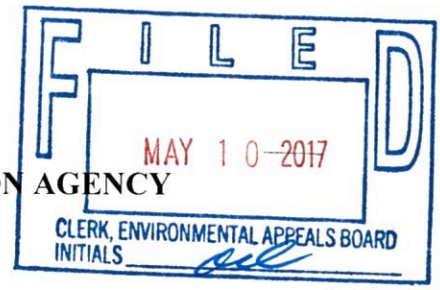
ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:	)	RCRA Appeal Nos. 16-01, 16-02, 16-03, 16-04, & 16-05
General Electric Company	)	
Permit No. MAD002084093	)	

CORRECTED ORDER ESTABLISHING FRAMEWORK FOR ORAL ARGUMENT[1]

This order establishes the framework for oral argument in the five permit appeals denoted *In re General Electric Co.*, RCRA Appeal Nos. 16-01 through 16-05, and allocates the time each party and amicus curiae will have to address the issues relevant to its position in these cases. The Board issues this order pursuant to its authority to establish additional procedures governing oral argument. 40 C.F.R. § 124.19(h).

Seven parties have indicated their intent to participate in the oral argument scheduled for June 8, 2017, beginning at 10 a.m. The parties opting to participate in person are General Electric Corporation, the Commonwealth of Massachusetts, the State of Connecticut, Mr. C. Jeffrey Cooke, and the Housatonic Rest of the River Municipal Committee. U.S. EPA Region 1 has indicated it is uncertain at this time as to whether it will participate in person or by videoconference. The Board will assume that Region 1 will appear in person unless we hear

[1] This order corrects two oversights in the order issued on May 4, 2017, by: (1) adding a topic the parties should be prepared to address in Section I, *see* Section I (4); and (2) increasing from 5 to 10 minutes EPA Region 1's time to respond in Section IV.

otherwise by May 18, 2017. Housatonic River Initiative has requested to participate by videoconference. In addition, two entities participating only as amicus curiae, the City of Pittsfield and Green Berkshires, Inc., have also asked to for time to present at oral argument in person. Oral argument will take place at the following location:

Administrative Courtroom
U.S. Environmental Protection Agency
William Jefferson Clinton East Building, Room 1152
1201 Constitution Avenue, N.W.
Washington, D.C. 20460

Given the complexity of the matter and the number of parties and amici involved, the Board encourages each party and amicus curiae to prepare for oral argument by thoroughly reviewing the issues and arguments contained in the briefs, as well as relevant portions of the administrative record. In particular, the parties and amici should be familiar with (1) the Board's standard of review for permit appeals at 40 C.F.R. § 124.19(a)(4), and (2) Board precedent on the review of a corrective action permit under the Resource Conservation and Recovery Act ("RCRA"), §§ 6901 – 6992k. *See, e.g.*, *In re Caribe General Electric Products, Inc.*, 8 E.A.D. 696 (EAB 2000); *In re Exxon Co.*, 6 E.A.D. 32 (EAB 1995); *In re Allied Signal, Inc.*, 4 E.A.D. 748 (EAB 1993).

Rather than hearing argument on the appeals seriatim, the Board has structured oral argument around the issues raised by the petitions. The Board has identified four main issues, with two of those issues broken into subparts. Additionally, for two of the issues, the Board has specified topics the Board requests the parties and amici be prepared to address at oral argument. The list of topics should not be construed as comprehensive – the parties should be prepared to address all issues raised in the briefs. Nor does the listing of topics indicate that the Board has made any determinations in these cases. The Board uses oral argument to explore all

considerations possibly relevant to a case. For each of the issues, the Board has allocated time for argument for the relevant parties and amici. The presenting petitioners for each issue may reserve time for rebuttal.

MORNING SESSION – 10 a.m.

I. The Law Governing the Board's Review of the 2016 RCRA Permit Modification

The parties should be prepared to address the following topics:

(1) The interplay between the Consent Decree and the Board's standard of review under 40 C.F.R. § 124.19(a)(4);

(2) The interplay between the Consent Decree and RCRA's corrective action permit provision (42 U.S.C. § 6924(u)), implementing regulations (40 C.F.R. § 264.101(a)), and guidance;

(3) The Board's jurisdiction under 40 C.F.R. § 124.19 to hear a claim based on an allegation that the 2016 RCRA Permit modification is inconsistent with the terms of the Consent Decree; and

(4) The relevance, if any, of the following Consent Decree language to the Board's review of the 2016 RCRA permit modification: "Settling Defendant shall design and implement the Rest of the River Remedial Action * * * as a CERCLA remedial action * * * * EPA's modification of the Reissued RCRA Permit to select such Remedial Action * * * shall be

considered to be the final remedy selection decision pursuant to Section 121 of CERCLA and Section 300.430 of the NCP." Consent Decree, ¶ 22.z.

Presenters:

- General Electric (10 minutes)
- Housatonic Rest of the River Municipal Committee (10 minutes)
- EPA Region 1 (10 minutes)

II. EPA Region 1's Decision on Disposal and Treatment

A. General Electric's argument in favor of on-site disposal

The parties should be prepared to address the following topics:

(1) The extent to which cost has played a significant role in other EPA remedial decisionmaking under RCRA or Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. If available, provide examples from federal judicial rulings or EPA final decisions illustrating how much weight was given to the cost differentials of remedial alternatives in selecting a remedy.

(2) The extent to which the "implementability" factor in selecting other RCRA corrective action remedies (*see* Corrective Action for Releases From Solid Waste Management Units at Hazardous Waste Management Facilities, 61 Fed. Reg. 19,432, 19,477 (May 1, 1996); Corrective Action for Solid

Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,877 (July 27, 1990)) has included consideration of state and community concerns. If available, provide examples from federal judicial rulings or EPA final decisions illustrating the nature of state and community concerns that have been considered and how those concerns have been addressed in RCRA corrective action remedial decisions.

(3) The extent to which the "state and community acceptance" factor under the National Contingency Plan, *see* 40 C.F.R. § 300.430(f), has played a significant role in selecting a CERCLA remedy. If available, provide examples from federal judicial rulings or EPA decisions illustrating the nature of state and community concerns that have been considered and how those concerns have been addressed in the CERCLA remedial decisions.

Presenters:

- General Electric (30 minutes)
- EPA Region 1 (15 minutes)
- Commonwealth of Massachusetts (10 minutes)
- Housatonic Rest of the River Municipal Committee (5 minutes)
- Green Berkshires (5 minutes)

B. The Housatonic River Initiative's argument in favor of treatment

Presenters:

- Housatonic River Initiative (15 minutes)
- EPA Region 1 (15 minutes)

AFTERNOON SESSION – 2 p.m.

III. EPA Region 1's Decision on the Extent of Remediation

A. Arguments by Petitioner Housatonic River Initiative that the cleanup remedy is not extensive enough

Presenters:

- Housatonic River Initiative (20 minutes)
- EPA Region 1 (20 minutes)

B. Arguments by Petitioners General Electric and Mr. C. Jeffrey Cook that the cleanup portion of the remedy is too extensive

Presenters:

- General Electric (20 minutes)
- Mr. C. Jeffrey Cook (10 minutes)
- EPA Region 1 (16 minutes)
- Commonwealth of Massachusetts (7 minutes)
- State of Connecticut (7 minutes)

IV. EPA Region 1's Decision Regarding Massachusetts Hazardous Waste Facility Siting Act, Mass. Gen. Laws ch. 21D, and other State and Local Issues

Presenters:

- Housatonic Rest of the River Municipal Committee (10 minutes)
- City of Pittsfield (5 minutes)

- Commonwealth of Massachusetts (5 minutes)
- State of Connecticut (5 minutes)
- General Electric (5 minutes)
- EPA Region 1 (10 minutes)

Each party and amicus curiae shall notify the Clerk of the Board in writing no later than Thursday, June 1, 2017, of the name or names of those persons who will present oral argument. Oral arguments before the Board are open to the public. For security purposes, advance notice is required to gain entry into the EPA building where the Courtroom is located. Members of the public wishing to attend oral argument, including representatives of the parties and amici and other interested parties, must contact the Clerk of the Board (Eurika Durr, 202-233-0122, durr.eurika@epa.gov) sufficiently in advance of the oral argument to allow the Clerk reasonable opportunity to notify appropriate security personnel (i.e., no later than Thursday, June 1, 2017).

So ordered.[2]

ENVIRONMENTAL APPEALS BOARD

Dated: May 10, 2017

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

[2] The three-member panel responsible for this order is composed of Aaron P. Avila, Kathie A. Stein, and Mary Beth Ward.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **CORRECTED ORDER ESTABLISHING FRAMEWORK FOR ORAL ARGUMENT** issued May 10, 2017, in the matter of *In re General Electric Co.*, RCRA Appeal Nos. 16-01, 16-02, 16-03, 16-04, and 16-05, were sent to the following persons in the manner indicated:

By First Class Mail:

For General Electric Company:
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For Housatonic River Initiative:
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For C. Jeffrey Cook:
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For Housatonic Rest of River Municipal Committee
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For Berkshire Environmental Action Team, Inc.:
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For City of Pittsfield:

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LLP.
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For Green Berkshires, Inc.:

Robert D. Cox, Jr.
Bowditch & Dewey, LLP
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Worcester, MA 01615

By EPA Pouch Mail:

For EPA Region 1:

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Bryan Olson (OSRR07-5)
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Dated: MAY 1 0 2017

Annette Duncan
Administrative Specialist