

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL ELECTRIC CO.,

Defendant.

CIVIL ACTION NO. 1:05 CV-01270

CONSENT DECREE MODIFICATION No. 2

WHEREAS, the United States and General Electric Company (“Settling Defendant”) hereby agree to this Consent Decree Modification No. 2 (“Modification”) of the Consent Decree in this matter (“Consent Decree”), which was entered by this Court on November 2, 2006. Pursuant to the Consent Decree, Settling Defendant was required, among other things, to perform response actions to address sediments contaminated with polychlorinated biphenyls (“PCBs”) at the Hudson River PCBs Superfund Site (“Site”), and to reimburse the United States for certain Site-related response costs.

WHEREAS, pursuant to the Consent Decree, Settling Defendant agreed to perform Phase the first year (“Phase 1”) of dredging to remove PCB contaminated sediments at the Site, with an option to perform Phase 2, which is the remainder of the dredging project.

WHEREAS, in 2009 and pursuant to the Consent Decree, Settling Defendant completed construction of a Sediment Processing/Transfer Facility in Fort Edward, New York needed for the removal of PCB-contaminated sediment from the Hudson. In 2009 Settling Defendant also completed Phase 1.

WHEREAS, in 2010 and pursuant to the Consent Decree, Phase 1 dredging was reviewed by an independent peer review panel, which evaluated whether to recommend changes to the Engineering Performance Standards that had been established by the U.S. Environmental Protection Agency (“EPA”) for Phase 1. In September 2010, the peer review panel issued a report in which the panel recommended certain changes to the Engineering Performance Standards for Phase 2.

WHEREAS, after review and discussion with Settling Defendant and stakeholder groups, on December 17, 2010, EPA issued changes to the Engineering Performance Standards and other aspects of the project (the "Phase 2 Revisions").

WHEREAS, the Phase 2 Revisions are contained in the following documents, which are attached to this Modification at Appendix 1 and which, in the case of the SOW (as defined below) and its attachments, are incorporated into the Consent Decree as set forth in the modification to Paragraph 129:

1. Revised Engineering Performance Standards for Phase 2;
2. Technical Memorandum, Quality of Life Performance Standards Phase 2 Changes;
3. December 2010 Statement of Work ("SOW") for Remedial Action and Operations, Maintenance and Monitoring, which includes the following attachments:
 - a. Attachment A: Critical Phase 2 Design Elements;
 - b. Attachment B: Phase 2 Remedial Action Monitoring Scope;
 - c. Attachment C: Phase 2 Performance Standards Compliance Plan Scope;
 - d. Attachment D: Phase 2 Remedial Action Community Health and Safety Program Scope;
 - e. Attachment E: Operation, Maintenance, and Monitoring Scope for Phase 2 of the Remedial Action; and
 - f. Attachment F: Certification Unit Completion Approval/Certification Forms.

WHEREAS, on December 31, 2010, Settling Defendant formally notified EPA that it would perform Phase 2 pursuant to the Consent Decree.

WHEREAS, the Phase 2 Revisions incorporate the concept of "adaptive management," which the peer review panel recognized as an important factor in being able to adapt to new information. The Phase 2 Revisions allow changes to be made through adaptive management as the cleanup proceeds in order to achieve the expected benefits of the project.

WHEREAS, EPA and Settling Defendant have agreed to date to certain limited modifications to the Phase 2 Revisions, which modifications are incorporated into work plans and other technical documents that have been approved by EPA for the first year of Phase 2; and it is possible that EPA will approve additional changes through adaptive management as the project proceeds.

WHEREAS, EPA and Settling Defendant believe that certain narrow modifications of the Consent Decree are appropriate in order to account for certain aspects of the Phase 2 Revisions and Settling Defendant's performance of Phase 2.

WHEREAS, this Modification:

- (i) revises Consent Decree Paragraph 20.b and certain defined terms in Section IV of the Consent Decree to provide that the Phase 2 Engineering Performance Standards and Phase 2 Quality of Life Performance Standards may be modified through adaptive management;
- (ii) revises the definition of "RA Performance Standards" to reflect the Phase 2 Revisions;

- (iii) revises Consent Decree Paragraphs 20.b and 83 to allow Settling Defendant to invoke dispute resolution over changes that EPA makes to the Phase 2 Engineering Performance Standards and Phase 2 Quality of Life Performance Standards through adaptive management;
- (iv) revises Consent Decree Paragraph 83 to add certain limitations on Settling Defendant's ability to invoke dispute resolution;
- (v) makes administrative changes to certain document distribution requirements of Consent Decree Paragraph 125; and
- (vi) revises the definition of "Appendix B" in Consent Decree Paragraph 129 to reflect that a new Statement of Work and attachments have been issued for Phase 2.

WHEREAS, this Modification is made by agreement between EPA and Settling Defendant pursuant to Paragraph 132 of the Consent Decree.

WHEREAS, this Modification does not fundamentally alter the basic features of the remedy selected in the ROD, within the meaning of 40 C.F.R. § 300.435(c)(2)(ii), and therefore, pursuant to Paragraph 132 of the Consent Decree, the Court's approval is not required with respect to this Modification.

WHEREAS, the State of New York has been provided with a reasonable opportunity to review and comment on this Modification.

NOW, THEREFORE, the Consent Decree is modified as follows:

1. Consent Decree Section IV (Definitions)

- a. The following sentence is added at the end of the definition of "Phase 2 Engineering Performance Standards":

These Phase 2 Engineering Performance Standards may be modified through adaptive management, pursuant to, and subject to the limitations and considerations included in, Section 7 (Adaptive Management) of the December 2010 SOW (Appendix B of this Consent Decree).

- b. The following sentence is added at the end of the definition of "Phase 2 Quality of Life Performance Standards":

These Phase 2 Quality of Life Performance Standards may be modified through adaptive management, pursuant to, and subject to the limitations and considerations included in, Section 7 (Adaptive Management) of the December 2010 SOW (Appendix B of this Consent Decree).

- c. The definition of "RA Performance Standards" is replaced with the following:

"RA Performance Standards" shall mean the Phase 1 Engineering Performance Standards, Phase 2 Engineering Performance Standards, Phase 1 Quality of Life Performance Standards, and Phase 2 Quality of Life Performance Standards; the

Remedial Action Objectives and Remediation Goals set forth in Section 9.1 of the ROD; and the Applicable or Relevant and Appropriate Requirements (“ARARs”) set forth or referred to in Tables 14-1 through 14-3 of the ROD (with the exception of those ARARs that were waived in the ROD based on technical impracticability (*see* ROD Section 14.2)). RA Performance Standards also include: (a) for Phase 1, the requirements set forth in the documents entitled “Substantive Requirements Applicable to Releases of Constituents not Subject to Performance Standards,” “Substantive Requirements of State Pollutant Discharge Elimination System Permit for Potential Discharge to the Champlain Canal (land cut above Lock 7),” and “Substantive Requirements of State Pollutant Discharge Elimination System Permit for Potential Discharge to the Hudson River,” all of which EPA provided to Settling Defendant on January 7, 2005; and (b) for Phase 2, the requirements set forth in those documents listed in part (a), above, including the modifications to the “Substantive Requirements Applicable to Releases of Constituents not Subject to Performance Standards” set forth in Section 6 of the Phase 2 Engineering Performance Standards and in the December 2010 Remedial Action Monitoring Scope and December 2010 Performance Standards Compliance Plan Scope.

2. In Consent Decree Paragraph 20 (Modification of the SOW), subparagraph b. is replaced with the following:

- b. If Settling Defendant notifies EPA, pursuant to subparagraph 15.c., above, that Settling Defendant will implement Phase 2 pursuant to this Consent Decree, and if during Phase 2 EPA determines that modification to the work specified in the SOW and/or in the work plans developed pursuant to the SOW is necessary to achieve and maintain the Phase 2 Engineering Performance Standards or the Phase 2 Quality of Life Performance Standards, or if EPA determines that modification of the Phase 2 Engineering Performance Standards or the Phase 2 Quality of Life Performance Standards is appropriate, EPA may require that such modification be incorporated in the SOW and/or such work plans, provided, however, that a modification may only be required pursuant to this subparagraph to the extent that it is consistent with, and would not materially expand, the scope of the remedy selected in the ROD, and provided further that Settling Defendant may dispute a modification of the Phase 2 Engineering Performance Standards or the Phase 2 Quality of Life Performance Standards pursuant to and subject to the limitations and considerations in Paragraph 83 of this Consent Decree. Modifications to the Phase 2 Engineering Performance Standards or the Phase 2 Quality of Life Performance Standards shall be made pursuant to, and subject to the limitations and considerations included in, Section 7 (Adaptive Management) of the December 2010 SOW (Appendix B to this Consent Decree). Any modification required by EPA under this subparagraph may not require the use of equipment or technology that is not commercially available or that is not consistent with standard engineering and construction practices.

3. The first paragraph of Consent Decree Paragraph 83 is replaced with the following:

83. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action, any disputes regarding any adaptive management changes that are required or made by EPA pursuant to Section 7 (Adaptive Management) of the December 2010 SOW (Appendix B of this Consent Decree), including but not limited to any

changes that EPA makes to the Phase 2 Engineering Performance Standards, Phase 2 Quality of Life Performance Standards, or any changes or additions to a design document, work plan or other document to implement an adaptive response, and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree. Nothing in this Consent Decree, however, shall be construed to allow any dispute by Settling Defendant regarding the validity or appropriateness of (a) the ROD's provisions; (b) the RA Performance Standards; (c) EPA's right to make changes to the Phase 2 Engineering Performance Standards or the Phase 2 Quality of Life Performance Standards, pursuant to, and subject to the limitations and considerations included in, Section 7 (Adaptive Management) of the December 2010 SOW (Appendix B to this Consent Decree); (d) any EPA decision to raise one or both of the Percentage Capping Limits set forth in Section 3.4 of EPA's *Revised Engineering Performance Standards for Phase 2*; (e) EPA's calculation of the *pro rata* reduction to make to the maximum limit on capping pursuant to footnote 10 of the *Revised Engineering Performance Standards for Phase 2* in the event that EPA, in its discretion, chooses to raise the backfilling threshold from an average concentration of 1 mg/kg Tri+ PCBs to 3.0 mg/kg Tri+ PCBs; (f) a refusal by EPA to make a GE-requested modification to a Phase 2 Engineering Performance Standard or Phase 2 Quality of Life Performance Standard; (g) a refusal by EPA to allow a GE-requested third dredging pass in an area containing less than 500 mg/kg Total PCBs; (h) any plan, report or other document which was finalized under the RD AOC prior to the effective date of this Consent Decree, or under the Sampling AOC; (i) EPA's decision regarding the location(s) for the Sediment Processing/Transfer Facility(ies) to be used for the Remedial Action; (j) EPA's decision whether, or how, to incorporate into the EPA Phase 1 Evaluation Report any of Settling Defendant's requested changes and/or additions to that report; (k) EPA's choice of the final charge questions under subparagraph 14.e., above; (l) EPA's decision pursuant to subparagraph 15.b., above, regarding changes, if any, to the Phase 1 Engineering Performance Standards, the Phase 1 Quality of Life Performance Standards, the SOW or the scope of Phase 2; (m) EPA's choice of the Peer Review Selector pursuant to subparagraph 14.c., above; or (n) any EPA determination pursuant to Paragraph 21, above (Evaluation of Benefits of Remedy); provided, however, that GE may dispute changes that EPA requires or makes to the Phase 2 Engineering Performance Standards and Phase 2 Quality of Life Performance Standards through adaptive management, but only if the dispute of such changes would not contravene the limitations on disputes set forth in clauses (c), (d), (e), (f) and (g), above, and provided further, however, that in any dispute that is allowed under this Consent Decree, Settling Defendant may dispute EPA's *interpretation* of the items listed in clauses (a), (b), (h), (k) and (l), above. A dispute regarding such an EPA interpretation shall be resolved under the procedures set forth in this Paragraph 83.

4. Consent Decree Paragraph 125, as modified by Consent Decree Modification No. 1, is revised as follows:

a. Under the heading "As to the United States or EPA":

i. The following is added:

Two paper copies (one unbound) and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports and one paper copy of all other written communications shall be sent to:

Director, Hudson River Field Office
U.S. Environmental Protection Agency, Region 2
421 Lower Main St.
Hudson Falls, NY 12839

- ii. For submissions to the Chief, New York Remediation Branch, the phrase "Three paper copies (one unbound) and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports" is replaced with the phrase "One paper copy and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports";
- iii. For submissions to EPA's Hudson River PCBs Superfund Site Attorney, the phrase "In addition, one paper copy of all work plans, technical reports and other written communications" shall be replaced with the phrase "In addition, one electronic copy (on CD-ROM or DVD) of all work plans and technical reports and one paper copy of all other written communications";

b. Under the heading "As to the State and the Federal Trustees for Natural Resources:"

- i. For submissions to the Director, Division of Environmental Remediation, New York State Department of Environmental Conservation, the phrase "Three paper copies (one unbound) and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports" shall be replaced with the phrase "One paper copy and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports";
- ii. For submissions to the National Oceanic and Atmospheric Administration and the United States Fish and Wildlife Service:

1. The phrase “Two paper copies and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports” is replaced with the phrase “One paper copy and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports”;
2. The following is added above “Lisa Rosman, Coastal Resource Coordinator, NOAA, 290 Broadway, 18th Floor, New York, NY 10007-1866”:

Alyce Fritz, Chief
NE/Mid-Atlantic Branch
NOAA
NOS OR&R Assessment and Restoration Division
7600 Sand Point Way, NE
Building 4 (N/ORR2)
Seattle, WA 98115

- iii. For submissions to the Director, Bureau of Environmental Exposure Investigation, New York State Department of Health, the phrase “Two paper copies and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports (except for engineering plans and drawings)” is replaced with the phrase “One paper copy and one electronic copy (on CD-ROM or DVD) of all work plans and technical reports (except for engineering plans and drawings)”;
5. In Paragraph 129 of the Consent Decree, the definition of “Appendix B” is replaced with the following:

“Appendix B” is: (a) with respect to Phase 1, the SOW as attached to this Consent Decree on the Effective Date, and as modified by Consent Decree Modification No. 1, including the following attachments: Critical Phase 1 Design Elements; Remedial Action Monitoring Scope; Performance Standards Compliance Plan Scope; Remedial Action Community Health and Safety Program Scope; Operation, Maintenance, and Monitoring Scope; and Certification Unit Completion Approval/Certification Forms; and (b) with respect to Phase 2, the SOW as modified in accordance with Paragraph 15.b of this Consent Decree, and including the following attachments: Critical Phase 2 Design Elements; Remedial Action Monitoring Scope for Phase 2; Phase 2 Performance Standards Compliance Plan Scope; Phase 2 Remedial Action Community Health and Safety Program Scope; Operation, Maintenance, and Monitoring Scope for Phase 2 of the Remedial Action; and Certification Unit Completion Approval/Certification Forms (as revised December 2010).

5. The effective date of this Modification shall be the date on which the United States files this Modification with the Court. If for any reason the United States does not file this Modification with the Court, then the mutual obligations of the United States and Settling Defendant set forth in this Modification shall be voided.

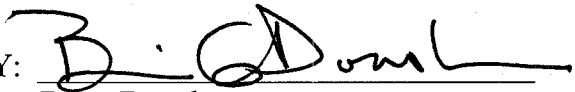
6. The Consent Decree modifications set forth herein are incorporated into, and are an enforceable part of, the Consent Decree. Except as set forth expressly herein, the Consent Decree, as modified by Consent Decree Modification No. 1, is unchanged.

THE UNDERSIGNED PARTY enters into this Modification No. 2 with respect to the Consent Decree in the matter of *United States v. General Electric Company*, Civ. No. 1:05-CV-1270 (N.D.N.Y.) relating to the Hudson River PCBs Superfund Site.

FOR THE UNITED STATES OF AMERICA

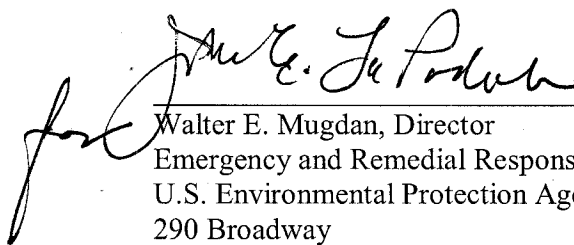
ROBERT G. DREHER
PRINCIPAL DEPUTY ASSISTANT ATTORNEY
GENERAL
ENVIRONMENT and NATURAL RESOURCES DIV.

8/12/11
Date

BY: 
Brian Donohue
Senior Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

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7/21/11
Date



Walter E. Mugdan, Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, N.Y. 10007-1866

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FOR GENERAL ELECTRIC COMPANY

7/20/2011
Date

A. R. Klee

Name: Ann R. Klee

Title: Vice President
Corporate Environmental Programs
General Electric Company