

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

_____))
In re:))
))
General Electric Company) NPDES Appeal No. 08-_____
))
NPDES Permit No. MA0003891))
_____))

**PETITION FOR REVIEW OF THE GENERAL ELECTRIC COMPANY
NPDES PERMIT ISSUED BY EPA REGION 1**

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), General Electric Company (“Petitioner” or “GE”), through counsel, petitions for review of NPDES Permit No. MA0003891 (the “Permit”), which was issued to GE by letter dated October 3, 2008, and sent via certified mail by the U.S. Environmental Protection Agency, Region 1 (“Region 1”). A copy of this Permit is attached as Exhibit A.

GE contends that certain conditions of the Permit are based on (1) a finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review. Specifically, 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, and conflicting statements in Region 1’s administrative record.
4. The ambient monitoring plan and permit re-opener, as set for 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. Errors in the identification of outfalls, as set forth in the Permit, Part I.A.13.

9. Error in the identification of Drainage Basin 007, as set forth in the Permit, Attachment C, BMP 1.A.

10. 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 the Permit, Parts I.A.3, I.A.5, I.A.7, I.A.11 and I.A.13.

JURISDICTIONAL BASIS FOR PETITION

For the following reasons, GE satisfies the jurisdictional requirements for filing this petition under Part 124:

1. GE has standing to petition for review of the Permit decision because it timely submitted substantial comments (a copy of GE's comments is attached as Exhibit B); and

2. All issues raised herein either: (a) were raised during the public comment period, to the extent reasonably ascertainable at that time, or (b) concern changes from the draft to the final Permit decision. 40 C.F.R. § 124.19(a); *see also In re RockGen Energy Ctr.*, 8 E.A.D. 536, 540 (EAB 1999).

FACTUAL AND PROCEDURAL BACKGROUND

GE owns a 225-acre parcel of land adjacent to the Housatonic River in Pittsfield, Massachusetts (the "GE Site"). Prior to the Region 1 action at issue here, GE was covered under two NPDES permits: (1) the individual permit; and (2) the multi-sector general permit for stormwater discharges associated with industrial activity (MSGP No. MAR05C102).

The individual permit was previously issued by Region 1 and Massachusetts Department of Environmental Protection ("MDEP") 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.

GE sought and obtained coverage under the multi-sector general permit on April 4, 2001, for stormwater discharges associated with industrial activity not covered under the individual permit. Pursuant to a Region 1 decision to cover all of GE's outfalls under an individual permit, GE submitted the appropriate individual permit application materials for the discharges to Region 1 and MDEP in July 2001. Thereafter, GE provided further information as requested by the Agencies in support of the development of a single individual permit.

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, which is being conducted in accordance with a consent decree in *United States, et al. v. General Elec. Co.*, No. 99-30225-MAP (D. Mass., Oct. 27, 2000), signed by GE, the United States, DEP and others (the "Consent Decree"). 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.¹

Region 1 and MDEP jointly issued a draft of the Permit on December 22, 2004. GE timely submitted substantial comments on this draft on March 25, 2005. As GE noted in its

¹ GE also submitted comments on the draft Permit raising the issue of conflicts with the Consent Decree. GE explained that, as a result of those conflicts, the Permit could be voided under the Consent Decree. Jurisdiction to resolve that dispute rests with the Federal District Court that oversees the settlement, not with this Board. Accordingly, GE reserves the right to invoke dispute resolution under the terms of the Consent Decree to raise the issues posed by that conflict.

comments, and as Region 1 confirmed in its responsiveness summary (a copy of which is attached as Exhibit C), 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.

ISSUES PRESENTED

1. Did Region 1 err in adding dry weather PCB limits for Outfalls 005, 006 and 009 to the final Permit, without first proposing such limits in the draft or providing the public with an opportunity to comment on them?
2. Did Region 1 err in adding dry weather PCB limits for Outfalls 005, 006 and 009 to the final Permit, without first performing, documenting or making available to the public its "reasonable potential" determination in support of those limits?
3. Did Region 1 err in adding dry weather PCB limits for Outfalls 006 and 009 to the final Permit, without first considering the need for schedules of compliance for those limits?
4. Did Region 1 err in imposing a dry weather discharge prohibition on Outfall 05A, even after GE specifically disclosed the potential for dry weather discharges from this Outfall in submittals to Region 1 that pre-dated issuance of the draft, as well as in comments on the draft Permit that Region 1 failed to address?
5. Are the PCB limitation and/or conditions applicable to the 64G treatment system impermissibly vague and unsupported by Region 1's administrative record, which contains directly conflicting statements about whether a limitation has been assigned or removed?
6. Did Region 1 err in requiring an ambient monitoring plan, which is premature pending further remediation of the GE Site, and providing for a permit re-opener without an adequate record basis?

7. Did Region 1 err in assigning footnote *13 to the PCB-related requirements in Part I.A.8, rather than footnote *14, which Region 1 assigned to all of the other wet weather discharge points?

8. Did Region 1 err in adding discharge sample collection and flow monitoring conditions applicable to Outfalls 005, 05A, 05B, 006, 06A, SR05 and 009, without first proposing them for public comment or considering the need for schedules of compliance?

9. Did Region 1 err in significantly increasing the monitoring frequencies at all outfalls, without first proposing them for public comment?

ARGUMENT

- 1. Region 1 erred by adding dry weather PCB limits for Outfalls 005, 006 and 009 to the final Permit, without first proposing such limits in the draft or providing the public with an opportunity to comment on them.**

The final Permit 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. These limits are not a “logical outgrowth” of the draft Permit. See *In re D.C. Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, 07-12, 2008 EPA App. LEXIS 15, *112 (EAB, March 19, 2008) (“a final permit that differs from a proposed permit and is not subject to public notice and comment must be a ‘logical outgrowth’ of the proposed permit.”), citing *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). As this Board has acknowledged:

The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft permit. In determining this, one of the most salient questions is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule. *Id.* (internal citations omitted).

In this proceeding, the answer to this “most salient” question is “yes.” Prior to issuance of the final permit, Region 1 never identified the need or potential for dry weather, water quality-

based PCB limits at these Outfalls. In fact, Region 1 had no dry weather discharge data on which to even begin to evaluate the need for such limits (*see* Section 2 below). Even assuming, for the sake of argument, that Region 1 had such data, the Agency never proposed them as a basis for limits or provided any opportunity for public review and comment on such a proposal.

If Region 1 had provided an opportunity for public review, GE would have submitted substantial comments focused, *inter alia*, on: (a) the absence of relevant dry weather discharge data; (b) the absence of a “reasonable potential” determination to support the new limits; (c) the absence of any consideration of the need for schedules of compliance for GE to achieve the new limits; (d) the preclusive effect of the Consent Decree, particularly as it relates to groundwater-related matters; and (e) the inequity of forcing GE to deal with dry weather discharges from the City of Pittsfield over which GE has no meaningful control.

In short, the new limits pose substantial new questions that GE has been precluded from raising. Although the reopening of a comment period on a draft permit is discretionary, this Board has not hesitated to remand permits to the Region to reopen the comment period when there has been no meaningful opportunity for comment. *D.C. Water and Sewer Auth.*, at *112-114, *citing In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 28-29 (EAB, Sept. 27, 2006) (remanding when the permit issuer did not provide an opportunity for public comment on a significant addition to the permit); *In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993) (remanding permit and directing Region to reopen public comment period when Region failed to provide public with opportunity to prepare an adequately informed challenge to a permit change); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 467 (EAB 1992) (remanding and directing Region to reopen public comment period when public was not given opportunity to comment on significant permit changes); *In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 797 (Adm’r 1992)

(explaining that despite the discretionary wording of the regulations, “there may be times when a revised permit differs so greatly from the draft version that additional public comment is required”).

Based on Region 1’s significant, unanticipated additions to the Permit here, GE respectfully submits that reopening of the comment period should be mandated by the Board.

2. Region 1 erred by adding dry weather PCB limits for Outfalls 005, 006 and 009 to the final Permit, without first performing, documenting or making available to the public its “reasonable potential” determination in support of those limits.

Before imposing new, water quality-based effluent limitations (“WQBELs”), like those for PCBs in dry weather discharges from Outfalls 005, 006 and 009, Region 1 must first perform a “reasonable potential” analysis, and then determine and document the need for such limitations on the basis of this analysis. Region 1 did nothing of the kind here.

The mandate to perform a “reasonable potential” analysis derives from 40 C.F.R. § 122.44(d)(1)(i), which requires Region 1 to determine whether a discharge “will cause, have the reasonable potential to cause, or contribute to, an excursion above any State water quality standard.” In making this determination, Region 1 must “use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.” 40 C.F.R. § 122.44(d)(1)(ii).

If Region 1 determines, through its “reasonable potential” analysis, that a WQBEL is required, then Region 1 must document this determination as a basis for calculating and imposing the WQBEL. *See In the Matter of Broward County, Florida*, 4 E.A.D. 705, 713 (EAB 1993) (“[EPA] must provide a detailed explanation of the factual basis for concluding that [the permittee’s] effluent has the reasonable potential for causing or contributing to a violation of

[water quality standards], thus requiring regulation in accordance with 40 C.F.R. § 122.44(d)(1)").

In this Permit proceeding, Region 1 never performed, documented or released for public review any "reasonable potential" analysis for PCBs in dry weather discharges from Outfalls 005, 006 and 009. More fundamentally, Region 1 lacked any dry weather discharge data on which to base such an analysis.

EPA has developed guidance for permit writers to use in developing WQBELs. *See Technical Support Document for Water Quality-Based Toxics Control*, EPA-505-2-90-001 (March 1991), <http://www.epa.gov/npdcs/pubs/owm0264.pdf>. In accordance with this guidance, if a permit writer chooses to impose a WQBEL *without* relevant discharge data, as was the case here, the permit writer must "provide adequate justification for the limit in its permit development rationale or in its permit fact sheet." *Id.* at p. 55. As EPA took pains to point out in its own guidance:

A clear and logical rationale for the need for the limit covering all of the regulatory points will be necessary to defend the limit should it be challenged. In justification of a limit, **EPA recommends that the more information the [permit writer] can acquire to support the limit, the better position the [permit writer] will be in to defend the limit if necessary.** In such a case, the [permit writer] may well benefit from the collection of effluent monitoring data prior to establishing the limit. *Id.* (emphasis in the original).

In short, without relevant dry weather discharge data, EPA's own guidance would have compelled Region 1 to clearly and adequately justify the new WQBELs in the administrative record. No such justification is present in the Permit, fact sheet or responsiveness summary. In fact, Region 1's record contains only two passing references to the basis for these new WQBELs, a self-serving and unsupported statement on p. 25 of the responsiveness summary, and another on p. 104, in which Region 1 suggested that it had "conducted a reasonable potential analysis for

all pollutants in the discharges from the GE Site and [had] included effluent limits on pollutants as necessary to ensure compliance with water quality standards.”

As this Board has recognized in other permit appeals, the lack of any documented “reasonable potential” analysis (including the evaluation of effluent variability as required by EPA’s regulations) is in itself “clear error and grounds for a remand.” *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004). This must be the result here, as well.

3. Region 1 erred by adding dry weather PCB limits for Outfalls 006 and 009 to the final Permit, without first considering the need for schedules of compliance for those limits.

Region 1 provided a schedule of compliance in footnote *15 of the Permit, which applies by its terms only to PCBs discharged from the 64G treatment plant (*see* Part I.A.1), as well as Outfall 005, which receives treated groundwater from both the 64G and 64T treatment plants (*see* Part I.A.3). By contrast, Region 1 provided no schedule of compliance at all for PCBs in dry weather discharges from Outfalls 006 and 009. At these Outfalls, there is no treatment comparable to the 64G or 64T treatment plants, but the WQBELs assigned by Region 1 are even more stringent.

Even assuming, for the sake of argument, that Region 1 had authority to impose dry weather PCB limits (which we dispute in Sections 1 and 2 above), it was irrational for Region 1 to allow a schedule of compliance at 64G and Outfall 005 but not Outfalls 006 and 009. In fact, there is nothing in the record provided with the final Permit to suggest that Region 1 even considered the need for a schedule of compliance at these Outfalls. *Id.* at 566 (“the administrative record must reflect the permit issuer’s ‘considered judgment,’ meaning that the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the crucial facts it relied upon in reaching those conclusions”).

MDEP's regulations squarely allow schedules of compliance as a matter of Massachusetts law. *See* 314 Mass. Code Regs. § 4.03 (1)(b)(2) (2008). And though MDEP's certification of the Permit under Section 401 of the Clean Water Act is silent on the issue, this silence cannot be considered dispositive. *See D.C. Water and Sewer Auth.*, at *58 (“a permit issuer ‘cannot rely exclusively on [a] section 401 certification, at least in a circumstance ... in which there is a body of information drawing the certification into question.’”), *citing In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 343 (EAB 2002).

Moreover, Region 1 retains primary responsibility, independent of MDEP's certification, to “prescribe conditions ... to assure compliance with the requirements of [§ 402(a)(1) of the Clean Water Act] *and such other requirements as [it] deems appropriate.*” 33 U.S.C. § 1342(a)(2) (emphasis added). While Region 1 has some measure of discretion here, that discretion is not unfettered. In other words, Region 1 must at least *consider* the need for “other requirements” in the permit, especially where, as here, EPA's own guidance calls for that consideration. *See EPA Permit Writers' Manual*, EPA 833-B-96-003 (Dec. 1996), <http://www.epa.gov/npdes/pubs/owm0243.pdf>, at p. 137 (noting that one justification for a special condition in a permit is “[t]o incorporate compliance schedules to provide the time necessary to comply with permit conditions”), and at p. 148 (authorizing compliance schedules in situations that include “new/revised water quality standards application,” as in the case here).

In short, Region 1 committed clear error by failing to provide a schedule of compliance for PCBs in dry weather discharges from Outfalls 006 and 009. The Board has frequently remanded permits where, as here, EPA's approach lacks sufficient support in the administrative record. *See In re City of Newburyport Wastewater Treatment Facility*, NPDES Appeal No. 04-06, 2005 EPA App. LEXIS 23, *22-23 (EAB Dec. 8, 2005), *citing In re Beckman Prod. Servs.*, 8

E.A.D. 302, 311 (EAB 1999) (remanding permit and requiring the Region to supplement the record with a “clearer rationale” for its permit determination); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997) (remanding permit where Region’s rationale for permit determination was not “clearly explained” in the record); *In re Chem. Waste Mgmt. of Ind. Inc.*, 6 E.A.D. 144, 154 (EAB 1995) (remanding permit and requiring Region to supplement record with a more “detailed explanation” for permit determination).

4. Region 1 erred by imposing a dry weather discharge prohibition on Outfall 05A, even after GE specifically disclosed the potential for dry weather discharges from this Outfall in submittals to Region 1 that pre-dated issuance of the draft, as well as in comments on the draft Permit that Region 1 failed to address.

In the draft Permit, Region 1 proposed a *new* dry weather discharge prohibition on Outfall 05A. In submittals to Region 1 that pre-dated issuance of the draft, as well as in response to the draft Permit, 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, Region 1 retained the dry weather discharge prohibition in the final Permit. In its responsiveness summary, Region 1 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* Region 1 responsiveness summary at p. 51. Region 1 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* Region 1

responsiveness summary 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).

Region 1 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 Region 1 had the authority to impose such a prohibition (which we dispute), Region 1 erred in not providing GE with a schedule of compliance within which to eliminate the potential for dry weather contributions.

5. **The PCB limitation and/or conditions applicable to the 64G treatment system are impermissibly vague and unsupported by Region 1's administrative record, which contains directly conflicting statements about whether a limitation has been assigned or removed.**

GE is entitled to fair notice of its compliance obligations. *See General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995); *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) ("The due process clause prevents...the application of a regulation that fails to give fair warning of the conduct it prohibits or requires."). However, the PCB limit assigned to the 64G treatment plant is impermissibly vague. In Part I.A.1 of the Permit, Region 1 identified 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."

Region 1's responsiveness summary is even more confusing. On p. 26 of this summary, Region 1 indicated that "[t]he PCB effluent limitation for 64G [had] been removed." However, on pp. 76 and 107, Region 1 indicated that it had in fact imposed a water quality-based limit of 0.014 µg/l on 64G.

Neither the Permit nor Region 1's supporting record provides GE with fair notice of its compliance obligations at 64G. Having created the confusion in the first instance, Region 1 must be directed to correct it.

6. Region 1 erred in requiring an ambient monitoring plan, which is premature pending further remediation of the GE Site, and providing for a permit re-opener without an adequate record basis.

In commenting on the draft Permit, GE explained why it would be premature for Region 1 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, Region 1 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* Region 1 responsiveness summary at pp. 3 and 22.

Instead of imposing such limits, Region 1 added conditions requiring (a) GE to develop an "ambient monitoring plan" and (b) Region 1 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 reopen 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," Region 1 cannot lock in an obligation to reopen the permit based on ambient data alone. Rather, Region 1 must have an "adequate record basis" that includes other information about the status and results of the remediation effort. *See* Region 1 responsiveness summary at p. 22 ("Consistent with [EPA's] Interim Permitting Policy, it is within EPA's authority to impose numeric limits whether or not remediation activities have concluded or other complexities have been fully resolved, *so long as there is an adequate record basis to do so.*") (emphasis added).

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). The Board should remand the Permit to Region 1 with directions to clarify that the Permit cannot be reopened unless and until there are adequate data and information -- specifically including the status and results of the remediation effort -- to allow Region 1 to determine background conditions and, in turn, the adequacy of the limits and conditions in the Permit.

7. Region 1 erred by assigning footnote *13 to the PCB-related requirements in Part I.A.8, rather than footnote *14, which Region 1 assigned to all of the other wet weather discharge points.

In its responsiveness summary, Region 1 made clear that it was *not* imposing wet weather, water quality-based discharge limits (*see* response 1, pp. 16-20). However, in Part I.A.8, which applies to wet weather discharges from Outfall 006, Region 1 assigned footnote *13 to PCBs. This footnote imposes a “total PCB monthly average compliance limit” of 0.065 µg/l.

It is evident that this footnote was assigned in error and should be replaced with footnote *14, which Region 1 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). This Board should remand that provision to Region 1 to make the necessary correction. *See In re Dominion Energy Brayton Point, L.L.C. (Formerly USGen New England, Inc.) Brayton Point Station*, 12 E.A.D. 490 (EAB 2006) (remanding a permit to Region 1 to correct a typographical error).

8. Region 1 erred in adding discharge sample collection and flow monitoring conditions applicable to Outfalls 005, 05A, 05B, 006, 06A, SR05 and 009, without first proposing them for public comment or considering the need for schedules of compliance.

The final Permit contains *entirely new* discharge sample collection and flow monitoring conditions applicable to Outfalls 005, 05A, 05B, 006, 06A, SR05 and 009, as more particularly described in the table below:

Permit Condition	Nature of Change/Addition
Part I.A.3- 005 Dry weather 24-hour composite sampler	The final Permit requires the collection of dry weather 24-hour composite samples for TSS and PCBs, as well as grab samples for pH, VOCs and SVOCs. The draft Permit did not require any dry weather sampling.
Part I.A.5- 05A Wet weather flow proportion sampler	The final Permit requires the collection of wet weather flow proportioned composite samples for TSS and PCBs, as well as grab samples for O&G and pH. The draft Permit required only grab samples.
Part I.A.6- 05B Wet weather flow proportion sampler	The final Permit requires the collection of wet weather flow proportioned composite samples for TSS and PCBs, as well as grab samples for O&G and pH. The draft Permit required only grab samples.
Part I.A.7- 006 Dry weather 24-hour composite sampler	The final Permit requires the collection of dry weather 24-hour composite samples for TSS and PCBs, as well as grab samples for pH, VOCs and SVOCs. The draft Permit did not require any dry weather sampling.
Part I.A.8- 006 Wet weather flow proportion sampler	The final Permit requires the collection of wet weather flow proportioned composite samples for TSS and PCBs, as well as grab samples for O&G and pH. The draft Permit required only grab samples.
Part I.A.9- 06A Wet weather flow proportion sampler	The final Permit requires the collection of wet weather flow proportioned composite samples for TSS and PCBs, as well as grab samples for O&G and pH. The draft Permit required only grab samples.
Part I.A.9- SR05 End of pipe flow meter	The final Permit requires a flow meter (“Recorder”) on Outfall SR05. The draft Permit required only an “Estimate” of flow. An estimate is typically a visual estimate at the end of pipe.
Part I.A.11- 009 Dry weather 24-hour composite sampler	The final Permit requires the collection of dry weather 24-hour composite samples for TSS and PCBs, as well as grab samples for pH, VOCs and SVOCs. The draft Permit did not require any dry weather sampling.
Part I.A.11- 009 End of pipe flow meter	The final permit requires a flow meter (“Recorder”) on Outfall 009 “at sampling point 009” (interpreted to mean end of pipe). The draft Permit required a flow meter (“Recorder”) “prior to discharging into Unkamet Brook” (interpreted to mean at GE's current monitoring point located approximately 100' upstream of end of pipe but after the combined discharges from OWS 119W and flow bypasses around OWS 119W).

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 every new condition cited above, 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.

GE submits that the new conditions are not logical outgrowths of the draft Permit. For this purpose, GE hereby incorporates the legal arguments set forth in Section 1 above. If Region 1 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.

Even assuming, for the sake of argument, that the new conditions were logical outgrowths of the draft, Region 1 erred by not considering the need for schedules of compliance. For this purpose, GE hereby incorporates the legal arguments set forth in Section 3 above. Region 1's error may expose GE to the untenable risk of noncompliance immediately upon the

Permit taking effect. GE submits that this alone is grounds for remand by this Board, so that Region 1 can consider and allow appropriate schedules of compliance.

9. Region 1 erred in significantly increasing the monitoring frequencies at all outfalls without first proposing them for public comment.

In the draft Permit, Region 1 proposed a monitoring regime that was specifically designed to be both “coordinated and cost-effective,” as required by EPA’s *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits*. See 61 Fed. Reg. 43,761 (August 26, 1996). Region 1’s particular rationale for this monitoring regime is set forth in the fact sheet, a copy of which is attached as Exhibit D.

Apparently in response to third party comments on the draft Permit, Region 1 significantly increased the monitoring frequency at all outfalls in the final Permit. See Region 1 responsiveness summary 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 contravenes the Agency’s own permitting guidance.

According to long-standing EPA guidance, “[e]ach stormwater permit should include coordinated and cost-effective monitoring program to gather necessary information to determine the extent to which the permit provides for attainment of applicable water quality standards and to determine the appropriate conditions or limitations for subsequent permits.” *Id.* at 43,761 col. 3; see also *EPA Permit Writers’ Manual*, at pp. 119-122. Recognizing that the amount and types of monitoring will vary permit-by-permit, “EPA encourages dischargers and permitting authorities to carefully evaluate monitoring needs and stormwater program objectives so as to select useful and cost-effective monitoring approaches.” See Memorandum from Robert Perciasepe, Assistant Administrator, to EPA Water Management Division Directors (Sept. 1, 1996), www.epa.gov/fedrgstr/EPA-WATER/1996/November/Day-06/pr-21053DIR/pr-

21053.html, at p. 7. Region 1 and GE did just that in developing and commenting on the draft Permit. Moreover, Region 1's rationale for the proposed monitoring regime is substantiated in the fact sheet, as recommended by EPA in its *Permit Writers' Manual*, at pp. 119-122.

Region 1 provided no similar rationale for the wholesale changes in the final Permit. Instead, Region 1 simply stated that it had “re-evaluated the frequency of sampling and [had] generally required increased sampling...” See Region 1 responsiveness summary at p. 75. This is clearly inadequate to address the many factors that EPA itself believes must be addressed (*i.e.*, effluent variability, design capacity, type of treatment, compliance record, cost of monitoring, frequency of the discharge and the number of samples used in developing the permit). See *EPA Permit Writers' Manual*, at pp. 119-122.

Moreover, by significantly increasing the monitoring frequencies in the final Permit without first providing for public comment, Region 1 denied GE the opportunity for meaningful review and input envisioned by EPA's guidance. If Region 1 had provided such an opportunity, GE would have submitted substantial comments focused, *inter alia*, on GE's robust existing data set, GE's compliance record, the adequacy of the previously proposed monitoring regime to meet Clean Water Act objectives and the imbalance between the burdens and benefits of significantly increased monitoring frequencies. While GE certainly appreciates the need for, and value of, monitoring, it is incumbent on Region 1 to develop a monitoring regime tailored to the particular permit and then give the permittee an opportunity to review and comment on it.

GE submits that the wholesale increase in monitoring frequencies at all outfalls is not a logical outgrowth of the draft Permit. For this purpose, GE hereby incorporates the legal arguments set forth in Section 1 above. Based on Region 1's significant, unanticipated changes

to the Permit, GE respectfully submits that reopening of the comment period should be mandated by the Board.

OTHER GROUNDS FOR REMAND

The Permit reflects a number of additional errors and/or oversights that merit remand to Region 1 for correction, if not review by this Board. Those errors include:

1. Permit, Part I.A.13: Outfalls YD6, YD7, YD8, YD9, YD14 have been closed, as previously reported by GE to Region 1. As a result, these Outfalls need to be removed from the Permit.

2. Permit, Attachment C, BMP 1.A: Outfall 007 has been closed, as previously reported by GE to Region 1. As a result, the reference to Drainage Basin 007 needs to be removed from the Permit.

3. Permit, Parts I.A.3, I.A.5, I.A.7, I.A.11 and I.A.13: Region 1 failed to rationally account for the potential discharge of fire suppression system water during *dry weather conditions* from Outfalls 05A, 005, 006, 009, YD10, YD11 and YD12. This failure would force GE to take substantial, otherwise unnecessary action to reroute this discharge or install holding tanks to collect it.

STAY OF CONTESTED AND NON-SEVERABLE CONDITIONS

In accordance with 40 C.F.R. §§ 124.16(a) and 124.60(b), the effect of the conditions contested herein must be stayed, along with any uncontested conditions that are not severable from those contested. GE submits that those non-severable conditions include:

1. BMP 1.C, as required by the Permit, Part I.C, and as set forth in the Permit, Attachment C. This condition is not severable from the contested dry weather PCB limits for Outfall 006. Those limits would compel GE to investigate the feasibility of eliminating dry weather flows from the City by rerouting the East Street Diversion Structure bypass line that

runs down Newell Street to SR05 and oil/water separator 64X. This existing bypass line and a second line running from East Street to oil/water separator 64X must be cleaned and video inspected pursuant to BMP 1.C. If this BMP is not stayed along with the contested dry weather PCB limits, then GE will be required to implement a BMP for lines that may ultimately be abandoned. This would involve substantial and potentially unnecessary expenditures, which alone are grounds to stay BMP 1.C under 40 C.F.R. § 124.60(b).

2. The PCB treatment capability study for the 64G treatment system, as set forth in the Permit, Part I.D. This study is not severable from the contested dry weather PCB limits for Outfalls 005 and 006. Those limits would compel GE to investigate the feasibility and practicality of rerouting dry weather flows from Outfalls 005 and 006 to the 64G treatment system. It would defy engineering logic to require GE to conduct the PCB treatment capability study unless and until GE is able to confirm influent flow volume and characteristics, both of which are dependent on the contested dry weather PCB limits for Outfalls 005 and 006.

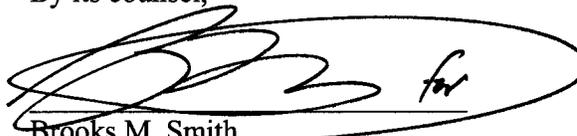
CONCLUSION

For the forgoing reasons, GE respectfully requests that the Environmental Appeals Board review, set-aside and remand to Region 1 the contested limitations and conditions in the Permit.

Respectfully submitted,

GENERAL ELECTRIC COMPANY

By its counsel,

A handwritten signature in black ink, appearing to read "BSM" followed by a flourish, is enclosed within a large, hand-drawn oval. To the right of the signature, the word "for" is written in a cursive script.

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GENERAL ELECTRIC COMPANY

Dated: November 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Review of the General Electric Company NPDES Permit Issued by EPA Region 1 in the matter of *In re: General Electric Company*, NPDES Permit No. MA0003891, Appeal No. 08-____ was served by United States First Class Mail on the following person, this 3rd day of November, 2008.

Mr. Robert Varney
Regional Administrator
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100
Mail Code: RAA
Boston, MA 02114-2023

A handwritten signature in black ink, appearing to read 'Brooks M. Smith for', enclosed within a hand-drawn oval.

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