

November 3, 2008

**VIA CERTIFIED MAIL**

Case Administrator  
MassDEP Office of Appeals and Dispute Resolution  
One Winter Street  
Boston, MA 02108

Re: General Electric Company, Pittsfield, MA  
Surface Water Discharge Permit No. MA0003891  
**Notice of Claim to Adjudicatory Hearing**

Dear Sir/Madam:

This letter is submitted on behalf of General Electric Company ("GE") as the notice of a claim to and request for an adjudicatory hearing under 310 CMR 1 and 314 CMR 2, 3 and 4 with respect to Surface Water Discharge Permit ("the SWDP" or the "Permit") No. MA0003891 that was issued by the Department of Environmental Protection ("MassDEP") to GE under cover of a letter dated October 3, 2008. The applicable requirements for the contents of a notice of claim to an adjudicatory hearing are set out at 310 CMR 1.01(6) and are satisfied as follows.

**The document appealed from**

MassDEP issued the SWDP to GE pursuant to the Massachusetts Clean Waters Act, as amended, M.G.L. c. 21, §§ 42-43, concurrently with a National Pollutant Discharge Elimination System permit ("NPDES permit") issued by the United States Environmental Protection Agency ("EPA"). A single document embodies both permits which, by their terms, become effective on December 1, 2008. A copy of the SWDP is provided as Exhibit A.

**The party filing the request, qualification as aggrieved person, address of the project**

The party filing this request is GE, the owner of the affected site and the permittee under the SWDP. The physical and business address of the site is 159 Plastics Avenue, Pittsfield, MA 01210. The facility representative is Michael T. Carroll. Mr. Carroll can be reached at (413) 448-5902. As the owner and permittee, GE qualifies as an aggrieved person within the meaning of 310 CMR 1.01(6)(b).

**Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.**

BOSTON | WASHINGTON | NEW YORK | STAMFORD | LOS ANGELES | PALO ALTO | SAN DIEGO | LONDON

**Authorized representative**

The undersigned is GE's authorized representative in this matter, with the address and other contact information as indicated above. See 310 CMR 1.01(2). All filings to GE in this matter should be sent to the undersigned at Mintz Levin.

**Request for adjudicatory hearing**

This letter constitutes a specific request for an adjudicatory hearing. See 310 CMR 1.01(6)(b). The following content also represents a specific, clear and concise description of the facts that are grounds for this appeal. See 310 CMR 1.01(6)(b). Furthermore, GE notes that it will be requesting by separate motion a stay of the SWDP terms and provisions that are being appealed. See 314 CMR 2.08.

**Parallel proceedings**

On this day, GE also has filed a separate petition under 40 C.F.R. § 124 with EPA's Environmental Appeals Board ("EAB") for review of these same exact terms and conditions from the NPDES permit. Upon appeal to the EAB, the appealed provisions from the NPDES permit are automatically stayed under federal law. See 40 C.F.R. § 124.16(a)(1). A copy of the Petition for Review of the General Electric Company NPDES Permit Issued By EPA Region 1 is provided as Exhibit B.

GE is presently conducting environmental remediation at the site that is the subject of the Permit ("GE Site"). These remediation efforts are being made in accordance with a consent decree executed by GE, EPA, MassDEP and others, and approved and entered by the U.S. District Court in Springfield, Massachusetts on October 27, 2000 (the "Consent Decree"). See United States, et al. v. General Elec. Co., No 99-30225-MAP (D. Mass. Oct. 27, 2000). The Consent Decree establishes a program for comprehensive environmental remediation of contaminated soil, non-aqueous phase liquid and groundwater at the GE Site and surrounding areas in order to meet established clean-up standards. Several of the Permit's provisions conflict with the Consent Decree. GE therefore will also be invoking the dispute resolution process in the Consent Decree in order to resolve any and all such conflicts, and jurisdiction to resolve such disputes rests with the federal district court.

**Filing fee and form**

Also provided, as Exhibit C, are a copy of the MassDEP Adjudicatory Hearing Fee Transmittal Form and a copy of the check for \$100 as the requisite filing fee, which have been sent this day under separate cover to the MassDEP Lockbox at: MassDEP, Box 4062, Boston, MA 02211.

### **Timeliness**

Under 310 CMR 1.01(6)(a), the time for filing this notice is established under 314 CMR 2.08, which provides that any aggrieved party may file a request for an adjudicatory hearing within thirty (30) days of MassDEP's issuance of the SWDP. Under cover of letter dated October 3, 2008, MassDEP issued the SWDP to GE along with a notice stating that an appeal would be timely if sent within 30 days of receipt of the letter. Under 310 CMR 1.01(3)(a)(3), a request is timely sent if postmarked within the applicable thirty (30) day period. This request, therefore, is timely because it has been postmarked within this thirty (30) day period.

### **Facts that are grounds for the proceeding**

The SWDP for the GE Site was previously issued by MassDEP -- concurrently with a NPDES permit issued by EPA -- on September 20, 1988, became effective on February 7, 1992, was modified on May 21, 1992, expired on February 7, 1997, and was administratively continued by virtue of a timely and complete renewal application filed on August 9, 1996, as revised from time-to-time thereafter.

At the time of the prior permit proceedings, as well as the most recent renewal applications, GE conducted various manufacturing operations on the GE Site. GE no longer conducts any such operations. Instead, its predominant activity is environmental remediation conducted in accordance with the Consent Decree, as discussed above.

MassDEP and EPA issued a joint draft SWDP and NPDES permit and accompanying Fact Sheet on December 22, 2004. Copies of these documents are attached as Exhibits D and E, respectively. GE timely submitted substantial comments on this draft on March 25, 2005. As GE noted in its comments, GE's activities under the Consent Decree have altered, and will continue to alter, the nature and characteristics of water discharged from the GE Site.

GE now points out that the SWDP includes numerous objectionable terms and provisions, as identified in the "Specific provisions appealed" section below, and in GE's petition to the EAB, including the following:

#### ***Dry Weather PCB Limits for Outfalls 005, 006, and 009***

The final SWDP contains *entirely new*, dry weather, water quality-based PCB limits of 0.014 µg/l at Outfalls 005, 006 and 009. See Permit, Part I.A.3, I.A.7 and I.A.11. But GE did not have the ability to submit comments on these new limits because prior to issuance of the final Permit, MassDEP never identified the need or potential for dry weather, water quality-based PCB limits at these Outfalls. In fact, MassDEP had no dry weather discharge data on which to even begin to evaluate the need for such limits. Even assuming, for the sake of argument, that MassDEP had such data, MassDEP never proposed them as a basis for limits or provided any opportunity for public review and comment on such a proposal.

If MassDEP had provided an opportunity for public review, GE would have submitted detailed comments demonstrating how the new limits raise substantial new questions that MassDEP should have considered. Moreover, MassDEP has not demonstrated that the new PCB limits are necessary to protect against actual or potential excursions above the Massachusetts Water Quality Standards.

Finally, even if the PCB limits could be justified on the current record (and without the provision for an opportunity for review and comment), MassDEP acted arbitrarily in not exercising its discretion under 314 CMR 4.03 to establish a reasonable compliance schedule for meeting the PCB limits at Outfalls 006 and 009, especially where it did appropriately exercise its discretion by implementing a compliance schedule for meeting the PCB limits at Outfall 005, see Part I.A.3, and the PCBs discharged from the 64G treatment plant. See Part I.A.1.

#### ***Dry Weather Discharge Prohibitions on Outfall 05A***

In the draft SWDP, MassDEP proposed a *new* dry weather discharge prohibition on Outfall 05A. In submittals to MassDEP that pre-dated issuance of the draft, as well as in response to the draft SWDP, GE disclosed the potential for a dry weather discharge. In turn, GE requested that Region 1 remove the prohibition. In its comments, GE specifically described the discharge from Outfall 05A as being comprised of “overflow from outfall 005 drainage system; wet and *dry weather* discharge of groundwater (infiltration); city water (used for fire protection testing); unknown *dry weather* flow from city storm drain; facility and city stormwater” (emphasis added). *See* GE Comments, Technical Exhibit A and Technical Comments Summary Chart.

In spite of GE’s repeated disclosures, MassDEP retained the dry weather discharge prohibition in the final Permit. In its Response to Comments (“RTC,” attached as Exhibit F), MassDEP indicated that it had made GE’s recommended revisions to other discharge descriptions, “with the exception of authorizing dry weather discharges from relief overflows.” See RTC, at p. 51. MassDEP went on to say that “[t]he prohibition is intended to prohibit the discharge from these outfalls under dry weather conditions, rather than to prohibit the discharges from including ‘dry weather’ flow components (*e.g.*, groundwater infiltration).” See RTC, at p. 52. However, this response misses the point of GE’s disclosures -- that there are known discharges *during dry weather* through Outfall 05A from sources over which GE has no meaningful control (*i.e.*, unknown dry weather flow from city storm drain).

MassDEP failed to meaningfully address GE’s disclosures. Prohibiting discharges known to exist is clearly erroneous, especially without any evaluation of the nature of these discharges, their impact on receiving water quality, or GE’s options, if any, to eliminate them. Even if MassDEP had the authority to impose such a prohibition (which we dispute), MassDEP erred in not providing GE with a schedule of compliance within which to eliminate the potential for dry weather contributions.

***Premature Ambient Monitoring Plan and Lack of Basis for Re-Opener***

In commenting on the draft SWDP, GE explained why it would be premature for MassDEP to impose wet weather, water quality-based discharge limits until the remediation work required under the Consent Decree is complete. In responding to these comments, MassDEP acknowledged that the “alternations in flows, pollutant constituents and operations ... will continue to evolve as the GE Site is further remediated” and that the “ongoing remediation effort can make a determination of future background conditions difficult.” See RTC, at pp. 3 and 22.

Instead of imposing such limits, MassDEP added conditions requiring (a) GE to develop an “ambient monitoring plan” and (b) MassDEP to assess the data collected under this plan to determine whether the Permit as written is sufficiently stringent to comply with applicable water quality standards, and, if not, to re-open the Permit. See Permit, Parts I.E and I.F. Recognizing that those data may “continue to evolve as the GE Site is further remediated,” MassDEP cannot lock in an obligation to re-open the permit based on ambient data alone. Rather, MassDEP must have an “adequate record basis” that includes other information about the status and results of the remediation effort.

As written, Parts I.E and I.F could trigger a re-opener *without* an adequate record basis (i.e., based solely on limited ambient data from the monitoring plan). Rather, it is only appropriate for the Permit to be reopened unless and until there are adequate data and information -- specifically including the status and results of the remediation effort -- to assist MassDEP in determining background conditions and, in turn, the adequacy of the limits and conditions in the Permit.

***Unnecessary or Unjustified Monitoring Requirements***

The SWDP contains entirely new discharge sample collection and flow monitoring conditions applicable to Outfalls 005, 05A, 05B, 006, 06A, SR05 and 009.

These conditions will compel GE to initiate actions that will take several months to complete. For example, it will take approximately 12 weeks for GE to obtain flow meters from a qualified vendor. Even after obtaining these meters, GE will face complications installing them, particularly at SR05, which runs through City-owned property and will require various City consents for installation. This installation may be further complicated by safety issues associated with the location of the conveyance line, as well as the power supply needed for reliable operation of the flow meter.

In short, for many of the new discharge sampling and monitoring conditions, GE will need to conduct field reconnaissance, consider equipment locations (and related access and safety issues), perform technical design activities, and then select, purchase, install and field-test

the appropriate equipment. These activities cannot possibly be accomplished by December 1, 2008, when the Permit by its terms will take effect.

If MassDEP had provided an opportunity for public review of these new conditions, GE would have submitted substantial comments focused, *inter alia*, on the legitimate technical and temporal constraints against implementation of the new conditions on or before the effective date of the Permit. MassDEP also erred by not considering the need for schedules of compliance.

The SWDP also significantly increased the monitoring frequency at all outfalls in the final Permit. See RTC, at pp. 74-75, 126-127, 154 and 163. GE had no reason to anticipate this wholesale increase, which is not supported by the record, and which was not submitted for public comment.

#### *Vague and Unsupported PCB Limitations*

GE is entitled to fair notice of its compliance obligations. However, the PCB limit assigned to the 64G treatment plant is impermissibly vague. Part I.A.1 of the Permit identifies the limit as "Report," but assigned footnote \*15. This footnote imposes "[i]nterim requirements and a schedule for attaining an effluent minimum level concentration of 0.065 µg/l."

The RTC is even more confusing. On p. 26 of the RTC, MassDEP indicated that "[t]he PCB effluent limitation for 64G [had] been removed." However, on pp. 76 and 107, MassDEP indicated that it had in fact imposed a water quality-based limit of 0.014 µg/l on 64G.

Neither the Permit nor MassDEP's supporting record provides GE with fair notice of its compliance obligations at 64G.

#### *Apparent Typographical Error*

In its RTC, MassDEP made clear that it was *not* imposing wet weather, water quality-based discharge limits. See RTC, at pp. 16-20. However, in Part I.A.8, which applies to wet weather discharges from Outfall 006, the permit assigned footnote \*13 to PCBs. This footnote imposes a "total PCB monthly average compliance limit" of 0.065 µg/l.

This footnote appears to have been assigned in error and should be replaced with footnote \*14, which the permit properly assigned to all of the other wet weather discharges from the GE Site. See Parts I.A.4, I.A.5, I.A.6, I.A.9, I.A.10 and I.A.12.

#### *Closed Outfalls*

Several outfalls regulated by the SWDP have been closed or no longer exist, and should be removed from the Permit as unnecessary. Specifically, Outfalls YD6, YD7, YD8, YD9, YD14 have been closed. Also, Outfall 007 has been closed.

***Failure to Account for Fire Suppression System Water***

MassDEP failed to rationally allow for the potential discharge of fire suppression system water during *dry weather conditions* from Outfalls 05A, 005, 006, 009, YD10, YD11, and YD12. See Permit, Parts I.A.3, I.A.5, I.A.7, I.A.11, and I.A.13. This failure would force GE to take substantial, otherwise unnecessary action rerouting this discharge or installing holding tanks to collect it.

**Specific provisions appealed**

On the basis of the grounds described above, those described in GE's petition to the EAB, and those further developed as this adjudicatory proceeding advances, GE challenges the following limitations and conditions in the Permit:

1. The dry weather, water quality-based PCB limitation of 0.014 µg/l applicable to Outfalls 005, 006 and 009, as set forth in the Permit, Parts I.A.3, I.A.7 and I.A.11, respectively.
2. The dry weather discharge prohibition applicable to Outfall 05A, as set forth in the Permit, Part I.A.5.
3. The PCB limitation and/or conditions applicable to the 64G treatment system, as set forth in the Permit, Part I.A.1.
4. The ambient monitoring plan and permit re-opener, as set forth in the Permit, Parts I.E and I.F, respectively.
5. The wet weather, water quality-based PCB limitation of 0.065 µg/l applicable to Outfall 006 by virtue of footnote \*13 in the Permit, Part I.A.8.
6. The discharge sample collection and flow monitoring conditions applicable to Outfalls 005, 05A, 05B, 006, 06A, SR05 and 009, as set forth in the Permit, Parts I.A.3, I.A.5, I.A.6, I.A.7, I.A.8, I.A.9 and I.A.11.
7. The wholesale increase in monitoring frequencies at all outfalls, as set forth in the Permit, Parts I.A.1 through I.A.12.
8. The identification of outfalls, as set forth in Permit, Part I.A.13.
9. The identification of Drainage Basin 007, as set forth in Permit, Attachment C, BMP I.A.

November 3, 2008

Page 8

10. The failure to account for the potential discharge of fire suppression system water during dry weather conditions from Outfalls 05A, 005, 006, 009, YD10, YD11 and YD12, as set forth in Permit, Parts I.A.3, I.A.5, I.A.7, I.A.11 and I.A.13.

**Relief sought**

GE seeks an adjudicatory hearing to contest MassDEP's findings and determinations in the SWDP as outlined above, and further discussed in GE's petition to the EAB. At the outcome of the adjudicatory hearing, GE seeks a remand to MassDEP under an order to issue an amended SWDP that conforms to the tribunal's findings on GE's objections.

**Certificate of Service**

GE has served a copy of this Notice pursuant to 310 CMR 1.01(4)(f). A copy of the Certificate of Service is attached as Exhibit G.

Thank you for your consideration.

Very truly yours,



Stephen T. Murray

encls. Surface Water Discharge Permit No. MA0003891  
Petition for Review of the General Electric Company NPDES Permit Issued By EPA  
Region 1  
Copy of Adjudicatory Hearing Fee Transmittal Form and Check  
Draft Surface Water Discharge Permit No. MA0003891  
Fact Sheet for Draft Surface Water Discharge Permit No. MA0003891  
Response to Comments  
Certificate of Service

cc: Glenn Haas  
Jane Rothchild (w/o attachments)  
Michael Gorski (w/o attachments)  
Paul Hogan (w/o attachments)