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OFFICE OF THE ATTORNEY GENERAL

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ENVIRONMENTAL PROTECTION BUREAU

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**By Electronic and U.S. Mail**

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Re: *Hudson River Superfund Site: General Electric's Application for a Certificate of Completion of the Remedial Action*

Gentlemen:

Thank you for providing the New York State Office of the Attorney General with the opportunity to comment on the General Electric Company's application for a Certificate of Completion of the remedial action for the Hudson River Superfund Site contained in its December 2016 "*Remedial Action Completion Report*."

We understand that EPA may issue a Certificate of Completion to General Electric for the Upper Hudson River based upon a determination that GE has completed the remedial tasks agreed to in the 2006 Consent Decree. For the legal and factual reasons discussed below, EPA's issuance of the Certificate of Completion would be unlawful at the present time because completion of the remedial tasks under the Consent Decree is not the functional or legal

equivalent of completion of a remedial action in accordance with CERCLA's requirements, as Section 122(f)(3) requires. 42 U.S.C. § 9622(f)(3).

Certifying completion of a CERCLA remedial action may only be lawfully issued under the statutorily prescribed terms of CERCLA itself. Before EPA certifies a remedial action to be complete, thereby giving rise to a covenant not to sue, Section 122(f)(3) requires that EPA certify that the remedial action has been completed "in accordance with the requirements of [CERCLA]." 42 U.S.C. § 9622(f)(3). Section 121(d)(1) requires, among other things, that the remedial action "shall attain a degree of cleanup ... at a minimum which assures protection of human health and the environment." 42 U.S.C. § 9621(d)(1). Thus, in issuing a Certificate of Completion under Section 122(f)(3), and in giving effect to a covenant not to sue, EPA must certify that the remedial action has attained the requisite degree of cleanup and therefore has been completed in accordance with CERCLA's requirements.

Here, EPA has not determined - and validly cannot determine based on the administrative record - that the remedial action for the Upper Hudson River has attained a degree of cleanup that assures protection of human health and has been completed in accordance with CERCLA's requirements. Significant amounts of PCB-contaminated sediment remain in the Upper Hudson River, causing PCB concentrations in fish to remain at levels injurious to human health if consumed. Indeed, those levels in fish are currently several times above the remedial action objectives set forth in EPA's 2002 Record of Decision. As is expected and as EPA acknowledges, the public continues to eat contaminated fish despite State-issued advisories cautioning against consumption. This has resulted in continuing exposure and unacceptable health risks to New Yorkers. Furthermore, by EPA's own admission, the remedial action is not now protective of human health and the agency currently does not have the data to determine if and when it may be protective in the future. Because EPA has not found that the remedial action has attained a degree of cleanup that assures protection of human health, a Certificate of Completion of the remedial action may not lawfully be granted nor a covenant not to sue given effect.

Additionally, CERCLA Section 122(c)(1) states that when EPA enters into a settlement agreement to implement a CERCLA remedial action, liability "shall be limited as provided in the agreement *pursuant to a covenant not to sue in accordance with subsection (f)*." 42 U.S.C. § 9622(c)(1) (emphasis added). Thus, the only covenant not to sue that EPA has the authority to lawfully issue is one that is in accordance with Section 122(f) after compliance with CERCLA's requirements, including the requirement in Section 121(d) to attain a degree of cleanup that is protective of human health and the environment. EPA has no residual or other authority to give effect to a covenant not to sue based solely upon completion of the remedial tasks identified in a settlement agreement, such as the Consent Decree here. EPA's issuance of the Certificate of Completion and covenant not to sue that are outside of CERCLA's parameters is *ultra vires* and contrary to law.

For the reasons stated above, additional investigation and further remedial action are required before EPA validly can determine that the remedial action is completed in accordance

with CERCLA's requirement and attains a degree of cleanup that assures protection of human health and the environment. A Certificate of Completion and covenant not to sue can be lawfully issued to GE only after CERCLA's requirements have been met.

Very truly yours,

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