BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)
	) RCRA Appeal No. 16-01
GENERAL ELECTRIC COMPANY	)
Modification of RCRA Corrective Action Permit No. MAD002084093	)

EPA'S MOTION FOR PARTIAL RECONSIDERATION

I. Introduction

The United States Environmental Protection Agency ("EPA") respectfully submits this motion in connection with the Environmental Appeals Board's January 26, 2018, *Order Remanding in Part and Denying Review in Part* with respect to the above-referenced petition for review of the Region's Modification of the RCRA Corrective Action Permit (the "Permit") to the General Electric Company ("GE"). In its opinion, the Board remanded for further consideration the Permit condition requiring GE to dispose of the excavated material off-site rather than on-site. It upheld the Region's decision not to require treatment of excavated sediment and soil prior to disposal. And it upheld, with one exception, the Region's decisions on the scope of the cleanup. The Board, however, clearly erred as a matter of law in arriving at its decision on this last matter.

Specifically, the Permit includes provisions entitled "additional response actions" that concern GE's obligations to perform additional response actions to address future work projects by third parties ("Additional Work Requirements"). These include projects such as construction and repair of structures, utility work, flood management activities, road and infrastructure projects, dam removal, and installation of canoe/boat launches and docks. The Board wrongly

concluded that because these Permit provisions did not explicitly state that the actions be determined "in accordance with" the Consent Decree, the Permit was unclear as to whether the Region's choice of such actions was subject to consistency with the Decree. The Board clearly erred on this issue as a matter of law, because it failed to account for the fact that the Permit on its face dictates that *all* its provisions must be consistent with the Consent Decree. This unambiguous description of the relationship between the Permit and Decree is mirrored by language in the Consent Decree. Pursuant to 40 C.F.R. § 124.19(m), EPA accordingly requests that the Board reconsider its remand of the Additional Work Requirements and instead adopt as binding EPA's interpretation of the Permit, as already set forth on the face of the Permit.

II. Grounds for Motion

Under 40 C.F.R. § 124.19(m), a party may file a motion for reconsideration or clarification within 10 days of service of an EAB final order. Motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. *See, e.g.*, *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, at 2 (EAB Apr. 9, 2001) (Order Denying Motion for Reconsideration) (quoting *In re S. Timber Prod., Inc.*, 3 E.A.D. 880, 889 (JO 1992)) ("The reconsideration process 'should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.'").

The Region respectfully submits that the Board's conclusion regarding the Additional Work Requirements is clearly erroneous, in light of the explicit limitations already placed on such Additional Work Requirements in *U.S. et al. v. General Electric Co.*, Civ. Act. No. 99-30225 through 30227-MAP (Entered October 27, 2000), AR 9420 ("Decree", or "CD"), and the Permit, AR 280170. Contrary to the Board's reasoning and prior precedent, the absence of a

specific clause in the Permit requiring that the Additional Work Requirements be "in accordance with" the CD does not by itself render the requirements ambiguous or create a facial conflict with the CD. The Board's error stemmed from its reading the Additional Work Requirements provisions in isolation, rather than as an integrated part of the Permit as a whole. *United States v. Okoye*, 731 F.3d 46, 49 (1st Cir. 2013) (a document's "meaning cannot be delineated by isolating words and interpreting them as though they stood alone.") (citing *Farmers Ins. Exchange v. RNK, Inc.*, 632 F.3d 777, 785 (1st Cir. 2011)). This, in turn, led the Board to demand of the permit writer a level of duplicative drafting detail that is simply not required when crafting enforceable RCRA permit provisions. *See In the Matter of Sun Pipe Line Co.*, 2002 EPA App. LEXIS 49, *22-23 (E.P.A. July 11, 2002) (finding no ambiguity in a permit after concluding that two separate reporting provisions of a permit should both "be addressed to the Director," even where only one provision contained that clause, based on the "clear intent" of the permit).

1. The Additional Work Requirements Are Not Ambiguous and Do Not Conflict with the Decree

The Board erred by failing to account for Decree and Permit language that expressly limits the operation of the Additional Work Requirements. *First*, Permit Special Condition II.A provides, "[t]he special conditions in this Reissued RCRA Permit for Rest of River describe the Rest of River Remedial Action and required Operation and Maintenance … *that the Permittee shall perform pursuant to the CD*", and also, "… all Permittee activities shall be conducted *pursuant to … the CD* …." (emphasis added). Permit, Special Condition II.A, page 12. In its ordinary usage, "pursuant" means "[t]o execute or carry out *in accordance with* or by reason of something." *Black's Law Dictionary*, Abridged 5th Edition (emphasis added). *Second*, the

Decree itself highlights the need for acting in accordance with the Decree. *See* Decree ¶¶ 22.p, 22.w, 22.z.

Based on the above, the Board's conclusion that the Permit is ambiguous in this regard is at odds with the plain text and clear intent of the Permit and the CD, as well as with the Board's own determinations regarding the interaction of these two documents on analogous issues (*i.e.*, finding that the Biota and Downstream Transport Performance Standards[1] must be implemented in accordance with the CD), to say nothing of the Board's precedent on interpreting permit terms. In erroneously concluding that an individual Permit provision "facially conflicts" with the CD for want of a qualifying clause that is set forth explicitly elsewhere in the operative documents, the Board has effectively converted the permit writer's desire to avoid duplication through an economy of expression into a non-existent instance of conflict.[2] The specific rationale used by the Board to arrive at its conclusion was not made by any party below. GE's arguments in its Petition were framed in terms of the breadth of EPA's authority and discretion to order future work (*i.e.*, "unfettered"), and the failure to specify specific activities to be undertaken in the Permit. Petition at 48-50. EPA's responded, in part, by citing to and relying on Section IV.G of its Response to Petition ("The Downstream Transport and Biota Performance

[1] The same interpretive principle the Board used regarding the Biota and Downstream Transport Performance Standards can be applied to the Additional Work Requirements. Specifically, with respect to such Performance Standards, the Board identified a principle of general applicability – to interpret the Permit in accordance with the Decree – that can also be applied to the Additional Work Requirements. *See* January 26, 2018 *Order*, at 84, citing to *Transcript - June 8, 2017 Oral Argument*, at 265-269.

[2] Had the Board in its opinion identified any information in the permit proceedings—such as conflicting or unresolved statements by EPA in the record—to support its inference that EPA may not have intended to subject the disputed provisions to a CD consistency requirement, the instant motion may not have been necessitated. The Board, however, does not point to anything in the Permit proceedings to indicate this was EPA's intent or how such a position could be inferred from EPA and GE's positions regarding the interrelationship between the the CD and the Permit. If EPA had for some reason decided to peremptorily *exclude* these provisions from consistency with the requirements of the CD, it obviously would have been required to articulate that exceptional decision explicitly. But the Board's conclusion that EPA should have expressly affirmed its decision in an instance where it was simply continuing to follow its existing approach is not a reasonable burden to place on the permit writer.

Are Not Clearly Erroneous"), where EPA outlined the limiting effect of the CD on the Permit. *See* Response to Petition at 50. In upholding EPA on that issue, the Board validated and affirmed that interpretation. The particular rationale used as the basis to remand the Additional Work Requirements was advanced by the Board for the first time in its decision, *sua sponte*, necessitating this reconsideration motion and accompanying explication of the Permit and CD. Pitted against the express text and clear intent of the Permit and CD, the Board's conclusion has clearly missed the mark. *United States v. GE*, 986 F. Supp. 2d 79, 87 (D. Mass. 2013) (stating that "the cardinal principle that the intention of the parties, to be gathered from the whole instrument, must prevail unless it is inconsistent with some established principle of law.") (footnotes omitted).

2. The Permit Already Provides Limitations Regarding the SOW

The Board's concern about the Region's ability to seek Additional Response Actions even prior to approval of the Rest of River Statement of Work ("SOW") is also unwarranted in light of Permit language providing that limitation. The Board's concern appears to flow from a reference to Permit Section II.B.6.b.(2)(c), which states that the Additional Work Requirements can be required "prior to implementing the initial response action set for in Section II.B.3." However, the Permit also makes clear that, for Additional Work Requirements, the Corrective Measures require that GE "perform the foregoing pursuant to Performance Standards, the requirements in Section II.B.6.b.(2)(a) through (c) below, and *in accordance with the plans submitted and approved pursuant to Section II.H of this Permit*." Permit at II.B.6.b.(2), emphasis added. Section II.H of the Permit provides that SOW documents be submitted by GE

and approved by EPA.[3] Thus, the Permit requires Additional Work Requirements be conducted only after the Statement of Work submittals have been approved by EPA.

3. Consistent with Past Practice, and This Board's Ruling, the Board Should Accept EPA's Interpretation of the Permit as Binding on EPA

EPA agrees with the interpretation that the Additional Work Requirements are to be determined in accordance with the CD, including the requirement that the Additional Work Requirements be consistent with the scope of the response action. Permit §§ II.B.2.j(1)(c), k(2), & .l(2), II.B.6.b(1) & (2)(b) & (c), II.B.6.c. Not only is this the most natural meaning of the Permit's words, but it is also the Region's interpretation, and, therefore, this meaning is binding on the Region. *In re Austin Power Co.*, 6 E.A.D. 713, 717 (EAB 1997). The Board may accept the Region's interpretation as the binding interpretation of the permit. *See In Re Amoco Oil Co.*, 4 E.A.D. 954, 959-60 (EAB 1993). Indeed, the Board has already affirmed that it "will interpret the Consent Decree to fulfill the parties' intent as reflected by its terms." *January 26, 2018 Order*, at 50; *See also January 26, 2018 Order*, at 84, citing to *Transcript - June 8, 2017 Oral Argument*, at 265-269. There is no controversy meriting remand, and no harm to Petitioner, by granting the requested relief. If during implementation, GE objects to an EPA determination, the Decree provides for dispute resolution, including appeal to U.S. District Court. Decree, § XXIV. Subjecting this issue to remand proceedings would needlessly consume time and administrative resources, where there is actually no dispute over how the provision operates.

In advance of filing this Motion, EPA contacted counsel for Massachusetts, Connecticut and Petitioner GE. Massachusetts said that it assents to EPA filing this Motion regarding the

[3] *See also* II.B.2.j.(2)(e)— "either before or after completion of any response actions conducted pursuant to Section II.B.2.e. through II.B.2.g.)" and the corresponding Corrective Measure II.B.2.j(2): "Permittee shall perform the foregoing . . .in accordance with the plans submitted and approved pursuant to Section II.H. of this permit."

Board's conclusion in its January 26, 2018 Remand Order concerning GE's obligation to perform additional response actions to address future work by third parties. Connecticut said that it supports EPA's request for reconsideration on future work by third parties. GE said that it "opposes any request for reconsideration of the EAB's decision on the third party additional work issue; the EAB presented an irrefutable rationale regarding the need for EPA to clarify the permit's terms on remand."

Conclusion

Based on the above, the Region respectfully requests that the Board reconsider its remand of the Additional Work Requirements.

Respectfully submitted,

February 5, 2018

/s/ Timothy M. Conway

Timothy M. Conway, Samir Bukhari, Joanna Jerison
Counsel for EPA Region 1
Mail Code OES 04-5
5 Post Office Square, Suite 100
Boston, MA 02109-3912
conway.tim@epa.gov
p: (617) 918-1705
f: (617) 918-0705

CERTIFICATE OF SERVICE

I, Timothy M. Conway, hereby certify that true and correct copies of EPA's Motion for Partial Reconsideration were served:

Via the EPA's E-Filing System on February 5, 2018 to:

Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3334

Via E-Mail on February 5, 2018 to:

Jeffrey R. Porter
Andrew Nathanson
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02111

Matthew F. Pawa
Benjamin A. Krass
Pawa Law Group, P.C.
1280 Centre Street
Newton, MA 02459

Kathleen E. Connolly
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street
Boston, MA 02110

James R. Bieke
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Jeffrey Mickelson
Deputy General Counsel
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

Robert D. Cox, Jr.
Jennifer Garner
Bowditch & Dewey, LLP
311 Main Street
P.O. Box 15156
Worcester, MA 01615

Lori DiBella
Assistant Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0210

Richard M. Dohoney
Angela W. Haylon
Donovan O'Connor & Dodig, LLP
1330 Mass MoCA Way
North Adams, MA 01247

Richard Lehan
General Counsel
Massachusetts Department of Fish and Game
251 Causeway Street, Suite 400
Boston, MA 02114

C. Jeffrey Cook
9 Palomino Drive
Pittsfield, MA 01201

Jane Winn
Berkshire Environmental Action Team, Inc.
29 Highland Ave.
Pittsfield, MA 01201-2413

Timothy Gray
Housatonic River Initiative, Inc.
P.O. Box 321
Lenoxdale, MA 01242-0321

(s) Timothy M. Conway
Timothy M. Conway