



Martin Suuberg
Commissioner

Commonwealth of Massachusetts
Charles D. Baker, *Governor* • Karyn E. Polito, *Lieutenant Governor*

Ronald S. Amidon
Commissioner

Executive Office of Energy and Environmental Affairs
Kathleen A. Theoharides, *Secretary*

September 18, 2020

Submitted by email at r1housatonic@epa.gov

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

Re: Commonwealth of Massachusetts, GE-Housatonic River Site Public Comments

Dear Sir/Madam,

The Commonwealth appreciates the opportunity to comment on the documents issued on July 9, 2020 by EPA for public comment concerning the cleanup plan for the “Rest of River” portion of the Housatonic River, including the Draft Revised 2020 Permit, the Determination on Remand and Supplemental Comparative Analyses of Remedial Alternatives, and the Statement of Basis. This submission constitutes the Commonwealth’s comments on these documents. The Commonwealth provides these comments for EPA’s consideration, and to establish for the record the Commonwealth’s position regarding the issues discussed herein.

The Commonwealth notes that the six municipalities most affected by the risks posed by PCBs in the Housatonic River and floodplain support the cleanup plan, and the Commonwealth intends to work with EPA and these municipalities to see that the cleanup plan is implemented. Accordingly, the Commonwealth does not object to the cleanup plan as set forth in the documents referenced above, nor the waiver of Applicable or Relevant and Appropriate Requirements (“ARARs”) when it is determined by EPA, pursuant to CERCLA 121(d)(4)(B), that compliance with certain ARARs will result in greater risk to human health and the environment than other alternatives.

EPA’s Position Concerning Certain Commonwealth Regulatory Requirements¹

¹ The Commonwealth notes that the same or similar language to that quoted herein is included in other documents issued by EPA on July 9, 2020 for public comment. The Commonwealth restates its comments with respect to such language.

Department of Environmental Protection
One Winter Street
Boston, MA 02108
617-292-5744

Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114
617-626-1000

Department of Fish and Game
251 Causeway Street, Suite 400
Boston, MA 02114
617-626-1500

In deciding on a cleanup, EPA must determine whether certain Massachusetts regulatory requirements qualify as ARARs. If a requirement is an ARAR, the cleanup must meet that requirement or EPA must properly invoke a waiver of the requirement under federal law. A requirement is deemed an ARAR for one of two reasons: either (1) it is applicable; or (2) it is relevant and appropriate. EPA concluded that a number of the Commonwealth's regulatory requirements were not applicable. The Commonwealth disagrees, and asserts that these regulatory requirements are applicable as that term is defined in the National Contingency Plan, and therefore are ARARs. However, because the Commonwealth does not object to EPA's application of the "greater risk to human health and the environment" waiver in the unique circumstances of this case, the status of these regulatory requirements as ARARs is not critical to implementation of the remedy. Put another way, the Commonwealth disagrees with certain aspects of the EPA's reasoning, but has no objection to the result EPA reached. Accordingly, while noting the Commonwealth's disagreement, the Commonwealth is not in this comment letter presenting as robust of an explanation of its position as it would if that disagreement made a difference to the remedy selection.

The Commonwealth disagrees with the manner in which EPA characterizes and applies certain of the Commonwealth's regulatory requirements, as set forth below:

310 CMR 16.40(3) and (4) - Facility Specific Site Suitability Criteria and General Site Suitability Criteria for Solid Waste Facilities

On page C-5 of Attachment C to the Draft Revised 2020 Permit, *Summary of Applicable or Relevant and Appropriate Requirements (ARARs)* ("Attachment C"), EPA characterizes the status of 310 CMR 16.40(3) and (4) as "potentially applicable or relevant and appropriate for Upland Disposal Facility" and states as follows:

"... 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). For each provision of 310 CMR 16, to the extent that they are deemed to be an ARAR but cannot be met at the Upland Disposal Facility, EPA determines that compliance would pose a greater risk to human health and the environment and accordingly, EPA would invoke a waiver of the provision pursuant to CERCLA 121(d)(4)(B) ..."

On page B-2 of Attachment B to the Determination on Remand and Supplemental Comparative Analyses of Remedial Alternatives for the General Electric (GE)-Pittsfield/Housatonic River Site Rest of River, EPA Region 1 July 2020 *Applicable or Relevant and Appropriate Requirements – Significant Changes for Draft Revised 2020 Permit* ("Attachment B"), EPA states as follows:

"Massachusetts Site Suitability Criteria, 310 CMR 16 – 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). For each provision of 310 CMR 16, to the extent that they are deemed to be an ARAR but cannot be met at the Upland Disposal Facility, EPA determines that compliance would create greater risk to human health and the environment and accordingly EPA would invoke a waiver of the provision pursuant to CERCLA 121(d)(4)(B)(hereinafter, references to CERCLA 121(d)(4)(B) include 40 C.F.R. 300.430(f)(1)(ii)(C)(2))..."

Commonwealth's Comment: The documents released for public comment by EPA do not demonstrate how full compliance with 310 CMR 16.40(3) and (4) will be achieved. It is the Commonwealth's position that the requirements set forth in 310 CMR 16.40(3) and (4) are ARARs

since they are applicable requirements.² Therefore, the requirements set forth in these regulations must be complied with during implementation of the proposed cleanup or properly waived by EPA pursuant to CERCLA 121(d)(4)(B).

310 CMR 16.40(4)(d) – Areas of Critical Environmental Concern

On page C-6 of Attachment C, EPA states as follows:

“To the extent: 1. the materials disposed of on-site during implementation of the remedy constitute solid waste under this regulation; and 2. the locations for disposal of the materials are within the ACEC (or, the locations are outside but adjacent to the ACEC and such locations fail to protect the outstanding resources of the ACEC) or in a Resource Area or Riverfront Area: the requirements are not appropriate for the Upland Disposal Facility because compliance will create greater risk to human health and the environment than implementation of the remedy set forth in the Draft Revised 2020 Permit ... However, if the provisions of 310 CMR 16.40(4)(d) are deemed to be ARARs, EPA considers as waived, pursuant to CERCLA 121(D)(4)(B), the requirements of 16.40 that prohibit or restrict such disposal locations during implementation of the remedy.”

On pages B-3 and B-4 of Attachment B, EPA states as follows:

“With respect to the disposal of materials during implementation of the remedy, EPA’s position is that the provisions of 16.40(4)(d) are relevant. To the extent that: 1. the materials disposed of on-site during implementation of the remedy constitute solid waste under this regulation and 2. the locations for disposal of the materials are within the ACEC (or, the locations are outside but adjacent to the ACEC and such locations fail to protect the outstanding resources of the ACEC), EPA has determined that the requirements are not appropriate for the Upland Disposal Facility because compliance will create greater risk to human health and the environment than implementation of the remedy set forth in the Draft Revised 2020 Permit ... However, if the provisions of 310 CMR 16.40(4)(d) are deemed to be an ARAR, EPA proposes to waive, pursuant to CERCLA 121(d)(4)(B), the requirements of 16.40(4)(d) that prohibit or restrict such disposal locations during implementation of the remedy.”

Commonwealth’s Comment: It is the Commonwealth’s position that 310 CMR16.40(4)(d) is an ARAR since it is an applicable requirement.³ Therefore, 310 CMR 16.40(4)(d) must be complied with during implementation of the proposed cleanup or properly waived by EPA pursuant to CERCLA 121(d)(4)(B).

310 CMR 16.40(3)(a)10. (Criteria for Landfill Facilities (Restricted Areas)) and 310 CMR 16.40(4)(a) (Agricultural Lands)

On pages B-2 and B-3 of Attachment B, EPA states as follows:

² “Applicable requirements” is defined in the National Contingency Plan. “Applicable requirements” means those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance ...” 40 C.F.R. 300.5.

³ See Footnote 2 for the definition of “Applicable requirements.”

“Below is EPA’s ARAR analysis regarding ... specific provisions from 310 CMR 16.

310 CMR 16.40(3)(a).10. Criteria for Landfill Facilities (Restricted Areas). No site shall be determined to be suitable or be assigned as a landfill facility where there is a potentially productive aquifer. In EPA’s assessment, this provision is not appropriate for the Upland Disposal Facility, because the flow of the groundwater from the site is away from residences, and the contamination of the area due to two existing landfills makes use as a productive aquifer unlikely and will be restricted by the remedy. As noted above, 2019 sampling demonstrated many exceedances of drinking water standards (sampling results exceeded drinking water standards for cyanide, 1,4-Dioxane, volatile organic contaminants, metals and total dissolved solids), making it likely that the aquifer cannot now, nor in the reasonably foreseeable future, be used as a public water supply due to existing contamination of the aquifer. Thus, EPA determines that even if it were relevant and appropriate, this area would meet one or more of the exceptions described in 310 CMR 16.40(3)(a).10.a-c. If, however, it were deemed to be an ARAR and not meet such exceptions, EPA proposes to waive the requirement based on greater risk to human health and the environment ...”

“310 CMR 16.40(4)(a) Agricultural Lands. EPA’s position is that this provision is not appropriate because any agricultural or horticultural values for the area have been largely eliminated by long-term gravel mining activities and the land is not actively devoted to agricultural or horticultural uses. In addition, current Mass GIS mapping does not identify any land as Prime Forest 1, Prime Forest 3, Unique or of State and local Importance. Prime Forest 2 land is mapped as only 0.66 acres of the 20 acres designated for land disposal. Additionally, the remedy will include restoration of the Upland Disposal Facility after closure and the 0.66 acres of Prime Forest and any other disturbed areas of the operational/support area can be appropriately restored or mitigated. Additionally, if the requirement were deemed to be an ARAR, EPA determines that the purposes of the requirement have been met. If, however, it were deemed that this requirement is an ARAR and has not been met, EPA proposes to waive the requirement under CERCLA based on greater risk to human health and the environment”

Commonwealth’s Comment: It is the Commonwealth’s position that 310 CMR 16.40(3)(a)10. and 310 CMR 16.40(4)(a) are ARARs since they are applicable requirements.⁴ Therefore, the requirements set forth in these regulations must be complied with during implementation of the proposed cleanup. The documents released for public comment by EPA do not demonstrate how compliance with these requirements will be achieved. As ARARs, the requirements set forth in these regulations must be complied with during implementation of the proposed cleanup or properly waived by EPA pursuant to CERCLA 121(d)(4)(B).

310 CMR 30 – Massachusetts Hazardous Waste Regulations

On page C-7 of Attachment C, EPA states as follows:

“The remedy does not include disposal of hazardous waste on-site so this provision does not apply to disposal of materials at the Upland Disposal Facility. The remedy includes, among other components, the excavation of PCB-contaminated soil and sediment, and the off-site disposal of at least 100,000 cubic yards of the PCB-contaminated material, including all PCB material that averages greater than or equal to 50 ppm (as determined by Attachment E to the Permit) at existing licensed facilities

⁴ See Footnote 2 for the definition of “Applicable requirements.”

approved to receive such material, and the on-site disposal of material averaging less than 50 ppm PCBs at the Upland Disposal Facility. Both the on-site and off-site disposal of PCBs are addressed pursuant to 40 C.F.R. 761.61(c) and EPA’s revised risk-based determination in Attachment D of the Draft Revised 2020 Permit... For disposal of material on-site, to the extent any material averaging less than 50 ppm is deemed to be Massachusetts hazardous waste solely because of the presence of PCBs, EPA has determined that the requirements are not appropriate. However, if the provision is deemed to be an ARAR, EPA proposes to waive it pursuant to CERCLA 121(d)(4)(B) because compliance with the prohibition of disposal at the Upland Disposal Facility would pose a greater risk to human health and the environment than the proposed remedy...”

Commonwealth’s Comment: It is the Commonwealth’s position that the requirements set forth in 310 CMR 30 including, without limitation 310 CMR 30.708 (Areas of Critical Environmental Concern), are ARARs since they are applicable requirements.⁵ Therefore, the requirements set forth in these regulations must be complied with during implementation of the proposed cleanup or properly waived by EPA pursuant to CERCLA 121(d)(4)(B).

301 CMR 12 Areas of Critical Environmental Concern

On page C-9 of Attachment C, EPA states as follows:

“The ACEC regulations pertain to State agency actions, and are not applicable to the federal EPA action. However, the remedy complies with the substantive requirements of 301 CMR 12.11(1)(c), which may be relevant and appropriate, by advancing the values of 301 CMR 12.11(1)(c), while avoiding adverse effects on identified values in section 12.11(1)(c).”

On page B-2 of Attachment B, EPA states as follows:

“Upon further review of the regulations, EPA has identified that virtually all the provisions in 301 CMR 12 are procedural, and thus are not substantive requirements that could be ARARs. The provisions of 301 CMR 12.11(1)(c) are substantive and may be relevant and appropriate. The remedy in EPA’s Draft Revised 2020 Permit thoroughly advances the seven values described in that provision (marine and aquatic productivity; surface and groundwater quality or quantity; habitat values and biodiversity; storm damage prevention or flood controls; historic and archaeological resources; scenic and recreational resources; and other natural resource values of the area). Additionally, the Hybrid Disposal approach portion of the Draft Revised 2020 Permit does not affect those values adversely.”

Commonwealth’s Comment:

In the 2016 permit, EPA determined that these regulations were ARARs, and characterized the regulations as applicable. As ARARs, the requirements set forth in these regulations must be complied with during implementation of the proposed cleanup or properly waived by EPA pursuant to CERCLA 121(d)(4)(B).

314 CMR 4.05(5)(e) - Numeric Massachusetts Water Quality Criteria for PCBs -Massachusetts Surface Water Quality Standards

⁵ See Footnote 2 for the definition of “Applicable requirements.”

In Attachment C, EPA reclassified this ARAR from a Chemical-Specific ARAR to an Action-Specific ARAR.

Commonwealth's Comment: Please explain why this ARAR was reclassified as an Action-Specific ARAR.

As stated earlier, the Commonwealth does not object to the cleanup plan as set forth in the public comment documents issued by EPA on July 9, 2020, nor the waiver of ARARs when it is determined by EPA that compliance with certain ARARs will result in greater risk to human health and the environment than other alternatives. The Commonwealth appreciates the opportunity to comment and intends to work with EPA and the municipalities to see that the cleanup is implemented in a proper and timely manner.

Sincerely,



Martin Suuberg
Commissioner
Massachusetts Department of
Environmental Protection



Ronald S. Amidon
Commissioner
Massachusetts Department of
Fish and Game