conduct response actions for the Rest of River. GE.Pet. at 44-47; GE.Reply-to-EPA at 18-19, 20-21. First, EPA can specify the response actions in the Modified Permit, as provided in CD-Permit Special Condition II.J, which states that the EPA will propose not only the Performance Standards, but also "the appropriate corrective measures necessary to meet the Performance Standards." Alternatively, if EPA does not specify a particular response action in the Modified Permit, it can later seek to compel GE to perform it as an additional response action ***only*** by following the covenant reopener process in Paragraph 162 and 163 of the CD – *i.e.*, by showing the existence of new conditions or information which, in EPA's determination, render the Remedial Action no longer protective of human health or the environment. Otherwise, the covenants in Paragraph 161 of the CD bar such an effort.

Connecticut cites a number of other CD provisions which, it argues, give EPA the authority to require GE to conduct unspecified future response actions without going through the covenant reopener process. For example, it cites Paragraphs 23 and 33 of the CD (in Att. 2 to EPA.Resp,). CT.Resp. at 10. Paragraph 23, however, provides only that GE "shall perform the response actions required under this Consent Decree to achieve and maintain the Performance Standards as described in … the Rest of River SOW [Statement of Work]." This says nothing about ***what*** response actions can permissibly be "required under" the CD. Paragraph 33 says

only that the Performance Standards for the Rest-of-River Remedial Action "will be developed through the processes specified in Paragraph 22" of the CD, and that GE "shall perform the Rest of River Remedial Action and achieve such Performance Standards, as provided in Paragraph 22…." Nothing in Paragraph 33 authorizes EPA to establish Performance Standards without specifying the response actions necessary to meet them. To the contrary, because Paragraph 33 references Paragraph 22, and Paragraph 22 incorporates the CD-Permit, these provisions, read together according to their terms, require EPA to specify in the Modified Permit both the Performance Standards and the response actions necessary to meet them.

Next, Connecticut relies on Paragraph 39.a of the CD, but its response omits a key part of that provision. CT.Resp. at 11. Connecticut fails to note that Paragraph 39.a authorizes EPA to modify the work specified in the Rest-of-River SOW or work plans to achieve and maintain the Performance Standards ***only*** if the modification is "consistent with the scope of the response action for which the modification is required and does not modify the Performance Standards." The Downstream Transport and Biota Performance Standards exceed the scope of Paragraph 39.a because the authority they purport to grant to EPA is not limited to modification of existing response actions, but also allows EPA to require additional, entirely new response actions, which could ***not*** be "consistent with the scope of the response action[s]" specified in the Modified Permit.[2] Connecticut is wrong, moreover, when it asserts that reading Paragraph 39.a as written would render that provision superfluous. *Id*. There are numerous types of modifications that EPA could require to the Rest-of-River SOW or the work plans thereunder that would change the

[2] In addition, to the extent that the additional response actions would modify any other Performance Standards for the Rest-of-River Remedial Action or any of the Performance Standards for any of the upstream remediation actions under the CD, they would be precluded by the provision of Paragraph 39.a that a modification thereunder cannot modify the Performance Standards.

way GE is performing a previously selected response action (*e.g.*, by modifying the dredging technique or other implementation approaches) but would be consistent with the scope of that response action.

Connecticut's citation to Paragraph 40 of the CD is also unavailing. *Id*. at 11-12. This provision says that nothing in the CD, the SOW, or the work plans thereunder "constitutes a warranty or representation" by the United States or the States that compliance with the work requirements set forth in the SOW or the work plans "will achieve the Performance Standards." Paragraph 40 may recognize that the performance of certain kinds of specified work does not, in and of itself, guarantee achievement of the Performance Standards, and thus may imply that modifications or additional work may be required. However, this provision, like those discussed above, does not alter the delineation in Paragraph 39.a and Paragraphs 162-163 of when and how EPA may require modifications or seek to compel GE to perform additional work.

Finally, Connecticut cites Paragraph 44 of the CD, which states that, "[i]f EPA determines, at any time, that any one of the response actions required pursuant to this [CD] is not protective of human health and the environment, EPA may select further response actions for the Site." CT.Resp. at 12 n.7, quoting CD ¶44 (included in Att. 2 to GE.Pet.). Connecticut fails to point out, however, that the CD goes on to say that, if EPA does select further response actions for the Site, GE "shall undertake or fund such further response actions ***to the extent that the reopener conditions in Paragraph 162 or Paragraph 163 … are satisfied***." CD ¶46 (emphasis added). The Section of the CD that contains Paragraphs 44 and 46 thus confirms the primacy of Paragraphs 162 and 163 and makes clear that, for EPA to require GE to perform additional response actions not specified in the Modified Permit, EPA must proceed through the covenant reopener process specified in those paragraphs of the CD. Connecticut gets it exactly backwards,

therefore, when it contends that GE's position would require a "major modification" of the CD that would need the approval of all parties and the court. CT.Resp. at 13. GE's position is based on the agreed-to language of the CD and the parties' intent as reflected by that language.

II. The Requirements to Conduct Response Actions for Future River and Floodplain Projects Exceed EPA's Authority under the CD.

GE has challenged the requirements in the Modified Permit that, for any future project or work implemented by a third party on or along the river or in the floodplain, GE must conduct response actions "to be protective" of the work. Connecticut's initial argument is that GE did not properly preserve that issue as to projects and work in Connecticut because GE's petition inadvertently failed to list specifically, among the disputed provisions, the Modified Permit conditions that apply that requirement to Connecticut, but only listed those that apply to Massachusetts. CT.Resp. at 13-14. GE's petition made unmistakably clear, however, that it was challenging the "Future Work" requirement as applied to both Massachusetts and Connecticut. It stated: "The Modified Permit requires that, for any such future project or work in Massachusetts, ***or for any such project or work in Connecticut that would require handling of sediment containing more than 1 mg/kg of PCBs***, GE must conduct 'response actions to be protective' of the work." GE Pet. at 48 (emphasis added).[3] GE then went on to show that those provisions exceed EPA's contractual authority under the CD with respect to both Massachusetts and Connecticut. *Id*. at 48-51. There was no distinction in GE's argument between those States.

[3] This language demonstrates that GE was contesting the requirement in Connecticut as well as Massachusetts, since it specified the difference between them. As stated in GE's petition, the Massachusetts requirement applies to any future project or work with no PCB concentration cutoff, whereas the Connecticut requirement applies only to future projects or work that would require handling of sediment that contains more than 1 mg/kg of PCBs.

Thus, GE's inadvertent failure to list the Connecticut provisions could not have misled anyone into thinking that GE was not challenging that requirement.[4]

EPA certainly understood what GE meant. In its Revised Notice of Uncontested and Severable Permit Conditions, dated January 9, 2017 (Att. 8 to CT.Resp.), EPA listed the Modified Permit provisions applying the Future Work requirement to Connecticut – *i.e.*, Sections II.B.2.l.(1)(a) and (2)(a) (as well as the references to subsection (2)(a) in subsection (2)(b).i) – as contested. If any potential for misunderstanding survived this clarification, GE eliminated it when it filed an Erratum with the Board on January 13, 2017, which specifically corrected this scrivener's error. Therefore, Connecticut has had a full opportunity to address the argument in its responding brief, and cannot claim to have been prejudiced by GE's mistake.

On the merits, Connecticut's argument is that GE is a responsible party under CERCLA and RCRA for the PCBs in the Rest of River and thus is required to conduct any necessary cleanup of those PCBs, and that GE's position is an effort to avoid its responsibility. CT.Resp. at 15-16. Connecticut's argument is undercut by its admission that the CD is a binding contract, executed by GE, EPA, Massachusetts, and Connecticut; and the terms of this contract govern the substance and manner of GE's cleanup pursuant to CERCLA and RCRA. As discussed above, for response actions in the Rest-of-River area, including those in Connecticut, the CD requires that EPA either specify those response actions in the Modified Permit, as provided in CD-Permit Condition II.J, or if it cannot do so and concludes that additional response actions are required later, follow the covenant reopener process specified in CD ¶¶162 and 163. It does not authorize

[4] In fact, several of the other petitioners in this case failed to even attempt to list any specific provisions of the Modified Permit that they were contesting, and so EPA was compelled to try to decide what provisions they were challenging. There was no such lack of clarity in GE's petition.

EPA to issue open-ended provisions that require GE to conduct unspecified response actions in unspecified areas for third-party projects in the future without an evaluation of those response actions under the CD's remedy-selection criteria or compliance with the covenant reopener conditions. That would conflict with the agreed-upon approach for requiring GE to carry out its responsibilities under CERCLA and RCRA.

In this respect, moreover, the CD would not affect the rights of third parties, including those in Connecticut, who may face additional costs to address PCBs in their planned projects on or along the River. If they have rights against GE, these parties can still bring claims against the Company for recovery of those incremental costs, and there are ample mechanisms available for resolving those claims through negotiation or judicial action. Such claims would be resolved in the context of the specific facts. The Modified Permit requirements, however, allow for something quite different, and foreign to both the letter and spirit of the CD: a unilateral administrative determination by EPA that GE is responsible to carry out whatever response actions EPA decides in the future are "protective" of the work. That is clearly erroneous.

III. The Requirement to Ensure Proper Inspection and Maintenance of Non-GE Dams in Massachusetts Conflicts with the CD and Exceeds EPA's Authority.

In its petition, GE challenged the Modified Permit's requirement that GE must "ensure" the inspection and maintenance of all non-GE-owned dams on the River in Massachusetts on two grounds: (1) that EPA did not evaluate that requirement; and (2) that the requirement imposes on GE obligations that belong to the dam owners under federal and state law. Connecticut does not address the first of these points. On the second point, Connecticut argues that GE is making a "preemption" argument but has failed to show, through a comparison of the Modified Permit requirements with federal or state regulations, that the Modified Permit requirement

"substantially and directly interferes with FERC [Federal Emergency Regulatory Commission] or State regulations regarding dams." CT.Resp. at 17-18.

Contrary to Connecticut's contention, GE did cite the provisions of the Modified Permit and the federal and state dam regulations with which they interfere. GE.Pet. at 51-52. Its citations to the Modified Permit included Section II.B.2.j.(2)(b), which states that "[f]or all [non-GE-owned] dams and Impoundments in Massachusetts [GE] shall ensure inspection, monitoring and maintenance for such dams," and that such activities shall include "(i) maintaining the integrity of the dam to contain contaminated sediment, and (ii) conducting materials handling and off-site disposal, and engineering controls related to dam maintenance, repair, upgrades, and enhancement activities …, (iii) and all other related activities." GE also cited the FERC and state regulations that require dam owners to inspect, monitor, maintain, and repair their dams as necessary. 18 C.F.R. Part 12; 302 CMR 10.07-10.14. Those monitoring and maintenance requirements would include the types of activities that the Modified Permit would impose on GE. While the Modified Permit allows GE to seek EPA approval for the dam owner to perform those activities, EPA may or may not grant such approval. In fact, the owner may feel that the Modified Permit gives it a good opportunity to shift its dam inspection and maintenance obligations to GE and/or to get GE to undertake any necessary repairs at its expense. Thus, GE may still have to take over the dam owner's responsibilities and this could even lead to a conflict with the dam owner regarding the need for or type of repairs.[5] Such events would substantially

[5] While the Modified Permit would allow GE, in the event it cannot fulfill its obligations, to submit a plan to EPA to describe what it will do (Section II.B.2.j.(2)(b)), the requirements for approval of such a request are unnecessarily stringent (potentially including remediation of the sediments behind the dam), and in any case, may still require GE to take over the dam owner's responsibilities.

and directly interfere with the federal and state dam regulatory requirements that impose such duties on the dam owner.

CONCLUSION

For the foregoing reasons and those set forth in GE's Petition, GE urges the Board to reject Connecticut's arguments.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R § 124.19(d)(1)(iv), undersigned counsel certifies that the foregoing Reply to the State of Connecticut's Response Brief contains 2,632 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, but not including the cover, Table of Contents, Table of Authorities, Glossary of Terms, Statement of Compliance with Word Limitation, and signatories; and thus this Reply meets the 7,000-word limitation specified in the Board's rules at 40 C.F.R. § 124.19(d)(3).

Respectfully submitted,

/s/ Jeffrey R. Porter
Jeffrey R. Porter
Andrew Nathanson
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C.
One Financial Center
Boston, MA 02111
(617) 542-6000
JRPorter@mintz.com

/s/ James R. Bieke
James R. Bieke
SIDLEY AUSTIN, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
jbieke@sidley.com

Attorneys for Petitioner General Electric Company

Of Counsel:
Roderic J. McLaren
Executive Counsel – Environmental Remediation
GENERAL ELECTRIC COMPANY
159 Plastics Avenue
Pittsfield, MA 01201

Dated: March 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2017, I served one copy of the foregoing General Electric Company's Reply to the State of Connecticut's Response Brief on each of the following:

Timothy Conway
Senior Enforcement Counsel
U.S. Environment Protection Agency, Region 1
Five Post Office Square, Suite 100
Boston, MA 02109-3912
(By express commercial delivery service)

Timothy Gray
Housatonic River Initiative, Inc.
P.O. Box 321
Lenoxdale, MA 01242-0321
(By first-class mail)

C. Jeffrey Cook
9 Palomino Drive
Pittsfield, MA 01201
(By first-class mail)

Benjamin A. Krass
Pawa Law Group, P.C.
1280 Centre Street
Newton, MA 02459
(By first-class mail)

Jane Winn
Berkshire Environmental Action Team, Inc.
29 Highland Way
Pittsfield, MA 01201-2413
(By first-class mail)

Kathleen E. Connolly
Louison, Costello, Condon & Pfaffe, LLP
101 Summer Street
Boston, MA 02110
(By first-class mail)

Lori D. DiBella
Assistant Attorney General
Office of the Connecticut Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
(By express commercial delivery service)

Jeffrey Mickelson
Deputy General Counsel
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108
(By express commercial delivery service)

Richard Lehan
General Counsel
Massachusetts Department of Fish and Game
251 Causeway Street, Suite 400
Boston, MA 02114
(By express commercial delivery service)

Richard M. Dohoney
Donovan, O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247
(By first-class mail)

/s/ James R. Bieke

James R. Bieke