By Electronic and Regular Mail

January 30, 2014

Ann R. Klee, Vice President
Corporate Environmental Programs
General Electric Company
3135 Easton Turnpike
Fairfield, CT 06828

Dear Ms. Klee:

On behalf of the Federal Natural Resource Trustees for the Hudson River, we send this letter to correct the public record in regard to the General Electric Company's ("GE") publicly released December 27, 2013 Report ("Report") submitted to the New York Office of the State Comptroller.[1]

We believe it is important for the public to understand our disagreement with a number of statements in the Report. The following are examples.

(1) The Trustees have documented injuries to natural resources that the Report does not acknowledge. In the Report, GE's discussion of injury ignores significant natural resource injuries that have already been established by the Trustees.[2] By selectively referencing only *some* of the Natural Resource Damage (NRD) regulations, the Report is misleading as to what constitutes an injured resource. Under the NRDA regulations, an injury also results when an action or tolerance level set by the United States Food and Drug Administration (FDA) is exceeded in a species or when an appropriate State health agency has issued a directive to limit consumption.[3] Fish consumption advisories are an injury. Injuries also result when surface or ground water exceeds established water quality criteria.[4]

For more than 30 years, PCB levels in fish throughout the 200 mile Hudson River Superfund Site, from the GE plant sites in the Upper Hudson all the way down to the Battery, have exceeded the FDA's PCB limit. PCB levels in waterfowl have also exceeded the FDA limit. Indeed, beginning in 1975, the Commissioner of the New York State Department of Health has issued annual consumption advisories for PCB-

contaminated fish (and later for waterfowl) based upon the threat to public health posed by the consumption of these Hudson River resources. Further, both surface water in the River itself and groundwater in the Towns of Fort Edward, Hudson Falls and Stillwater have PCB contamination in excess of the New York State water quality criteria.[5]

The Trustees have issued injury determinations that GE did not address in the Report, including: Hudson River Fishery Resources: Fishery Closures and Consumption Restrictions[6] (June 2001); Injuries to Hudson River Surface Water Resources Resulting in the Loss of Navigational Services[7] (July 2006); Injury Determination Report for Hudson River Surface Water Resources[8] (December 2008); and Hudson River Resident Waterfowl Injury Determination[9] (August 2013).

Accordingly, at a minimum, surface water, groundwater, fish, and waterfowl are "injured" from the release of GE's PCBs; GE has failed to address this in the Report. Further, the Trustees are permitted to seek compensation for the lost human uses of those injured resources.

(2) <u>We have advised GE that additional dredging would reduce GE's NRD liability.</u> GE states in the Report that "there is no basis to conclude that expanded dredging would reduce the Company's long-term NRD liability."[10] This statement is demonstrably inaccurate. We have publicly issued a number of letters to GE and released other documents regarding EPA's remedy and GE's NRD liability. Most recently is our letter on June 21, 2011,[11] informing GE of our concerns.

In addition, we have publicly released maps showing hot spots that could be targeted for sediment removal over and above that called for in the EPA remedy, and calculated the acreage to be dredged based on specific surface cleanup triggers. Information on these recommendations is publicly and explicitly available. For example, we presented a poster entitled "Hudson River Remedy Part I: Unremediated PCBs and the Implications for Restoration"[12] at the February 2011 Battelle International Conference on Remediation of Contaminated Sediments, the April 2011 Hudson Delaware Chapter of the Society for Environmental Toxicology and Chemistry conference[13] and at the April 2013 Hudson River Environmental Society State of Hudson River Science Symposium.[14] We had presented similar information to the Hudson River Community Advisory Group (CAG) in June 2011.[15] GE is an official liaison to the CAG, and all CAG presentations are publicly available. These and similar sources are widely available on the Trustee web sites.

We continue to assert that additional dredging would reduce natural resource injuries, and associated damages, that will otherwise continue well into the future despite the remedy. To be clear, we are interested in additional dredging as a way of accelerating recovery of the river and reducing GE's future NRD liability, as well as working with GE with respect to GE's overall NRD liability. GE fails to recognize that the Trustees' NRD claim addresses natural resources that have been injured for decades, *and will continue to be injured by PCBs* well into the future even after the EPA dredging remedy is fully implemented. The more thorough and comprehensive the dredging GE does now, the less residual (future) injury there will be. That will have an effect on

GE's potential NRD liability. Information with respect to additional dredging is well known to GE.

Therefore, GE's statement that they have "no basis to guess how much additional dredging the trustee agencies might want, in which locations, and applying which engineering or other performance standards" is not accurate. Similarly, it is not accurate for GE to state in the Report that GE has *no basis to conclude* that additional dredging would reduce its NRD liability. We have repeatedly provided that basis to GE.

(3) GE's discharges of PCBs prior to 1975 were not authorized by any permit. In its Report, the company states that, "GE held the proper government permits to discharge PCBs to the river at all times required," suggesting that all of GE's PCB releases to the River were made pursuant to a permit.[16] That is not only misleading, but also beside the point. Although the company may not have been required to have a permit to discharge PCBs until the mid-1970s, GE is not absolved from liability for natural resource damages under the Superfund statute with respect to pre-permit discharges. And it is undisputed that GE discharged and released massive amounts of PCBs to the Hudson River from point sources (engineered wastewater outfalls) and non-point sources (contaminated soil and groundwater) at the Fort Edward and Hudson Falls facilities prior to obtaining a permit.[17] For example, GE indicated that it directly discharged at least 30 pounds of PCBs per day in its 1973 permit application.[18]

Thereafter, unpermitted discharges continued from the non-point sources. In addition, after GE obtained discharge permits in the mid-1970s, the company at times released PCBs directly to the River in violation of the permits that it did hold. Indeed, the latter releases precipitated issuance of Notices of Violation by the NYSDEC and the NYS Attorney General's Office many years ago.[19] During the course of a 1975 – 1976 administrative enforcement proceeding at the New York Department of Environmental Conservation (NYSDEC), on February 9, 1976, Administrative Law Judge Abraham Sofaer found that GE's discharges of PCBs violated the State's Environmental Conservation Law.[20] He stated, "in summary, the record in this case overwhelmingly demonstrates violations of ECL 17-0501 and 17-0511, within the applicable statutory period."[21]

In short, the implication of GE's Report is misleading. As stated in 2001 by then-NYS Assistant Attorney General-in-Charge Peter Lehner, "the record should be clear that GE's very large discharges prior to 1975 were not authorized by any permit, that the continuing seepage of PCB's into the River is not authorized by any permit, and that certain of GE's discharges both before and after 1975 have been unlawful."[22] In summary, not all of GE's releases were permitted, and regardless, GE is not absolved of natural resource damage liability for their PCB releases.

(4) GE's characterization of inconclusive studies on belted kingfisher and spotted sandpiper is misleading. In its Report, GE states that studies on spotted sandpiper and belted kingfisher demonstrate no adverse impact to those species from exposure to PCBs.[23] More accurately, those studies were simply unable to show an association between PCBs and adverse impact. Both make a point of stating that the lack of

association may have resulted from the sample size being too small.[24] [25] The studies are, therefore, inconclusive.

(5) The Trustees value public input and seek to ensure the public is informed and engaged. GE implies in the Report that the Trustees have been secretive with respect to their NRD assessment. For example, GE states that ". . . the trustees are somewhere in the middle of the assessment process that is largely hidden from public view (including GE's view)."[26] GE's implication is not accurate. The Trustees are stewards of the public's natural resources and place high value in ensuring that members of the public are informed and engaged. The Trustees have released numerous plans and documents for public review and comment, a number of data reports and fact sheets, and provide information to the public through three web sites: http://www.darrp.noaa.gov/northeast/hudson/index.html, http://www.fws.gov/contaminants/restorationplans/HudsonRiver/index.html, and http://www.dec.ny.gov/lands/25609.html. The Trustees have accepted multiple invitations to address and present papers to the Hudson River Community Advisory Group, and at events organized by scientific, educational, and nonprofit organizations. Just recently, the Trustees published a fact sheet on restoration planning, made public a list of restoration projects that Trustees actively solicited from members of the public, and maintain a mailing list for NRDA activities.

The Trustees strive to keep the public informed of their progress. Indeed, the Trustees have publicly invited GE to participate in the NRD process for many years, including extending GE an "Invitation for Cooperative Assessment" in the 2002 Hudson River NRD Assessment Plan,[27] an invitation that was most recently extended again to GE in the July 2012 "Responsiveness Summary for the Study Plan for Mink Injury Determination."[28] GE has chosen not to participate in this process.

We will be posting this letter on our Hudson River web sites as part of our continuing effort to keep the public informed.

Sincerely,

Thomas Brosnan
Hudson River Trustee
National Oceanic and Atmospheric Administration

Kathryn Jahn
Hudson River Case Manager
Department of the Interior

[1] http://www.hudsondredging.com/wp-content/uploads/2013/12/HudsonRIverProjectReport.pdf ("GE Report").
[2] GE Report, page 17.
[3] *See* 43 C.F.R. § 11.62(f)
[4] *See* 43 C.F.R. § 11.62(b) and (c)
[5] 6 NYCRR Part 703
[6] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/HudsonConsumptionAdvisory-FishInjury-ReportJune2001.PDF
[7] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/HudsonRiverNRDASurfaceWaterLossNavigationalServicesJuly2006.pdf
[8] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/InjDetRepHudsonRiverSurfaceWaterResourcesDec2008.pdf
[9] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/waterfowl%20report%20august%2026%202013.pdf
[10] GE Report, pages 16-17
[11] http://www.darrp.noaa.gov/northeast/hudson/pdf/lettertoGEPhase2design_signed.pdf
[12] http://www.darrp.noaa.gov/northeast/hudson/pdf/Battelle1_Field.final1.pdf
[13] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/HUD_DEL_SETAC%202011PCBposter.pdf
[14] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/HRES%20Hudson%20River%20PCBs%20Remedy%20Implications.pdf
[15] http://www.hudsoncag.ene.com/files/NRDA%20pre-meeting%20presentations.pdf
[16] GE Report, page 6
[17] http://www.fws.gov/northeast/EcologicalServices/docs/hudson/HudsonRiverNRDASurfaceWaterLossNavigationalServicesJuly2006.pdf
[18] For example, see http://docs.nrdc.org/legislation/files/leg_10100603a.pdf, at page 20
[19] ECL Sections 17-0501 and 17-0511
[20] The legal opinion is available on page 6 of this PDF document, accessed through NRDC. http://docs.nrdc.org/legislation/files/leg_10100603a.pdf
[21] Violations discussed in this document, accessed through NRDC. http://docs.nrdc.org/legislation/files/leg_10100603a.pdf
[22] http://www.hudsonwatch.net/nysag1.html
[23] GE Report, page 23.
[24] Custer, T. W., Custer, C. M., & Gray, B. R. 2010. Polychlorinated biphenyls, dioxins, furans, and organochlorine pesticides in spotted sandpiper eggs from the upper Hudson River basin, New York. Ecotoxicology, 19(2): 391-404. http://www.ncbi.nlm.nih.gov/pubmed/19809875
[25] Custer, T. W., Custer, C. M., & Gray, B. R. 2010. Polychlorinated biphenyls, dioxins, furans, and organochlorine pesticides in belted kingfisher eggs from the Upper Hudson River basin, New York, USA. Environmental Toxicology and Chemistry, 29(1): 99-110. http://www.ncbi.nlm.nih.gov/pubmed/20821424
[26] GE Report, pages 16-17.
[27] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/HudsonRiverNRDASept2002.pdf
[28] http://www.fws.gov/contaminants/restorationplans/hudsonriver/docs/Responsiveness-Summary-Mink-Injury-Determination-July-2012.pdf