

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

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In the Matter of: )

GENERAL ELECTRIC COMPANY )  
Modification of RCRA Corrective Action )  
Permit No. MAD002084093 )  
\_\_\_\_\_ )

) RCRA Appeal No. 16-01

RESPONDENT REGION 1'S SUR-REPLY

Respectfully submitted,

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Dated: April 12, 2017

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## **TABLE OF ATTACHMENTS**

<b>Attachment No.</b>	<b>AR/SEMS Number</b>	<b>Title</b>
Attachment 1	AR472605, 580275	Excerpts from GE's Revised Corrective Measures Study Report, Housatonic River, Rest of River (October 2010) (RCMS)
Attachment 2	AR243739	Excerpts from EPA's February 2005 Human Health Risk Assessment, February 2005

## I. INTRODUCTION

The United States Environmental Protection Agency, Region 1 (“the Region”) files this Sur-reply to respond to two arguments newly raised by the General Electric Company (“GE”) in its March 27, 2017 Reply to the Region’s Response to GE’s Petition for Review. For the other remaining issues raised by GE’s Reply, the Region anticipates addressing them in oral argument per the Board’s February 23, 2017 “Order Granting Oral Argument”.

## II. ARGUMENT

GE has raised new issues and arguments in its Reply in contravention of 40 C.F.R. § 124.19(c)(2). The new issues and arguments were not raised in GE’s Petition. As such, the new arguments and issues should not be considered. As the Board has stated, “Petitioners ... may not raise new issues and arguments for the first time in their reply brief. See 40 C.F.R. § 124.19(c)(2) (prohibiting petitioners from raising “new issues or arguments” in the reply)”. *In re FutureGen Industrial Alliance, Inc.*, 16 E.A.D. 717, 731 (EAB 2015); *see also, In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 126, n. 9 (EAB 1999) ([N]ew issues raised for the first time at the reply stage of these proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness) (citations omitted).

If the Board decides to consider the newly-made arguments, the GE contentions should fail for the following reasons.

### **A. EPA accurately described the Decree authority for additional modified response actions for the Downstream Transport and Biota Performance Standards.**

In its Reply, GE argues for the first time that the Downstream Transport and Biota Performance Standards violate the Consent Decree (“Decree”) because the Decree allegedly “draws a bright line between two kinds of Agency authority: i) EPA’s ability to *modify* the

remedial actions specified in the Modified Permit, and (ii) the Agency's ability to seek GE's performance of *additional* remedial actions." GE Reply at 18.<sup>1</sup> GE's artificial barrier is not supported by the Decree.

Decree Paragraph 39.a, by its plain language, is designed to ensure that if EPA determines that a modification to the work previously required for a response action is necessary to "achieve and maintain the Performance Standards or to carry out and maintain the effectiveness" of a response action, EPA may require such modification so long as the modification is consistent with the scope of the response action and does not modify Performance Standards. Decree ¶ 39.a. GE concedes (as it must) that EPA may require "modified" response actions to achieve and maintain Performance Standards under Decree Paragraph 39.a. Despite that, GE then sets up an artificial limitation by arguing that such modified response actions may never include response actions termed "additional" response actions, even if such modified response actions under Paragraph 39.a are, in fact, *additions* to previously required action. GE Reply at 18-19.

To the contrary, Paragraph 39.a cannot be read to exclude additional actions from the universe of potential modifications. First, Paragraph 39.a itself provides no such restriction. Second, the Decree parties did place a limitation on Paragraph 39.a modification, namely that such a modification may only be required "to the extent that it is consistent with the scope of the response action for which the modification is required and does not modify the Performance

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<sup>1</sup> GE's discussion of the Permit Modification's Biota Performance Standards and Downstream Transport Performance Standards in its November 23, 2016 Petition for Review (GE-Pet. at 43-47) did not include this false distinction.

Standards ...” (Decree ¶ 39.a), but did not incorporate the restriction now proffered by GE. Accordingly, GE’s semantic exercise in minimizing the scope of Paragraph 39.a fails.

## **B. GE conceded liability for PCBs downstream of its Facility.**

In its Reply, GE claims for the first time that the Permit Modification’s Future Work requirements “prejudge and adjudicate GE’s liability to ... hypothetical future plaintiffs before their claims gestate, effectively declaring now-for-then that GE is 100% responsible, regardless of the circumstances.” GE Reply at 22.<sup>2</sup> Yet, when GE entered into the Consent Decree, as part of its bargain, it agreed that for PCBs “which could have migrated to the Rest of River area from either the GE Facility or the Former Oxbow Areas, [GE] will not contend that such waste and/or constituents did not migrate from the GE Facility.” Appendix G to the Decree, RCRA Corrective Action Permit for Rest of River (“CD-Permit”), Paragraph I.P. at 12. Here, the Permit Modification’s Future Work requirements for Rest of River relate to PCBs that could have migrated from GE’s Facility.

The administrative record, including GE’s own acknowledgment, clearly reinforce GE’s concession. In its 2010 Revised Corrective Measures Study (“RCMS”), GE first states that “[t]he Rest of River area consists of the portion of the Housatonic River and its floodplain downstream of the Confluence ... to which release of hazardous waste or hazardous constituents from the GE facility have migrated.” Attachment 1, RCMS at 1-14. Immediately thereafter in the RCMS, GE explained why Reach 17 is not part of Rest of River, namely “... because that reach has received inputs of PCBs and other contaminants from industries in the immediate area.” *Id.* EPA’s February 2005 Human Health Risk Assessment provides similarly, “Reach 17

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<sup>2</sup> GE’s discussion of the Permit Modification’s Future Work requirements in its November 23, 2016 Petition for Review (GE-Pet. at 48-51) did not raise this issue.

has received inputs of PCBs and other contaminants from industries in the immediate area, and, for that reason, is not included in the EPA GE/Housatonic River Study, which is focused on contaminants originating from the GE facility in Pittsfield, MA.” Attachment 2 at 1-19.

By now arguing that GE is allegedly not responsible for addressing downstream PCBs, GE is renegeing on its agreement set forth in the Decree and CD-Permit.

### III. CONCLUSION

GE’s newly-raised arguments should not prevail and its Petition should be denied.

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this response contains less than 7000 words (966 words per word processing calculation) in accordance with 40 C.F.R. § 124.19(d)(3).

Dated: April 12, 2017

/s/ Timothy M. Conway

Timothy M. Conway

CERTIFICATE OF SERVICE

I, Timothy M. Conway, hereby certify that true and correct copies of EPA Region 1's

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