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ENVIR. APPEALS BOARD

December 21, 2016

Mr. Bryan Olson, Director, Office of Site Remediation and Restoration
Timothy Conway, Esq., Senior Enforcement Counsel
U.S. Environmental Protection Agency
EPA New England
5 Post Office Square, Suite 100
Boston, MA 02109-3912

**Re: General Electric Company, Pittsfield, MA
Appeal of Modification of RCRA Corrective Action Permit No. MAD002084093,
Appeal Nos. 16-01 through 16-05
Response to EPA's Notice of Uncontested and Severable Permit Conditions**

Dear Messrs. Olson and Conway:

The General Electric Company (GE) has reviewed Mr. Olson's letter dated December 13, 2016, listing the provisions of the Modified RCRA Permit issued by EPA on October 24, 2016, that EPA had preliminarily determined were uncontested and severable and thus not stayed by the appeals of the Modified Permit to the Environmental Appeals Board (EAB). That same letter also indicates that EPA would consider any additional information or analysis to demonstrate that any of the listed conditions are, in fact, not severable, before making a final determination. While GE agrees with the majority of EPA's determinations regarding the uncontested and severable conditions of the Modified Permit, others are directly related to contested matters and thus are not "severable" for purposes of Paragraph 22.r of the Consent Decree (CD). Those permit conditions, and the bases for GE's conclusions that they are not severable, are presented below. After you have had the opportunity to review our conclusions, we would like to discuss with you any of the permit conditions with respect to which we continue to disagree regarding severability and how EPA and GE should proceed in light of any such dispute.

At the outset, GE agrees that the following conditions of the Modified Permit are uncontested and severable, and will become effective on the Effective Date in accordance with Paragraphs 22.r and 22.x of the CD:

- I.A.a through 3
- I.B.1 through 14
- II.A
- II.B.2.h
- II.B.2.i
- II.B.2.j.(1)(b) and (2)(a), (2)(c), and (2)(d)
- II.B.4

- II.B.6.a
- II.B.6.b.(2)(a)
- II.B.7
- II.C and II.D
- II.F and II.G
- The following deliverables listed in II.H:
 - 1.b
 - 3 (Floodplain Investigation Work Plan)
 - 9
 - 16
 - 19 (for 6.a and 6.b.(2)(a))
 - 20 (for Woods Pond and Rising Pond Dam)
- II.J through II.N

The conditions that are not severable from disputed conditions are:

Condition II.B.1.c: Restoration Requirements

This condition requires GE to develop and submit four deliverables relating to the restoration of affected habitats. As shown below, these deliverables are inextricably related to and dependent on the scope of the remedial actions to be implemented for the river, the banks, and the floodplain, which have been contested by multiple parties. E.g., GE Pet. at 33-43; Housatonic River Initiative Pet. at 1; Cook Pet. at 3-6; Berkshire Environmental Action Team Pet. at 1-3.

- The Baseline Restoration Assessment is required to consist of an assessment of the pre-remediation conditions and functions of the habitats that would be affected, including delineation of wetlands; the presence, location, abundance, and condition of state-listed rare species and invasive species; and evaluation of vernal pools; and characterization of the physical and biological attributes of affected areas. To conduct such a detailed assessment, it is necessary to know the areas that will be affected, including the areas to be remediated and the locations of ancillary facilities such as access roads, staging areas, and disposal facilities (including an on-site facility see GE Pet. at 9-25).
- The Restoration Performance Objectives and Evaluation Criteria (RPOEC) are required to include measurable criteria for evaluation of success. Those criteria depend on the habitats affected by the remedial action, and that, in turn, also depends on the extent of the remedial action.
- The Restoration Corrective Measures Coordination Plan (RCMCP) is required to include integration of restoration activities with remediation activities (including locations of access roads and staging areas, bank stabilization methods, and construction of bed/bank interface), specification of pre-construction preparation requirements (such as silt fence installation and field delineation of affected species and of vernal pool boundaries), and specification of protocols to minimize impacts on state-listed rare species. Clearly, these items cannot be specified without knowing the location and extent of the remediation activities, which multiple parties have challenged, as noted above.

- The Restoration Plan must constitute a specific plan for restoration of affected habitats, including identification of materials and sources, restoration construction plans, identification of the experts to be used, and monitoring and maintenance programs. Such a plan is obviously directly dependent on the locations to be remediated and the locations of the ancillary facilities, and the habitats that would be affected in those areas. Those are directly involved in the appeals.

Thus, the requirements for these deliverables are not severable from the disputed conditions.

Condition II.B.2.l: Additional Response Actions for River Projects in Connecticut

This condition includes requirements that, for any Legally Permissible Future Project or Work in the Connecticut portion of the river (Reaches 10 through 16) that involves handling of material with PCBs greater than 1 mg/kg, GE must conduct response actions to be protective of that project or work (Conditions II.B.2.l.(1)(a) and (2)(a)). GE identified the similar provisions for future projects or work in Massachusetts (Conditions II.B.2.j.(1)(c) & (2)(e) and II.B.2.k) as contested provisions, but inadvertently neglected to specifically identify the similar provisions for Connecticut as contested provisions in its Petition. However, its Petition makes clear that it is contesting those provisions. It states: “The Modified Permit requires that, for any such future project or work in Massachusetts, *or for any such project or work in Connecticut that would require handling of sediment containing more than 1 mg/kg of PCBs*, GE must conduct ‘response actions to be protective’ of the work.” GE Pet. at 48 (emphasis added). GE then goes on to show that those provisions exceed EPA’s contractual authority under the CD. *Id.* at 48-51. It is thus clear that GE is contesting those requirements in both Massachusetts and Connecticut. Therefore Conditions II.B.2.l.(1)(a) and (2)(a) are disputed. The remainder of Condition II.B.2.l is not contested and is severable and thus is not stayed.

Condition II.E: ARARs (MESA/Conservation New Benefit Plan)

This condition notes that the applicable or relevant and appropriate requirements (ARARs) are listed in Attachment C. As EPA recognizes earlier in its letter, GE has disputed the MESA/Conservation Net Benefit Plan requirement that is listed as an ARAR in Attachment C. GE Pet. at 53-54.

Condition II.H, No 1.b: Baseline Restoration Assessment

This condition is not severable from disputed requirements for the reasons given in the first bullet under Condition II.B.1.c above.

Condition II.H, No 1.e: Work Plan for Phase 1B Cultural Resources Survey

This provision would require GE to develop a work plan for the field investigation of potential cultural resources that could be affected by the remedial action. GE’s Initial Phase IA Cultural Resources Assessment for the Housatonic River – Rest of River Project (April 2008) explains:

“It is possible that, *after the remedial actions for the Rest of River are known*, additional Phase IA investigations may be necessary to further refine the information preempted in this report, focused on the *areas that would be subject to or affected by the remedial actions*. . . .

Once Phase IA has been completed, it is anticipated that a Phase IB cultural resources survey will be conducted, which may include terrestrial and underwater investigations, and potentially an architectural survey, as necessary to determine the extent to which potentially significant cultural resources *may be impacted by the remedial action*. These activities would best be conducted during the remedial design phase so that they can integrate the survey data together with *information during the remedial design*.” (Emphases added.)

EPA’s comments on this report, included in its September 9, 2008 comments on the initial CMS Report, did not comment on the above description of future activities. As that description recognizes, there may need to be additional Phase IA investigations after the remedial actions are known and only then would a Phase IB work plan be appropriate. Further, the Phase IB field investigations themselves would need to be focused on areas that would be impacted by the remedial actions and would use information developed during the remedial design. That work plan thus depends on knowing the extent and locations of the remedial action, which are under appeal. E.g., GE Pet. at 33-43. As a result, this requirement is plainly not severable from disputed conditions.

Condition II.H, No. 2: Overall Strategy and Schedule for Implementation of the Corrective Measures

This deliverable is required to present an overall strategy for implementing the corrective measures selected by EPA, including preparation of work plans and reports, pre-design investigations, implementation of the remediation, and maintenance and monitoring. It must include, among other things, GE’s project organizational structure, lines of communication, coordination of floodplain and river remediation, sequence of remediation, and a project implementation schedule. While some of these items can be determined now (e.g., GE’s project organizational structure), this deliverable cannot be completed until the scope of remediation is known and input from the selected Remediation Contractor is obtained. For example, the strategy for implementing the corrective measure, the coordination between floodplain and river remediation, and the sequence of remediation may change depending on the scope of the corrective measures and the approach selected by the Remediation Contractor. And it is clear that a project implementation schedule cannot be developed until the remedial measures, as well as the disposal site, have been determined and a Remediation Contractor is selected. Those issues are all part of GE’s appeal. GE Pet. at 9-43. Thus, this deliverable is not severable from some of the disputed conditions.

Condition II.H, No. 8: Contractor Health and Safety Plan(s)

These plans cannot be prepared until a contractor or contractors are selected; and contractors cannot be selected until the remedy and disposal site are known and the Conceptual and Final Remedial Design/Remedial Action (RD/RA) Works Plans have been completed. As this provision recognizes, contractor Health and Safety Plans (HASPs) are normally submitted as part of the Supplemental Information Package (SIP), which is submitted *after* EPA approval of the Final RD/RA Work Plan. Moreover, some provisions of the HASP may depend on the areas to be remediated, which have been contested, as previously noted. Clearly, this requirement is not severable from disputed conditions.

Condition II.H, No. 12: Restoration Project Objectives and Evaluation Criteria, Restoration Corrective Measures Coordination Plan, and Restoration Plan

The required submission of these deliverables is not severable from disputed requirements for the reasons given in the second, third, and fourth bullets under Condition II.B.1.c above.

Condition II.H, No. 15: Cultural Resource Plan

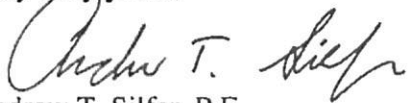
This plan cannot be prepared until the Phase IA and IB cultural resource investigations have been completed and it has been determined whether any significant cultural resources would be impacted by the remedial action. Again, it is clear that this cannot be done until the extent and locations of the remedial actions and the ancillary facilities (including any on-site disposal facility) have been finalized – all of which are subject to appeal, as noted above. Thus, this condition is not severable from the disputed conditions.

Condition II.I: Schedule

This condition requires, among other things, that the corrective measures begin in Reach 5A and Woods Pond and proceed downstream on a parallel track, that final sediment caps in the impoundments not be placed until all remediation in the upstream reaches has been completed, and that sediment removal and capping in Rising Pond take place after capping in Reach 7G. These sequencing requirements could all be potentially affected by the ultimate scope of the remedy, which is under appeal, as noted above. Accordingly, this condition, too, is not severable from disputed conditions.

GE would like to discuss these unseverable conditions with EPA before EPA makes any revised determination of severability different from GE's determinations. As noted above, we would also like to discuss with EPA how to resolve any dispute regarding the permit conditions on which our determinations of severability differ.

Very truly yours,



Andrew T. Silfer, P.E.
GE Project Coordinator

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