

Attachment 9

**Excerpts from EPA's Statement of Position in Support of
Intended Final Decision on the Modification to the
Reissued RCRA Permit and Selection of CERCLA
Response Action (February 29, 2016) ("EPA SOP")**

**STATEMENT OF POSITION OF THE U.S. ENVIRONMENTAL
PROTECTION AGENCY**

**IN SUPPORT OF INTENDED FINAL DECISION ON THE
MODIFICATION TO THE REISSUED RCRA PERMIT AND
SELECTION OF CERCLA RESPONSE ACTION**

**REST OF RIVER REMEDY, GE-PITTSFIELD/HOUSATONIC
RIVER SITE**

February 29, 2016

information from: (1) independent third party scientists, including peer review of EPA's risk assessments and EPA's computer modeling work related to fate, transport and bioaccumulation of PCBs in the River; (2) citizens, neighborhood groups, non-governmental organizations, local government officials, and local businesses, including multiple opportunities for comment, public meetings, public workshops and a public hearing; (3) GE, including its submission of a Corrective Measures Study ("CMS") and a Revised CMS of remedy alternatives, its comments at every decision point, and its technical discussions with EPA during a more-than-one-year period; and (4) state environmental agencies, including multiple opportunities for comment and feedback at every decision point, and its technical discussions over many months regarding EPA's remedy proposal.

All this information was included in the Administrative Record and was considered and evaluated by EPA before reaching its Intended Final Decision. EPA weighed all the relevant information under the governing process set forth in the Decree, considering the nine criteria and all the relevant information in the Administrative Record, and reached its Intended Final Decision with significant input from the state environmental agencies. Therefore, the Intended Final Decision is a quintessential Agency decision entitled to deference under principles of administrative law. Moreover, the Intended Final Decision is the best suited alternative -- and is in the middle of the range of alternatives in terms of costs and intrusiveness - to address contamination in the River considering the multiple complexities and factors presented in the Administrative Record.

Two examples illustrate that GE is not in a better position than EPA to evaluate the remedy selection criteria and other relevant information in the Administrative Record to select a remedy: namely EPA's selection of off-site disposal for contaminated soils and sediments and the remedy for Woods Pond. GE objects because off-site disposal is more expensive than on-site disposal. However, EPA evaluated all disposal alternatives, including more expensive potential treatment technologies, which EPA rejected. Nonetheless, GE failed to establish that any of its proposed on-site disposal locations, although cheaper, would be equally suitable compared to established off-site landfills. For example, the Decree specifically provides that one of the selection decision factors for EPA's selection of a remedy is "implementability," which includes, among other things, coordination with other agencies, availability of suitable landfills, and consideration of regulatory and zoning restrictions. GE claims that the outpouring of public and governmental opposition to on-site disposal is irrelevant to EPA's decision making under the Decree. GE is mistaken because of these implementability concerns. On-site disposal is opposed by many local residents and community advocacy groups, every Berkshire County city or town along the Housatonic, and at least seven state offices within Massachusetts. Community members have already petitioned the Commonwealth successfully to designate the area as an ACEC, affording the area heightened protection under the law, including prohibitions on siting landfills. Several community advocacy groups have used legal action to oppose EPA's work at the Consent Decree site directly. EPA's experience at other cleanup sites supports the concern that coordinated opposition to on-site disposal at the Housatonic will unduly delay implementation and completion of the remedy. The Decree also directly refutes GE's claim that EPA's decision making process should have ignored local and state opinions. The Decree requires public comment on many aspects of EPA's remedy selection process and that these comments be part of the Administrative Record supporting EPA's Intended Final Decision. The Decree

In 2011, EPA presented a potential proposed remedy to EPA's National Remedy Review Board ("NRRB") and Contaminated Sediments Technical Advisory Group ("CSTAG").²⁴ EPA considered comments from the NRRB and CSTAG and responded to those comments in August 2012.²⁵

All this information and analysis gathered over the years is contained in the Administrative Record for the Rest of River Remedial Action. CD ¶ 22.m. GE cannot dispute that EPA followed *the process* set forth in the Decree for gathering scientific information and analysis for the Administrative Record.

b. Process for Gathering Community Input under the Decree

The Decree also establishes an exhaustive process for EPA to gather information from the community. For over a decade EPA has made extraordinary efforts to involve the public and to solicit and respond to the views of GE, other stakeholders, and the other members of the public on the Rest of River. The community has been provided the opportunity to comment upon EPA's draft permit modification decision as well as upon the RFI Report, CMS, Revised CMS, HHRA, ERA, each of EPA's river modeling documents, and other similar documents. CD ¶ 22.m, n, o. These Comments are part of the Administrative Record for the River. In addition, the Citizens Coordinating Council ("CCC") and community relations are both formal components of the Decree requiring cooperation and participation, including from GE. CD ¶ 213. The CCC is made up of over 30 environmental, business and community leaders from Berkshire County and Connecticut. In particular, EPA has supported the CCC since its formation in 1998, as a meaningful opportunity for citizens to keep involved in the Site cleanups. In addition, in 2011, EPA held a series of workshops and a meeting known as a "charrette" to further engage the community in the remedy selection process.

Community members have successfully petitioned the Commonwealth to designate certain portions of the Housatonic River as part of an ACEC. This designation affords the area heightened protection under the law.

EPA's actions taken under the Decree have also been consistent with CERCLA's and RCRA's statutory provisions contemplating consideration of community input through the comment process as well as regulation and guidance documents recognizing community acceptance as a factor in the remedy selection process. CERCLA, 42 U.S.C. § 9617; RCRA, 42 U.S.C. § 6974; National Contingency Plan, 40 C.F.R. § 300.430(f)(3); RCRA Regulations, 40 C.F.R. 256.63; *see also RCRA Public Participation Manual*, EPA, EPA 530-R-96-007 (1996), *A Guide to Selecting Superfund Remedial Actions*, EPA, OSWER 9355 0-27FS.

GE cannot contend that EPA acted inconsistently with the process set forth in the Decree for gathering community input for the Administrative Record.²⁶

²⁴ EPA presents potential proposed remedy to EPA's National Remedy Review Board (NRRB) and Contaminated Sediments Technical Advisory Group (CSTAG)—June 2011.

²⁵ EPA issues regional response to NRRB/CSTAG Comments—August 2012.

²⁶ GE argues about the substantive impact of EPA's information gathering from the community, including that EPA allegedly provided too much weight to community input. This issue is addressed below in more detail at Section III.A.7, but such claims are different from arguing that EPA violated the process set forth in the Consent Decree for gathering information from the community and maintaining this information in the Administrative Record.

b. Woods Pond

Requirement: The Intended Final Decision requires removal of approximately 285,000-340,000 cubic yards (“CY”)¹¹⁷ of PCB contaminated sediment and placement of an engineered cap in Woods Pond (Reach 6).¹¹⁸

GE Position: The intended remedy for Woods Pond requires unnecessary removal and provides insufficient risk-based benefits compared to a smaller, less disruptive, and less costly alternative.

EPA Position: At issue here is the opportunity to permanently remove the risks posed by approximately 285,000-340,000 CY (depending upon EPA’s or GE’s respective calculations)¹¹⁹ of PCB-contaminated sediment. Woods Pond sediment contains approximately 25% of the mass of PCBs present in the Housatonic River,¹²⁰ and does not provide priority habitat for state-listed species.¹²¹ Accordingly, the remedy in the Intended Final Decision for Woods Pond represents the opportunity to remove a significant mass of PCBs from the river system, thereby reducing the potential for downstream transport of PCBs, and significantly reducing the bioavailability and exposure of PCBs to human and ecological receptors (including but not limited to the consumption of contaminated fish) with minimal short- or long-term impacts to the environment from the remediation itself. EPA’s remedy selection for Woods Pond is supported by the Administrative Record, and falls within EPA’s expertise in evaluating all the relevant factors in selecting a remedy for the Rest of River.

In terms of procedure, EPA followed the decision-making process outlined in the Decree and Permit in reaching its proposal for Woods Pond, and GE is not in a better position than EPA to evaluate the relevant considerations. EPA evaluated the relevant criteria based upon the Administrative Record, including comments received from GE and other members of

¹¹⁷ The removal volume estimates are based on the requirements of the Intended Final Decision, which generally calls for removal of sediment throughout the pond and an Engineered Cap placed to result in a residual depth of 6 feet, except in shallower areas.

¹¹⁸ For each remedy component, the Statement of Position provides a general description of the remedy requirements. For the specific requirements, consult EPA’s September 30, 2015 Intended Final Decision.

¹¹⁹ GE and EPA differ on the volume of material required to be excavated from Woods Pond under the Intended Final Decision. EPA based its calculations of 285,000 CY on a minimum water depth of six feet, not an average depth of six feet as GE mistakenly claims. Comparative Analysis, Attachment 6; GE SOP at 16, n. 17. GE provided no support for its 340,000 figure so it is difficult to comment upon its accuracy. Further, GE’s “preferred remedy” as briefly described in its SOP would likely involve the removal of approximately 100,000 CY or more. The 100,000 CY estimate is based on a 1.0 to 1.5 foot excavation (not 9 inches, which was not contemplated in GE’s Revised CMS – See Table 6-1) in both the shallow and deep portions of Woods Pond. Excavation in the deep part of Woods Pond may be necessary to avoid the loss of flood storage capacity in the Woods Pond area. Therefore, the difference between EPA’s Intended Final Decision and GE’s SOP preferred remedy is 185,000 CY, a smaller differential than portrayed by GE. But even if GE’s figures were correct, EPA’s analysis would not change for all the reasons set forth herein. GE’s SOP position was not included in the series of remedial options evaluated by GE in its Revised Corrective Measures Study (“Revised CMS”), so GE’s SOP position has not been fully evaluated by EPA against the remedy selection criteria. Significantly, GE in its Revised CMS, opined that the alternative known as SED 10 best met the permit criteria. For Woods Pond, SED 10 required the removal of 169,000 CY in the top 2.5 feet of sediment without the placement of an Engineered Cap.

¹²⁰ GE’s RCRA Facility Investigation Report for the Rest of River, 2003. Table 4-11. This does not include the PCB mass in the floodplain.

¹²¹ Commonwealth of Massachusetts’ Comments (2014) at 6.

the public in selecting the proposed remedy for Woods Pond. In doing so, EPA relied upon its technical expertise to evaluate the merits of the multiple and complex factors that shape and determine the selection of remedy that is in the public interest to protect human health and the environment. The soundness of EPA's decision is contrasted with GE's bias favoring its own bottom line as shown below.

GE ignores or discounts the many benefits of removing significant quantities of PCB contaminated sediment from Woods Pond.¹²² For example, the Woods Pond represents a significant percentage of the total PCB contamination, in an area that does not provide priority habitat for any state-listed species, and that is amenable to traditional open water dredging technologies. Therefore, there is an opportunity at Woods Pond to remove a significant source of PCBs without impacting the state Core Habitats and by using relatively straightforward engineering methods. Once dredging of the Pond is initiated, continuing deeper dredging to remove a significant mass of PCB contaminated material from the Pond will result in minimal additional natural resources being disrupted while providing the benefit of greater removal. There is no other point on the River where it is possible to remove over 285,000 CY of PCB contaminated material from a single location with fewer negative impacts to habitat.¹²³

GE claims that a shallow removal followed by capping would provide almost the same level of protection to human health and the environment, in part because it is the owner of Woods Pond dam and therefore there is unlikely to be any dam breach or failure resulting in significant releases of PCBs. EPA does not disagree with GE's assertion that sediment removal sufficient to place a properly designed, constructed, operated and maintained Engineered Cap in perpetuity might achieve the same reductions as this greater PCB removal for certain risks, such as fish consumption, direct contact, and ecological risk in Woods Pond itself. However, this conclusion assumes that such a cap will be achieved and be properly maintained and operated to resist floods and ice-scour in perpetuity and that there is no breach or failure of Woods Pond Dam. In making these arguments, GE discounts the benefits of more effective source control through the permanent reduction in the bioavailability of PCBs to human and ecological receptors through removal. Here the more extensive source control – removal – leads to the twin benefits of risk reduction, including reduction of the risk of downstream transport, and increased long-term effectiveness. In Woods Pond, there is a significant benefit to removal of the large amount of PCBs in the event of breach or failure of Woods Pond Dam.¹²⁴ After all, even with the best intentions and significant resources, it is impossible to guarantee that there will never be a dam breach or failure in perpetuity,¹²⁵ even if GE remains the Dam owner in perpetuity, including unknowns or uncertainties associated with potential climate change. In contrast, removing sediment from behind the dam and disposing of it in a secure landfill guarantees that such sediment cannot be reintroduced into the environment and transported downstream in the event of cap or dam breach or failure. GE simply fails to account for the benefits provided by the finality in risk reductions and source

¹²² This position contradicts its earlier view as set forth in its Revised CMS that the best alternative for Woods Pond was removal of 169,000 CY of sediment. Revised CMS at 28 and table 6-1.

¹²³ This is not to say that other portions of the River do not also require cleanup to address the ongoing risks posed to the River and floodplains.

¹²⁴ Also see EPA SOP III. B.5.

¹²⁵ The PCB contamination caused by the 1992 partial breach of the Rising Pond dam, described further in Section III.A.2.e, is a relevant example.

control related to actually removing 285,000-340,000 CY of PCB-contaminated material from the River.

In its SOP, for the first time,¹²⁶ GE also attempts to discount the value of removing Woods Pond sediment as EPA proposes by suggesting that most of the deeper sediments (more than two feet below the sediment surface) contain PCB concentrations less than 1 mg/kg. Even if most of the deeper concentrations (more than two feet below the sediment surface) are less than 1 mg/kg more than two feet below the sediment surface, which is uncertain,¹²⁷ far higher levels of PCB concentrations are also present more than two feet below the sediment surface. For example, PCB concentrations as high as 273 mg/kg are located from 2 to 2.5 feet deep; as high as 152 mg/kg from 2.5 to 3 feet deep; as high as 21.5 mg/kg from 3 to 3.5 feet deep; and as high as 146 mg/kg from 5.5 to 6 feet deep.¹²⁸ In addition, GE ignores the fact that, according to the data presented in Table 4-10 of GE's RFI Report, approximately 75% of the PCB mass in Woods Pond is contained in sediment from one to six feet deep.¹²⁹ Thus, removing sediment from one to six feet deep beneath the current pond bottom results in the removal of a significant mass of PCBs from the Pond, and thereby reduces future risks of PCBs becoming bioavailable and/or being transported downstream.

In addition, GE exaggerates the downsides of the EPA proposal for Woods Pond, by arguing that other remedies would be almost as good and cost far less. EPA believes that GE's cost discrepancies are inflated. While GE infers a cost difference of approximately \$130 million, EPA believes a more accurate cost difference is likely to be approximately \$80 million.¹³⁰ Regardless of the exact figures, EPA considered the magnitude of any additional cost when evaluating all the relevant factors for its Intended Final Decision.¹³¹

Similarly, GE argues that the benefits provided by a deeply dredged Woods Pond in its capacity to serve as a PCB trapping mechanism to prevent PCB transport downstream are allegedly immaterial. GE acknowledges that the proposed deepening increases the PCB trapping efficiency compared to remedies that do not deepen the Pond. Accordingly, at issue is the significance of the increased trapping. GE's own modeling shows that as a result of the increase in trapping efficiency, the incremental reduction in downstream transport, or flux, over Woods Pond is 0.1 kg/year and over Rising Pond is 0.2 kg/yr. GE SOP at 18. These reductions in flux are significant relative to the Downstream Transport Performance Standards. If these trapping related reductions were not achieved it would decrease the likelihood of GE achieving the Downstream Transport Performance Standard. Furthermore, the pond and dam have historically been an effective trap as a significant amount of PCB mass

¹²⁶ First, it should be noted that GE's latest proposed remediation is to a depth of only nine inches (in the shallow areas of the Pond only), and GE's comment refers to sediment more than *two* feet below the surface.

¹²⁷ For information on sediment heterogeneity, see 2004 ERA, Appendix D, Sections D.2.4.4 and D.2.4.6 and Model Calibration Report, Appendix B, Pages B.1 to 10.

¹²⁸ Rest of River Site Investigation Data Report.

¹²⁹ GE RFI Report, Table 4-10. In Table 4-10, GE does not present the estimate of the average pounds of PCB mass for each depth interval. The percentage calculated is based on GE's +2 Standard Error estimate.

¹³⁰ If the volume of material is only 285,000 CY as EPA believes, the cost of excavation and disposal will be proportionately reduced compared to 340,000 CY. EPA believes the cost difference between the Intended Final Decision and a GE's proposed shallow remedy in its SOP is around \$80 million.

¹³¹ Even if GE's cost figures and assumptions are accurate, EPA's proposal for Woods Pond would remain the preferred alternative based upon a full evaluation of all the relevant factors, including the objective of eliminating risks related to source control and downstream transport.

criteria and the administrative record. For example, without limitation, (1) permanent on-site disposal at one of GE's preferred locations would not meet TSCA landfill siting requirements and/or require waiver of ARARs designed to protect wetland habitat and/or an ACEC; (2) unlike on-site disposal, off-site disposal does not entail the potential siting of a new landfill in an area that may not meet all the suitability requirements for such a landfill, such as proximity to drinking water sources, hydrology, and soil permeability; (3) on-site disposal would require the creation of a new landfill in an area with no known contamination whereas off-site disposal will place contamination in a pre-existing area licensed to accept hazardous substances; (4) on-site disposal faces significant state and local opposition that threatens the implementation of the remedy; and (5) while off-site disposal is more expensive than on-site disposal, it is less expensive than other alternatives requiring the treatment of contamination. In sum, based on EPA's review of the relevant criteria and the Administrative Record, off-site disposal is best suited to meet the general standards outlined in the Permit, in consideration of the Permit's decision factors, including a balancing of those factors against one another.

i. EPA's selection of off-site disposal is supported by the nine permit criteria and the administrative record.

GE claims that EPA concedes that off-site disposal would be no more protective to human health and the environment than on-site disposal. GE SOP at 6. On the contrary, EPA does favor off-site disposal in terms of protectiveness. In addition, and even more significantly, GE treats cost and protectiveness as the sole criteria for decision-making, when they are only two of the nine Permit criteria that EPA evaluated. When viewed in that context, off-site disposal is clearly the best suited disposal option.

One of the Permit factors EPA considered in selecting the remedy is its implementability, including coordination with other agencies, regulatory and zoning restrictions, and availability of suitable facilities. Long-standing and active opposition to on-site disposal threatens the Rest of River remedy with lengthy litigation and community resistance. By proposing off-site disposal, EPA avoids these road-blocks, rendering the entire remedy more likely to be promptly implemented and in that respect more protective of human health and the environment. EPA acted in a manner consistent with the Decree in considering public and governmental objections to on-site disposal because these objections are relevant to the implementability criterion listed in the Permit. In addition, the Decree allows EPA to consider any relevant evidence in the administrative record, including the overwhelming number of public comments opposing on-site disposal. Moreover, the Decree offers multiple public participation opportunities, and these would be meaningless if EPA could not consider the views of the public in remedy selection.

Apart from implementability, EPA also considered the other relevant Permit criteria, including cost. For example, in evaluating long-term reliability and effectiveness, EPA evaluated the suitability of the proposed on-site landfill locations, considering the fact that GE did not establish that the proposed locations were suitable in light of soil permeability, hydrology, and proximity to potential drinking water sources and the Housatonic River. Similarly, EPA recognized that the Woods Pond and Forest Street locations would require the waiver of ARARs designed to protect an ACEC and/or wetlands habitat. EPA further considered the suitability of a pre-existing licensed off-site disposal location in comparison

with creating a new on-site landfill and potentially disturbing the habitat in an area with no known contamination. EPA also considered disposal alternatives that might have reduced PCB mobility, volume, or toxicity -- one of the nine criteria -- but these treatment alternatives were more expensive than off-site disposal and were rejected. Overall, EPA determined that off-site disposal is the best alternative under the relevant criteria because it will provide improved implementability, increased long-term reliability and effectiveness, compliance with ARARs, and be more protective of human health and the environment. Collectively these benefits outweigh off-site disposal's higher cost and the increased short-term impacts from the remedy.

ii. EPA's consideration of public and state opposition was well within the legal framework for the remedy selection process.

GE argues that EPA's off-site disposal requirement "conflicts with the Consent Decree's remedy selection criteria and is unlawful." In fact, EPA appropriately considered public and government opposition to on-site disposal. First, the text of the Decree and Permit authorize EPA to consider public and State views in evaluating alternatives, and second, the community and State views are a significant part of the Administrative Record that the Permit directs EPA to consider.

a.. Consideration of Public and State Views Fits Squarely within the Permit Criteria

EPA's consideration of public or governmental comment is supported by the Permit and Decree. The procedures outlined within those documents encompass consideration of community, local government, and state views. The Permit directs GE to consider each remedial alternative according to nine criteria that provide the standards for corrective measures.

Within the nine criteria set forth in the Permit, it is permissible to consider state and local opposition because they fall within the "implementability" criterion, Permit Section II.G.2.e. GE argues that EPA is reading state and community opposition into the "implementability" remedy selection criterion. But to implement means to "put into effect," or "to carry out."¹⁶⁸ The public and legal opposition to on-site disposal is squarely within the plain meaning of the term "implementability" because it will jeopardize EPA and GE's ability to carry out the entire remedy.

Those who oppose on-site disposal have several mechanisms to severely delay or block implementation of the remedy. The Decree itself recognizes the Commonwealth's right to appeal the remedy pursuant to 40 C.F.R. § 124.19 before the EAB and Section 7006(b) of RCRA before the 1st Circuit.¹⁶⁹ But the Commonwealth is not the only party with this right. In fact, any party that commented on the draft permit or participated in a public hearing on the draft permit may petition for review of the permit before the EAB. 40 C.F.R. § 124.19. Similarly, under Section 7006(b) of RCRA, "any interested person" may seek review of a permit modification under the Administrative Procedures Act in the relevant Circuit Court of Appeals. Even after these appeals were exhausted, the Commonwealth or local governments could pass new legislation or regulations to bar on-site disposal, which may have to be defeated through litigation before the remedy could proceed.

¹⁶⁸ Pocket Oxford American Dictionary and Thesaurus, Third Ed., 2010, at 403.

¹⁶⁹ Decree Paragraph 22.bb.

EPA's reading of the term "implementability" is further informed by several of the subsections listed in the permit under implementability. Subsection 6, "coordination with other agencies," would include the many comments from Massachusetts agencies, and local municipalities and towns opposing a local landfill. The ACEC designation and the solid and hazardous waste site restrictions fall within Subsection 3, "regulatory and zoning restrictions." Finally, public and governmental opposition bears upon Subsection 7, the availability of "suitable on-site or off-site treatment, storage, and disposal facilities and specialists," because if all on-site landfills are strongly opposed by the community, the suitability of those sites is compromised.

EPA's interpretation of the nine permit criteria takes into account its CERCLA and RCRA guidance documents. These guidance documents call for EPA to consider state and local acceptance in remedy selection. The National Contingency Plan, which is the set of regulations governing Superfund cleanups, includes "state and community acceptance" as "modifying criteria that shall be considered in remedy selection."¹⁷⁰ In accordance with this regulation, EPA's Superfund Community Involvement Handbook notes "The agency may alter the preferred alternative or shift from the preferred alternative to another if public comments or additional data indicate that these modifications are warranted."¹⁷¹

As in CERCLA, EPA's regulations for issuing RCRA permits (along with other types of permits) require public comment and public hearing opportunities on draft permits, allowing EPA to alter the final permit in response to public views.¹⁷² EPA's RCRA Public Participation Manual states, "Public participation plays an integral role in the RCRA permitting process."¹⁷³ A guidance document for RCRA corrective action decision documents notes that the response to comments accompanying the final permit decision should include any changes made to the proposed remedy due to public comments.¹⁷⁴

b. *GE Overstates Potential Limit on Consideration of Community and State Concerns*

As shown above, the Permit criteria explicitly support the consideration of public and State views. Beyond that, even if the Permit criteria did not do so, the Permit does not limit EPA to these criteria in selecting its remedy. When EPA is selecting the corrective measures and performance standards for the Rest of River, the Permit directs EPA to consider the submissions from GE, such as the nine criteria analysis in the Corrective Measures Study report, along with "any other relevant information in the Administrative Record for the modification of this Permit."¹⁷⁵

Public and governmental comments, minutes of the Citizens Coordinating Council, and other information relating to the many public engagement sessions sponsored by EPA are within the Administrative Record for the modification of the Permit. The Administrative Record also includes EPA regulations and guidance documents, including guidance documents for selection of CERCLA remedies and RCRA corrective actions. As explained below, these

¹⁷⁰ 40 C.F.R. § 300.430(f)(1)(i)(C).

¹⁷¹ USEPA, Superfund Community Involvement Handbook, April 2005 at 36.

¹⁷² 40 C.F.R. §§ 124.10 through 124.14.

¹⁷³ 1996 Edition, at 2-1.

¹⁷⁴ US EPA, 1991, Guidance on RCRA Corrective Action Decision Documents.

¹⁷⁵ Permit Section II.J.

guidance documents call for consideration of community and state acceptance in remedy selection.¹⁷⁶

The Decree envisions active public and state participation in the remedy selection process. This public participation would be empty if, as GE asserts, EPA cannot consider the wishes of the community in remedy selection. For instance, Decree Paragraph 22.n calls for EPA to propose the draft permit modification pursuant to EPA's RCRA regulations, "including the provisions requiring public notice and an opportunity for public comment . . ." Similarly, Paragraphs 22.j and 22.k require GE to submit a CMS Proposal and CMS Report to Massachusetts and Connecticut. Comment periods and opportunities for coordination with the states would be meaningless if public and state opinions were irrelevant to remedy selection. EPA's consideration of public or governmental comment is required by the Decree and Permit and the procedures outlined within those documents encompass consideration of community, local government and state views.

Additional support for the need for state and community concerns to be considered comes from EPA's 1996 RCRA Advanced Notice of Preliminary Rulemaking ("Notice").¹⁷⁷ At that time, EPA's national RCRA corrective action program championed strong public participation at the same time as proposing use nationally of Corrective Action Permit criteria similar to those being used in the Rest of River permit. The 1996 Notice stated that "EPA is committed to providing meaningful public participation in all aspects of the RCRA program, including RCRA corrective action" and that among EPA's key goals and implementation strategies for corrective action was to "Continue to involve the public in all stages of the corrective action process."¹⁷⁸ In that same Notice, EPA proposed to implement RCRA corrective action remedy selection through use of ten remedy selection criteria, none of which were Community Acceptance or State Acceptance.

Admittedly, the Permit does not explicitly list public and state acceptance as individual stand-alone remedy selection criteria. Nonetheless, the Permit's detailed description of the Implementability criterion, such as its specific subsections on coordination with other agencies, regulatory and zoning restrictions, and availability of suitable on-site or off-site treatment, storage, and disposal facilities and specialists, clearly is meant to accommodate public and State views. Moreover, to interpret the nine criteria otherwise leads to a result totally inconsistent with EPA guidance, the clear direction of the Decree, and RCRA and CERCLA desire for public participation. Moreover, it cannot be considered arbitrary for EPA to follow its own RCRA and CERCLA guidance in interpreting the permit criteria, and to follow the Permit direction to factor in any relevant information in the Administrative Record, in selecting the remedy. If GE intended for EPA to depart from this longstanding EPA practice codified in EPA's RCRA and CERCLA regulations, GE should have negotiated for an explicit prohibition in the Decree or Permit, but there is no prohibition in these documents. In short, far from being "arbitrary," EPA's decision to consider public and state views on the disposal alternatives was

¹⁷⁶ The National Contingency Plan includes "state and community acceptance" as modifying criteria. 40 C.F.R. § 300.430(f)(1)(i)(C).

¹⁷⁷ The negotiations on the Decree and Appendix G, the RCRA Corrective Action Permit, began in 1998, and the Decree was lodged in U.S. District Court in 1999.

¹⁷⁸ 61 Fed. Reg. 19432.

authorized by the text of the Decree, CERCLA's regulations, RCRA guidance, and overall EPA policy.

iii. Opposition to a new local PCB landfill has been persistent and vigorous.

GE stands alone in its advocacy of on-site disposal. Local communities and governments strongly oppose on-site disposal of PCB-contaminated material in Berkshire County. EPA has encountered this opposition from numerous Berkshire County residents, community groups, municipalities along the Housatonic, and from Massachusetts government agencies. Many residents worry about the risks posed by a PCB landfill in Berkshire County, and public opposition only intensified after GE's disposal of PCBs at the "Hill 78" landfill near a Pittsfield elementary school. Community groups have historically taken legal action to contest EPA's choices related to the cleanup. Citizens nominated, and the Commonwealth designated, the Upper Housatonic as a protected area, which activated a state prohibition on permanent landfills. EPA has encountered similar levels of resistance in other site cleanups across the country; such intense public and governmental opposition to on-site disposal threatens to delay and/or altogether block completion of the Rest of River Remedial Action. Berkshire County residents have expressed their objections to siting a new PCB landfill in their community in hundreds of public comments, protests at public meetings, and letters to newspaper editors over the last decade. For example, residents submitted comments to EPA identifying this widespread sentiment, saying that creating a landfill in Berkshire County "is unacceptable to the people of this county,"¹⁷⁹ And "will not be tolerated by its populace."¹⁸⁰

A common theme among commenters has been a concern about the ongoing negative environmental effect of a dump or landfill in Berkshire County, which has already endured decades of impacts from GE's contamination. The Planning Board for the town of Great Barrington wrote that it "believes that there is tremendous potential for serious and long-lasting environmental and economic damage to the Town of Great Barrington if this [PCB landfill] is forced on the Town."¹⁸¹ Tim Gray, Executive Director of the Housatonic River Initiative, wrote, "Toxic hazardous waste dumps will be dangerous to residents, [affect] property values, and be terrible for our tourism industry."¹⁸² Ann Gallo asked pointedly, "GE continues to be unaware of, or are deliberately overlooking the impact of their thoughtless, offensive choices. [...] Why, yet again, do they leave behind their waste on a struggling county?"¹⁸³

In some cases, public comments were informed by the Hill 78 controversy. As part of the non-Rest of River cleanup, the Decree allowed GE to use a pre-existing landfill located on the former GE facility to dispose of soil and sediment excavated in remediating the Site. This historic landfill, called "Hill 78," was across the street from Allendale Elementary School. Residents turned out in force to voice their concerns about placement of additional material at Hill 78. Nearly 85 residents attended a public meeting at the Allendale School¹⁸⁴ Community

¹⁷⁹ Comment from Jeffrey Leppo, M.D. to US EPA (Apr. 10, 2008), SDMS 289634.

¹⁸⁰ Comment from John Messerschmitt to US EPA (Apr. 9, 2008), SDMS 289634.

¹⁸¹ Comment from Town of Great Barrington Planning Board to US EPA (Jan. 29, 2011), SDMS 477441.

¹⁸² Comment from Tim Gray to US EPA (Jan. 30, 2011), SDMS 477441.

¹⁸³ Comment from Ann Gallo to US EPA (Dec. 4, 2010), SDMS 477441.

¹⁸⁴ Jack Dew, *PCB Dump Looms Over Allendale Elementary School*, Berkshire Eagle, Oct. 23, 2005. Dew describes the scene at this meeting: "Dozens raised their hands and several shouted questions, asking 'Would you let your children play here?' 'Would you live next to the dump?'"

groups arranged independent testing of the school's air filters.¹⁸⁵ All 11 Pittsfield pediatricians signed a letter to the Pittsfield mayor noting concern over airborne PCBs reaching Allendale students from Hill 78 disposal activities and stating, "We urge the community to aggressively pursue options that will further reduce or eliminate the risk to our children."¹⁸⁶

The "Hill 78" controversy galvanized citizens to oppose any future PCB landfills in the region. For instance, William and Christine Coan, Pittsfield residents, "strongly urge[d]" EPA to oppose an upland disposal facility in Berkshire County: "In light of the community uproar generated by the disposal dump located behind Allendale School in Pittsfield, we would suggest that the project would be delayed for years as communities utilized all political and legal means available to keep such a dump out of Berkshire County."¹⁸⁷ Similarly, Peter Lafayette wrote that he has "fierce opposition to GE's proposal to create another toxic landfill in Pittsfield or Berkshire County. The recently created Hill 78 contains PCB waste and has become a battleground for residents. To suggest that another PCB landfill is to be considered for Pittsfield or Berkshire County is outrageous."¹⁸⁸

Massachusetts has also declared vigorous disapproval of a new local landfill in public comments and meetings with EPA officials. From 2007 through 2014, EPA received comments from seven offices within the Commonwealth of Massachusetts, including the Departments of Fish and Game, Environmental Protection, Conservation and Recreation, and Public Health, advocating against disposal within Massachusetts. For example, the Commissioners of three Commonwealth offices wrote that "[t]he Commonwealth vigorously opposes two disposal options outlined in the revised CMS that call for disposal of removed material to be sited within Berkshire County" because:

Installation of a disposal facility in Berkshire County would also have extremely negative impacts to the communities surrounding the facility including economic, aesthetic, recreational, and potential health impacts should the facility fail. Further, construction of yet another such facility just expands the number of locations that would be affected by PCB-contamination, requiring additional long-term monitoring, operation and management beyond what is already a long-term burden on the community, and which runs counter to the concept of the anti-degradation provisions incorporated into the Massachusetts site cleanup regulations.¹⁸⁹

In addition, every Berkshire city or town along the Housatonic (Pittsfield, Lee, Lenox, Stockbridge, Great Barrington, Sheffield, and Tyringham) submitted at least one comment against any additional landfills. For instance, the chair of the Lenox Board of Selectmen wrote: "We find it unacceptable that there could be a new, permanent hazardous waste landfill constructed in our community. We wish to state in very clear terms that such a facility will be vigorously opposed."¹⁹⁰ In 2008, Pittsfield's city council unanimously passed a resolution

¹⁸⁵ Jack Dew, *Allendale Parents Upset at Agencies over PCBs*, Berkshire Eagle, Jan. 22, 2006.

¹⁸⁶ Letter from Siobhan McNally, M.D. *et al.* to Mayor James Ruberto (May 1, 2006).

¹⁸⁷ Comment from William and Christine Coan to US EPA, (Apr. 3, 2008).

¹⁸⁸ Comment from Peter Lafayette to US EPA, (Apr. 8, 2008).

¹⁸⁹ Letter from Richard Sullivan, Secretary of the Massachusetts Executive Office of Environmental Affairs, *et al.* to US EPA (Jan. 31, 2011).

¹⁹⁰ Letter from Stephen Pavlosky, Chair Lenox Board of Selectmen, to US EPA (May 15, 2008).

stating its opposition to any upland disposal facility for dredged sediments in the city of Pittsfield or Berkshire County.¹⁹¹

In addition to voicing disapproval, the Commonwealth and public have taken action to protect the unique ecosystem of the Upper Housatonic. For example, 43 community members, including several members of the Massachusetts legislature, nominated the Upper Housatonic for designation as an ACEC, in 2008.¹⁹² Nearly 1000 area residents signed petitions supporting this nomination.¹⁹³ In response, the Secretary of the Executive Office of Energy and Environmental Affairs designated the Upper Housatonic River as an ACEC in March 2009.¹⁹⁴ This designation automatically activated State-wide environmental protections provided for ACECs to the 13-mile corridor of riverbed, riverbank, floodplain and riverfront land running from Pittsfield to Lee, including the prohibition of siting permanent Solid Waste facilities within or adjacent to ACECs.¹⁹⁵ The Commonwealth later amended its statewide Hazardous Waste Facility Location Standards to prohibit permanent hazardous waste facilities in or adjacent to any ACEC in the Commonwealth.¹⁹⁶

Several community advocacy groups and the Schaghticoke Nation have sought to shape the Housatonic River remedy, and have opposed on-site disposal. A Citizens Coordinating Council has been meeting since 1998, with participation from groups including Mass Audubon, Berkshire Natural Resources Council, and the Schaghticoke Nation. A community group called the Housatonic River Initiative has sponsored “No More Dumps” conferences and meetings for more than five years. Several of the groups have used legal action to oppose EPA’s work at the Site. When EPA moved to enter the Decree in 2000, Housatonic River Initiative, Housatonic Environmental Action League, and the Schaghticoke Nation, among other entities, moved to intervene to overturn the Decree, in part because they opposed the Hill 78 landfill.¹⁹⁷

EPA’s experience at other sites lends credence to its fear that opposition to on-site disposal at the Housatonic will bar completion or timely completion of the remedy. In Bloomington, Indiana, a 1985 consent decree called for the construction of an incinerator to treat the PCB wastes from six area Superfund sites, all contaminated by Westinghouse industrial activities.¹⁹⁸ The public opposed the consent decree but it was entered despite this

¹⁹¹ *Politicians Vow to Fight Second PCB Dump*, Pittsfield Gazette, Apr. 10, 2008.

¹⁹² Commonwealth of Massachusetts, Designation of the Upper Housatonic River Area of Critical Environmental Concern, March 30, 2009 (“March 2009 ACEC Designation”).

¹⁹³ March 2009 ACEC Designation.

¹⁹⁴ March 2009 ACEC Designation.

¹⁹⁵ *Id.*

¹⁹⁶ 310 CMR 30.708; also see Proposed Action on Regulations, July 19, 2013; and Regulations Filed with the Secretary of State, Dec. 20, 2013, Massachusetts Register Number 1250. In addition to the normal public hearings on changes to MADEP Regulations at MADEP regional offices, two additional public hearings were arranged for Lenox and Pittsfield. This regulation applies specifically to facilities that manage wastes containing PCBs at concentrations at or above 50 ppm. A potential waiver of these regulations is discussed *infra* at Section C.

¹⁹⁷ Memorandum by Housatonic River Initiative in support of Motion to Intervene, Dkt. No. 20, Feb. 29, 2000; Memorandum by Housatonic Environmental Action League and Schaghticoke Nation in support of Motion to Intervene, Dkt. No. 77, May 19, 2000. Housatonic River Initiative eventually withdrew its Motion to Intervene after it reached a settlement with the US.

¹⁹⁸ *United States v. Westinghouse Electric Corp. et al*, Civ. Action No. IP83-9-C and IP 81-488-C (S.D. Ind. 1985).

opposition in 1985. At that point, the public successfully lobbied the Indiana legislature to pass laws that delayed construction of the incinerator, in part by forbidding local disposal of the incinerator ash. In 1994 the parties to the decree began to explore alternative remedies. Consent decree amendments memorializing agreements for alternative remedies were entered in 1997, 1998, 1999, and 2008. In the end, cleanup was delayed for over a decade.

Similarly, in New Bedford, Massachusetts, a 1990 Record of Decision selected dredging, on-site incineration, and on-site disposal of incinerator ash for the PCB hotspot in New Bedford Harbor.¹⁹⁹ In response to strong local opposition including a letter-writing campaign and other community activism, in 1993 New Bedford passed a city ordinance banning transportation of the incinerator within city limits in an attempt to prevent the cleanup. Congressional involvement from Representative Barney Frank, Senator John Kerry, and Senator Ted Kennedy, as well as the Massachusetts Department of Environmental Protection convinced then EPA administrator Carol Browner to direct EPA Region 1 to plan a new remedy with community support.²⁰⁰ The new remedy, selected in a 1999 ROD amendment, included dredging and off-site disposal of hot spot sediments without incineration.²⁰¹ In the end, cleanup of this most contaminated area of New Bedford harbor was delayed for nine years.

Having learned from these experiences, EPA takes community opposition seriously in its remedy selection process. In part due to strong public opposition, EPA has chosen off-site disposal at some of the nation's largest PCB-contaminated sediment sites, such as the Hudson River site. There, more than 2.7 million cubic yards of contaminated sediment have already been disposed off-site.²⁰² EPA has proposed off-site disposal for the anticipated 4.3 million cubic yards of contaminated soil and sediment at the Passaic River Diamond Alkali Site after the public and state of New Jersey expressed opposition to on-site confined aquatic disposal.²⁰³ And at the Lower Fox River site, more than 3.6 million cubic yards of dredged sediments were disposed at off-site licensed and regulated landfills.²⁰⁴ Taken together, the volume of sediments disposed off-site at these three sites alone exceed the volume of sediments disposed on-site at other sites around the country.²⁰⁵

¹⁹⁹ US EPA, Record of Decision Amendment, New Bedford Harbor Site, Hotspot OU, at 4-7, Apr. 27, 1999.

²⁰⁰ Troy W. Hartley, How Citizens Learn and Use Scientific and Technical Information in Environmental Decision Making, 10 J. of Higher Ed. Outreach and Engagement, 153, 159-161 (2005).

²⁰¹ US EPA, Record of Decision Amendment, New Bedford Harbor Site, Hotspot OU, Apr. 27, 1999.

²⁰² Telephone Interview with Michael Cheplowitz, EPA Remedial Project Manager (August 2015); EPA First Five Year Review for Hudson River PCBs Superfund Site, June 1, 2012.

²⁰³ Telephone Interviews with Alice Yeh, EPA Remedial Project Manager (August 2015 and January 2016); EPA Proposed Plan for Lower Eight Miles of the Lower Passaic River, Part of the Diamond Alkali Superfund Site, April 2014; Letter from Bob Martin, Commissioner of New Jersey Department of Environmental Protection, to Amy Legare, National Remedy Review Board Chair, Dec. 6, 2012.

²⁰⁴ Telephone Interview with Jim Hahnenberg, EPA Remedial Project Manager (August 2015); Telephone Interview with Susan Pastor, EPA Community Involvement Coordinator (January 2016); Five Year Review Report for Fox River NRDA/PCB Releases Superfund Site, July 17, 2014.

²⁰⁵ Based on the volume of on-site sediment disposal identified in Exhibit A to GE's Statement of Position.

iv. EPA evaluated all the relevant remedy selection factors, not just the factors related to implementability, in proposing off-site disposal.

It should be understood that EPA considered all the relevant remedy selection factors in proposing off-site disposal, not just the factors related to implementability. For example, EPA considered factors related to cost, protectiveness, control of sources, short-term impacts, compliance with ARARs, and the long-term reliability and effectiveness of GE's proposed upland disposal locations. These points are discussed below.

In EPA's view, GE's proposed upland disposal facilities may be less effective at containing waste than an off-site disposal facility, because the locations selected by GE do not meet TSCA's siting requirements for PCB landfills.²⁰⁶ GE admits this.²⁰⁷ For instance, GE acknowledges that none of the three proposed landfill sites meet TSCA's requirements for soil characteristics including permeability²⁰⁸. Even more troubling, it notes that none of the three sites meet all of TSCA's requirements for a landfill site's hydrological characteristics, all three sites are located within close proximity to the Housatonic River.²⁰⁹ By contrast TSCA requires that the bottom of the landfill liner be more than 50 feet above the historical high water table, that groundwater recharge areas be avoided, and that there is no hydraulic connection between the site and a surface waterbody.²¹⁰ Similarly, the Forest Street Site would not meet the TSCA requirement that a landfill be located in a relatively flat area to minimize erosion or landslides.²¹¹

These TSCA criteria are meant to be protective of human health and the environment in the event of leaks or failure in the landfill technology. As explained in EPA's Statement of Basis, "there is the potential for PCB releases to the Housatonic watershed if the landfills are not properly operated, monitored and maintained." Statement of Basis at 36. Moreover, the potential extended duration of the operation of the proposed on-site landfills, given the range of sediment and soil volumes at issue here and the length of remedy implementation, likely necessitates that the proposed on-site facilities operate for an extended period of time.²¹² These factors increase the risks of potential future releases to the Housatonic watershed, compounded by the poor suitability of the proposed locations given such factors as soil permeability, proximity to the Housatonic watershed, and/or drinking water sources. Accordingly, use of on-site landfills would "rel[y] heavily on proper long-term operation, maintenance, and monitoring activities."²¹³

By contrast, an off-site disposal facility would pose no risk of release to the Housatonic watershed, would be fully licensed and regulated under TSCA and/or other applicable federal and state requirements. Such facilities are generally constructed in the area best suited to that use considering the hydrology and soil characteristics. Here, GE has not been able to identify any on-site locations that would meet the TSCA PCB landfill siting requirements. In addition,

²⁰⁶ 40 CFR § 761.75(b)(1).

²⁰⁷ GE's Revised CMS at 9-48 to 9-49.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ 40 CFR § 761.75(b)(3).

²¹¹ GE's Revised CMS at 9-49.

²¹² Comparative Analysis at 64.

²¹³ Comparative Analysis at 65.

an off-site disposal landfill will already contain hazardous substances whereas none of the proposed locations identified by GE are known to be contaminated, making them a less suitable alternative.

Compliance with ARARs is also one of the nine criteria, in fact one of the three general standards to be met in a remedy decision. EPA can waive ARARs only under certain specific circumstances, including where compliance is technically impracticable. GE claims that it is arbitrary for EPA to waive ARARs in situations involving the *temporary* storage of hazardous substances on-site but not to do so for the creation of permanent on-site landfills. However, the two situations are not analogous as discussed below.

Excavated PCB-contaminated sediments and soils will likely need to be temporarily stored on-site while awaiting transport to an off-site facility. In terms of temporary storage on-site, under some scenarios, as described more fully in Attachment C to the Intended Final Decision²¹⁴ off-site disposal may require a waiver of the Massachusetts regulations that prevent hazardous and solid waste facilities within ACECs, in order to implement the remedy and allow *temporary* storage areas where the waste would be prepared for long distance transport. As discussed in more detail below in Section III.D.7. of this Statement of Position, if those conditions occur and the regulations are applicable to temporary storage, a waiver for temporary storage is appropriate because it is technically impracticable to perform the remedy without temporary stockpiling. All alternatives for disposal and transport of the dredged sediments involve temporary storage. These waivers for temporary storage would not defeat the purpose of the waste facility siting regulations because the storage areas will not result in a permanent landfill, and EPA has established Restoration Performance Standards to ensure the temporarily-used storage areas are restored effectively.

In contrast, permanent on-site disposal at GE's Woods Pond landfill location would require waivers of these waste facility siting regulations because that location is within the ACEC and GE is seeking to place a permanent landfill there. Because the Forest Street landfill location is within a regulated wetland area a waiver may also be required of regulations or requirements designed to protect such areas including: EPA's and the Corps of Engineers' regulations under Section 404 of the Clean Water Act (40 CFR Part 230, 33 CFR Parts 320-323); the federal Executive Order for Wetlands Protection (E.O. 11990); the Massachusetts water quality certification regulations for discharges of dredged or fill material into waters of the U.S. (314 CMR 9.06); and the Massachusetts Wetlands Protection Act regulations (310 CMR 10.53(3)(q)). Likewise, the Rising Pond landfill abuts 25 acres of Priority Habitat for the state-listed Wood Turtle. As a result, further confirmation would be needed to conclude if there are any effects on priority habitat of rare species in the operational area of the landfill, and depending on the significance of such effects, compliance with, or a waiver of, the Massachusetts Endangered Species Act would be required. As another example, GE's proposed sites may not meet the potentially applicable Massachusetts hazardous waste landfill siting criteria, namely its prohibition on siting disposal facilities within 1000 feet of an existing private drinking water well. 310 CMR 30.704, 703(4) 30.010. The Woods Pond location is within 1000 feet of a drinking water well. GE did not investigate whether the other locations were within 1000 feet of drinking water wells.

²¹⁴ Intended Final Decision, Attachment C, at pages 11-12.

Since off-site disposal is a practicable alternative, technical impracticability does not provide a basis for these waivers, and there is no other valid basis for a waiver. Furthermore, Massachusetts would likely challenge all waivers related to on-site disposal under CERCLA Section 121(f)(2)(B), as authorized by Decree paragraph 22.bb.i. During this challenge, the revised permit is stayed, causing significant delay. Decree paragraph 22.bb.ii. All-in-all, the numerous ARAR waivers required by on-site disposal, and the associated implementability challenge associated with Commonwealth appeals of those waivers, weigh against selecting on-site disposal under the nine criteria analysis based on the administrative record.

GE objects to the added cost of approximately \$200 to \$300 million associated with off-site disposal compared to on-site disposal, depending on the assumed location of the landfill, the transport method for off-site disposal and the rates charged by an off-site landfill at the time of disposal. However, GE fails to recognize that EPA also considered alternative options involving treatment of PCB contamination. While these alternatives included positive aspects such as controlling sources of releases and reduction of toxicity of the contamination – two of the nine Permit criteria -- these treatment alternatives are more costly than off-site disposal, and were rejected. In other words, EPA has hardly selected the most expensive or the most aggressive remedy under consideration.

GE notes that some of the short term impacts from the disposal process itself, namely transporting the waste, are likely to be somewhat higher for off-site disposal. There will be higher greenhouse gas emissions from long-distance transport, and statistics suggest that there could be an increase in injuries or fatalities from traffic accidents. However, GE fails to observe that EPA’s modified permit includes a preference for rail transport, which will mitigate greenhouse gases as compared to truck transport.

In addition, community impacts of truck traffic will probably be lower for off-site disposal as compared to on-site disposal for two of the three potential on-site disposal facilities (Forest Street and Rising Pond). Only miles driven on local roads (whether on-site or off-site), as opposed to miles driven on major highways such as the Massachusetts Turnpike, should be considered to impact the local community.²¹⁵ As a result, trucks will travel fewer miles on local roads to reach a rail loading facility or the Massachusetts Turnpike, in the off-site disposal scenarios, as opposed to traveling to GE’s more distant landfill locations.²¹⁶ The Forest Street location in particular, is several miles off any main road and would result in traffic through a relatively remote area, over roads that cannot support the loading. Also, as shown in the attached table, the impacts for truck traffic for the Woods Pond on-site disposal

²¹⁵ The “short-term effectiveness” Permit criterion specifically mentions “impacts to nearby communities.” Permit at 22.

²¹⁶ The location of the rail loading facility has not yet been determined, but GE assumed a location immediately upstream of Woods Pond in its 2014 comments. Using this location, EPA estimates local miles traveled under each scenario. The estimated mileage includes estimates for construction of the disposal facilities and transport of waste on local roads:

	Upland Disposal Facility			Off-site by Truck	Off-site by Rail
	Woods Pond	Forest Street	Rising Pond	Travel to Massachusetts Turnpike	Rail loading Facility
EPA Estimate	955,350	4,868,700	3,147,800	1,110,200	860,950

facility and off-site disposal would be similar assuming a rail loading facility is close to the Woods Pond disposal facility.

v. The Administrative Record and the relevant remedy selection factors support EPA's decision to require off-site disposal.

EPA weighed the host of relevant factors under the Decree based on the Administrative Record after years of study and information gathering. Selecting off-site disposal would enable prompt completion of the remedy through a suitable well established landfill in an appropriate location. By contrast, allowing GE to build a new landfill adjacent to the Housatonic River would delay or bar completion of the remedy and result in a potentially unsuitable landfill location in an area with no known contamination. During any delay associated with on-site disposal, the public health and environment would be unprotected. PCBs would continue to migrate downstream, including into Connecticut, and to wash up on floodplains during storm events. Fish in the Housatonic would continue to bioaccumulate PCBs from food web exposure pathways and direct uptake pathways that will continue until the remediation of the river, and unacceptable risks would remain in the floodplain. Off-site disposal protects the public health and environment better than on-site disposal because it allows for the remedy (and corresponding risk reduction) to be implemented with a minimum of delay, and in an established suitable landfill location.

Even if GE is correct that the federal government, through Court orders and other coercive means, could eventually impose the landfills on the community against their will, after establishing that such locations are otherwise suitable and protective, this would only occur after a long, drawn out process, substantially delaying the cleanup. Further, GE is requesting that EPA waive environmental regulations or requirements to create a new landfill near the Housatonic River and/or potential drinking water sources in areas of unsuitable geology and permeable soil to save GE money, without considering the multiple benefits of promptly implementing the remedy through existing off-site established locations. GE fails to adequately account for the uncertainties and risks associated with long term operation and maintenance of a new landfill within the Housatonic River and watershed.

GE provided a table of 24 sites where it asserts that PCB-contaminated sediments and soil were disposed on-site or at local landfills, included as Exhibit A to its Statement of Position. More complete and accurate information for each of the sites listed in GE's table is provided in Table 2 to this Statement of Position. While it is true that EPA has successfully implemented on-site disposal of dredged sediments at several sites around the country, GE's table is misleading because it lumps local landfills together with true on-site disposal. For instance, GE cites 250,000 cubic yards of non-TSCA sediment locally disposed at the Ottawa River Site. These non-TSCA sediments were actually disposed at an off-site landfill owned and operated by the City of Toledo, while the TSCA-regulated sediments from that site were disposed out of state at a hazardous waste landfill. This "local disposal" at a fully-regulated municipal landfill is not comparable to on-site disposal, where regulations may be waived.

GE also stretches the term "on-site disposal" beyond its logical limits. For instance, GE calls the disposal of roughly 100,000 cubic yards of less-contaminated sediment at the River Raisin Site "on-site disposal," but this sediment was actually disposed at an off-site pre-existing confined disposal facility two miles away operated by the US Army Corps of Engineers for disposal of contaminated sediments unearthed during navigational dredging.

restoration of disturbed areas, there will be only short-term impacts on the resources of the ACEC. Such short-term impacts are dramatically different than the impacts on the resources of the ACEC associated with construction of a hazardous waste disposal facility, which will impact the resources of the ACEC in perpetuity. In addition, removal of GE's PCBs to reduce the unacceptable health risks cannot be implemented without temporary impacts to the resources of the ACEC, whereas the remedy can be implemented without allowing permanent impacts to the resources of the ACEC that would result from construction of a hazardous waste disposal facility. Permanent on-site disposal within the ACEC at GE's preferred Woods Pond landfill location, would require waivers of these waste facility siting regulations. Since off-site disposal is a viable alternative, technical impracticability does not provide a basis for this waiver, and there is no other basis for a waiver.

8. Massachusetts Site Suitability Criteria for Solid Waste Facilities:

Requirements: These requirements provide criteria for placement in Massachusetts of solid waste facilities, including restrictions for placement of a solid waste facility in an ACEC.

The Intended Final Decision includes excavation of PCB-contaminated soil and sediment and the off-site disposal of such excavated soil and sediment. The Intended Final Decision does not require disposal at a solid waste disposal site in the ACEC. However, prior to transportation of the excavated soil and sediment to its off-site disposal location, the Intended Final Decision provides for temporary management of excavated soil and sediment at locations near the River, some of which would be within the ACEC. The temporary management may include temporary stockpiling or accumulation of materials, and may include locations related to railroad transport of excavated materials. Also, the remedy includes restoration of the temporarily used areas -- for each area disturbed during remedy implementation, including those within the ACEC, the remedy includes provisions for restoration of what is disturbed by the temporary management of the excavated material.

These regulations prohibit permanent disposal locations within an ACEC. As further described in Attachment C to the Intended Final Decision, to the extent that the provisions of 310 CMR 16 apply to temporary management of materials after excavation and prior to off-site disposal, and if the temporary management occurs within or in close proximity to the ACEC, and the materials being temporarily managed are subject to these regulations, EPA, in consultation with the Commonwealth, considers as waived, pursuant to CERCLA 121(d)(4)(c), the requirements of 310 CMR 16.40 that prohibit such temporary management locations during remedy implementation.

GE Position: GE makes three arguments: (1) that these requirements should be waived because the State has not applied the requirements to on-site waste management/disposal facilities at other sites in Massachusetts, or at the GE-Housatonic Site; (2) that EPA should waive the requirements for permanent disposal under the same analysis as EPA proposes to waive the ARAR for temporary stockpiling of solid waste; and (3) that if the regulations do apply, the prohibition on siting a solid waste handling facility in a Riverfront Area (within 200 feet of a flowing waterbody) would need to be waived as technically impracticable from an engineering perspective.

EPA Position: As to the application of requirements by the State, CERCLA Section 121(d) requires each remedial action to achieve the ARARs, unless a specific reason for a waiver of the ARAR exists. One basis for a waiver is if a State has not consistently applied (or

site, but to the permanent disposal within the ACEC of solid waste generated in the cleanup. EPA disagrees. Placement of a permanent disposal facility is clearly within the scope of the regulations. Moreover, the temporary and permanent effects on the resources of the ACEC are very different. With temporary management of waste, followed by restoration of disturbed areas, there will be only short-term impacts on the resources of the ACEC. Such short-term impacts are dramatically different than the impacts on the resources of the ACEC associated with construction of a hazardous waste disposal facility, which will impact the resources of the ACEC in perpetuity. In addition, removal of GE's PCBs to reduce the unacceptable health risks cannot be implemented without temporary impacts to the resources of the ACEC, whereas the remedy can be implemented without allowing permanent impacts to the resources of the ACEC that would result from construction of a hazardous waste disposal facility. Permanent on-site disposal within the ACEC at GE's preferred Woods Pond landfill location would require waivers of these waste facility siting regulations. Since off-site disposal is a viable alternative, technical impracticability does not provide a basis for this waiver, and there is no other basis for a waiver.

Finally, as to GE's argument about a waiver of the Riverfront Area requirements, the provision would be potentially applicable like other provisions in 310 CMR 16. To the extent that (1) the provisions of 16.40 apply to the temporary management of materials during implementation of the remedy after excavation and prior to off-site disposal; (2) the materials temporarily managed on-site during implementation of the remedy constitute solid waste under the regulation; and (3) the locations for management of materials include Riverfront Area(s) pursuant to the regulations, EPA, in consultation with the Commonwealth, considers as waived, pursuant to CERCLA 121(d)(4)(C), the requirements of 16.40 that prohibit or restrict such temporary management locations during implementation of the remedy.

9. MESA:

In its reference to the MESA ARAR in the Statement of Position (pages 40-41), GE has raised the same arguments as it makes regarding MESA at pages 34-35 of its brief. That being the case, EPA's position regarding the MESA ARAR dispute is the same as EPA's position at Section III.C.2 above.

IV. CONCLUSION

As the foregoing demonstrates clearly, the arguments in GE's Statement of Position should be rejected, and EPA's Intended Final Decision affirmed. For over a decade, EPA has followed faithfully the remedy decision-making process provided in the Consent Decree and Permit, including scientific information gathering and technical analysis, multiple reviews by independent peer-review panels, and an extraordinary number of process opportunities for both GE and the public. EPA relied upon its technical expertise and objectivity, along with input from GE and the public, in analyzing alternatives in light of the relevant criteria in the Permit and information in the Administrative Record. Based on that analysis, EPA proposed a balanced, reasonable remedial approach, rejecting more costly and intrusive alternatives, as well as alternatives with less health protection and less cost.

EPA has carefully considered GE's arguments, and has identified herein particular modifications or clarifications that EPA is willing to make in the final Permit to address GE's concerns. For example, see the clarification as to the obligation to address a Legally