



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
NEW ENGLAND REGION  
ONE CONGRESS STREET, BOSTON, MA 02114-2023**

Via Electronic and U.S. Mail

February 5, 2009

Ian A. Bowles, Secretary of Energy and Environmental Affairs  
Attn: Liz Sorensen, ACEC Program  
Dept. of Conservation and Recreation  
251 Causeway Street, Suite 600  
Boston, MA 02114

Dear Secretary Bowles:

Thank you for the opportunity to provide comments on the Upper Housatonic River Area of Critical Environmental Concern ("ACEC") nomination. EPA shares the goal of the nominators to increase awareness and to protect the natural and cultural resources in the unique area that is the Upper Housatonic River. After discussing this matter with EOEEA, DCR and DEP staff and listening to the citizens of the Berkshires, EPA is providing our comments on the proposed nomination.

For over two decades EPA has spent considerable time and resources evaluating the effect of contaminants on the Housatonic River and its ecosystem. The peer-reviewed assessments of risks posed by the contamination demonstrate unacceptable ecological and human health risks. Throughout our work on the River, EPA's key concern has been the protection of public health and the health of the river and floodplain ecosystem.

EPA believes it is critical that any cleanup actions avoid, minimize, or mitigate negative impacts on environmentally sensitive areas and plant and animal species. We also believe that it is critical to restore the river and floodplain to its existing character to the greatest extent possible. We welcome the ideas and energy of the public, and EOEEA, in ensuring that happens.

To this end, for the last ten years, EPA, in consultation with MassDEP, has been directing a large-scale cleanup effort, requiring General Electric Company ("GE") to address PCB contamination from its Pittsfield facility in River sediments, riverbank and floodplain soils, contaminated upland areas, and other potential sources of contamination to the River. This work is being performed pursuant to a Consent Decree ("Decree"), signed by EPA, GE, the Commonwealth, the state of Connecticut, and other parties, which was subsequently approved by the U.S. District Court.

As required by the Decree, an area that has undergone extensive investigation and for which potential remediation is now being considered is a portion of the River known as the “Rest of River”, which includes the Housatonic River and associated floodplain downstream from the confluence of the East and West Branches. A significant portion of the Rest of River coincides with the area under consideration for the ACEC determination. The Decree provides for a specific process and set of decision-making criteria for EPA to select the appropriate corrective measures for the Rest of River. The Decree also requires GE to implement the corrective measures selected by EPA, subject to the legal right of GE and the public to appeal the EPA cleanup determination. EPA’s responsibilities under the Decree, ordered by the federal court, underlie EPA’s comments outlined below.

1. Both the Commonwealth and EPA recognize that certain challenges would accompany the designation of an ACEC for an area covered by the cleanup process prescribed in the Decree. If the designation goes forward, we will work closely with the Commonwealth and the community to address such challenges. It would not be in either of our Agencies’ interest for the ACEC to be used to delay or even preclude remediation, habitat protection, or restoration activities that we determine necessary to protect human health and the environment.

I am encouraged that past implementation of the ACEC program appears to demonstrate EOEEA’s ability to accommodate potentially competing, important environmental obligations. Among the 29 ACEC designations historically, several have explicitly stated that the designation will be used to facilitate other cleanup activities within the geographic boundaries, or that the designation is by no means intended to affect other projects of broad public benefit. Examples include the following:

A. The 1988 Rumney Marshes ACEC designation included a number of different exclusions or exemptions from the ACEC due to other publicly-beneficial projects ongoing or planned, including the following:

i. Three “exclusions” from the ACEC designation for dredging projects in Belle Isle Creek, Saugus River, and Pines River. EOEA, the predecessor to EOEEA, determined that if any of the dredging projects met the threshold for a “waiver” from the ACEC designation’s prohibition on dredging, the project could proceed. A main criterion for the waiver is “providing the broadest possible public benefit”, which could be applied to sediment removal necessary to protect public health or the environment;

ii. Two “exemptions” for projects to reduce or control flood damage in the Saugus River, and in Sales and Green Creeks. EOEA’s exemption of these projects relied in part on the fact that the projects had potentially broad public benefits and also that they would be closely scrutinized by environmental regulatory agencies.

While we acknowledge that the state environmental regulations may have changed since that designation, it remains important to note that EOEEA has demonstrated its ability to fine-tune the ACEC designation for projects with broad public benefit, which are being closely scrutinized by regulatory agencies.

B. Prior to the 1992 designation of the Fowl Meadow and Ponkapoag Bog ACEC, MassDEP, among other agencies, had requested an exemption from the ACEC designation for sixteen state-regulated hazardous waste sites within the ACEC geographic boundaries. In the determination, EOEA stated as follows: “[i]n finding that ACEC designation is appropriate because of threats associated with inappropriate use, I recommend that this ACEC designation be implemented to facilitate and expedite the clean-up of hazardous waste sites located within the ACEC by the DEP and authorized parties to protect public and to restore and preserve the resources of the ACEC.”

C. The 1995 designation of the Neponset River Estuary ACEC includes very similar language to the Fowl Meadow and Ponkapoag Bog determination to respond to public comments about excluding from the ACEC the thirteen hazardous waste sites within its boundaries.

These examples demonstrate the ability of EOEEA to use any ACEC designation in a manner that does not serve to delay or eliminate other necessary public improvement projects. We urge you to ensure that any ACEC designation includes language similar to that referenced above, to emphasize that this ACEC designation shall be implemented to facilitate and expedite the cleanup of the Housatonic Rest of River under the Decree.

2. It is important to emphasize that EPA has not yet selected or even proposed any corrective measures for the Rest of River. While over the past ten years EPA has conducted extensive studies including human health and ecological risk assessments and river modeling (all of which underwent external Peer Review), to date, the only analysis of cleanup alternatives is the March 2008 Corrective Measures Study Report (“CMS”) submitted by GE, which GE is currently supplementing at EPA’s direction. The CMS includes eight alternatives for addressing risks posed by River sediment, seven alternatives for addressing risks posed by the River floodplain, and five alternatives for treatment or disposition of materials removed from the River or its floodplain.

EPA has reviewed the components of those alternatives, and compared them to regulations that the Commonwealth has indicated are related to an ACEC designation. At this point in EPA’s decision-making process, we cannot predict with certainty the exact components of any remedial alternative that is ultimately selected. Without conceding any applicability of any ACEC-related regulation to the ongoing Consent Decree process, EPA, based on discussions with EOEEA, DCR and DEP staff and review of the regulations identified by EOEEA, has the following specific comments:

A. Fill or structures: GE’s CMS includes sediment remediation alternatives that incorporate placement of clean fill in the River, both in conjunction with and without sediment removal. In performing the PCB remediation for the upstream 1.5 Mile Reach, it was necessary for EPA to place structures, including temporary roads, abutments, river crossings, a bridge, and a dam in the River to properly perform the cleanup. Such measures may be necessary for Rest of River, and if so, will clearly need to be implemented in a manner that recognizes the unique resources involved. Our understanding from discussions with the Commonwealth is that to the

extent fill or structures are necessary to implement EPA's determination for Rest of River corrective measures, that such fill or structures would not be restricted from placement. EPA asks that you clarify this point in any formal ACEC designation.

B. Improvement dredging: The proposed ACEC boundary includes the entire river channel from upstream of the confluence of the East and West Branches of the River to a point over 2 miles downstream of Woods Pond. GE's CMS includes 6 sediment alternatives (SED 3-8) with excavation and/or dredging of river sediment within the ACEC boundary. To the extent that EPA determines that river sediment and/or bank soil removal is necessary to protect human health or the environment, or to satisfy other decision criteria in the court-ordered Rest of River Corrective Action Permit ("Permit"), such river sediment and bank soil removal would clearly be for fishery and wildlife enhancement. PCB levels in fish and waterfowl in and along the Housatonic River are very high. The human health and ecological risk assessments completed and peer-reviewed for the Rest of River concluded that the risks of fish consumption were unacceptable, and that a number of ecological endpoints had unacceptable risks. EPA requests that you clarify that any river sediment and/or bank soil removal required in the Permit remediation decision would be permissible as fishery and wildlife enhancement.

C. Solid waste management facilities: GE's CMS includes five "treatment and disposition" alternatives. In addition, each active sediment or floodplain remediation alternative would require some management of waste within the current boundaries of the proposed ACEC. In any formal ACEC designation, EPA recommends you clarify that a restriction on placement of solid waste management facilities within ACECs would not apply to facilities required as part of EPA's determination for Rest of River corrective measures.

D. Wetlands: The ACEC regulations share EPA's focus on wetlands and habitat protection, and increase the scrutiny that actions that affect wetlands must undergo. In GE's CMS, the active sediment remediation alternatives, the active floodplain remediation alternatives, and treatment and disposition alternatives, may include some alteration of wetlands. It is EPA's interpretation, that any wetland alteration required as part of EPA's Rest of River corrective measures determination would be allowed, for example, as a "limited project" under State law. EPA requests that you clarify that an ACEC designation would not prohibit wetlands alteration required by a Rest of River corrective measures determination.

E. Confined aquatic disposal facilities: GE's CMS includes confined aquatic disposal as one of GE's five Treatment and Disposition alternatives. EPA recommends you clarify the Commonwealth's position regarding any confined aquatic disposal facility required as part of EPA's determination for Rest of River corrective measures.

F. Intermediate facilities, sites or locations that are used to manage material prior to its ultimate reuse or disposal (e.g., stockpiling, or barge, truck or train loading and unloading): The alternatives calling for active remediation of the Rest of River area necessarily must include intermediate locations to organize and arrange for transport of materials remediated. In that event, EPA would ensure that the activity would include restoration of any areas used

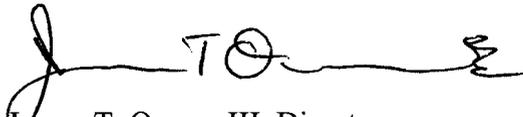
temporarily, so that there would be no permanent adverse impact on the Rest of River area. Therefore, EPA recommends that you clarify that a restriction on intermediate facilities would not apply to any intermediate facility required as part of EPA's determination for Rest of River corrective measures, or that such impacts during the cleanup process would not be considered permanent adverse impacts on the ACEC, provided, of course, that the intermediate facility is not permanent, i.e. is removed after project completion.

G. Massachusetts Environmental Policy Act ("MEPA"): it is EPA's understanding that given the circumstances of the federal Consent Decree, and the implementation of the RCRA Facility Investigation, human health and ecological risk assessments, modeling and Corrective Measures Study, that the Commonwealth would not assert that separate MEPA requirements apply. Please confirm that understanding.

As noted above, EPA has not yet proposed any remedy for Rest of River. To the extent that an ACEC requirement conflicts with, or is inconsistent with those Decree responsibilities entered into by the Commonwealth and EPA, EPA reserves its right to assert that the Decree requirements must be followed and/or that ACEC requirements do not constitute applicable or relevant and appropriate requirements.

Thank you for your consideration of EPA's comments. I am sure that we mutually recognize the importance of proper cleanup and restoration of the Upper Housatonic River, and hope that EPA and the Commonwealth can continue to work together to make that goal a reality. Please contact me at (617) 918-1201 if you have questions regarding these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "J. T. Owens III", with a stylized flourish at the end.

James T. Owens III, Director  
Office of Site Remediation and Restoration

cc: Ian A. Bowles, Secretary of Energy and Environmental Affairs  
Liz Sorenson, ACEC Program, MA Department of Conservation and Recreation  
Laurie Burt, Commissioner, MassDEP  
Lucy Edmondson, Deputy Commissioner, MassDEP  
Mike Gorski, Director, Western Regional Office, MassDEP  
Ira Leighton, EPA  
Rich Cavagnero, EPA  
Jim Murphy, EPA  
Dean Tagliaferro, EPA  
Susan Svirsky, EPA  
Tim Conway, EPA