

Attachment 12

Excerpts from Consent Decree in *United States et al. v. General Electric Company* (October 27, 2000) (“CD”)

CONSENT DECREE
Site: GE-0000
Break: 10, 8
Other: 9420

WESTON Ref. No.

00-0388

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

UNITED STATES OF AMERICA,
STATE OF CONNECTICUT,
COMMONWEALTH OF
MASSACHUSETTS,

Plaintiffs,

v.

GENERAL ELECTRIC
COMPANY,

Defendant.

CIVIL ACTION NO'S. _____

99-30225, 99-30226,

99-30227-MAP

(consolidated cases)

CONSENT DECREE

9420



SEMS Doc ID 9420

resource protection and restoration actions as specified herein, and reimburse the Trustees for costs Incurred and to be Incurred, all as provided in this Consent Decree.

7. Commitments by EPA. EPA intends to implement a Removal Action in the 1 ½ Mile Reach. Performance of such Removal Action shall be in accordance with the 1 ½ Mile Reach Removal Action Memorandum. Funding of such Removal Action shall be in accordance with Paragraphs 103-111 of this Consent Decree.

8. Compliance With Applicable Law And Protectiveness

a. All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Except for the Rest of the River Remedial Action, for all activities undertaken pursuant to CERCLA in this Consent Decree, Settling Defendant must also comply with any ARARs of all federal and state environmental laws, as described in Attachment B to the SOW and in ARARs tables in the Removal Action Work Plan for the Upper ½ Mile Reach (Appendix F hereto), EPA's Action Memorandum for the Allendale School Removal Action (Appendix C hereto), and a Supplemental Addendum to the Work Plan for On-Plant Consolidation Areas (included in Annex 1 to the SOW), unless otherwise determined by EPA pursuant to CERCLA and the NCP. For the Rest of the River Remedial Action, for all activities undertaken pursuant to CERCLA in this Consent Decree, Settling Defendant must also comply with any ARARs of federal and state environmental laws set forth in the documents selecting the Rest of the River Remedial Action and/or in the Rest of the River SOW, unless waived by EPA pursuant to CERCLA and the NCP. For purposes

of this Consent Decree, ARARs shall not be considered Performance Standards unless, for the Rest of the River, EPA specifically identifies an ARAR as a Performance Standard. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be deemed to be consistent with the NCP.

b. EPA, MADEP and CTDEP have determined that:

(i) The Removal Actions, when implemented and completed in accordance with this Consent Decree, the SOW, and the Work Plan for the Upper ½ Mile Reach Removal Action (including achieving and maintaining Performance Standards), are protective of human health and the environment with respect to the areas addressed by those Removal Actions; and

(ii) Except as expressly provided in this Consent Decree, no further response actions for the areas addressed by such Removal Actions are necessary to protect human health and the environment.

c. The Consent Decree establishes a process intended to ensure that the Remedial Action to be selected for the Rest of the River will be protective of human health and the environment.

d. In the event that EPA, or MADEP or CTDEP (as applicable), determines that a Removal Action or Remedial Action is no longer protective of human health or the environment, the Consent Decree provides a procedure by which EPA or MADEP or CTDEP (as applicable) can seek additional relief.

9. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Any measures performed pursuant to Paragraphs 118 and 123 (Restoration Work and Other Natural Resource Protection and Restoration Actions) shall be considered on-site for purposes of this provision. Where any portion of the Work that is not on-site requires a federal, state or local governmental permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. Settling Defendant may seek relief under the provisions of Section XXIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation, or local law.

10. Reissuance of RCRA Permit

a. Settling Defendant and the United States agree that, in connection with the settlement embodied in this Consent Decree, GE's RCRA Permit will be revoked and reissued pursuant to 40 C.F.R. §§ 124.5 and 270.41, upon the effective date of this Consent Decree. Settling Defendant and EPA have jointly proposed for

public comment, pursuant to 40 C.F.R. § 124.10, a draft Reissued RCRA Permit in the form attached hereto as Appendix G. Following the close of the public comment period on the draft Reissued RCRA Permit, and prior to any United States motion for entry of this Consent Decree, EPA shall issue a final permit decision on the Reissued RCRA Permit in accordance with 40 C.F.R. § 124.15, to be effective in accordance with Paragraph 10.d.

b. In the event that EPA's final permit decision on the Reissued RCRA Permit does not materially modify the draft Reissued RCRA Permit attached as Appendix G, Settling Defendant shall not seek review of, or otherwise contest, that final permit decision, and shall comply with requirements of the Reissued RCRA Permit and this Consent Decree.

c. To the extent that Settling Defendant believes the final Reissued RCRA Permit to be a material modification of the draft Reissued RCRA Permit attached as Appendix G, Settling Defendant, may, within 15 days of its receipt of the final Reissued RCRA Permit, file a motion with the Court for dispute resolution pursuant to Paragraph 136.c and d (record review) of this Consent Decree, regarding the final Reissued RCRA Permit. Settling Defendant's dispute shall be limited to whether the final Reissued RCRA Permit materially modifies Appendix G. The United States, the State and Connecticut may file an opposition to Settling Defendant's motion within thirty days after receipt of such motion. The Parties hereby stipulate that after lodging and prior to entry of this Consent Decree, such dispute shall proceed under this Paragraph as a contractual matter. If, at the conclusion of dispute resolution, the final Reissued

j. Following EPA's approval of IMPGs, EPA's determination of the completion of the peer review processes on validation of EPA's model, and receipt by Settling Defendant of EPA's model (including its equations and results) from EPA, Settling Defendant shall develop and submit to EPA a Corrective Measures Study ("CMS") Proposal in accordance with, and on the schedule provided in, the Reissued RCRA Permit. Settling Defendant shall submit copies of that CMS Proposal to the Trustees, the State and Connecticut.

k. Following EPA's approval of the CMS Proposal, Settling Defendant shall carry out the CMS and shall develop and submit to EPA a CMS Report in accordance with, and on the schedule provided in, the Reissued RCRA Permit, or on an alternative schedule provided in the approved, conditionally approved or modified CMS Proposal. Settling Defendant shall submit a copy of that CMS Report to the State, the Trustees and Connecticut.

l. EPA expressly reserves the right to undertake any studies it deems necessary for the Rest of the River to shadow or supplement studies undertaken by Settling Defendant.

m. The RFI Report, IMPG Proposal, CMS Report, EPA's report(s) containing the human health and ecological risk assessments and EPA's modeling activities, the reports of the peer review panels on the human health and ecological risk assessments and on modeling, all comments submitted to EPA and those panels, and other documents considered or relied on by EPA will become part of the administrative record for the Rest of the River Remedial Action.

n. Upon satisfactory completion of the CMS Report in accordance with the Reissued RCRA Permit, EPA will issue a Statement of Basis and a draft modification to the Reissued RCRA Permit, which will set forth the proposed Remedial Action for the Rest of the River and O&M, to be implemented by Settling Defendant pursuant to CERCLA and this Consent Decree. EPA will propose this draft permit modification pursuant to the Reissued RCRA Permit and EPA's regulations on RCRA permit modifications (40 C.F.R. § 270.41 and Part 124), including the provisions requiring public notice and an opportunity for public comment on the draft permit modification.

o. Following the close of the public comment period, EPA will notify Settling Defendant of its intended final decision on the modification of the Reissued RCRA Permit. Settling Defendant shall have the right, within 30 days of such notification, to invoke administrative dispute resolution pursuant to Paragraph 135 of Section XXIV (Dispute Resolution) of this Consent Decree with respect to such notification.

p. Upon completion of such dispute resolution process (if invoked) or after the 30 day period from EPA's notification referred to in Paragraph 22.o (if Settling Defendant does not invoke dispute resolution), EPA will issue a modification of the Reissued RCRA Permit, obligating Settling Defendant to perform the selected Rest of the River Remedial Action and O&M, which performance shall be pursuant to CERCLA and this Consent Decree.

q. Settling Defendant shall perform the selected Rest of the River Remedial Action and O&M set forth in EPA's permit modification decision referred to in

Submissions) and Michael Manlogon, Financial Management Officer, EPA Region I, One Congress Street, Suite 1100, Boston, MA 02114-2023.

111. To the extent that funds, including interest, remain in the 1 ½ Mile Special Account following EPA's closeout of the interagency agreement with the ACOE for the 1 ½ Mile Reach Removal Action, such funds shall be used and applied as a credit against Settling Defendant's obligations under Paragraphs 95.a, 98.a or 98.b of this Consent Decree for U.S. Future Response Costs, U.S. Oversight Costs or U.S. Rest of River Oversight Costs until the monies in the 1 ½ Mile Special Account have been fully depleted.

XXI. NATURAL RESOURCE DAMAGES

112. Satisfaction of the Plaintiffs' claims for Natural Resource Damages shall consist of:

- a. Performance of the response actions required under this Consent Decree.
- b. The payment of cash to the Trustees by Settling Defendant for Natural Resource Damages as set forth in Paragraph 114 of this Section;
- c. The performance of Restoration Work as set forth in Paragraph 118 of this Section;
- d. Other natural resource protection and restoration actions to be undertaken by Settling Defendant as set forth in Paragraph 123 of this Section;
- e. Performance by PEDDA of the obligations set forth in Paragraph 124 of this Section (for which Settling Defendant shall not be liable); and

f. The payment of DOI Past Assessment Costs, DOI Future Costs, DOI Oversight Costs, NOAA Past Assessment Costs, NOAA Future Costs, NOAA Oversight Costs, Massachusetts Trustee Future Response Costs, Massachusetts Trustee Oversight Costs, and, to the extent they include costs Incurred or to be Incurred by the Trustees, Massachusetts Past Response Costs, Connecticut Past Response Costs, and Connecticut Future Costs, all in accordance with Section XX of this Consent Decree.

113. Notification of Lead Administrative Trustee ("LAT"). Within 30 days of the effective date of this Consent Decree, the Trustees will notify Settling Defendant, EPA, MADEP and CTDEP of the designation of a Lead Administrative Trustee ("LAT"). The LAT will serve as the contact representative for the Trustees for all meetings and other interactions with Settling Defendant, EPA, MADEP and CTDEP on all Trustee-related matters under this Consent Decree, unless otherwise specified in this Consent Decree. The LAT will only serve as the contact representative of the Trustees and will not exercise trusteeship authority on behalf of the Trustees.

114. Payment of Natural Resource Damages by Settling Defendant. Within 30 days of the effective date of this Consent Decree, Settling Defendant shall make the following payments:

- a. \$15,000,000 for Natural Resource Damages, plus Interest from the date of lodging of this Consent Decree;
- b. \$600,000 as mitigation for wetlands impacts associated with PCB contamination and with response actions at the Site, plus Interest from the date of lodging of this Consent Decree;

c. \$60,000 as mitigation for additional habitat impacts associated with PCB contamination and Removal Actions at the Site; and

d. \$75,000 for Restoration Work to be performed by the Trustees in Silver Lake.

115. Settling Defendant shall pay to the Trustees the amounts set forth in Paragraphs 114.a, b, c and d of this Consent Decree using the U.S. Treasury's Remittance Express program, or, in the event said program is not available to Settling Defendant, then via Federal Wire Transfer. Payment shall be made in accordance with instructions provided by the Department of the Interior. Any payments received after 4:00 p.m. Eastern Time shall be credited on the next business day. Settling Defendant's notice that such payment has been made shall be sent to:

Bruce Nesslage
DOI Restoration Fund
Mail Stop 4449
1849 C St. NW
Washington, D.C. 20240

Executive Office of Environmental Affairs
Attn: Thomas LaRosa
100 Cambridge Street, Room 2000
Boston, Massachusetts 02202

Edward Parker
Bureau Chief, Bureau of Natural Resources
Department of Environmental Protection
79 Elm Street
Hartford, Connecticut 06103

Mark Barash
Office of the Regional Solicitor
U.S. Department of the Interior
One Gateway Center, Suite 612
Newton Corner, MA 02158-2868

Information Request and MADEP's September 9, 1997 information request. As of eighteen months following entry of the Consent Decree, for purposes of Paragraphs 162 and 164.b, the information and the conditions known to EPA shall include all other documents submitted by Settling Defendant in response to EPA's Information Request and MADEP's 1996 and 1997 information requests.

b. For purposes of Paragraphs 163 and 164.c, the information and the conditions known to EPA shall include only the information and conditions identified in the subparagraph immediately above, and that information and those conditions known to EPA as of the date of Certification of Completion of each individual Removal or Remedial Action and set forth in the applicable Action Memorandum or final modification of the Reissued RCRA Permit, the administrative record supporting the particular Removal or Remedial Action, the administrative record developed in design or implementation of the particular Removal or Remedial Action, or in any information received by EPA pursuant to the requirements of this Consent Decree or the Reissued RCRA Permit prior to Certification of Completion of the particular Removal or Remedial Action.

166. Massachusetts Covenants

a. (i) In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of this Consent Decree, and except as provided in Paragraphs 166.k, 167, 168, 175, and 176, the State covenants not to sue or to take administrative action against Settling Defendant, pursuant to the statutes and common law theories listed in Paragraph 166.a(ii), whether on its own behalf or as *parens patriae*, for releases or threatened releases of Waste Material at the

Site (where such Waste Material originated at the GE Plant Area) or for performance of the Work; provided, however, that such covenant is limited to claims or actions: (A) to compel Settling Defendant to implement, comply with, or fund response actions, corrective actions or measures, or similar judicial or administrative response-type injunctive relief; (B) for recovery, reimbursement, contribution, or equitable share of response costs or Natural Resource Damages; and (C) for recovery, reimbursement, contribution, or equitable share of property damage.

(ii) The statutes and common law theories subject to the covenant in Paragraph 166.a(i), and to the limitations set forth therein, are the following: Sections 107, 113, 121(e)(2), 121(f), and 310 of CERCLA; Sections 1002, 1005, 1006, 1008, and 1009 of the Oil Pollution Act; Section 7002 of RCRA; Section 20 of TSCA; Section 505 of the Clean Water Act; Sections 3A, 4, 4A, 5, 9, and 10 of M.G.L. c.21E and Section 11 of M.G.L. c.21E for violation or enforcement of such Sections 3A, 4, 4A, 5, 9, and 10; Section 4 of M.G.L. c. 21H; Sections 5, 7, and 11D of M.G.L. c.12; Sections 42, 44, 46, and 53 of M.G.L. c.21; Sections 9 and 10 of M.G.L. c.21C; Sections 142A, 142B, 160, 160B, and 162 of M.G.L. c.111; Section 169 of M.G.L. c.111 for violation of Section 167; Sections 40, 40A, 42, and 90 of M.G.L. c.131; Section 7A of M.G.L. c.214; Section 39G of M.G.L. c.40; Sections 59 and 59A of M.G.L. c.91; Sections 4, 9, and 11 of M.G.L. c.93A for violation of Section 2; and Section 6 of M.G.L. c.131A (including the implementing regulations of the statutes listed in this subparagraph a(ii)); and nuisance, trespass, negligence, strict liability, or restitution.

(iii) While not agreeing that CERCLA does not authorize challenges to decisions by EPA to waive ARARs for removal actions, the State agrees not to challenge a decision by EPA to waive a standard or requirement for the Removal Actions Outside the River, the Upper ½ Mile Reach Removal Action, or the 1½ Mile Reach Removal Action, based on the status of such standard or requirement as an ARAR. The State further agrees not to challenge any failure by EPA to enforce such a standard or requirement based on the status of such a standard or requirement as an ARAR. The State reserves any other rights it may have with respect to enforcement or waiver of such standard or requirement.

(iv) Nothing in this Paragraph 166 or Paragraph 22 shall be interpreted as modifying or otherwise affecting any of the following:

(A) Settling Defendant's obligations to comply with all ARARs for the Rest of River Remedial Action that have not been waived by EPA pursuant to Section 121 of CERCLA and Special Condition II.J. of the Reissued RCRA Permit;

(B) the State's rights pursuant to Section 121 of CERCLA and to this Consent Decree to receive notice of, and reasonable opportunity to comment on, EPA's remedy selection plans and decision for the Rest of River;

(C) the State's rights pursuant to Paragraph 22.bb of this Consent Decree to seek review of any determination by EPA, in its initial or a revised decision to modify the Reissued RCRA Permit, to waive an ARAR for the Rest of the River Remedial Action or O&M; and

(D) any rights the State may have pursuant to Section 121 of CERCLA to bring an action challenging EPA's determination to waive an ARAR for the Rest of the River Remedial Action or O&M during implementation of such Remedial Action or O&M (other than bringing an action challenging EPA's selection of such Remedial Action or O&M pursuant to Paragraph 22.bb) and/or to bring an action challenging EPA's failure to enforce such an ARAR during implementation of the Rest of the River Remedial Action or O&M; provided that, in either case:

(1) the State brings such action in this Court;

(2) the State brings such action within two years of obtaining actual knowledge of EPA's determination to waive such ARAR or its failure to enforce such ARAR;

(3) Settling Defendant or the State may request this Court to grant a stay, pending the Court's decision, of the work (or portion of the work) for which resolution of the State's challenge is necessary to be decided prior to proceeding or proceeding further with such work (or portion thereof); and if Settling Defendant or the State does so, there will be a rebuttable presumption in favor of granting such stay and the Court will consider all relevant equitable factors in deciding whether to grant such stay;

(4) in the event that the Court holds that EPA has improperly waived such ARAR or has improperly failed to enforce such ARAR, neither Settling Defendant nor EPA shall be required to undo or re-do any implementation work that has previously been completed by Settling Defendant or EPA, so as to comply with such

ARAR. However, Settling Defendant shall be required to comply with such ARAR, in accordance with the Court's decision, in implementing all future work;

(5) Settling Defendant shall not be deemed to be in noncompliance with this Consent Decree for failure to comply with such ARAR unless and until the Court determines that EPA improperly waived or declined to enforce such ARAR and Settling Defendant fails to comply with such ARAR in accordance with the applicable schedule as determined by the Court or as approved by EPA (after reasonable opportunity for review and comment by the State) following the Court's decision; and

(6) the United States reserves its rights to respond to any such State challenge, including the United States' right to argue that Section 121 of CERCLA does not provide for such a challenge, and Settling Defendant reserves any rights it may have to respond to any such State challenge.

b. (i) In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of this Consent Decree, and except as provided in Paragraphs 166.c and 175, the State covenants not to sue or to take administrative action against Settling Defendant for civil or administrative penalties or civil fines with respect to the release or threatened release of Waste Materials at the Site (regardless of the manner in which such Waste Materials may be listed, defined, or characterized under the statutes and regulations listed in subparagraph 166.b(i)(D) and regardless of whether such release or threatened release is characterized as storage, release, threatened release, presence, disposal, discharge, handling or otherwise pursuant to the statutes and regulations listed in subparagraph

166.b(i)(D)) for alleged violations of or noncompliance with the following requirements that occurred prior to the lodging of this Consent Decree and that are based on "known conditions and information" (as set forth in Paragraph 166.b(iv)):

(A) the Consent Order issued by EPA on June 30, 1981, pursuant to Sections 3007, 3013, and 7003 of RCRA;

(B) the RCRA Permit;

(C) the Administrative Consent Orders executed in 1981 and 1990 by MADEP and Settling Defendant, to the extent such Orders applied to any properties within the Site; and

(D) M.G.L. c.21E; the Massachusetts Contingency Plan; M.G.L. c.21H; Sections 26-53 of M.G.L. c.21; M.G.L. c.21C; Sections 150A and 150B of M.G.L. c.111; Sections 40, 40A, 42, and 90 of M.G.L. c.131; M.G.L. c. 91; M.G.L. c.93A; and M.G.L. c. 131A (including the implementing regulations of the statutes listed above and including, but not limited to, alleged violations or noncompliance with respect to any report, response, or submission by Settling Defendant, or failure to make a report, response, or submission).

(ii) The State and Settling Defendant concur that the remediation of the existing Waste Material contamination at the Site is to be governed by this Consent Decree, subject to the terms and conditions set forth herein. Accordingly, in consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of this Consent Decree, except as provided in Paragraphs 166.c and 175, the State covenants not to sue or to take administrative

action against Settling Defendant for civil or administrative penalties or civil fines with respect to the performance of the Work, or with respect to the release or threatened release of Waste Materials at the Site (regardless of the manner in which such Waste Materials may be listed, defined, or characterized under the statutes and regulations listed in subparagraph 166.b(iii) and regardless of whether such release or threatened release is characterized as storage, release, threatened release, presence, disposal, discharge, handling or otherwise pursuant to the statutes and regulations listed in subparagraph 166.b(iii)) for alleged violations of or noncompliance with the following requirements occurring after the lodging of this Consent Decree:

(A) those duties otherwise imposed by state law that have been preempted by operation of CERCLA;

(B) any obligations under state law where the conduct or inaction that underlies such violation or noncompliance also constitutes a violation of Settling Defendant's obligations under this Consent Decree (other than conduct or inaction that constitutes a violation solely of the first sentence of Paragraph 8 of this Consent Decree and not of any other provision of this Consent Decree); or

(C) any obligations that Settling Defendant otherwise may have independent of this Consent Decree, pursuant to the statutes and regulations listed in Paragraph 166.b(iii), with respect to the continued presence or passive release of Waste Materials at the Site that this Consent Decree is designed to address (regardless of the manner in which such Waste Materials may be listed, defined, or characterized under such statutes and regulations and regardless of whether such continued presence or

passive release is characterized as storage, release, threatened release, disposal, discharge, handling, or otherwise pursuant to such statutes), regarding the following

(1) a duty to maintain records regarding, to abate, or to respond to such continued presence or passive release;

(2) a duty to secure a permit or other approval for such continued presence or passive release; or

(3) damage or injury caused by such continued presence or passive release.

(iii) The statutes and regulations referred to in Paragraph 166.b(ii) are: M.G.L. c.21E; the Massachusetts Contingency Plan; M.G.L. c.21H; Sections 26-53 of M.G.L. c.21; M.G.L. c.21C; Section 39G of M.G.L. c.40 and Sections 160, 162, and 170 of M.G.L. c.111; Sections 150A and 150B of M.G.L. c. 111; Sections 40, 40A, 42, and 90 of M.G.L. c.131; M.G.L. c. 91; M.G.L. c.93A; and M.G.L. c.131A (including the implementing regulations of the statutes listed above).

(iv) For purposes of Paragraph 166.b(i), "known conditions or information" shall mean:

(A) Information and conditions described in the following, to the extent received by the State 30 or more days prior to lodging of this Consent Decree:

(1) The reports submitted to MADEP in accordance with, and the documents issued by MADEP pursuant to, the 1981 Administrative Consent Order executed by MADEP and Settling Defendant;

(2) The reports submitted to MADEP in accordance with, and the documents issued by MADEP pursuant to, the 1990 Administrative Consent Orders (dated May 22 and July 2, 1990) executed by MADEP and Settling Defendant;

(3) The reports submitted to MADEP pursuant to the RCRA Permit;

(4) The reports and other documents submitted by Settling Defendant to MADEP pursuant to the Unilateral Administrative Order (issued by EPA to Settling Defendant on December 18, 1996) for the Building 68 Removal Action;

(5) Reports and other documents submitted to MADEP by Settling Defendant which were also submitted to EPA pursuant to the EPA Action Memorandum for the Upper Reach;

(6) The reports listed in Appendix V (which consist of other reports submitted to MADEP in 1998 and 1999 relating to investigations and other response actions conducted by Settling Defendant at the Site in those years);

(7) The results of any sampling or other investigations conducted by MADEP at or regarding the Site;

(8) Copies of reports submitted by EPA to MADEP of sampling or other investigations conducted by EPA at the Site; and

(9) Settling Defendant's responses (including Bates numbered and other documents submitted in such responses) to MADEP's 1996 and 1997 Requests for Information; and

(B) Information made known to MADEP concerning the Site, after entry of the Consent Decree, relating to the presence, concentrations, and quantities of Waste Materials or practices and policies for the treatment or disposal of Waste Materials (regardless of the manner in which such Waste Materials may be listed, defined, or characterized under the statutes and regulations listed in subparagraph 166.b(i)(D) that is generally consistent with such information already known to MADEP at least 30 days prior to lodging of this Consent Decree, as provided in subparagraphs iv(A)(1)-(9) above.

c. The covenant in Paragraph 166.b shall not apply to, and the State specifically reserves, any judicial or administrative claim seeking civil or administrative penalties for the following: (i) failure to notify MADEP of releases or threats of releases of oil or hazardous material; (ii) failure to timely, adequately, and completely respond to, or comply with, requests for information issued by MADEP, including, but not limited to failure to produce complete and timely information and records to MADEP with regard to the transportation, transfer, or disposal of fill, debris, or other material from the GE Plant Area, and making, or causing any person to make, false, inaccurate, incomplete, or misleading statements with regard to the transportation, transfer, or disposal of fill, debris, or other material from the GE Plant Area; (iii) to the extent not covered by clauses (i) and (ii), failure, prior to the lodging of this Consent Decree, to produce complete and timely information and records to MADEP with regard to the transportation, transfer, or disposal

of fill, debris, or other material from the GE Plant Area to or at Newell Street Area I or II as defined in the SOW; and (iv) to the extent not covered by clauses (i) and (ii), making, or causing any person to make, false, inaccurate, incomplete, or misleading statements, prior to the lodging of this Consent Decree, with regard to the transportation, transfer, or disposal of fill, debris, or other material from the GE Plant Area to or at Newell Street Area I or II as defined in the SOW; and (v) the matters reserved in Paragraph 175 (General Reservations), including all claims, liability, and actions expressly referenced therein.

d. Except as otherwise expressly provided by the terms of Paragraph 166.b, the covenant set forth in Paragraph 166.b does not apply to any judicial or administrative action through which the State is seeking a civil penalty for violations of those statutes set forth in Paragraph 166.b; provided, however, that nothing in this subparagraph shall be interpreted as qualifying the terms of Paragraph 166.c.

e. The State's covenants at Paragraphs 166.b and 166.j shall be effective upon entry of this Consent Decree. Except with respect to the covenants for future liability at Paragraphs 166.a and 166.g, the covenants not to sue at Paragraphs 166.a and 166.g shall take effect upon the receipt by the State of the payment required by Paragraph 94.d(i) of Section XX (Reimbursement of Costs). With respect to future liability, the covenants not to sue at Paragraphs 166.a and 166.g shall be effective for each Removal or Remedial Action to be performed by Settling Defendant pursuant to this Consent Decree, and for the area and media addressed by such Removal or Remedial Action, upon EPA's Certification of Completion for that individual Removal or Remedial

Action, except for the 1 ½ Mile Reach, for which the covenant not to sue for future liability shall be effective upon EPA's completion of the 1 ½ Mile Reach Removal Action referred to in Paragraph 21 of this Consent Decree. The covenant not to sue for future liability for the Site under Paragraphs 166.a and 166.g shall be effective upon EPA's issuance of the final Certification of Completion of Work for the Site issued pursuant to Paragraph 89 of this Consent Decree. EPA's Certification of Completion of Work for the Site shall state that it is the final Certification for purposes of this Paragraph 161.e.

f. These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree; provided, however, that a failure by Settling Defendant to satisfactorily perform its obligations with respect to a Removal or Remedial Action shall not affect the State's covenant not to sue with respect to any other Removal or Remedial Action, unless such failure to satisfactorily perform its obligations with respect to one Removal or Remedial Action results in a Work Takeover pursuant to Paragraph 178 of this Consent Decree, in which case the covenants not to sue do not apply to any Removal or Remedial Action subject to the Work Takeover.

g. Without addressing whether the United States could lawfully do so, the Parties acknowledge that the United States has not to date delegated to the State the authority to take administrative or judicial action pursuant to Section 106 of CERCLA. The Parties further acknowledge that they intend that, in the event the United States were to delegate such authority to the State, the State shall not exercise such authority to

the extent that the United States has covenanted not to exercise such authority in Paragraph 161 of this Consent Decree.

h. Nothing in this Consent Decree affects Settling Defendant's obligations pursuant to M.G.L. c.253, §§ 44-50A, and to the regulations promulgated thereunder, and the State reserves the right to take any administrative or judicial action to enforce any such obligations, including, but not limited to, issuing administrative orders or pursuing judicial enforcement or cost recovery; provided, however, that the Parties acknowledge that such authority shall be used exclusively with regard to the dam safety purposes underlying such obligations, and not to seek additional response actions or costs to address the contamination concerns addressed by this Consent Decree.

i. The covenants included in this Paragraph 166 do not constitute a Brownfields Covenant Not to Sue Agreement entered into pursuant to M.G.L. c.21E, § 3A(j)(3) and 940 C.M.R. 23.00.

j. Notwithstanding any other provision of this Consent Decree, the State covenants not to seek civil penalties pursuant to Section 310 of CERCLA for any violation of this Consent Decree by Settling Defendant.

k. The covenants in this Paragraph 166 shall not apply to, and the State specifically reserves, any rights or claims that the Massachusetts Highway Department may have against Settling Defendant under any contracts, existing as of the date of lodging of this Consent Decree, between the Massachusetts Highway Department and Settling Defendant relating to the Massachusetts Highway Department's project to reconstruct Merrill Road and East Street in Pittsfield, Massachusetts, including but not

limited to such contracts regarding the properties and easements taken by eminent domain from Settling Defendant by the Massachusetts Highway Department in 1997 for the purpose of such reconstruction.

167. State's Pre-Certification Reservations (Except Relating to Natural Resource Damages): The State reserves its rights pursuant to this Paragraph with respect to performance of each individual Removal or Remedial Action at the Site. Issuance of a Certification of Completion for any individual Removal or Remedial Action at the Site shall have no effect on the covenants or reservations of rights by the State for any other response action at the Site. Subject to Paragraph 177 (Issuance of Administrative Orders) of this Consent Decree, the State on behalf of MADEP reserves, and this Consent Decree is without prejudice to, any right jointly with, or separately from, the United States to institute proceedings in this action or in a new action under Section 107 of CERCLA, 42 U.S.C. § 9607, or under any applicable State law, including but not limited to M.G.L. c. 21E, seeking to compel Settling Defendant (1) to perform other response actions at the Site, or (2) to reimburse the State for additional response costs for response actions at the Site, to the extent that EPA has determined that such response actions required under (1) and (2) above in this Paragraph will not significantly delay or be inconsistent with the response actions selected or contemplated by EPA, if, prior to EPA's Certification of Completion of each individual Removal or Remedial Action;

(i) conditions at the Site, previously unknown to the State, are discovered or become known to the State, or