UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America, Plaintiff, vs. General Electric Company, Defendant	)))))))))	Case No.: 06-CV-00354-PB Judge Paul J. Barbadoro

ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM

General Electric Company ("GE"), by and through its undersigned attorneys, respectfully submits the following Answer, Affirmative Defenses and Counterclaim in response to the Complaint of the United States of America (the "United States"):

PRELIMINARY STATEMENT

1. This is a civil action brought pursuant to Sections 107(a) and 113(g)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9613(g)(2). The United States seeks the recovery, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), of costs that have been incurred by the United States in response to the release and/or threatened release of hazardous substances at and from the Fletcher's Paint Works and Storage Facility Site (the "Site") in Milford, New Hampshire. The United States further seeks a declaration, pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), that is binding as to liability in any subsequent action for response costs that may be incurred by the United States in connection with the Site.

ANSWER: Paragraph 1 of the United States' Complaint is the United States Environmental Protection Agency's ("EPA's") characterization of the relief sought by the United States against GE and the alleged underlying statutory bases for such relief and thus no response

is required. To the extent that a response is required, GE admits that paragraph 1 is EPA's characterization of this civil action. GE otherwise denies the allegations in paragraph 1 of the Complaint.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to Sections 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9607 and 9613(b), and 28 U.S.C. §§ 1331 and 1345.

ANSWER: GE admits the allegations in paragraph 2 of the Complaint.

3. Venue is proper in this District pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b), because the release or threatened release of hazardous substances that gave rise to this claim occurred in this District.

ANSWER: GE admits that venue is proper in this judicial district pursuant to Section113(b) of CERCLA, 42 U.S.C. § 9613(b) and 28 U.S.C. § 1391(b).

DEFENDANT

4. General Electric Company ("General Electric") is a corporation established under the laws of the State of New York, with headquarters in Fairfield, Connecticut, and places of business in additional locations.

ANSWER: GE admits the allegations in paragraph 4 of the Complaint.

THE SITE

5. The Site is a former paint manufacturing and retail paint sales facility consisting of three non-contiguous parcels in Milford, New Hampshire. The parcels were consolidated into one Site due to their proximity, common operation, the nature of wastes present, and the similarity of the conditions in each area.

ANSWER: GE states that EPA has defined the Site in the Record of Decision ("ROD") issued on or about September 30, 1998. Furthermore, GE states that the ROD speaks for itself, and thus no response to the first sentence of paragraph 5 of the Complaint is required. To the extent that a response is required, GE denies the allegations in the first sentence of paragraph 5 of the Complaint. GE specifically denies that the characterization of the business historically conducted at the Site is complete. GE is without knowledge or information sufficient to form a belief as to the remaining allegations contained in the second sentence of paragraph 5 of the Complaint, and therefore denies the remaining allegations.

6. Windsor-Embassy Corporation owned and operated the portions of the Site where it did business as Milford Paint Works and/or as Fletcher's Paint Works (collectively "Fletcher's").

ANSWER: GE admits that a business known as "Milford Paint Works" and/or "Fletcher's Paint Works" operated on a portion of the Site. GE is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 6 of the Complaint and therefore denies the remaining allegations.

7. The "Elm Street" or "Paint Works" portion of the Site contained the building housing the manufacturing and retail sales operations of Fletcher's. This portion of the Site consists of a 1.6-acre plot bounded on the north-northeast by the Souhegan River, on the east by a cemetery, on the South by Elm Street, and on the west by Keyes Drive and a municipal recreation area.

ANSWER: GE is without knowledge or information sufficient to form a belief as to the allegations contained in the first sentence of paragraph 7 of the Complaint, and therefore denies those allegations. GE states that the portion of the Site described in the second sentence

of paragraph 7 of the Complaint is bounded on the west by Keyes Drive and private properties, and that a municipal recreation area is situated to the northwest. GE admits the remaining allegations contained in the second sentence of paragraph 7 of the Complaint.

8. The "Mill Street" or "Storage Facility" portion of the Site included a building used for storing miscellaneous materials owned by Fletcher's. This portion of the Site consists of an approximately 100 foot by 125 foot lot located approximately 700 feet to the south of the Elm Street portion of the Site. The lot is bounded on the north by the Boston and Maine Railroad right-of-way, on the east by Cottage Street, on the south by Mill Street, and on the west by the Draper Energy property.

ANSWER: GE is without knowledge or information sufficient to form a belief as to the allegations contained in the first sentence of paragraph 8 of the Complaint, and therefore denies those allegations. GE denies that the lot described in the second sentence of paragraph 8 of the Complaint is approximately 100 feet by 125 feet, but admits that it is bounded on the north by a property owned by the Boston and Maine Railroad. GE admits the remaining allegations contained in the second and third sentences of paragraph 8 of the Complaint.

9. The "Drainage Ditch" portion of the Site is part of a ditch and culvert system carrying seasonal discharge to the Souhegan River from an approximately 11-acre pond and adjoining wetland system located across from Mill Street and south of the Storage Facility.

ANSWER: GE admits that EPA defined the "Drainage Ditch/Culvert System" portion of the Site in the ROD. GE states that the ROD speaks for itself, and thus no further response to paragraph 9 is required. To the extent a response is required, GE denies the allegations in paragraph 9 of the Complaint.

10. At all relevant times, General Electric manufactured capacitors at its plant locations in Pittsfield, Massachusetts, Hudson Falls, New York and/or Fort Edward, New York. During the relevant time period, General Electric arranged for disposal or treatment at the Site of hazardous substances from its capacitor manufacturing operations.

ANSWER: The allegations in paragraph 10 of the Complaint are vague and ambiguous because EPA has not specified any temporal scope. Specifically, GE objects to the use of the words "at all relevant times" and "the relevant time period" as vague and ambiguous. Without waiving its objection, GE admits that it has manufactured capacitors at its plant locations in Pittsfield, Massachusetts; Hudson Falls, New York; and Fort Edward, New York. GE denies that it arranged for the disposal or treatment of any hazardous substances at the Site.

11. In 1985, EPA conducted a Preliminary Assessment and Site Investigation on facilities near the Keyes Municipal Supply Well, located in Milford, New Hampshire, to determine which facility might be responsible for that well's contamination with volatile organic compounds ("VOCs"). The Paint Works and Storage Facility areas were determined to be the most probable sources of contamination.

ANSWER: GE admits that on or about 1985, EPA performed an investigation at the Site. GE is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 11 of the Complaint and therefore denies the remaining allegations.

12. EPA's inspection of the Paint Works on December 10, 1987, revealed approximately 800 drums containing hazardous substances. Many of these drums were leaking, bulging, rusted, or dented. In addition, the inspection revealed stained soil indicative of past spills or leaks of hazardous substances in unknown amounts.

ANSWER: GE is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 of the Complaint and therefore denies all of the allegations in the paragraph.

13. EPA's further investigation revealed that soils on all portions of the Site were contaminated by numerous hazardous substances, as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), including but not limited to polychlorinated biphenyls ("PCBs") and VOCs.

ANSWER: GE denies "soils on all portions of the Site were contaminated by numerous hazardous substances." GE admits that certain hazardous substances, including PCBs and VOCs, have been detected in certain soils on certain portions of the Site. GE denies the remaining allegations contained in paragraph 13 of the Complaint.

14. On March 31, 1989, the Site was placed on the National Priorities List, a list of hazardous waste sites deemed by EPA to pose the greatest threat to health, welfare and the environment. The National Priorities List is established pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. Part 300, Appendix B.

ANSWER: GE admits that the Site was added to the National Priorities List ("NPL") on May 1, 1989. GE denies EPA's characterization of the statutory and regulatory factors relevant to the addition of a site to the NPL. GE admits the allegation in the second sentence of paragraph 14 of the Complaint.

RESPONSE ACTIONS BY THE UNITED STATES

15. EPA determined that certain response actions were necessary to respond to the release or threatened release of hazardous substances from the Site and the resulting harm or threat of harm to the public health or welfare or the environment.

ANSWER: The allegation in paragraph 15 of the Complaint is vague and ambiguous because EPA has not specified any context, document, or setting in which it is alleged to have made such a determination. Without waiving its objection, GE admits that EPA undertook certain response actions and made certain statements in support of those actions in EPA-issued documents, including the ROD. GE is without knowledge or information sufficient to form a belief as to the specific allegation contained in paragraph 15 of the Complaint because it is made without temporal scope or other objective reference and, therefore, denies the allegation.

16. EPA undertook removal action activities, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, to respond to the release or threatened release of hazardous substances from the Site. The removal action activities included without limitation: characterizing, removing, and disposing of certain hazardous substances; installing (and repairing) a temporary cover or cap on soils located at both the Elm Street and Mill Street portions of the Site; installing a fence at the Elm Street portion of the Site; demolishing and disposing of the Mill Street building; and completing a remedial investigation and feasibility study ("RI/FS") for portions of the Site.

ANSWER: GE admits the allegations in paragraph 16 of the Complaint.

17. Pursuant to a July 13, 1995 Unilateral Administrative Order, General Electric removed PCB-contaminated soils from three residential properties adjacent to the Mill Street portion of the Site and re-paved a portion of Mill Street to direct surface water runoff toward the Site property and away from adjacent residences. EPA temporarily relocated residents who would be affected by General Electric's removal work.

ANSWER: GE admits that, among other things, it removed certain contaminated soils from parcels immediately south of Mill Street and re-paved a portion of Mill Street to direct surface water runoff away from three residential properties located on the south side of Mill

Street pursuant to EPA's July 13, 1995, UAO. GE admits the allegations in the second sentence of paragraph 17 of the Complaint. GE denies the remaining allegations in paragraph 17 of the Complaint.

18. On September 30, 1998, EPA issued a Record of Decision ("ROD") for the first operable unit ("OU-1") at the Site. The OU-1 remedy includes, without limitation, the demolition and disposal of the former Fletcher's building on Elm Street, excavation and on-site treatment of contaminated soils via ex-situ thermal desorption, the backfilling of treated soils into excavated areas at the Site, the placement of a soil and asphalt cover over residual low-level threat wastes, and monitored natural attention of the contaminated groundwater.

ANSWER: GE admits the allegations contained in the first sentence of paragraph 18 of the Complaint. GE states that the ROD speaks for itself and, thus, no response is required. To the extent a response is required, GE denies the remaining allegations in paragraph 18 of the Complaint.

19. On July 16, 2001, EPA issued a Unilateral Administrative Order ("UAO") (CERCLA docket No. 01-2001-0063) to General Electric. The UAO requires General Electric to perform the remedial design and remedial action for OU-1 as specified in the ROD, and the explanation of significant differences for the ROD, for OU-1. EPA has incurred and will incur response costs through oversight of General Electric's response actions at the Site.

ANSWER: GE admits the allegations contained in the first sentence of paragraph 19 of the Complaint. GE states that the UAO speaks for itself, and thus, no response is required to the second sentence of paragraph 19 of the Complaint. To the extent a response is required, GE admits that the UAO purports to require GE to perform the remedial design and remedial action for OU-1 as specified in the ROD, and the explanation of significant differences for the ROD, for

OU-1. GE is without knowledge or information sufficient to form a belief as to the allegations contained in the third sentence of paragraph 19 of the Complaint, and therefore denies those allegations.

20. EPA's activities in response to the release or threat of release of hazardous substances at the Site, including all enforcement activities related thereto, constitute response actions, as defined in Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

ANSWER: Paragraph 20 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE denies the allegations in paragraph 20 of the Complaint.

21. In 1991, the United States filed an initial action against General Electric seeking recovery of response costs and a declaratory judgment that General Electric is liable for all future response costs at the Site.

ANSWER: GE admits that the United States filed an initial action against General Electric in 1991 seeking "all past costs of response incurred by the United States in connection with the pre-1988 investigations and the 1988 removal at the Site, plus enforcement costs incurred and to be incurred, and interest" as well as "all response costs to be incurred by the United States through the completion of the RI/FS and issuance of the Record of Decision selecting remedial action for the Site." GE denies the remaining allegations in paragraph 21 of the Complaint.

22. In 1994, the judicial action described in Paragraph 21 of this Complaint was resolved through entry of a Consent Decree on June 16, 1994 (the "Consent Decree").

ANSWER: GE admits the allegations in paragraph 22 of the Complaint.

CLAIM FOR RELIEF

23. Paragraphs 1 through 22 of this Complaint are realleged and incorporated by reference.

ANSWER: GE reaffirms and realleges its responses to paragraphs 1 through 22 above and incorporates the same by reference herein.

24. The Fletcher's Paint Works and Storage Facility Site, including the Paint Works, the Storage Facility, and the Drainage Ditch, is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

ANSWER: Paragraph 24 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE denies the allegations in paragraph 24 of the Complaint.

25. Threatened and actual "releases" of "hazardous substances" within the meaning of Sections 101(14) and (22), and 107(a) of CERCLA, 42 U.S.C. §§ 9601(14) and (22) and 9607(a), have occurred and continue to occur into the environment and at the Site.

ANSWER: Paragraph 25 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE denies the allegations in paragraph 25 of the Complaint.

26. At times relevant to this action, hazardous substances were disposed of at the Site, as the term "disposal" is defined in Section 101(29) of CERCLA, 42 U.S.C. §§ 9601 (29).

ANSWER: Paragraph 26 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE denies the allegation in paragraph 26 of the Complaint.

27. Defendant General Electric is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

ANSWER: Paragraph 27 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE admits the allegation in paragraph 27 of the Complaint.

28. Defendant General Electric is a person "who, by contract, agreement, or otherwise, arranged for disposal or treatment, ... of hazardous substances," as defined in Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), which were disposed of at the Site.

ANSWER: Paragraph 28 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE denies the allegation in paragraph 28 of the Complaint.

29. The United States has incurred "response costs," as defined in Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), for actions taken in response to the release or threat of release at the Site. The United States has incurred at least $9,195,021.28 in unreimbursed response costs at the Site.

ANSWER: Paragraph 29 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE admits that the United States has incurred response costs in response to a release of a hazardous substance. GE is without knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph 29 of the Complaint and therefore denies said allegations.

30. These costs incurred by the United States in connection with the Site were not inconsistent with the National Oil and Hazardous Substance Pollution Contingency Plan ("NCP"), 42 C.F.R. Part 300.

ANSWER: Paragraph 30 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, GE denies the allegations in paragraph 30.

31. General Electric is liable for all unreimbursed response costs incurred by the United States regarding the removal action at the Site and the OU-1 remedy.

ANSWER: Paragraph 31 of the Complaint states a conclusion of law to which no response is required. To the extent that a response is required, GE denies the allegation in paragraph 31.

32. The releases and threatened releases of hazardous substances at or from the Site have caused and will cause the United States to incur response costs in connection with the Site in addition to those incurred to date. Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), in any action for recovery of response costs, this Court shall enter a declaratory judgment on liability for response costs that will be binding on any subsequent action or actions to recover further response costs.

ANSWER: Paragraph 32 of the Complaint states conclusions of law to which no response is required. To the extent that a response is required, as to the first sentence, GE admits that the United States has incurred and may incur response costs in response to a release of a hazardous substance. GE denies the remaining allegations in paragraph 32 of the Complaint.

WHEREFORE, the defendant, General Electric, requests that this Court deny the United States' requested relief, enter judgment for GE in this case and grant such other and further relief as the Court deems appropriate.

GENERAL DENIAL

GE denies each and every factual allegation of the Complaint, except as expressly admitted.

AFFIRMATIVE AND ADDITIONAL DEFENSES

1. Plaintiff's claims for damages violate GE's right to due process and equal protection under the United States Constitution.

2. The United States' claim is barred by the applicable statute of limitations including, but not limited to, 42 U.S.C. § 9613(g)(2).

3. Plaintiff fails to state any claims upon which relief may be granted.

4. To the extent that there was a release or threatened release of a hazardous substance at the Site that caused the United States to incur response costs, such release or threat of release and the resulting costs were caused solely by the act or omission of a third party or parties other than an employee or agent of GE and not in connection with a contractual relationship with GE.

5. Plaintiff's prior determination that certain other parties are "*de minimis*" contributors of hazardous substances to the Site is arbitrary and capricious, otherwise not in accordance with law, and inconsistent with CERCLA and the NCP.

6. The costs the United States seeks to recover in this action are not response costs recoverable from GE within the meaning of CERCLA, and are otherwise inconsistent with the NCP.

7. The United States is not entitled to recover from GE some or all of the alleged response costs and other relief requested in the Complaint because GE did not release, cause the

release, dispose, or arrange for the disposal of hazardous substances that have allegedly necessitated the response actions which the United States claims it has undertaken.

8. The harm alleged in the United States' Complaint is divisible. Therefore, in the event that GE is found responsible for any of the harm alleged in the United States' Complaint and affirmative relief is granted against GE, then such relief should be limited to the costs of responding to only that portion of the harm specifically attributable to GE.

9. The remedy selected by EPA and set forth in the ROD for the Site is inconsistent with the National Contingency Plan.

10. EPA's action in selecting the remedy set forth in the ROD for the Site was arbitrary and capricious and otherwise not in accordance with the law.

11. GE reserves its right to assert any and all additional defenses that become known or available to it as a result of information developed through discovery or at trial.

COUNTERCLAIM

1. GE's Answers to the United States' allegations in paragraphs 1 through 32 of the Complaint are realleged and incorporated by reference into this Counterclaim.

2. In the Complaint, the United States has called upon the Court to determine GE's liability to the United States for response costs that have been or will be incurred at the Site.

3. The United States has pled that this Court has jurisdiction to make this determination.

4. Pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), this Court has jurisdiction to resolve all controversies arising under the statute.

5. The transactions at issue did not involve the disposal or treatment of hazardous substances, the arrangement for disposal or treatment of hazardous substances, or the transportation of hazardous substances to the Site by GE.

6. GE did not own or operate the Site.

7. Therefore, GE is not liable pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, for the costs of response actions to address any releases or threats of releases of hazardous substances at the Site, nor may GE be required pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), to implement any such response actions.

8. Purporting to act pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), the United States Environmental Protection Agency ("EPA") issued Unilateral Administrative Orders ("UAOs") on or about July 13, 1995, and on or about July 16, 2001, (CERCLA Docket No. 01-2001-0063) directing GE to take certain response actions at the Site.

9. Since the issuance of the UAOs, GE has incurred costs in responding to the alleged release or threat of release of hazardous substances at the Site. As of the filing of this Answer, Affirmative Defenses, and Counterclaim, GE has incurred over $5,000,000 in response costs at the Site.

10. As of the filing of its Answer, Affirmative Defenses, and Counterclaim, GE has complied with the terms of the UAOs to the extent required by law, and completed other work in response to contamination at the Site.

11. Given the existing CERCLA statutory scheme, GE has been unable to date to obtain judicial review of its liability pursuant to CERCLA, despite the fact that GE bears no liability with respect to the Site.

12. Despite its lack of liability, GE has expended substantial amounts of money to conduct response actions at the Site, including but not limited to soil removal from multiple properties; grading and repaving of Mill Street and an associated apron; removal of 230 tons of coal piles on property owned by Draper Energy; lining and backfilling of a former truck-scale pit; collection of data and generation of reports regarding conditions at the Elm Street and Mill Street properties; design of remediation plans for OU-1; collection of sediment and biota data in the nearby Souhegan River; litigation expenses; and the reimbursement of alleged past response costs of the United States.

13. Given the jurisdiction of the Court over the instant litigation instituted by the United States against GE, the substantial amounts of money incurred by GE with respect to the Site, GE's absence of liability, and in the light of the ongoing and extensive work yet to be performed under the existing UAOs, GE seeks a declaration from the Court that it is not liable under CERCLA as well as reimbursement of the response costs that it has incurred or will incur with respect to the Site in this litigation.

14. Should this Court determine that GE is not a liable party pursuant to CERCLA, this Court should, consistent with the jurisdiction invoked by the United States, also determine that the UAOs are not enforceable against GE and that GE is entitled to recover its cost of response in complying with the UAOs.

REQUEST FOR RELIEF

THEREFORE, GE respectfully requests that this Court:

1. Find that GE is not liable for responding to any release or threatened release of hazardous substances at the Site;

2. Find that GE has no further obligations with respect to the UAOs identified herein;

3. Find that, despite its lack of liability, GE has incurred recoverable response costs at the Site in complying with the UAOs and otherwise;

4. Order the United States to immediately reimburse GE for any and all costs and reasonable attorney fees incurred by GE with respect to the Site, with interest; and

5. Order such other and further relief as the Court deems appropriate.

Respectfully submitted,
General Electric Company
By its attorneys,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America,	)	
	)	
Plaintiff,	)	
	)	Case No.: 06-CV-00354-PB
vs.	)	
	)	Judge Paul J. Barbadoro
General Electric Company,	)	
	)	
Defendant	)	

CERTIFICATE OF SERVICE

I, Daniel S. Bleck, do hereby certify that on the 17th day of November, 2006, I caused a copy of the Answer, Affirmative Defenses and Counterclaim to be served by first class mail, postage prepaid to all parties on the attached Service List.

/s/ Daniel S. Bleck
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