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

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

STATE OF CONNECTICUT'S RESPONSE BRIEF

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(b)(4), the State of Connecticut ("Connecticut") respectfully submits this response to General Electric Company's ("GE" or "Petitioner") Petition for Review ("Petition") of RCRA Corrective Action Permit No. MAD002084093 ("the Permit," A.R. 593921, a copy of which is attached hereto as Attachment 1), [1] which was issued to the Petitioner on October 24, 2016, by the United States Environmental Protection Agency, Region 1 ("EPA" or "Region"). The Permit at issue in this proceeding authorizes and obligates GE to perform the selected Rest of River Remedial Action. The Petition was filed on November 23, 2016.

The Petitioner challenges, on various grounds, the following permit provisions:

(1) The requirement that all removed sediments and soils be sent to an off-site disposal facility (Condition II.B.5);

(2) and (3) The remedies for the Woods Pond and Rising Pond impoundments (Conditions II.B.2.e and 2.g);

(4) and (5) The overall Rest-of-River Remedial Action (Conditions II.B.2.a-II.B.2.g and II.B.3);

(6) The Downstream Transport and Biota Performance Standards (Conditions II.B.1.a and II.B.1.b);

(7) The requirements for GE to conduct response actions if a third party undertakes projects on or along the river or in the floodplain (Conditions II.B.2.j.(l)(c) and (2)(e), II.B.2.k, Il.B.6.b.(1) and (2)(b) and (c), and II.B.6.c);

[1] When cited for the first time, documents are cited by reference to the Administrative Record. Thereafter, documents are cited by title or as abbreviated in their initial reference. Especially relevant documents or excerpts of documents are attached hereto (as noted within the brief) and field herewith.

(8) The requirement to ensure proper inspection and maintenance of certain dams (Conditions II.B.2.j.(l)(a) and (2)(b)); and

(9) The MESA/Conservation Net Benefit Plan requirement (Modified Permit, Attachment C at C-16).

Of the provisions contested by the Petitioner, Connecticut provides its response with respect to the following: the Downstream Transport and Biota Performance Standards (Issue 6), the legally permissible future work (Issue 7) and ensuring dam inspection and maintenance (Issue 8). Contrary to the Petitioner's assertions, the Region was well within its authority to establish these requirements (assuming all of these issues are reached on the merits in this proceeding). For the reasons discussed below, the Environmental Appeals Board ("EAB") should deny and dismiss at least these portions of the Petition. To the extent Connecticut does not address all of the issues raised in the Petition; this does not mean that Connecticut is in agreement with the Petitioner on the other issues. Rather, Connecticut believes that these other issues are better addressed by the Region and/or the Commonwealth of Massachusetts ("Massachusetts") at this juncture. [2]

II. STATEMENT OF THE CASE

A. Factual and Procedural Background

From the early 1900s, GE operated a large-scale industrial facility in Pittsfield, Massachusetts. From 1932 through 1977, General Electric manufactured and serviced electrical

[2] Connecticut has not addressed Petitioner's Issues (4) and (5) challenging the "overall Rest-of-River Remedial Action" because the Region is in the best position to defend the overall remedy set forth in the Permit. Connecticut does note, however, that this objection centers only on harm and risk within the footprint of the active remediation and does not factor in the harm to downstream receptors from not taking an action in the source areas that EPA did have to consider in fashioning an overall remedy. As noted within the discussion below in Section III, the Region should receive deference on issues that are technical in nature and supported by the administrative record, which the Region will demonstrate in its response that this remedy is.

transformers containing polychlorinated biphenyls ("PCBs'). Years of PCB use led to significant contamination at GE's Pittsfield facility as well as downstream within the Housatonic River watershed. The Housatonic River is approximately 150 miles from its headwaters on the East Branch in Hinsdale, Massachusetts and flows through Connecticut into Long Island Sound. As a consequence of the contamination, EPA proposed the GE site to the Superfund National Priorities List (NPL) in 1997. Thereafter, EPA, Massachusetts, Connecticut, the City of Pittsfield, the Pittsfield Economic Development Authority, and GE entered into negotiations to reach a comprehensive settlement to address contamination at and from the GE facility. These negotiations resulted in a Consent Decree ("CD"). (A.R. 9420) between the United States, the State of Connecticut, the Commonwealth of Massachusetts as Plaintiffs, and General Electric Company as Defendant, which was approved by the court on October 27, 2000.

The CD, requires GE to complete response actions at several separate areas contaminated by GE's PCBs (CD §§ VI-IX), to reimburse the Plaintiffs for their costs incurred in responding to the PCB threats (CD § XX), and to provide compensation and perform activities to address natural resource damages (CD § XXI). The CD also provides GE with covenants not to sue by the Plaintiffs, and recognizes the protection for GE from contribution actions based on GE's commitment to perform the cleanups (CD §§ XXVI (Covenants by Plaintiffs) and XXIX Contribution Protection). The subject of this dispute is the "Rest of River" area,

Under the CD, the cleanup is addressed in three stages. The first stage involved the first half-mile cleanup area adjacent to GE's former Pittsfield plant and was completed by GE in 2002. The second stage, completed in 2007, addressed the next one and one-half miles and was cleaned up under EPA's direction through a cost-sharing agreement with GE. The third stage is referred to as the "Rest of River." This stage of the clean-up (commencing at the end of the 1.5

mile cleanup completed in 2007) encompasses the 130 miles from the confluence of the East and West branches of the Housatonic, through Massachusetts and Connecticut, to Derby/Shelton Dam in Connecticut. *See* Attachment 2, Rest of River Figure 1, excerpt from EPA Statement of Position, A.R. 586286 ; *see also* CD[3] at page 33; Permit at page 3. It is this third stage of the cleanup that is addressed in the Permit that is the subject of this Petition; the CD provides that a RCRA Corrective Action Permit governs the Rest of River investigation, alternatives analysis and remedy selection steps in the process. Following remedy selection and any challenges to that selected remedy, GE is obligated to perform the selected Rest of River Remedial Action and O&M, pursuant to CERCLA and the CD. *See* CD Paragraphs 22, 23. [4]

As described above, the CD itself did not include a specific cleanup plan for Rest of River, but instead set forth a process to select the appropriate remedial action for the Rest of the River. As part of this process, EPA issued a Statement of Basis and Draft Modification to the Reissued RCRA Permit on June 1, 2014 (A.R. 558619, 558621). EPA accepted comments on the draft permit until October 27, 2014. The State of Connecticut filed comments on October 27, 2014 (A.R. 568479). On September 30, 2015, EPA issued an Intended Final Decision on the final Modification of the Reissued RCRA Permit and Selection of CERCLA Response Action. (A.R. 582991). That decision was subject to further review as part of the formal dispute resolution process under the CD. A final decision on the dispute ("Dispute Resolution Decision") was issued by the designated Dispute Resolution Decision-maker, Regional Counsel, Carl Dierker on October 13, 2016 (A.R. 593967); and, thereafter the final Permit and formal Response to Comments ("RTC") was issued on October 24, 2016 (A.R. 593921, 593922).

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[3] Especially relevant excerpts of the CD specifically cited throughout this brief are collectively attached hereto as Attachment 3.

[4] As paragraph 212 of the CD also indicates, a draft of the RCRA Permit was included as Appendix G to the CD.

Connecticut files this Response Brief pursuant to 40 C.F.R. § 124.19(b)(4) as a State where the permitted facility or site is or is proposed to be located, as was confirmed in the EAB Order Granting Requests for Extension of Time, Denying the Region's Request to File a Consolidated Response, and Clarifying that General Electric May File a Response dated December 15, 2016 (Kathie A. Stein, Environmental Appeals Judge, Docket Document # 16, EAB Docket # 16-01).[5] Connecticut is particularly concerned about issues of downstream transport, and has received significant amounts of PCB contamination to its portion of the Housatonic River, a valued natural resource for which Connecticut seeks to achieve a fishable, swimmable designation and prevent unacceptable impacts to our ecological resources in the future in accordance with the Clean Water Act 33 U.S.C. §1251 et seq.

B. Statutory and Regulatory Background

RCRA and CERCLA are among the jurisdictional bases for the CD from which the current matter has arisen. With regard to the particular statutes, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted by Congress in 1980 in response to the serious environmental and health risks posed by industrial pollution. CERCLA was designed to promote the "timely cleanup of hazardous waste sites" and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.

[5] This is because the CD defines the term "Site" as including the Rest of River. *See* CD Definitions at page 35; and also because a large portion of the Rest of River is located in Connecticut. *See* Attachment 1 depicting the Rest of River; *see also* CD Definitions at page 33; Permit Definitions at page 3. Further, under CERCLA, liability attaches to the owner of a facility from which hazardous substances have been released; but also because the "facility" also includes any area where a hazardous substance has been deposited or otherwise come to be located. CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A); § 101(9)(B), 42 U.S.C.§ 9601(9)(B). Similarly, RCRA §§ 3004(u) and 3004(v,) (certain of the provisions under which the Permit that is the subject of this Petition was issued) provide that any person seeking a RCRA permit must perform any "corrective action" necessary to clean up releases of hazardous wastes or hazardous constituents from any solid waste management unit at the facility. RCRA § 3004, 42 U.S.C. § 6924. Connecticut was also a co-Plaintiff in the civil action which gave rise to the CD. The Region also notes in the Response to Comments the integral role of Connecticut. *See* Attachment 4, RTC, pages 1,335.

Consolidated Edison Co. of N. Y. v. UGI Util., Inc., 423 F.3d 90, 94 (2d Cir. 2005); *see also Meghrig v. KFC Western, Inc*., 516 U. S. 479, 483 (1996); *Dedham Water Co. v. Cumberland Farms Dairy, Inc*., 805 F. 2d 1074, 1081 (1st Cir. 1986)*; Burlington Northern and Santa Fe Railway Company v. United States*, 556 U.S. 599 (2009). CERCLA is a remedial statute that was designed by Congress to protect and preserve public health and the environment and to be implemented by EPA.

The Resource Conservation and Recovery Act ("RCRA") was enacted in 1976 and empowers EPA "to regulate hazardous wastes from cradle to grave…." *City of Chicago v. EDF*, 511 U.S. 328, 331 (1994). As part of RCRA, Congress established a permitting program for facilities that treat, store or dispose of hazardous waste and directed EPA to implement the program. The 1984 Hazardous and Solid Waste Act Amendments to RCRA added Section 3004(u) and (v) to RCRA, providing that any person seeking a RCRA permit must perform any "corrective action" necessary to clean up releases of hazardous wastes or hazardous constituents from any solid waste management unit at the facility. The Permit that is the subject of this Petition was issued pursuant to Sections 3004(u), 3004(v), and 3005(c) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984, 42 United States Code (U.S.C.) §§ 6901 et seq. ("RCRA"). It requires GE to conduct certain RCRA Corrective Action activities at areas affected by releases of hazardous waste and/or hazardous constituents that emanated from the General Electric Facility located in Pittsfield, Massachusetts. More specifically, this Permit covers the remediation of the Rest of the River area, which is defined as all sediments, surface waters, and floodplain soils of the Housatonic River which are downstream of the confluence of the East and West branches of the River, including backwaters in the floodplain, and to which

releases of hazardous wastes and/or hazardous constituents are migrating or have migrated from the GE Facility. *See* Permit at page 3.

III. STANDARD OF REVIEW

A RCRA permit can be subject to review by the Environmental Appeals Board if it is based on a clearly erroneous finding of fact or conclusion of law, or if it involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i); *see also, In re Caribe General Electric Products*, RCRA Appeal No. 98-3, slip op. at 9 (EAB, Feb. 4, 2000), *In re Austin Powder Co*., 6 E.A.D. 713, 715 (EAB 1997); *In re Johnston Atoll Chem. Agent Disposal System*, 6 E.A.D. 174, 178 (EAB 1995); *In re Allied-Signal, Inc*., 5 E.A.D. 291, 292 (EAB 1994). *In re Three Mountain Power, LLC* 10 E.A.D. 39, 47 (EAB 2001). The burden that the Petitioner faces is to demonstrate why the Region's response to its objections as voiced in comments (the Region's basis for its decision) is clearly erroneous. *In re Envotech, L.P*., 6 E.A.D. 260, 268 (EAB 1996) (quoting *In re LCP Chem*., 4 E.A.D. 661, 664 (EAB 1993)); *see also In re Austin Powder Co.*, 6 E.A.D. 713, 721 (EAB 1997). It is not enough that the Petitioner merely repeat the objections that it made during the comment period. Instead, where the petition raises an issue that was addressed in the response to comments document, the petitioner must explain why the permit decision maker's "response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii). As previously stated by the EAB, [a] petitioner may not simply reiterate comments made during the comment period, but must substantively confront the permit issuer's subsequent explanations." *In re City of Attleboro MA Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op. at 11 (EAB, Sept. 15, 2009). Moreover, the EAB assigns a heavy burden on petitioners seeking review of issues that are technical in nature. *See In re City of Moscow*, l0 E.A.D. 135, 142 (EAB 2001); *In re Town of*

Ashland Wastewater Treatment Facility, 9 E.A.D. 661, 667 (EAB 2001). As stated by the EAB, "[i]f the Board is satisfied that the permit issuer gave due consideration to comments received and adopted an approach in the final permit that is rational and supportable, the Board will typically defer to the permit issuer. *In re Upper Blackstone Water Pollution Abatement District*, NPDES Appeal Nos. 08-18 & 09-06, slip op. at 44 (EAB May 28, 2010).

IV. ARGUMENT

As identified above, the Petitioner has raised nine issues in this appeal. Connecticut, with its response addresses: the Downstream Transport and Biota Performance Standards (Issue 6), the legally permissible future work (Issue 7) and ensuring dam inspection and maintenance (Issue 8). After applying the legal standard of review, a careful evaluation of these contested conditions in the Permit reveals that there are several problems with the Petition. For the reasons set forth in detail below, the EAB should deny and dismiss at least the portions of the Petition addressed below.

A. The Region Has the Legal Authority and Was Correct to Include the Downstream Transport and Biota Performance Standards in the Permit.

The Petitioner contests requirements within the permit to evaluate and potentially conduct additional actions should the Downstream Transport and Biota Performance Standards be exceeded. These performance standards are meant to address the impact of bioaccumulation of PCBs in fish in Connecticut, the impact of PCB levels in the water column and sediments in the Connecticut portion of the river, and Connecticut's ability to comply with the Clean Water Act and the goal under the Clean Water Act to have a swimmable and fishable river in the future. In contesting these provisions related to the Downstream Transport and Biota Performance Standards, the Petitioner asserts no claim at all about the merits of the technical standards themselves, but instead largely rehashes the same legal arguments (directed at the Region's legal

authority under the CD) that Petitioner already made in its comments filed on the draft permit, all of which were adequately responded to by EPA in the Response to Comments. (*See* RTC, pages 62-83 at Attachment 4). A careful review of this issue demonstrates that the Petitioner's position is simply not supported by the four corners of the CD and that the Region unquestionably has the authority for these standards and their implementation.

In reviewing this issue, the EAB must first consider, as with the immediate case, that consent decrees are entered into by parties to a case "after careful negotiation has produced agreement on their precise terms." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Consequently, when seeking to construe the terms of a consent decree, the scope of the decree "must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id*. at 682. Although the Petitioner is correct that consent decrees are analyzed or interpreted according to contract law principles, a consent decree must be read in accordance with its express terms and plain meaning, and a court should interpret such a document in a manner that gives meaning to all of its provisions and makes sense. *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). The primary goal in contract interpretation is to honor the intent of the parties, and courts look for such intent in the words used in the document. *Saulte Ste. Marie Tribe of Chippewa Indians v. Engler*, 271 F. 3d 235, 238 (6th Cir. 2001). At the same time, consent decrees are more than contracts; they are also enforceable judicial orders. *United States v. Alcoa, Inc.*, 533 F.3d 278, 286 (5th Cir. 2008). Courts should read consent decree terms by their plain meaning and ordinarily must hold parties to the terms of the decree. *Id*. Ultimately, "[c]onsent decrees are judgments despite their contractual nature." *Id.* at 288.

In attempting to argue that the Region lacks authority under the CD for these requirements, the Petitioner advances a slanted interpretation of the CD, concentrating on certain provisions, primarily paragraphs 162 and 163 relating to the circumstances under which the CD could be re-opened, while ignoring several other provisions that are directly on point. However, the 399 page CD in this matter was negotiated over a significant period of time, was meticulously drafted to cover every possible situation, and left nothing to chance. The Petitioner nonetheless asserts that the Region cannot require work necessary to meet a performance standard in clear contravention of the plain meaning of the CD, as set forth below. The Petitioner also essentially takes the position that it requires absolute certainty in the Rest of the River remedy, but absolute certainty is not what was negotiated in the CD. [6]

In taking this narrow read, the Petitioner ignores that the Region determined the implementation of these performance standards, along with others, as a result of following the specific steps and requirements set forth in paragraph 22 of the CD governing the Rest of the River remediation. Included in these steps for developing performance standards was the requirement for modeling the fate, transport, and bioaccumulation of PCBs in the Rest of the River by the Region**.** (*See* CD Paragraph 22.g. at pages 90-91). Further, Petitioner agreed in paragraph 23, Performance Standards and Other Requirements, at page 114, and in paragraph 33 at page 133, to achieve the performance standards as described in the Rest of the River SOW to be developed (by EPA) through the process specified in paragraph 22 of the CD. Therefore, the performance standards and the process to implement them that Petitioner presently takes issue with were clearly provided for in the CD and are well within the Region's authority.

[6] However, if the Petitioner wanted greater certainty, it could have agreed to remove a greater mass of PCBs as part of the remedy.

Notably, the Petitioner also agreed to CD paragraph 39.a., page 140, which provides that if EPA determines that a modification of the work plan for the Rest of the River SOW is necessary to achieve or maintain a performance standard or to carry out and maintain the effectiveness of a particular Removal or Remedial Action, EPA may require modification (of the Rest of the River) SOW. This provision of the CD lends further support for the Region's authority to issue performance standards, including the Downstream Transport and Biota Standards, because it authorizes the Region to require additional work to meet the standards. GE's reading of the CD would render this provision superfluous, demonstrating again a strained reading of an otherwise clear CD. The Petitioner knew and agreed in the CD that it might have to do additional work to meet performance standards. Implicit in this agreement is the Region's authority to issue the performance standards in accordance with the CD. Also, it should be noted that this very authority was recognized in the Dispute Resolution Decision at page 9 (copy attached as Attachment 5), stating, "[T]he CD contains clear language providing EPA with authority to modify the work to achieve and maintain Performance Standards or to require additional response actions under certain circumstances, which may include clean up actions to protect human health and the environment in the downstream state, Connecticut."

Similarly, the Petitioner ignores that in the CD, it also accepted a provision at paragraph 40, page 141-142, which provides that nothing in the CD or the Rest of the River SOW, or any work plans developed pursuant to the CD constitute a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the Rest of the River SOW will achieve the performance standards. This means that the Petitioner in entering into the CD

knowingly agreed to performance standards, and also knowingly agreed to a certain degree of uncertainty in the process for which it now demands more certainty. [7]

Importantly, the terms of the CD control enforcement of the Rest of the River remedy. Pursuant to paragraph 22.aa. of the Rest of the River provisions, at page 104 of the CD, in the event that both the Reissued RCRA Permit and the CD require performance of a given action by GE, enforcement shall be pursuant to the CD, rather than pursuant to RCRA or the Reissued RCRA Permit.

In summary, as detailed above, the CD authorizes the Region to specify performance standards and the measures necessary to meet them. It also requires the Petitioner to achieve and maintain performance standards, and the Downstream Transport Performance Standard and Biota Standards are included in of those standards. The CD also includes mechanisms to allow the Region to ensure that performance standards are achieved and maintained, and that the remedy remains protective of human health and the environment. The Petitioner challenges these provisions as clearly erroneous by essentially repeating the same arguments that it made in its comments. The Petitioner contends that these performance standards are clearly erroneous because they exceed EPA's authority under the CD. Yet, as demonstrated above, the Petitioner's strained and incorrect reading of the CD, relying only on certain paragraphs in isolation is misplaced and is not supported by the full context and language of the CD, especially given the overall meticulously crafted provisions and the clear intent of the parties as ascertained by the four corners of the CD. The CD that the Petitioner accepted specifically acknowledged that there is no warranty, guarantee or representation of any kind that compliance with the work

[7] Similarly, CD paragraph 44, states: "If EPA determines, at any time, that any one of the response actions required pursuant to this CD is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP."). *See also* CD paragraph 8.d.

requirements for the Rest of the River will achieve the performance standards and, that if necessary to achieve or maintain a performance standard, EPA may require additional work. GE also agreed in the CD to achieve and maintain performance standards.

The certainty and finality that GE now seeks would be a major modification of the CD which would need the approval of all the parties and the district court. Furthermore, cases interpreting CERCLA and RCRA support the conclusion that some uncertainty at the time of remedy selection is acceptable. *See United States v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. 1067, 1073 (W.D.N.Y. 1982); *aff'd*, 749 F.2d 968 (2d Cir. 1984). (Upholding the settlement of a RCRA corrective action complaint even though the final remedy had not been selected, pending further sampling and additional information, stating the approach was "wise" and that the "parties have chosen to proceed cautiously.") Similarly, in *United States v. Akzo Coating*, 719 F. Supp. 571, 585 (E.D. Mich. 1989); a*ff'd*, 949 F.2d 1409 (6th Cir. 1991), the court upheld a CERCLA settlement over objections that proposed pilot testing was ill-defined and unreliable, concluding that it was legally acceptable to leave aspects of a remedial action plan open for further determination. *Id.* at 585.

For all of these reasons, the EAB should acknowledge the language and overall structure of the CD as well as its legal context and give it the intended and natural meaning; and thereby deny this portion of the Petition.

B. If Even Properly Before the EAB, The Region Has the Legal Authority and Was Correct to Include a Provision for Legally Permissible Future Work in Connecticut

Before reaching any argument on the merits of this issue, there is a threshold jurisdictional matter that must first be resolved, because there is a question as to whether this issue was properly preserved by the Petitioner and is properly before the EAB. In the Region's December 13, 2016 Notice of Uncontested and Severable Permit Conditions, the Region noted at

page 4 that II.B.2.l. of the Permit was uncontested and severable. (Copy attached hereto as Attachment 6, Docket Document # 15, EAB Docket # 16-01). In its Response to EPA's Notice of Uncontested and Severable Permit Conditions dated December 21, 2016, the Petitioner admits at page 3 that in its Petition it only cited and contested the future work requirement as to Massachusetts. (Copy attached hereto as Attachment 7, Docket Document # 19, EAB Docket # 16-01.) The Petitioner argues that the use of the word "Connecticut" in one place in the narrative in this section of its Petition is sufficient to preserve and present this issue to the EAB, despite its failure to cite the relevant permit sections pertaining to Connecticut in the Petition, which it did for other contested provisions. Petitioner indicates in its letter that it meant to dispute II.B.2.l.(1)(a) and (2)(a). In response to the Petitioner's letter, the Region issued a second Notice of Uncontested and Severable Permit Conditions-Revised on January 9, 2017, stating that II.B.2.l.(1)(a) and (2)(a) are contested. (Copy attached hereto as Attachment 8, Docket Document #20, EAB Docket # 16-01). The Petitioner should not have the ability to revise and augment its Petition nearly a month after the filing deadline for petitions for review set forth in 40 C.F.R. § 124.19(a)(3). Connecticut finds nothing in the cited authority for the exchanged letters, specifically 40 C.F.R. § 124.16 and CD paragraphs 22.q. and 22.x., which would allow unilateral resolution of this issue by agreement. Simply, it appears that this issue is not properly before the EAB. This is a threshold jurisdictional issue that should be addressed. This point is now further underscored by the Petitioner's recent filing of an Erratum to General Electric Company's Petition for Review in this docket on January 13, 2017 which seeks to amend its Petition nearly two months after the filing deadline. *See* Attachment 9, Docket Document # 21, EAB Docket # 16-01.

Should the Petitioner overcome this jurisdictional hurdle, Connecticut provides the following response on the merits. The Petitioner objects to the inclusion in the Permit of provisions that require it to address sediment containing more than 1 mg/kg of PCBs in Connecticut in the event a property owner conducts a Legally Permissible Future Project or Work, as that term is defined in the permit, at its property that would require the handling of such contaminated sediment. The thrust of the Petitioner's argument is that the Region cannot require future work. Yet, for all of the reasons already discussed in Section IV.A., *supra*, the Region clearly has the authority under the CD to require the Petitioner to clean up PCB pollution that it created and to require additional work, if deemed necessary. The Petitioner's arguments are contrary to the agreed upon terms of the CD.

In addition, the Petitioner is still a responsible party under CERCLA and RCRA. The Petitioner is a covered person for purposes of CERCLA liability because it is the owner of a facility from which hazardous substances have been released. CERCLA § 101 (20)(A); 42 U.S.C. § 9601 (20)(A). Particularly relevant in this instance with respect to the Rest of River, under CERCLA the facility also includes any area where a hazardous substance has been deposited or otherwise come to be located. CERCLA § 101(9)(B), 42 U.S.C.§ 9601(9)(B). Similarly, RCRA §§ 3004(u) and 3004(v) certain of the provisions under which the Permit that is the subject of this Petition was issued, provide that any person seeking a RCRA permit must perform any "corrective action" necessary to clean up releases of hazardous wastes or hazardous constituents from any solid waste management unit at the facility. RCRA § 3004; 42 U.S.C. § 6924. This requires GE to conduct certain RCRA Corrective Action activities at areas affected by releases of hazardous waste and/or hazardous constituents that emanated from its facility, and more specifically, with respect to this Permit, the remediation of the Rest of the River. Without

question, GE is liable for PCB contamination that has flowed downstream from its facility in Pittsfield, Massachusetts and accumulated in sediments and riverbank soils in Connecticut. Nothing about the contamination being on a third-party's property changes this; and to reach any other conclusion would mean that a responsible party would never have to address its contamination.

Environmental laws are meant to protect the public and to be construed liberally to fulfill their intended purpose. *See United States v. Kayser–Roth Corp*., 910 F.2d 24, 26 (1st Cir.1990), *cert. denied*, 498 U.S. 1084 (1991) ("Because CERCLA is a remedial statute, we ... construe its provisions liberally to avoid frustration of the beneficial legislative purpose."); *Schiavone v. Pearce,* 79 F.3d 248, 253 (2d Cir.1996)*;* ("An interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and purpose of the legislation."); *see also*, *Dedham Water Company,* 805 F.2d at 1081 ("CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment."). The Region has included this particular provision about future work in the Permit because PCB contaminated sediments that are located, for example, behind structures in the Connecticut portion of the river pose a risk. EPA clearly has the authority to require GE to address contaminated sediment in the river and riverbank soils, and the equities and express purpose of the applicable environmental protection statutes would be obliterated under the Petitioner's account of this requirement. To not hold the Petitioner responsible for its contamination of properties in Connecticut is unconscionable, contrary to the terms of the CD, and inconsistent with the law.

Finally, if the EAB were to ever find the provision of this future work clearly erroneous as presently drafted in the Permit, then it should only do so with the express instruction for a

remand, so that this work can instead be required to be done at the same time as all other remedial work required under the Permit, so as to remove the future component.

C. The Region Has the Legal Authority and Was Correct to Include a Provision for the Maintenance of Dams in Massachusetts

The Petitioner next asserts that it should not be responsible for maintenance of dams based on a purported conflict with FERC regulations and with Massachusetts state regulations relating to dams. This issue has direct bearing on potential downstream transport of PCBs. Significantly, on page 29, footnote 19, of its Petition, the Petitioner specifically acknowledges that under previous ownership of Woods Pond dam, repair actions undertaken at the dam led to a release of contaminated sediments downstream. In contesting this requirement, the Petitioner is essentially making an argument that is akin to preemption. When a party challenges a permit requirement itself, rather than any action taken on a permit application, the challenge is considered facial, rather than "as applied." *California Coastal Commission v. Granite Rock Co*., 480 U.S. 572, 580 (1987). Although GE has made the bold assertion that the Region cannot have a provision in the Permit relating to ensuring dam inspection and maintenance occurs in order to prevent the spreading of PCBs in the river, the Petitioner has done no legal analysis to support its contention. The Petitioner simply proclaims that FERC and the State of Massachusetts regulate dams, so this permit condition cannot stand. This is clearly insufficient to prevail on this issue.

The issue is whether the environmental permitting requirement related to ensuring the inspection and maintenance of dams to prevent unreasonable environmental degradation in the river by unleashing contaminated sediments is somehow preempted by FERC or state law governing the inspection and maintenance of dams. In order to successfully assert this, the Petitioner should have analyzed the requirements in the Permit on this issue against the

requirements of the cited laws to determine if there is a direct and substantial effect. *Cf. Phillip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 86 (1st Cir. 1997) (Courts have applied the "direct and substantial effect" test to field preemption claims.) The Petitioner is essentially claiming that because FERC and the State of Massachusetts regulate dams, that the Permit cannot address dams. However, the petitioner fails to analyze whether the provision of the Permit directly or substantially attempts to regulate in a substantial enough way to be preempted. Not every provision which has some remote effect on the preempted field of regulation is preempted. *Cf. Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992*); Vango Media v. City of New York*, 34 F.3d 68, 73 (2d Cir. 1994). The Petitioner has failed to establish that the Permit condition related to ensuring future dam maintenance and inspections substantially and directly interferes with FERC or State regulations regarding dams.

In addition, the Petitioner has not adequately addressed the Region's Response to Comments wherein the Region specified that Petitioner's responsibilities under the Permit with respect to the dams is in connection with minimizing releases of the PCBs that are located behind the dams; and that the requirements do not relieve the dam owner of its statutory obligations. The Region even stated that if the Petitioner believed that a dam owner is currently performing inspections of the dam in a frequency and a manner that will ensure minimization of releases of PCBs located behind the dam, that Petitioner could seek to be relieved of inspection related requirements at that dam. *See* RTC, pages 169-171 at Attachment 4.

In conclusion, based upon the failure to adequately demonstrate that the Permit provision directly and substantially interferes with existing law and the failure to address why the Region's response is inadequate, the Petitioner has failed to carry its burden and this portion of its Petition

should also be denied, especially because a dam failure would release PCBs that are behind the dam impoundments downstream into Connecticut.

V. CONCLUSION

The issue of legally permissible future work in Connecticut was not properly preserved, or timely raised, and should not be before the EAB. On the merits of the issues addressed herein (in the event the merits of all issues are reached), the Petitioner has failed to demonstrate that the Region committed clear error and has failed to raise any important policy considerations on the grounds addressed herein. Therefore, the EAB should deny and dismiss at least the permit challenges identified above because these issues are neither: (1) based on findings of fact or conclusions of law that are clearly erroneous as required by 40 C.F.R. § 124.19(a)(1); nor (2) reflect exercises of discretion or important policy considerations that should be reviewed by the Board as required by 40 C.F.R. § 124.19(a)(2). For all of the foregoing reasons, Connecticut respectfully requests that the Board deny and dismiss GE's Petition at least with respect to the issues raised herein.

RESPECTFULLY SUBMITTED,

STATE OF CONNECTICUT

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STATEMENT OF COMPLAINCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv), the undersigned counsel hereby certifies that the foregoing Response Brief contains 6,134 words as counted by a word processing system, including headings, footnotes, quotations and citations in the count, but not including the cover, Table of Contents, Table of Authorities, Table of Attachments, Statement of Compliance With Word Limitation, signatories or Attachments, and thus this response brief meets the 14,000 word limit for a response brief as set forth in the Board's regulations at 40 C.F.R. § 124.19(d)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2017, true and correct copies of Connecticut's Response Brief and Attachments were served:

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