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September 18, 2020

GE-Housatonic River Site Public Comments  
EPA Region 1  
5 Post Office Square (Mail Code SEMD-07-01)  
Boston, MA 02109-3912

**Re: GE-Pittsfield/Housatonic River Site – Rest of River  
GE's Comments on EPA's Draft Revision of the 2016 Modified RCRA Permit**

Dear Mr. Tagliaferro:

Attached are the comments of the General Electric Company (GE) on EPA's draft 2020 revision of the 2016 Modified RCRA Permit (Draft Revised Permit) for the Rest of River portion of the Housatonic River. The Draft Revised Permit incorporates elements of the February 2020 Settlement Agreement among EPA, GE, the State of Connecticut, the Massachusetts municipalities through which the Rest of River runs, and other stakeholders relating to cleanup of the Rest of River.

As discussed in the attached comments, if EPA approves the final Revised Permit, GE will partner with EPA and the surrounding communities to implement a remedy that expedites the Housatonic River cleanup. GE supports the 2020 Settlement Agreement and the provisions of the Draft Revised Permit that incorporate the terms of that Settlement Agreement, which will lead to an aggressive cleanup of the Housatonic River at the earliest opportunity, with public participation and transparency throughout, while requiring stringent safety measures and protections. The proposed remedy includes the removal of more PCBs from the Housatonic River and floodplain than would have been required under the 2016 Permit and has many other provisions that will benefit the Rest of River communities. It also requires GE to send the more highly contaminated dredged and excavated material to a landfill outside of Massachusetts and to construct, for disposal of the remaining sediments and soils, a state-of-the-art facility using a former gravel quarry outside the floodplain of the River.

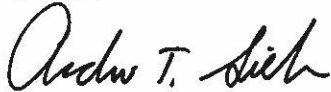
The Settlement Agreement expedites the cleanup by providing for GE to take steps now to begin the necessary pre-design and design work for the Rest of River remedy and by avoiding further litigation. Indeed, GE has already begun to implement the agreement, including the submission of a Rest of River Statement of Work to EPA in early June 2020 outlining all the deliverables that GE will submit to design and carry out the agreed-upon remedy. In addition, the Settlement Agreement provides other benefits to the local communities, including substantial development funds, additional land resources, and aesthetic improvements. The Agreement provides for public participation throughout the cleanup so

that GE and EPA can hear and mitigate concerns about the remedy implementation where possible and can share information and data regarding the cleanup with the public.

GE's attached comments describe the benefits of the Draft Revised Permit in greater detail. They also point out a limited number of specific provisions that need to be clarified or modified to be consistent with the terms of the Settlement Agreement or to further the purposes of that Agreement.

Please let me know if you have any questions about the attached comments.

Very truly yours,



Andrew T. Silfer, P.E.  
GE Project Coordinator

Attachment

cc:

- Bryan Olson, EPA\*
- Robert Cianciarulo, EPA\*
- Timothy Conway, EPA\*
- Dean Tagliaferro, EPA\*
- Michael Gorski, MassDEP\*
- Elizabeth Stinehart, MassDEP\*
- Betsey Wingfield, CT DEEP\*
- Roger Martella, GE\*
- Eric Merrifield, GE\*
- Kevin Mooney, GE\*
- James Bieke, Sidley Austin\*
- Jeffrey Porter, Mintz Levin\*

\* Via electronic mail

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**COMMENTS OF THE GENERAL ELECTRIC COMPANY  
ON U.S. ENVIRONMENTAL PROTECTION AGENCY'S DRAFT  
2020 REVISION OF THE 2016 MODIFIED RCRA PERMIT FOR  
THE HOUSATONIC RIVER – REST OF RIVER**

**September 18, 2020**

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## I. OVERVIEW

### A. Introduction and Summary

General Electric Company (GE) appreciates the opportunity for GE and the public to submit comments on EPA's July 2020 draft revision of the 2016 Modified RCRA Corrective Action Permit for the former GE facility in Pittsfield (Draft Revised Permit). GE supports the provisions of the Draft Revised Permit that incorporate the terms of the February 10, 2020 Settlement Agreement among EPA, the State of Connecticut, the Massachusetts municipalities through which the Rest of River portion of the Housatonic River runs, other stakeholders, and GE (the 2020 Settlement Agreement). Those provisions will lead to a more aggressive cleanup of the Housatonic River sooner than otherwise required, with public participation and transparency throughout, while requiring stringent safety measures and protections. The proposed remedy would remove more PCBs from the Housatonic River and floodplain than would have been required under the 2016 Permit and includes many other provisions that will benefit the Rest of River communities and the environment. It also requires GE to send the more highly contaminated dredged and excavated material to a landfill outside of Massachusetts and to construct, for disposal of the remaining sediments and soils, a state-of-the-art facility using a former gravel quarry outside the floodplain of the River.

If EPA issues a final Permit consistent with the terms of the 2020 Settlement Agreement, GE will partner with EPA and the surrounding communities to implement a remedy that accelerates the Housatonic River cleanup and avoids further litigation. The Settlement Agreement has already led to GE expediting the cleanup by taking steps now to begin the necessary pre-design and design work for the Rest of River remedy. For example, GE has already submitted a Rest of River Statement of Work to EPA in early June 2020 outlining all the deliverables that GE will submit to design and carry out the agreed-upon remedy. In addition, the Settlement Agreement provides other benefits to the local communities, including substantial development funds, additional land resources, and aesthetic improvements. The Agreement provides for public participation throughout the cleanup so that GE and EPA can hear and mitigate concerns about community impacts where possible and can share information and data regarding the cleanup with the public.

The Draft Revised Permit builds upon the 2000 Consent Decree (CD), in which GE committed to work with EPA to clean the Housatonic River and surrounding areas. For the past 20 years, under the CD, GE has invested hundreds of millions of dollars in the cleanup of the first two miles of the River beginning at the former GE Pittsfield facility, and in remediating numerous areas at the GE facility, nearby commercial areas adjacent to the River, Silver Lake, and both residential and non-residential properties in the floodplain of the River. In addition, GE has provided economic development funds to the City of Pittsfield, donated properties to the Pittsfield Economic Development Authority (PEDA), and provided additional economic development funds to PEDA.

For the last several years, GE has been working with EPA on a common-sense solution to the PCBs remaining in the Rest of River portion of the Housatonic River – i.e., the stretch downstream of the Confluence of the East and West Branches in Pittsfield. During that time, GE has remained committed to implementing one of the most extensive river cleanups in the country; and in fact, GE, EPA, and other stakeholders largely have been able to come to consensus regarding the cleanup of PCBs from the River. Beyond the actual cleanup, one of the most contentious issues involved where the removed sediments and soils should be disposed of. In reviewing GE's challenge to EPA's prior requirement for out-of-state disposal, the EPA Environmental Appeals Board (EAB) remanded the issue to EPA to reconsider that requirement.

Following the EAB's decision, GE agreed to enter into mediated discussions with EPA, the Rest of River municipalities, and other stakeholders to attempt to reach agreement on an accelerated Rest of River remedy that would be protective of human health and the environment and could be implemented without the delay of further litigation. Those discussions led to the 2020 Settlement Agreement which, as described below, provides increased benefits and protections to the River and communities compared to previous requirements.

The revised Rest of River remedy embodied in that Settlement Agreement and reflected in the Draft Revised Permit has many benefits. It provides for a more aggressive cleanup that EPA, the municipalities through which the Rest of River runs, environmental groups, and GE have agreed to. That enhanced cleanup will remove more PCBs from the Housatonic River and floodplain than would have been required under the 2016 Permit, including more sediment removal and less capping in several areas of the river and more soil removal in certain residential and non-residential floodplain areas. The remedy also includes a variety of other elements that will benefit the Rest of River communities, as discussed in Section I.B of these Comments. The agreement avoids delay by providing for GE to take steps now to begin the necessary pre-design and design work for the Rest of River remedy. And it resolves a number of the prior legal challenges and puts to rest the protracted litigation that would have delayed cleanup activities. With respect to the disposal issue, the agreed-upon remedy requires GE to transport the more highly contaminated dredged and excavated material to a landfill outside of Massachusetts and to construct, for disposal of the remaining sediments and soils, a state-of-the-art Upland Disposal Facility (UDF) using a former gravel quarry property outside the floodplain of the River. It thus strikes a balance that involves disposal of the most contaminated sediments and soils outside of Massachusetts combined with a more aggressive river/floodplain cleanup with a secure local disposal facility for other sediments and soils removed as part of the cleanup.

In addition to revisions to the cleanup remedy, as noted above and described in more detail below, the 2020 Settlement Agreement provides other benefits to the local communities, including substantial development funds, additional land resources, and aesthetic improvements.

These Comments provide further details regarding the benefits of the 2020 Settlement Agreement and the provisions of the Draft Revised Permit effectuating that agreement. They also recommend clarifications or modifications to particular provisions of the Draft Revised Permit to



make those provisions consistent with the terms of the Settlement Agreement or to further the purposes of the Settlement Agreement. Further, as a legal matter, these Comments reiterate an important element of the parties' agreement – that if the Final Revised Permit is not consistent with the 2020 Settlement Agreement, GE retains the right to contest the Permit provisions.

To reiterate, GE supports the provisions of the Draft Revised Permit that incorporate the terms of the 2020 Settlement Agreement.

## **B. Benefits of the 2020 Settlement Agreement**

### **1. Benefits of Revised Remedy**

The revised Rest of River remedy specified in the 2020 Settlement Agreement and the Draft Revised Permit provides significant benefits to the environment and the surrounding communities. Those benefits include the following:

- The revised remedy includes more sediment removal and less capping than the 2016 Permit remedy. Overall, the amount of capping has been reduced by nearly 100 acres compared to the 2016 Permit remedy. The reduction in capping will require more removal of PCB-containing sediments to meet the Performance Standards within those reaches where capping was reduced or completely eliminated. Specifically, the revised remedy will:
  - Eliminate capping from all 57 acres in Reach 5C;
  - Reduce capping by 29 acres in the Reach 7 impoundments, including elimination of all capping in the Columbia Mill impoundment (Reach 7B) and the former Eagle Mill impoundment (Reach 7C); and
  - Reduce capping in Rising Pond by 10 acres.
- GE has committed to using a hydraulic dredging and/or hydraulic pumping approach, if feasible, to remove sediments from Reach 5C and Woods Pond and potentially adjacent backwaters. The hydraulically dredged sediments would be pumped directly to the UDF support area for processing, which would reduce truck traffic by approximately 50,000 truck trips. This approach is facilitated by the selected UDF location, which, as noted above, will be located in a former gravel quarry outside the floodplain of the River, but sufficiently close to Woods Pond and Reach 5C to allow for the possibility of hydraulic pumping of dredged sediments. To the extent that a hydraulic dredging and/or hydraulic pumping approach is not feasible, material will be transported from Reach 5C and Woods Pond to the UDF via trucks, while avoiding driving on public roads to the maximum extent practicable.
- GE will remove floodplain soil from 22 residential properties in Pittsfield, as well as six more in Lenox (if the property owners agree), as necessary to meet the cleanup standards for

residential use. GE will also conduct expanded floodplain soil removal at the Massachusetts Audubon Canoe Meadows Wildlife Sanctuary in Pittsfield.

- The Columbia Mill Dam and former Eagle Mill Dam in Lee will be removed. For any floodplain area that is created as a result of removal of these dams (i.e., former impounded areas that become exposed due to removal of a dam), the evaluation process for remediation of floodplain soils described in the Revised Permit will be followed.
- Under the Settlement Agreement, GE has begun work to accelerate the Rest of River cleanup without delay and sooner than it otherwise would be required to do. Consistent with that commitment, GE has already taken steps to expedite the remedy design process through its development and submission of a Rest of River SOW to EPA in early June despite the significant limitations imposed by the COVID-19 State of Emergency. That SOW outlines all the steps and deliverables that GE will submit to design and implement the agreed-upon remedy.
- GE will transport the more highly contaminated dredged and excavated material (minimum of 100,000 cubic yards) for disposal at a landfill outside of Massachusetts. For those remaining sediments and soils that meet the criteria specified in the 2020 Settlement Agreement, GE will construct a secure lined UDF, which will assure the safe and protective disposal of the material; and it will conduct rigorous long-term operation, maintenance, and monitoring of the UDF to ensure that it remains protective. As discussed further in Section I.B.2, use of this local UDF will result in a substantial reduction in the volume of off-site truck traffic and the related potential for injuries and fatalities, as well as in the amount of greenhouse gas emissions generated, compared to the 2016 Permit remedy.
- GE will prepare and submit to EPA for approval a detailed Quality-of-Life Compliance Plan to mitigate impacts to the local communities during the cleanup. This plan will discuss how various quality-of-life topics will be addressed during remediation, including: (1) potential noise, air, odor, and light impacts; (2) potential impacts on recreational activities; (3) road use, including restrictions on transportation of waste material through residential areas and methods to minimize and mitigate transportation-related impacts to neighborhoods, infrastructure, and the general public; (4) coordination with affected residents or landowners at or near areas impacted by remediation; and (5) community health and safety. Further, in this regard:
  - GE has committed to working with the Commonwealth of Massachusetts, the City of Pittsfield, and the Towns of Great Barrington, Lee, Lenox, and Stockbridge to facilitate their enhancement of recreational activities such as canoeing and other water-related activities, hiking, and use of bike trails in the Rest of River corridor in areas where remediation occurs or where temporary access roads are constructed.



- GE will also coordinate with municipal officials and affected property owners regarding work activities, schedules, and traffic routes. In particular, prior to starting any remediation work, GE will survey and photographically document the pre-existing conditions of any municipal roads and infrastructure associated with those roads (i.e., bridges, culverts) to be used during remediation. GE will conduct necessary repairs to those roads and/or infrastructure caused by remediation activities.
- Finally, EPA has agreed to enhanced coordination with the various project stakeholders as the cleanup design progresses. This includes affected property owners, local municipalities and communities, Native American tribes, Massachusetts Audubon, and other stakeholders.

## **2. Reduction in Adverse Impacts**

The revised remedy will have fewer overall adverse impacts, including on residents of Berkshire County, than the 2016 Permit remedy. An evaluation of the reductions in adverse impacts is documented in GE's June 2020 *Summary and Evaluation of Settlement Agreement Remedy*. A summary is provided below.

- The revised remedy will involve approximately one third fewer truck trips (approximately 50,000 fewer truck trips) than the 2016 Permit remedy. This reduction is largely due to the use of hydraulic dredging and direct pumping to the UDF for sediments removed from Reaches 5C and Woods Pond, rather than transporting them via truck. Further, if direct hydraulic pumping of sediments removed from the backwaters is feasible, that would further reduce truck trips. In addition, due to the use of the local UDF, the revised remedy will result in a considerable reduction in the extent and length of off-site truck traffic relative to that under the 2016 Permit remedy. For example, the prior remedy, assuming the use of truck transport, would have required 81,700 off-site long-distance truck trips to transport excavated material to the designated off-site disposal facility(ies), whereas the hybrid disposal approach under the revised remedy will involve only 8,300 similar off-site truck trips (based on 100,000 cubic yards of off-site disposal) to transport excavated material to off-site disposal facility(ies) – a decrease of over 73,000 such truck trips.
- The revised remedy will have a considerably lower potential for injuries and fatalities (approximately 60% fewer injuries and 80%-90% fewer fatalities) than the 2016 Permit remedy. This reduction is primarily due to the decrease in off-site transport.
- The revised remedy will have a lower carbon footprint – i.e., approximately 30% lower overall greenhouse gas emissions – than the 2016 Permit Remedy. This reduction is largely due to the fact that, because the revised remedy would include disposal of certain excavated materials (those containing lower PCB concentrations) in the UDF and would include hydraulic dredging and direct pumping to the UDF, if feasible, for sediments removed from Reaches 5C and Woods Pond, it would result in a considerable reduction in the extent and length of off-site waste transport.

### 3. Other Benefits of Settlement Agreement

In addition to the remedy changes described in Section I.B.1, as well as other revisions to the Revised Permit, the 2020 Settlement Agreement provides other substantial benefits, outside the context of the Revised Permit, to the communities through which the Housatonic River flows. For example, the Settlement Agreement provides that:

- GE will donate a 150-acre parcel adjacent to Rising Pond to the Town of Great Barrington (or its designee) to allow for conservation and development, and will release a deed restriction at the adjacent Hazen Paper Mill Site that precludes residential development (subject to appropriate releases from future liability);
- GE will undertake aesthetic improvements at three GE parking lots adjacent to the GE facility, with the potential subsequent donation of those lots to the City of Pittsfield, and will implement aesthetic improvements at several other GE properties and buildings in Pittsfield;
- GE will donate certain additional property on Woodlawn Avenue to PEDAs, subject to agreement by the City; and
- GE will provide economic development funds to the local communities totaling \$63 million.

As with the proposed remedy, GE has already begun to implement some of these activities. It has initiated the process of collaboration with local communities, including a meeting with the City of Pittsfield. Additionally, GE is working to landscape the three former parking lots adjacent to the Pittsfield facility and should complete that work in 2020.

## II. COMMENTS ON REQUIREMENTS FOR REMEDIATION

GE has identified specific provisions of the Draft Revised Permit that need to be clarified or revised, principally to be consistent with the 2020 Settlement Agreement or to better effectuate the objectives of that Agreement.

### 1. Reach 5A and 5B Riverbanks

Sections II.B.2.a.(2)(c) (p. 23) and II.B.2.b.(2)(c) (pp. 24-25) of the Draft Revised Permit attempt to implement the provision of the 2020 Settlement Agreement (Section II.C) which provides that GE “shall . . . consider supplemental bank removal” in Reaches 5A and 5B (beyond the required remediation of those riverbanks) based on the evaluation of several specified factors. However, to be consistent with the 2020 Settlement Agreement (Section II.C), two revisions should be made. First, the initial clause of each of these provisions should be changed to read: “In addition, for Reach 5A [or Reach 5B] banks that do not otherwise require remediation pursuant to . . . .” Second, and more importantly, the last clause of these provisions, requiring that GE “shall propose further action as necessary,” is not in the Settlement Agreement; the Agreement provides only that GE will *consider* such action. Thus, that clause should be changed to read: “GE will



advise EPA of the results of its consideration of supplemental riverbank removal, with any proposed action that GE considers warranted.”

## **2. Reach 5C**

Section II.B.2.c.(1)(a) (p. 25) requires GE to remove sediments in Reach 5C to achieve a spatially weighted average concentration of 1 mg/kg in surface sediment and subsurface sediment “in each averaging area and depth interval.” Section II.B.2.c.(2)(a) (p. 26) requires GE to propose “separate averaging areas” for the remediation of Reach 5C and “proposed depth intervals” for averaging. Use of multiple averaging areas and multiple depth intervals (within the subsurface) was not part of the 2020 Settlement Agreement. The Agreement provides only that, in Reach 5C, “GE shall excavate sediment to achieve an average PCB concentration of 1 mg/kg or less” (Section II.D). EPA should thus revise these provisions to delete the references to multiple averaging areas and depth intervals.

## **3. Future Work**

Sections II.B.2.j.(1)(c) (p. 39), II.B.2.k.(1) (p. 43), II.B.2.l.(1)(a) (p. 45), II.B.7.b.(1)(a) (p. 61), and II.B.7.c.(1)(b) (p. 86) contain the Performance Standards for conducting response actions to be protective of any Future Project or Work in the various areas. As EPA recognizes in later provisions of the Draft Revised Permit under Corrective Measures, the 2020 Settlement Agreement provides that any further response actions must be in accordance with the CD and must be consistent with the scope of the response actions in the Revised Permit, and that GE’s responsibility for them will be limited to costs solely related to the presence of PCBs (Section II.I). These provisions should also be incorporated into the Performance Standards.

In addition, there are a couple of instances under Corrective Measures where EPA needs to clarify that the above-described agreements apply to all response actions covered by the overall section:

- In Section II.B.2.l.(2)(d) (p. 47), to make clear that this paragraph applies to all response actions under Section II.B.2.l, the first clause of this provision should be revised to read: “Any further response actions under this Section II.B.2.l will be . . . .”
- In Section II.B.7.c.(2)(c) (p. 71), to make clear that the two new sentences inserted into this paragraph apply to all response actions under Section II.B.7.c, those sentences should be broken out into a separate subsection (II.B.7.c.(2)(d)) and its introductory clause should be revised to read: “Any further response actions under this Section II.B.7.c will be . . . .”

## **4. Inspections of Non-GE Dams**

Section II.B.2.j.(2)(b) (p. 40) requires GE to ensure the inspection, monitoring, and maintenance of non-GE-owned dams in Massachusetts. EPA should clarify that this requirement does not apply to the former Eagle Mill Dam, which no longer functions as a dam and will be removed.



## **5. Residential Properties in Reach 5C**

Section II.B.3.a.(1)(d) (p. 48) provides that, for the residential properties in Reach 5C, as identified in Table 5, GE shall excavate and replace soil to achieve the Residential Performance Standards. Table 5 recognizes that, as provided in Section II.B of the 2020 Settlement Agreement, this requirement applies only if the Town of Lenox determines that the property owners consent to the necessary removal, and, in that event, the costs are to be shared equally by GE and the Town of Lenox. For consistency, the second sentence of Section II.B.3.a.(1)(d) should likewise be revised as follows: "For the Residential Floodplain Properties in Reach 5C that are identified in Table 5, Permittee shall, if the Town of Lenox determines that any of the property owners consents to such removal, excavate and replace soil at such property(ies) to achieve the Residential Performance Standards set forth in Table 3, with the costs thereof to be shared equally by Permittee and the Town of Lenox."

## **6. Calculation of Exposure Points Concentrations for Residential Properties**

Footnote 12 on page 49 of the Draft Revised Permit provides that exposure point concentrations (EPCs) for floodplain exposure areas shall be calculated using methods described in Appendix D to GE's Corrective Measures Proposal and revised in GE's Revised Corrective Measures Study Report. This footnote was written in the 2016 Permit before the Permit included residential properties that will be remediated to achieve Residential Performance Standards, as now specified in the 2020 Settlement Agreement. Since then, through correspondence relating to GE's Pre-Design Investigation Work Plan for Floodplain Residential Properties, GE and EPA have agreed that the procedure in footnote 12 for calculation of EPCs applies only to non-residential Exposure Areas and that, for the Floodplain Residential Properties discussed in Section II.B.3.a.(1)(d) and identified in Table 5 that will be remediated to meet the Residential Performance Standards, EPCs will be calculated using the spatial averaging procedures described in Attachment E to the *Statement of Work for Removal Actions Outside the River* (Appendix E to the CD) and used to evaluate the Actual/Potential Lawns of floodplain residential properties under the CD.<sup>1</sup> Thus, the footnote should be revised to add an initial sentence stating that the EPCs for those residential properties shall be calculated using the latter spatial averaging procedures, and then to add, at the beginning of the following sentence: "For the remaining Exposure Areas, the EPCs shall be calculated ...."

## **III. COMMENTS ON APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS**

Attachment C to the Draft Revised Permit consists of a revised table of applicable or relevant and appropriate requirements (ARARs) that discusses only the ARARs that have changed since the 2016 Permit and states that the other ARARs listed in the 2016 Permit will remain as ARARs for

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<sup>1</sup> See GE's Revised Pre-Design Investigation Work Plan for Reach 5A Floodplain Residential Properties (submitted on July 9, 2020) at p. 6, and EPA's approval letter for that work plan, dated July 23, 2020.

the revised remedy (p. C-13). GE's comments in this section relate to certain ARARs that are different, or differently applied, than those in the 2016 Permit.

**1. Massachusetts Solid Waste Site Suitability Criteria and Massachusetts Hazardous Waste Facility Location Standards**

EPA's revised ARARs table discusses the Massachusetts solid waste site suitability regulations (310 CMR 16.40(3)&(4)) and hazardous waste facility location regulations (310 CMR 30.00) in its revised ARARs table (Attachment C, pp. C-4 through C-8). The discussion of each set of regulations goes back and forth between permanent on-site disposal in the UDF and temporary management of remediation-related waste prior to disposal. These discussions should more clearly distinguish between these two types of activities. GE's comments on each are as follows:

**a. Permanent disposal in the Upland Disposal Facility**

Under Attachment C to the 2020 Settlement Agreement (reprinted as Attachment F to the Draft Revised Permit), material to be placed in the UDF will have a volume-weighted average PCB concentration of less than 50 mg/kg, but some amount of that material will have a discrete PCB concentration equal to or greater than 50 mg/kg. EPA's discussion of the pertinent regulations includes several key points that are relevant to the on-site disposal of material with a PCB concentration equal to or greater than 50 mg/kg in the UDF. These include the following:

- With respect to EPA's regulations under the Toxic Substances Control Act (TSCA) (40 C.F.R. Part 761), EPA states that, "[a]s provided in Attachment D to the Permit, PCB-contaminated sediments and soils in the Rest of River are regulated for cleanup and disposal as PCB-remediation waste under 40 C.F.R. Part 761" (p. C-5). It also states that "[b]oth the on-site and off-site disposal of PCBs are addressed pursuant 40 C.F.R. 761.61(c) and EPA's revised risk-based determination in Attachment D of the Draft Revised 2020 Permit" (p. C-7).
- With respect to the state solid waste site suitability regulations in 310 CMR 16.40(3) and (4), EPA states that those regulations are "potentially" applicable or relevant and appropriate for the UDF (p. C-5). It then states that "EPA believes that the remedy can comply with all substantive provisions of 310 CMR 16 except for the provisions of 310 CMR 16.40(4)(d)" (which prohibits siting such a facility in an Area of Critical Environmental Concern [ACEC]), but that, in any event, for each provision of these regulations that is deemed an ARAR but cannot be met at the UDF, "EPA determines that compliance would create a greater risk to human health and the environment," and it thus would invoke a waiver of such provision under CERCLA Section 121(d)(4)(B) (*id.*).
- With respect to the state hazardous waste regulations in 310 CMR 30, EPA states that those regulations do not apply to the UDF, but that, to the extent that any material to be disposed of in the UDF "is deemed to be Massachusetts hazardous waste because of the presence of PCBs, EPA has determined that the requirements [of these regulations] are not appropriate," and that if these regulations are considered an ARAR, EPA "proposes to waive" them on the



ground that “compliance would pose a greater risk to human health and the environment than the proposed remedy” (p. C-7).

GE agrees with EPA in several respects. First, GE agrees that PCB-contaminated sediment and soil in the Rest of River constitute “PCB remediation waste” and thus “are regulated for cleanup and disposal . . . under 40 C.F.R. Part 761.”

GE also agrees with EPA’s risk-based determination in Attachment D to the Draft Revised Permit, pursuant to 40 C.F.R. § 761.61(c), for both on-site and off-site disposal activities specified in the Draft Revised Permit, including the disposal of PCB remediation waste in the UDF in accordance with Attachment E to the Draft Revised Permit.

GE also agrees with EPA that any state regulatory requirements that would otherwise interfere with the on-site disposal of PCB remediation waste in the UDF as specified in the Revised Permit are inappropriate because compliance with those state regulatory requirements would cause greater risk to human health and the environment than the proposed remedy, and therefore any such state regulatory requirements should be waived under CERCLA Section 121(d)(4)(B).

Consistent with these fundamental agreements, a number of clarifications and revisions are necessary in EPA’s discussion of the application of the Massachusetts solid and hazardous waste regulations to the UDF.

First and most importantly, since the UDF will not meet certain of the solid waste site suitability criteria in 310 CMR 16.40 and/or the hazardous waste facility location standards at 310 CMR 30 *in addition* to the ACEC prohibition, EPA must, consistent with the 2020 Settlement Agreement, clarify that any such requirements that would interfere with the on-site disposal in the UDF of any material that meets the criteria in Attachment F to the Draft Revised Permit, including any such PCB remediation waste, are waived under CERCLA Section 121(d)(4)(B) for the reasons identified by EPA.

In addition, EPA should clarify that, insofar as the UDF will manage state hazardous waste due to the presence of PCBs, the locational requirements of the state hazardous waste regulations do not apply to the UDF. The reason is that those regulations exempt facilities regulated under 40 C.F.R. Part 761, including by virtue of a risk-based determination pursuant to 40 C.F.R. § 761.61(c) (such as the one EPA has made here), except for certain provisions relating to a location within an ACEC (310 CMR 30.501(3)(a)); and those ACEC provisions (310 CMR 30.501(3)(a)4 and 30.708) will be waived under CERCLA Section 121(d)(4)(B).

Similarly, EPA should clarify that, to the extent that the UDF will manage Massachusetts hazardous waste, the solid waste site assignment regulations would not apply to the UDF at all, because they exclude facilities that manage hazardous waste (310 CMR 16.01(4)(a)).



**b. Temporary management of excavated/dredged materials**

Similar clarifications should be made with respect to the statements in the ARARs table regarding temporary management of excavated materials.

With respect to the application of the state solid waste site assignment regulations to such temporary management, the table states that there is no change in status from the 2016 Permit (p. C-4). That permit stated that, to the extent that those regulations apply to the temporary management of materials prior to off-site disposal and that such materials constitute solid waste and that locations for such temporary management are in an ACEC or a Resource Area or Riverfront Area, EPA, in consultation with the State, waives the requirements that "prohibit or restrict" such management as technically impracticable under CERCLA Section 121(d)(4)(C) (2016 Permit, Att. C at pp. C-14 – C-15). The current table attempts to repeat this statement in the fourth paragraph of the last column relating to these regulations; but it introduces the discussion by referring only to Section 16.40(4)(d) (the ACEC prohibition) (p. C-5).

This reference to only the ACEC prohibition in Section 16.40(4)(d) is too limited. For example, the prohibition on temporary management of solid waste in a Riverfront Area is in Section 16.40(3)(d).6, and there may be other locational provisions of Sections 16.40(3)(d) or 16.40(4) that will similarly "prohibit or restrict" certain temporary waste management areas. In addition, the table says that the waiver applies only to temporary management *prior to off-site disposal* whereas it should also apply to temporary management prior to transport to the UDF (p. C-5). GE suggests that, to avoid confusion, this paragraph be revised to read:

"The remedy may necessarily include temporary management of excavated material, some of which may constitute solid waste under these regulations, in portions of the ACEC (or at locations outside but adjacent to the ACEC) or at a Resource Area or Riverfront Area or at other types of areas subject to 310 CMR 16.40(3)(d) or 16.40(4). EPA considers as waived, pursuant to CERCLA 121(d)(4)(C), any of the requirements of these regulations that would prohibit or restrict such temporary management."

As to the temporary management of excavated materials that constitute hazardous waste under the state regulations, the ARARs table again states that there is no change in status from the 2016 Permit (C- 7). That permit stated that, to the extent that the hazardous waste regulations apply to the temporary management of materials prior to off-site disposal and that such materials constitute hazardous waste under these regulations and are not subject to an exemption (such as the exemption for dredged material) and that locations for such temporary management are within (or could affect) the ACEC, EPA, in consultation with the State, waives the requirements that prohibit such management as technically impracticable under CERCLA Section 121(d)(4)(C) (2016 Permit, Att. C at pp. C-12 – C-13). The current table repeats that waiver (p. C-7).

This statement is also too limited. The locational requirements of these regulations (310 CMR 30.700-708) that would likely apply to temporary management areas go beyond the prohibition

on location in an ACEC.<sup>2</sup> Given EPA's risk-based determination under TSCA, all of these requirements are subject to the above-referenced TSCA exemption except with respect to temporary management of hazardous waste in the ACEC (310 CMR 30.501(3)(a)). To make clear that none of these prohibitions will "prohibit or restrict" temporary management areas for excavated material that constitutes state hazardous waste, EPA should broaden its waiver by including language along the following lines:

"EPA's risk-based TSCA determination in Attachment D to the Permit applies to the temporary management of excavated materials that constitute hazardous waste under these regulations. To the extent that (a) the remedy would involve temporary management of such excavated materials that are not subject to an exemption (such as the exemption for dredged material) and (b) the locations for such temporary management are within (or could affect) the ACEC or are within the other types of areas subject to the provisions of 310 CMR 30.700-708 and are not subject to the TSCA exemption in 310 CMR 30.501(3)(a), EPA considers as waived, pursuant to CERCLA 121(d)(4)(C), the requirements that prohibit or restrict such temporary management."

## **2. Massachusetts Dam Safety Standards**

The ARARs table in Attachment C states that the Massachusetts Dam Safety Standards, 310 CMR 10.00, are applicable to the remedy and that the remedy will comply with them for Massachusetts dams in the area of remedy activity (p. C-4). EPA should clarify that the Massachusetts standards do not apply to dams regulated by the Federal Energy Regulatory Commission (FERC) – i.e., the Willow Mill and Glendale Dams – because, for such dams, these state regulations are preempted by FERC regulation under the Federal Power Act. See *First Iowa Hydro-Electric Cooperative v. Federal Power Comm'n*, 328 U.S. 152 (1946); *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490 (1990). In fact, in its October 2016 Response to Comments on the 2014 Draft Permit, EPA "recognize[d] that if responsibilities for a particular dam are subject to preemption by FERC, the state dam safety ARAR would not be applicable" (p. 313). EPA should do the same in the 2020 ARARs table.

## **3. RCRA Regulations for Hazardous Waste**

The 2016 Permit lists certain provisions of EPA's RCRA regulations as potentially applicable or relevant and appropriate to various remedial activities in the event that RCRA hazardous waste is identified and that such waste is removed the Area of Contamination but remains on-site in temporary management areas during remedy implementation (2016 Permit, Att. C at pp. C-6, C-20 – C-21). The entry for RCRA regulations on the identification of Hazardous Waste (40 C.F.R.

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<sup>2</sup> For example, they include such requirements as that the active portion of a waste pile may not be constructed (a) in the 500-year floodplain, (b) in watershed of Class A surface waters, (c) in wetlands, (d) within ½ mile of public water supply well, (e) on land overlying an actual, planned, or potential public underground drinking water source, (f) within 1,000 feet of an existing private drinking water well, or (g) without a 200-foot buffer zone to fenceline.



261) (2016 Permit, Att. C at p. C-20) states that materials subject to removal will be tested to determine whether they constitute hazardous waste under RCRA. GE suggests that EPA also note that, under 40 C.F.R. § 261.4(g), dredged material that is subject to the requirements of Section 404 of the Clean Water Act (which will be the case here given the Section 404 ARAR) does not constitute a hazardous waste (regardless of testing results), and that thus the RCRA hazardous waste requirements would not apply to the temporary management of any such material.

#### IV. GE'S RESERVATIONS OF RIGHTS

All of the parties to the 2020 Settlement Agreement, including GE, have agreed not to challenge the final Revised Permit issued by EPA unless it is inconsistent with the terms of the 2020 Settlement Agreement. GE believes that, in its current form, the Draft Revised Permit is largely consistent with the 2020 Settlement Agreement, with certain important exceptions discussed in prior sections of these Comments that must be reconciled in the final Revised Permit. However, if the final Revised Permit is inconsistent with the terms of the 2020 Settlement Agreement, GE and all of the other non-EPA parties to the 2020 Settlement Agreement have the right to challenge that final Revised Permit in the EAB and then in a reviewing court. GE expressly reserves that right, including raising in such a challenge any of the arguments presented in GE's challenge to the 2016 Permit in the EAB, as well as any issues raised by any new provisions of the Revised Permit.<sup>3</sup>

In this regard, the Draft Revised Permit states (on p. 7, Section I.A.3.b – Second Appeal) that, in the event that the final Revised Permit is inconsistent with the 2020 Settlement Agreement and GE appeals it to the EAB, GE "shall perform all severable work . . . for which EPA's original permit modification decision was upheld previously by the EAB, and if appealed from the EAB, by the United States Court of Appeal[s] for the First Circuit ('First Circuit Court of Appeals')." That statement is legally incorrect. Since no party has yet had the opportunity to raise any aspect of the revised Permit to the First Circuit Court of Appeals, GE would not be required under the Consent Decree, in the event of a new appeal from a final Revised Permit, to perform any work that is subject to that appeal during the pendency of the appeal.<sup>4</sup> While we hope that the risk of any legal appeals is very low and that cleanup work can commence and continue without delay,

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<sup>3</sup> This reservation includes the right to challenge any of the ARARs that were included in the 2016 Permit, including those that are not addressed in EPA's revised ARARs table in Attachment C to the Draft Revised Permit.

<sup>4</sup> More specifically, because the EAB remanded the original permit modification decision (i.e., the 2016 Permit) to EPA for further consideration, the First Circuit Court of Appeals has not yet had the opportunity to consider any aspect of the Revised Permit. Accordingly, in the event that the final Revised Permit is inconsistent with the 2020 Settlement Agreement and a party to the original appeal (including GE) appeals again to the EAB, that party has the right thereafter to appeal to the First Circuit Court of Appeals any aspect of the Revised Permit. In that case, under the Consent Decree, work that is subject to that appeal would not be required to proceed, even if previously upheld by the EAB, until the appeal is resolved.



it is important as a matter of record to ensure legal conformity. The Permit should thus be modified to be consistent with the Consent Decree and the 2020 Settlement Agreement in this regard. Specifically, EPA should make clear that, in the event of a GE appeal to the EAB, GE shall perform all severable work that is not subject to that appeal (and not preserved for future appeal to the First Circuit Court of Appeals), but shall not be required to perform work that was challenged in GE's initial appeal to the EAB until GE has had the opportunity to present its position to the First Circuit Court of Appeals.

Further, while GE supports the 2020 Settlement Agreement, it does not agree with certain of the contentions made by EPA in support of the Draft Revised Permit in the Statement of Basis (SB) for the Revised Permit and the Supplemental Comparative Analysis (SCA), including with regard to application of the remedy evaluation criteria in the 2000 Permit. Again, in the event that the final Revised Permit is inconsistent with the 2020 Settlement Agreement, GE reserves its right to dispute those contentions.<sup>5</sup>

## V. CONCLUSION

GE supports EPA finalizing the Draft Revised Permit subject to the necessary corrections described in these Comments. Once the Revised Permit is final, GE looks forward to fulfilling its commitment to EPA and the surrounding communities to expedite the cleanup of the Housatonic River and ensure the additional protections and benefits outlined in the Settlement Agreement.

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<sup>5</sup> For example, GE does not concede that the additional removals required by the revised remedy "make the 2020 Alternative better" in terms of effectiveness (SB p. 23), or, more broadly, that "the 2020 Alternative is better suited [than the 2014 Alternative] to meet the General Standards of the 2000 Permit in consideration of the Selection Decision Factors of the 2000 Permit" (SCA p. 24). Similarly, GE does not agree with EPA's various statements that the new hybrid disposal alternative (TD 6) better meets the Permit's remedy evaluation criteria than the alternative of all on-site disposal (TD 3) (SB pp. 28-30; SCA pp. 31-35 & 40). GE preserves its position on those issues.