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November 6, 1997

Richard Caspe
U.S. Environmental Protection Agency
Region II
220 Broadway
New York, NY 10007-1866

Re: Hudson River PCB Superfund Site

Dear Mr. Caspe:

I am writing on behalf of the General Electric Company in response to Douglas Tomchuk's statement at the meeting with the New York State Department of Environmental Conservation on October 16th that the Hudson River PCB Superfund Site ("Site") encompasses the entire 200 mile stretch of the Hudson River between Hudson Falls and the Battery.

The listing documents for the Site demonstrate that the Lower Hudson is not listed on the NPL. EPA listed the Site on September 21, 1984. 49 Fed. Reg. 37070. EPA's listing documents in the NPL docket describe the Site as "a 40-mile stretch of the Hudson River between Mechanicville and Fort Edward, New York," and the Agency's analysis supporting the listing of the Site was limited to this 40-mile stretch. Although subsequently EPA, at times, has referred to the Site as encompassing portions of the Lower River -- for example in its "Phase I Report - Review Copy, Interim Characterization and Evaluation, Hudson River PCB Reassessment RI/FS" (Aug. 1991) -- these *post hoc* statements cannot legally modify the promulgated definition of the Site as limited to the Upper Hudson. Nor can the addition in 1995 to the NPL docket for the Site listing of a memorandum claiming that site boundaries at the time of listing are inexact support a preposterous claim that EPA, with no analysis, and without proceeding through notice and comment rulemaking, can unilaterally increase by 150 miles the area encompassed by the initial listing. The D.C. Circuit has made it clear that EPA's authority is much more limited. Washington State Dept. of Transportation v. EPA, 917 F.2d 1309, 1311 (D.C. Cir. 1990) ("EPA may include specific parcels of land within a NPL site so long as they are within the broad compass of the notice provided by the initial NPL listing." (emphasis added)); see also, The Mead Corp. v. Browner, 100 F.3d 152, 157 (D.C. Cir. 1996) ("The idea that Congress implicitly allowed EPA broad discretion to lump low-risk sites together with high-risk sites, and thereby to transform the one into the other, is anything but reasonable"). Acting pursuant to notice and comment rule-

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making, EPA listed the site as the forty miles of the Upper Hudson between Mechanicville and Fort Edward. Any material amendment of the Site definition must also be accomplished by notice and comment rule-making. The addition of 150 miles of River to a site is clearly material, and we are unaware of any notice and comment rule-making undertaken by EPA in this regard. If we are wrong on this point, please inform us immediately.

EPA must accept the constraints that are imposed as a result of having limited the geographical reach of the Site and, consequently, limiting its review of potential response actions to the Upper River. See GE's PMCR Comments (Nov. 21, 1996). While it is reasonable to look at the effect of potential remedial measures in the Upper River to assure that a possible remedial course will not adversely impact the Lower River, it is unreasonable to seek to justify Upper River remedial action on the basis of purported benefits to Lower River fish or those who consume Lower River fish. Yet, the statement made at the DEC meeting that EPA plans to undertake a human health risk assessment focused on the reach of the River between the Troy Dam and Poughkeepsie suggests that the Agency may in fact be attempting to justify a remedial action on the basis of benefits to the Lower River.

Expanding the site by 150 miles, or justifying any remedial action on the basis of benefits to the Lower River, would have serious consequences to the scope of EPA's present reassessment. In such circumstances, EPA must investigate and evaluate remedial alternatives, such as source control in the lower River; consider the greatly increased number of sources of PCBs (and other contaminants) to fish in the Lower Hudson; and identify the much wider group of parties who would be classified as PRPs at a Superfund site that encompassed the Hudson River from the Troy Dam to the Battery. The Agency would be obliged to collect extensive information through requests pursuant to Sec. 104(e) of CERCLA. The presence of other dischargers of PCBs in the Lower River is well known to EPA; the agency has conducted recent studies of PCB discharges into New York Harbor, including sampling outfalls, and of comparative contributions of PCBs into the Harbor. The Agency made the importance of other contaminants plain in its 1984 ROD, concluding "that detectable levels of dioxin, dibenzofurans, mercury and chlordane (from known and unknown sources) have also been identified in Hudson River fish, and that even if PCBs decrease to an acceptable level, the fishing bans would continue on the basis of these other types of contaminants." If the site is expanded by 150 miles or remedial actions in the Upper Hudson are justified on the basis of benefits to the Lower Hudson, not only must EPA proceed by notice and comment rulemaking, but the Agency must fully and fairly address the obvious issues which we have set out in this paragraph. This would appear to require several years of work, but any other course would be clearly prejudicial to GE which has focused its data collection and factual analysis on the Upper River.

EPA cannot have it both ways. The Agency cannot describe the site as encompassing the 150 miles from Troy to the Battery and then address only one contaminant and

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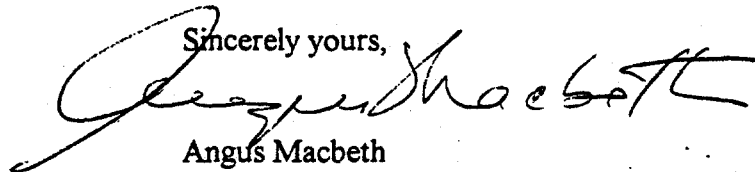
one or two PRPs outside that 150 miles as the sole subjects for remedial consideration. The scope of EPA's Superfund activity at the Site is circumscribed by the characterization and definition of the site which EPA promulgated in its rule-making many years ago.

If the Agency disagrees with any of the relevant facts which we have set out or is pursuing a different theory that would make the 150 miles from the Troy Dam to the Battery part of this Superfund Site, please inform us promptly so that GE may act to protect its interests accordingly.

As a first step in protecting GE's position, we request that EPA segregate and clearly label any expenditures associated with any area outside the forty miles of the Hudson described in the 1984 listing. Should EPA persist in spending Superfund money on areas not listed on the NPL, GE does not want to be met with a claim in the future for NPL Site-related costs where the Agency cannot distinguish money spent on the NPL Site from any other expenditure.

Please place this letter in the administrative record for the Site.

Sincerely yours,



Angus Macbeth

cc: Douglas Tomchuk
William McCabe
Paul Simon