FINAL ADMINISTRATIVE DECISION

IN RE GE'S DISPUTE OF EPA'S INTENDED FINAL DECISION ON REST OF HOUSATONIC RIVER REMEDY

On January 19, 2016, General Electric Company (GE) submitted a Statement of Position (SOP) initiating the formal dispute process under the October 27, 2000 Consent Decree (CD) regarding cleanup of the Housatonic River in Massachusetts and Connecticut. On February 29, 2016, the U.S. Environmental Protection Agency (EPA) responded by submitting its SOP. On March 15, 2016, GE submitted its Reply to EPA's SOP. In accordance with the CD, I have been designated as the official responsible for resolving this formal dispute.[1] This Final Administrative Decision represents my final decision regarding this matter. Pursuant to Paragraphs 136 and 141 of the CD, I have given the Commonwealth of Massachusetts and the State of Connecticut a reasonable opportunity to review and comment on this decision. I have considered their comments and incorporated such changes to the draft final decision that I deemed appropriate.

Standard of review

I recognize there can be legitimate differences of opinion about the various possible alternatives for such a large-scale, complex remediation effort. Federal courts frequently have to grapple with such differences of opinion between federal agencies, the regulated community and members of the public. Under the Administrative Procedure Act and other federal laws, judicial

[1] Memorandum from Curt Spalding, Regional Administrator to Carl Dierker, Regional Counsel, dated January 21, 2016

review of agency action proceeds under an arbitrary and capricious standard, based on the administrative record supporting the agency's decision. While my role in resolving this dispute is not the same as a reviewing court, I believe it is appropriate for me to evaluate EPA's actions under an arbitrary and capricious standard as well, taking into account the voluminous information considered by EPA in making its decision, including the materials provided by GE as part of this dispute. I note that GE specifically refers to the arbitrary and capricious standard in presenting its arguments disputing elements of EPA's intended Rest of River Remedial Action Decision.[2]

Issues raised by GE

GE raises a number of issues in its submissions regarding EPA's September, 2015, draft permit under the Resource Conservation and Recovery Act (RCRA),[3] referred to herein as EPA's Intended Final Decision. Most of GE's positions are based on allegations that EPA's actions violate or are in conflict with the CD. Other positions are based on arguments that EPA misinterprets ARARs and other similar requirements. GE also claims that EPA's proposed cleanup decision would not achieve protectiveness of human health or the environment, that EPA has failed to correctly consider relevant information, or that EPA's analysis or approach is wrong. I have thoroughly read all of the information submitted by GE and EPA, have carefully

[2] *See e.g.,* GE's SOP at pp. 2-3, 6 and 41 (January 19, 2016) and GE's Reply to EPA's SOP at pp. 6 and 34 (March 15, 2016).

[3] As stated in the draft permit, "[t]he Permittee is required to conduct certain activities at areas affected by releases of hazardous waste and/or hazardous constituents from the General Electric Facility located in Pittsfield, Massachusetts, in accordance with Sections 3004(u), 3004(v), and 3005(c) of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), as specified in the conditions set forth herein."

considered each of the arguments made by GE and the counterarguments made by EPA, and have reached the conclusions described below.

The CD is lengthy and complex, and as explicitly stated in paragraph 201, "[t]he Parties agree that the characteristics of the Site and the context of these negotiations are unique and that no aspect of this settlement should be considered precedent." In carrying out my role under the CD, I fully agree with GE's statement on page 2 of its January 19, 2016 SOP that "[i]t is axiomatic that EPA must act within the limits of its statutory authority, and any EPA decision that conflicts with its governing statute or exceeds its authority is unlawful and cannot stand." Therefore, I have reviewed the conflicting position statements submitted by both parties and have evaluated them paying particular attention to making sure the Intended Final Decision is fully consistent with the CD, as well as EPA's statutory authorities under federal law (e.g., RCRA, CERCLA, Clean Water Act, TSCA).

GE alleges that EPA's actions violate or are in conflict with the CD

GE argues that only certain criteria, described in the RCRA permit and incorporated into the CD, must govern EPA's actions here. For example, with regard to the off-site disposal component of the cleanup, GE maintains that EPA is not allowed to consider state and local opposition to on-site disposal of the PCB waste, because those specific criteria are not included in the RCRA permit and CD. In evaluating the positions advanced by GE and EPA, I find that EPA's approach regarding consideration of state and local stakeholder views to be entirely reasonable. For purposes of carrying out the unique arrangement agreed to by the parties in this CD, I note

that the "implementability" factor, included as part of the Rest of River remedy selection criteria envisioned by the CD but not defined in paragraph 4 or any other provision of the CD, is broad enough to encompass a number of parameters. EPA here has come to the conclusion that the long-standing and vigorous opposition to a new PCB landfill by state and local stakeholders (fully documented in EPA's SOP) effectively means that a certain path forward (i.e., on-site disposal) would be difficult or impossible to pursue, and thus would not be implementable. I believe the terms of the CD do not preclude such a conclusion, and that it is in fact a completely reasonable position to take, given the close intergovernmental partnerships EPA cultivates with states and local governments -- as well as the meaningful opportunities to participate legally afforded to the public in general, including local community members and other stakeholders -- all of which is integral to the overarching principle of "cooperative federalism" the Agency employs in carrying out all its environmental programs, including its cleanup programs. In fact, it would be unreasonable for EPA to ignore the ability of state and local authorities to thwart the implementation of proposed cleanup plans in deciding how to proceed. Moreover, it would be highly unusual for any major RCRA or Superfund cleanup plan to be selected and implemented by EPA in the face of strong state opposition. Finally, to ignore such opposition would severely diminish and undermine the public participation opportunities set forth in the CD.

Similarly, I have read and carefully considered GE's other arguments that EPA's positions and conclusions in its Intended Final Decision are inconsistent with, or conflict with, the specific terms and conditions of the CD. EPA's response provides sufficient information to conclude that the Agency's approach is reasonable, supported by adequate data and information, is permissible under the actual language of the CD, and is well within the scope of the Agency's discretionary

authorities in the broad, remedial statutes which provide the underlying authority for the CD (e.g., RCRA section 3005(e) and CERCLA sections 104 and 121).

GE alleges that EPA misinterprets ARARs and other similar requirements

GE raises additional objections with regard to the way EPA interprets various Applicable or Relevant and Appropriate Requirements (ARARs), as well as other requirements, standards and policies relevant to EPA's Final Decision. GE argues for example that EPA's cleanup decision would improperly make GE carry out natural resource restoration activities. As EPA correctly points out, the Clean Water Act section 404 and its implementing regulations, which typically would constitute an ARAR under CERCLA for much of the cleanup work to be accomplished at this site, include specific provisions requiring mitigation (for example, when remedial actions impact wetlands). While the section 404 mitigation requirement may appear to overlap with natural resource damage restoration activities, these are legally separate and distinct requirements. As such, mitigation carried out as part of the cleanup overseen by EPA in compliance with section 404 is different from the role of restoration as part of addressing damaged natural resources.

To satisfy the requirements of the section 404 program (i.e., to obtain a Corps of Engineers permit in a RCRA permit setting or to take advantage of the CERCLA section 121(e)(1) permit exemption provision for a Superfund cleanup), the administrative record should demonstrate substantive regulatory compliance with the underlying standards (*e.g.*, 404(b)(1) guidelines

analysis, environmental mitigation analysis, and evaluation of the Least Environmental Environmentally Damaging Practicable Alternative (LEDPA)). The information and data in the administrative record should provide a clear analysis showing how the cleanup work and mitigation required by EPA at this site (e.g., how loss of aquatic or wetlands habitat due to dredging activities in specific areas will be offset) will not overlap with natural resource restoration activities otherwise being addressed by natural resource trustees pursuant to the CD.

GE also argues that EPA's 40 CFR 761.61(c) risk-based management determination, found in Attachment D of EPA's Intended Final Decision, is "arbitrary, capricious, and unlawful because on-site disposal would likewise meet the regulatory conditions for such a determination -- i.e., it would not result in an unreasonable risk of injury to human health or the environment." GE SOP, p. 11. In Attachment D, EPA has concluded that in order to ensure no unreasonable risk for purposes of the TSCA PCB regulations, "[a]ll contaminated sediment and floodplain soil that is removed will be disposed of off-site at an existing TSCA-approved facility or RCRA hazardous waste landfill or a landfill permitted by the receiving state to accept PCB remediation wastes, depending on the contaminant levels and waste classifications." Among its reasons for this position, EPA states that certain site-specific "factors increase the risks of potential future releases to the Housatonic watershed, compounded by the poor suitability of the proposed locations given such factors as soil permeability, proximity to the Housatonic watershed, and/or drinking water sources."[4] As a legal matter under established TSCA case law, the "no unreasonable risk" standard is based on cost-benefit analysis.[5] Under RCRA and CERCLA,

[4] *See* EPA's SOP at p. 51 (February 29, 2016).
[5] *See e.g., Corrosion Proof Fittings v. EPA,* 947 F.2d 1201 (5th Cir. 1991).

however, one of the operative statutory standards when making cleanup decisions is protection of human health and the environment, which is a health-based standard that does not use a cost-benefit analysis approach.[6] In my opinion, GE does not provide sufficient information to determine that EPA's conclusions in Attachment D are incorrect, unreasonable, or unsupported as a factual matter. I also note that Attachment D by itself does not provide sufficient information and analysis on its face to demonstrate that the use of a TSCA risk-based management approach (e.g., "no unreasonable risk") for this cleanup will ensure "protectiveness of human health and the environment," as required by RCRA and CERCLA (e.g., as provided in the NCP, the cancer risk is within the 10^{-4} to 10^{-6} range, and for non-cancer risk the Hazard Index is no greater than 1).

Furthermore, GE disagrees with EPA's position on the appropriate use of the Massachusetts Endangered Species Act (MESA), including its approach to the Conservation/Net Benefit Plan provisions. EPA's SOP indicates that the Agency has been coordinating closely with the Commonwealth's Division of Fisheries and Wildlife, which administers MESA, on the role of MESA at this site, including the law's requirement that a take of a state-listed species be mitigated through GE's implementation of a conservation and management plan providing for a long-term net benefit to the affected state-listed species. Regardless of MESA's status as a

[6] I note that "protectiveness" for CERCLA purposes is determined using a cancer risk of 10^{-4} to 10^{-6} or for non-cancer risks, a hazard index no greater than 1, as well as ecological considerations (consistent with the NCP and long-standing published program guidance). EPA has published long-standing CERCLA program guidance which makes it clear that merely attaining an ARAR does not necessarily lead to ensuring protectiveness of human health (*see e.g.*, 55 Fed. Reg. at pp. 8701, 8709, 8712; 1997 OSWER Directive 9200.4-23, *Clarification of the Role of Applicable or Relevant and Appropriate Requirements in Establishing Preliminary Remediation Goals Under CERCLA*). To the extent 40 CFR 761.61(c) is being used as an ARAR at this site and to the extent the CERCLA/NCP health-based protectiveness standard is a more stringent standard than the TSCA "no unreasonable risk" standard in 40 CFR 761.61(c), the administrative record supporting the cleanup decision should contain specific information, data and analysis explaining how the cleanup ensures "protectiveness of human health."

potential ARAR for CERCLA purposes, EPA would be free to use it to help ensure protectiveness of human health and the environment at this site (e.g., either pursuant to the omnibus authority in section 3005(e) for RCRA permits or by designating it as a TBC ("to be considered") for CERCLA response actions).[7] Thus, EPA's use of MESA in ensuring protectiveness of human health and the environment appears reasonable and appropriate.

With regard to dam safety standards, I note that GE has agreed to undertake the cleanup of PCBs as contemplated by the CD. In addition, I note that paragraph 39 of the CD expressly provides for modification of the Rest of River Statement of Work to include modified work to achieve and maintain Performance Standards, and that the CD in paragraphs 162 and 163 reserves the rights of the United States to seek performance of additional response actions under certain conditions. Furthermore, the CD expressly provides that EPA may require additional work in order to ensure protectiveness of human health and the environment.[8] In my opinion, EPA's approach is reasonable and consistent with the CD and RCRA (e.g., the "omnibus provision in RCRA section 3005(e)), as well as CERCLA and the NCP, in that it is intended to ensure protection of human health and the environment over the long-term for the cleanup work GE agrees to perform. Thus, because it is possible that the failure of a dam owned by another party could undermine the integrity of the cleanup already undertaken by GE, to the extent EPA identifies this as a likely contingency and seeks to include reasonable steps to avoid additional releases of

[7] *See e.g.*, 40 C.F.R. 300.400(g)(3); 55 Fed. Reg. at pp. 8744-46 (March 8, 1990).

[8] *See e.g.,* para. 44, which states: "If EPA determines, at any time, that any one of the response actions required pursuant to this Consent Decree is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP."). *See also* para. 8(d), which reflects the fact that additional work may be needed in the future to ensure protectiveness of human health or the environment.

PCBs in the future, I believe the Agency's broad remedial authorities allow EPA to address such a contingency in its cleanup decision.

GE's other challenges to EPA's proposed cleanup decision

GE's other arguments appear to reflect an honest disagreement with EPA's cleanup approach. For example, GE argues that EPA's cleanup approach "goes beyond what is necessary to protect human health" and it disagrees with EPA's development of the Downstream Transport Performance Standard. To the extent GE claims that EPA's allegedly open-ended or vague approach in several respects conflicts with the CD, as noted above, the CD contains clear language providing EPA with authority to modify the work to achieve and maintain Performance Standards or to require additional response actions under certain circumstances, which may include cleanup actions to protect human health and the environment in the downstream state, Connecticut. While GE advances a number of possible arguments on how to proceed differently with the cleanup at this site, it is EPA that has been vested with the responsibility under federal law to determine what is needed to ensure protectiveness of human health and the environment, and has been given broad discretion in developing options and making decisions in this regard. While I can understand why GE would prefer to use its methodologies to come up with a different, perhaps less costly cleanup, Congress gave the federal government the role of making such decisions in a manner that protects public health and the environment. Under federal law, EPA does not have unbridled discretion, but it does get deference when making complex decisions involving numerous statutory and regulatory factors. I believe EPA has been and continues to be conscientious and balanced in applying its legal authorities, in considering its

policies and guidance, and developing a rational, supportable approach (including its approach to downstream transport) for protecting human health and the environment. Given the scope and variability associated with a site of this size and complexity, EPA's development of a cleanup approach overall is entirely reasonable and is supported by the data and information in the administrative record.

Conclusion

Based on the information submitted to me to resolve this dispute, I find that EPA has compiled an extensive administrative record showing the Agency's thorough consideration of exhaustive scientific and technical information, as well as a wide variety of stakeholder views, including GE's. There has been a vigorous exchange of views among the interested parties which is clearly reflected in the comprehensive responses contained in EPA's Statement of Position, including attachments, tables and figures, dated February 29, 2016. While I can appreciate GE's disagreement with EPA's exercise of its discretion in making complex scientific, technical and engineering decisions, and with the way it has weighed and balanced other important factors, I find that overall EPA's reasoning, rationale and analysis are sound and adequately supported by the data and information it has carefully considered.

Carl F. Dierker
Regional Counsel
U.S. EPA, Region 1, New England

October 13, 2016
Date