

70230

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

CHICAGO
DALLAS
LOS ANGELES

1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711

FOUNDED 1866

NEW YORK
LONDON
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8271

May 5, 1998

Douglas Fischer
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
290 Broadway
New York, NY 10007-1866

Re: Hudson River PCBs Superfund Site

Dear Mr. Fischer:

Thank you for your letter of January 7, 1998 concerning the scope of the Hudson River PCBs Superfund Site ("Site"). General Electric Company ("GE") believes that a continuing dialogue on these and other issues is beneficial to both EPA and the company, and we appreciate the care and effort which your letter reflects.

While we recognize the differences between us and the fact that they are unlikely to be resolved definitively in the near future, we would like to address three points in your letter.

You cite to the definitions of the "Site" in the administrative order on consent (II CERCLA-90224), and the 1990 consent decree between GE and EPA concerning the remnant deposits, U.S. v. General Electric Company, Inc., Civ. No. 90-CV-575 (N.D.N.Y.). The implication is that GE has conceded that the NPL "site" extends below the Federal Dam at Troy. That is not the case. I draw your attention to paragraph 85 of the administrative order on consent and paragraph XXXIV of the consent decree, both of which provide that by executing the consent order and decree, GE did "not admit the truth of the factual statements and legal conclusions or allegations contained in [the documents]. . . Except as otherwise provided in [these documents, GE] reserves the right to controvert, in any subsequent proceeding, the validity of or the responsibility for any of the factual or legal determinations made herein." Thus, GE did not accept EPA's expanded definition of the NPL site by signing those documents.

The D.C. Circuit's recent decision in Montrose Chemical Corp. v. EPA, 1998 U.S. App. LEXIS 383 (D.C. Cir. 1998) bears directly on this issue as well, since the court made it

100224

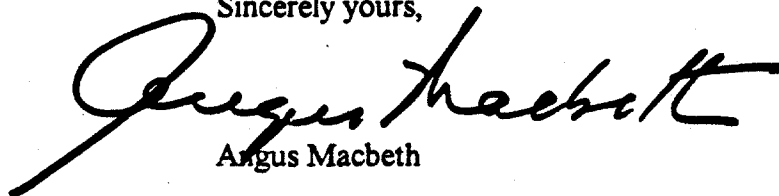
Douglas Fischer
May 5, 1998
Page 2

clear that EPA must follow CERCLA's rulemaking procedures to expand the scope of a NPL listing beyond the area identified and analyzed in the initial rulemaking. Post-rulemaking statements in memoranda or other documents cannot be used to amend the site as defined in the NPL rulemaking. As I am sure you are aware, we disagree with your interpretation of Washington State Dep't. of Transportation v. EPA, 917 F.2d 1309 (D.C. Cir. 1990), and Eagle-Picher Industries v. EPA, 759 F.2d 922 (D.C. Cir. 1985), but even if they did support a post-rulemaking expansion of a site to the enormous extent claimed for the Hudson, they have been superseded by the court's statements in Montrose. Thus, we remain confident that the interpretation of the law set out in our initial letters is correct.

Finally, GE is pleased that your letter confirms that EPA is limiting its current analysis to remedial actions in the upper River. We continue to believe that the Agency should not rely on benefits to the lower River, where numerous other PCB sources exist, to justify remediation in the upper River without looking at alternatives that directly address those lower River sources. While we do not expect to resolve this issue now, we do request that EPA inform us immediately should the Agency's focus change to an examination of possible remedial alternatives in the lower River. Such an analysis obviously implicates many additional PCB sources and a different array of remedial options and is a matter that GE would have to address promptly.

Please do not hesitate to contact me should you wish to discuss this issue further. Please place this letter in the administrative record for the Site.

Sincerely yours,



Angus Macbeth

cc: Mel Schweiger
John Haggard
Mike Elder