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

IN THE MATTER OF:	)	
General Electric Co.	)	Appeal No. RCRA 16-04
RCRA Permit No. MAD002084093	)	
	)	

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW BY HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE

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INTRODUCTION

A state siting statute like the one at issue here protects municipalities against being forced to accept hazardous waste storage facilities without compensation. GE and the Region contend they may ignore this compensatory law because they are carrying out a CERCLA cleanup, under which time is of the essence, and "permits" are not required. But the very existence of GE's RCRA appeal, challenging the Region's application of non-CERCLA remedy-selection criteria, belies this argument. GE is not carrying out a CERCLA cleanup, and, unlike a CERLCA cleanup – which forbids postponing a cleanup while the responsible party appeals – GE may exhaust its appeals before commencing cleanup. Moreover, a siting agreement under the state Siting Act is, by law, a municipal contract, not a "permit" in any sense of the word. For these reasons and others set forth below, the state Siting Act is not preempted by CERCLA. In addition, the Region clearly erred in failing to require GE to maintain the remedy in perpetuity.

ARGUMENT

I. The Region Should Have Required GE to Comply With the Siting Act.

A. State Law Does Not Exempt the Remedy from the Siting Act.

At the outset, the Board may dispense readily with the Region's argument that the Siting Act does not apply to an EPA-authorized cleanup of a hazardous waste site. *See* Region Br. 14, 18. The "Definitions" section of the Siting Act broadly defines "Facility" as "a site or works for the storage, treatment, dewatering, refining, incinerating, reclamation, stabilization, solidification, disposal or other processes where hazardous wastes can be stored, treated or disposed of." Mass Gen. L. ch. 21D § 2. While the statute expressly provides for certain

exceptions, *id.* § 18, there is no exemption for EPA-authorized cleanups and no serious argument can be made that the capacious definition in section 2 does not encompass the facilities for storage, processing and dewatering of PCB-laden soils and sediment that GE will construct here. *See* PFR Exh. 1 (Permit Modification), at 65-66 (requiring construction of "centralized temporary location(s) for contaminated materials processing and transfer.").

The Region's argument relies on a state regulation interpreting the Siting Act, *see* Region Br. 14, but in fact that regulation contradicts the Region's position. The regulation, 990 CMR 1.02(2)(f), provides an exemption from the Siting Act and its implementing regulations for "[t]he clean-up of spills and discharges of oil, hazardous material or hazardous waste by the Department of Environmental Quality Engineering [now DEP] or by a contractor or transporter licensed by the Department of Environmental Quality Engineering." The cleanup at issue here is not being undertaken by DEP or a DEP-licensed contractor; it is being undertaken by GE at the behest of a federal agency. The regulation conspicuously does not say that it also exempts "EPA-authorized cleanups of hazardous waste sites," as the Region incorrectly states. *See* Region Br. 14. The Region's interpretation is thus impermissible, because it contradicts the plain language of both the underlying statute and the regulation. *Cf. Finkelstein v. Bd. of Registration in Optometry*, 349 N.E.2d 346, 348-49 (Mass. 1976) (rejecting agency's interpretation of regulation that conflicted with "fair reading" of plain language). Under standard interpretive rules, the specification of "one exception . . . strengthens the inference that no other exception was intended." *Protective Life Ins. Co. v. Sullivan*, 682 N.E.2d 624, 628 (Mass. 1997) (quotation marks omitted); *Bagley v. Illyrian Gardens, Inc.*, 519 N.E.2d 1308, 1310 (Mass.

1988) (applying doctrine of "[e]xpressio unius est exclusio alterius"). Thus, the express wording of 990 CMR 1.02(2)(f) compels the conclusion that the Siting Act applies to EPA-authorized cleanups undertaken by private parties.

The Region also incorrectly contends that, in 310 CMR 40.01111(1) and 40.01112(1), DEP "clarified and codified that hazardous waste sites are 'adequately regulated' when the cleanups are undertaken in accordance with CERCLA and/or RCRA and DEP concurs in the selected remedy." Region Br. 18. In fact, those regulations state that certain CERCLA and RCRA responses in which DEP concurs shall be deemed "adequately regulated *for purposes of compliance with 310 CMR 40.0000.*" The DEP regulations in 310 CMR 40.0000 *et seq*. are different from the Siting Act Regulations of 990 CMR 1.01 *et seq.*; the "for purposes of" limitation italicized above cannot be read out of these regulations as the Region attempts to do. Moreover, the regulations in 310 CMR 40.0000 were issued under the authority of M.G.L. chapters 21A, 21C and 21E – *not* Chapter 21D. *See* 310 CMR 40.0001. Thus, the regulations in 310 CMR 40.0000 *et seq.* plainly exempt CERCLA and RCRA responses from compliance only with the specifically identified state laws, the Siting Act conspicuously not among them.

Finally, the "Applicability Committee" Report upon which GE relies, *see* GE Br. 6, directly undercuts the argument that the Siting Act does not apply here. That committee not only had no rule-making authority, what it in fact recommended was that a further process be initiated (by a separate committee) to make yet more recommendations to the agency on how to "revise" 990 CMR 1.02(2)(f) in order to "clarify" this regulation so as to exclude CERCLA cleanups. *See* GE Attachment 3 at 1. That was a direct acknowledgement that the regulation as written did not

exclude CERCLA cleanups. Moreover, the recommendation to amend the regulation was never carried out, leaving the express terms of the regulation as it remains today, *i.e.*, as excluding only those cleanups undertaken by DEP or its licensed contractors. Once again, the evidence offered against application of the Siting Act here serves only to establish the opposite conclusion. The Siting Act applies to this cleanup.

B. The Substantive Siting Act Requirements Are Not a "Permit."

The Region does not dispute the Committee's argument against express preemption. Instead, the Region drops a footnote stating that it is merely "arguable" that CERCLA expressly preempts the requirements of the Siting Act. *See* Region Br. 15 n.13 ("21D §12 is arguably a waivable permit under Section 121(e)(1)").

GE's attempt to make the argument on the Region's behalf fails, for three reasons. GE ignores (1) the fundamental differences between a permit and a contract, (2) other provisions in CERCLA § 121 that make this argument untenable and (3) CERCLA savings clauses, and the cases construing them – notably including *United States v. Colorado*, 990 F.2d 1565, 1582 (10th Cir. 1993).

First, the core Siting Act requirement is to negotiate and pay compensation, either pursuant to an agreement with a municipality that "shall" include compensation provisions, or (if an agreement cannot be reached) pursuant to an arbitrator's order. Mass. G.L. ch. 21D, §§ 12,

15.[1] The "agreement" is expressly deemed a "contract" with a municipality. *Id*. § 12; *Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102, 106 (Mass. 1984). A municipal contract is not a permit; still less is such an agreement an "approval" from a "regulatory body," to quote GE's definition. Numerous cases state this fundamental distinction: "a permit is not a contract." *Cty. of Mendocino v. Williams Communs.*, 2006 U.S. Dist. LEXIS 34198, at *10 (N.D. Cal. Apr. 18, 2006).[2] The difference is based upon fundamental differences between permits and contracts. A permit is unilaterally issued by a regulator, who decides what conditions the recipient must obey, and who usually has revocation powers. But a contract is negotiated bilaterally, between parties of equal standing, it contains only the terms they agree on, and it is revocable only to the extent the parties have so agreed. Similarly, an arbitrator's decision cannot in any sense be understood as a "permit" or regulatory "approval"; it is effectively an award of compensatory damages and injunctive relief, imposed just as conditions are often imposed in labor contracts by arbitrators; it is another traditional legal category that would never be called a "permit." Moreover, although some terms in a Siting Act municipal

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[1] The Region contends that the Committee's petition "conceded" that compensation is not in fact required under the Siting Act. Region Br. 19 n.16. Not so. The relevant part of the petition correctly stated that, under the Siting Act, the municipal agreement "shall specify" the compensation to be provided by the developer, and in addition that this compensation "may" also include cash payments over and above the compensation required for "demonstrably adverse impacts." Mass. G.L. ch. 21D, § 12, Muni. PFR 15.

[2] *Accord Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 42 (Tex. App. 1997) (same); *Tognoli v. Taroli*, 127 Cal. App. 2d 426, 428-29, 273 P.2d 914, 916 (1954) (same).

contract (*e.g.*, operating procedures) cover topics that are also traditionally addressed in permits, GE's core duty to "compensate" and provide "services" is emphatically not that sort of obligation. These factors distinguish *Rhode Island Resource Recovery Corp. v. Rhode Island Department of Environmental Management*, 2006 U.S. Dist. LEXIS 56072 (D.R.I. July 26, 2006), cited by GE. The case involved an attempt by state regulators to require their "written approval" to use certain fill material at a landfill. That "approval" was practically identical to a "permit" as a matter of plain language (unlike a contract), the approval was to be issued unilaterally (not bilaterally) by a regulator acting *qua* regulator (not by a contractual counterparty), and it exclusively covered a classic environmental topic (unlike compensation). For these reasons, GE's argument that a contract is actually a "permit" should be rejected.

Second, GE's position is at odds with CERCLA section 121(d)(2)(C). This provision (with certain exceptions not relevant here) expressly preempts any state "standard, requirement, criteria, or limitation (*including any State siting standard or requirement*) which could effectively result in the statewide prohibition of land disposal" of hazardous waste. 42 U.S.C. § 9621(d)(2)(C)(ii) (emphasis added). Congress thus gave specific consideration to the degree of preemption applicable to a "State siting standard or requirement" and decided only to preempt those state siting laws that would effectively constitute a statewide ban on land disposal. The Siting Act is a "siting standard" but not a statewide ban. To the contrary: its purpose is to "facilitate the siting of safe facilities for the disposal and treatment of the wastes generated by schools, hospitals, government, and industry in Massachusetts by denying municipalities the right to veto facilities outright." *Warren*, 466 N.E.2d at 106-07. If such siting "standards or

requirements" were "permits" categorically preempted by section 121(e)(1), then section 121(d)(2)(C) would be superfluous.

Third, GE barely even mentions the legal authorities that support, even require, the Committee's interpretation. For example, the Committee's reading of CERCLA § 121(e) is required by the basic rule that preemption clauses are read narrowly, and by the explicit provisions in CERCLA preserving state law.[3] These considerations prompted the Tenth Circuit in *United States v. Colorado*, 990 F.2d 1565, 1582 (10th Cir. 1993), to define "permit" narrowly. The court read CERCLA § 121(e) not to preempt a state law under which a PRP was required to submit a cleanup plan to state officials, notwithstanding the fact that the PRP was concurrently carrying out a federal cleanup under CERCLA. *Colorado* is directly on point.

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[3] *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("the historic police powers of the States are not to be superseded by [federal law] unless that [is] the clear and manifest purpose of Congress."); 42 U.S.C. § 9659(h) (CERCLA does "not affect or otherwise impair the rights of any person" under state law); 42 U.S.C. § 9614(a) (preserving states' rights to impose additional requirements related to hazardous substance releases). The Region points out that, notwithstanding these savings clauses, various attempts to sue PRPs for natural resource damages, for contribution, or even for additional cleanup under state law have been preempted because the lawsuits conflicted with CERCLA provisions on NRD, contribution, and remedy selection. Region Br. 25-26, citing *New Mexico v. GE*, 467 F.3d 1223 (10th Cir. 2006) and *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998). However, in those cases the application of state law would not have resulted in a merely narrow interpretation of a CERCLA provision, as is the case with CERCLA § 121(e)(1), but a wholesale nullification of a CERCLA provision. *See PMC*, 151 F.3d at 618 ("A savings clause is not intended to allow specific provisions of the statute that contains it to be nullified.").

GE attempts to distinguish *Colorado* on the basis that the Colorado statute implemented the state's federal RCRA duties, whereas the Siting Act is wholly a creature of state law. But GE's argument ignores the plain language of the statute: far from distinguishing between state and federal permits, CERCLA § 121(e) expressly treats any "Federal, State, or local permit" the same way. Moreover, GE's argument has it exactly backwards – the wholly "state" nature of the Siting Act makes it *less* subject to preemption than the Colorado law with its (allegedly) federal character. This is because of the federalism principles underlying CERCLA's savings clauses and the broader presumption against preemption of state law.

Finally, GE again cites the 1994 "Applicability Committee" report – this time for its broad interpretation of CERCLA § 121(e)(1) instead of state law – but again the report is of no avail. GE Br. 6. That advisory committee was neither a court nor a federal agency, so its statement interpreting CERCLA § 121(e) should have no weight here – particularly when it contradicts the plain language of the statute, the CERCLA savings clauses, the strong presumption against preemption, and a federal appellate case (*Colorado*) directly on point.

For these reasons, the Siting Act's core compensatory requirements are not a "permit" within the meaning of CERCLA § 121(e).

C. CERCLA § 121(e) Does Not Apply to this Cleanup Because It Was Not Selected in Accordance with the NCP.

In the alternative, even if a siting agreement under the Siting Act were somehow considered to be a permit, Section 121(e) would not apply, because the remedy was not "selected" in compliance with the NCP, as required by this provision. The Region concedes that

the remedy "will be selected and reviewed as a RCRA permit and implemented as a CERCLA permit." Region Br. 1.

In its petition, the Committee pointed out several departures from the NCP, including the lack of a ROD, the right of GE and others to institute an immediate remedy-selection appeal under RCRA, and the deliberate modification of several of the nine NCP remedy-selection criteria. In response, the Region makes several arguments, none of them joined by GE, and none of them persuasive.

First, the Region argues that, although "some" of the CD's procedural requirements (such as the RCRA appeal provisions) "may prolong the ultimate cleanup," the CD "as a whole" was a "compromise designed to avoid greater delay from protracted litigation." Region Br. 27. The upshot of this is apparently that the CD should not be understood as a significant departure from the NCP, and should not be read to "forfeit" the Region's authority to "expedite cleanup by relying on … permit waivers" in CERCLA § 121(e)(1). *Id.* But the unusual CD at issue here clearly has *not* produced a faster cleanup of the Rest of River area. The Rest of River remedy would never have been subjected to pre-implementation litigation absent the CD, and this is a major slowdown. Yet EPA now contends that, in the interests of speed, its hybrid remedy should nonetheless be interpreted to require a purely CERCLA-based preemption of state law – namely, of a state law that provides important protections to municipalities.

Second, while the Region admits that it used a "hybrid RCRA/CERCLA process" to issue the remedy, it argues that the remedy selection process under the two statutes is "generally similar." Region Br. 30-31. But "generally similar" does not suffice. The Region never

discusses what these "general similarities" are, and it ignores many of the vital distinctions between RCRA and CERCLA described in the Committee's petition. Chief among these distinctions is that giving GE a RCRA appeal is adding years of delay to the remedy selection process.[4] And, as the Region has effectively admitted, delay is significant, because it contradicts the whole rationale for permit preemption, which is to expedite cleanup. *See* Region Br. 27 (permit preemption is to "expedite the cleanup"). Moreover, the "general similarity" between RCRA and CERCLA proves too much: the same logic would authorize EPA to exploit CERCLA permit preemption at *all* RCRA cleanups, which would be contrary to RCRA guidance, RCRA caselaw, and RCRA itself. It would also be contrary to CERCLA sections 121(e)(1) and 121(a), which explicitly condition permit preemption on compliance with the NCP, rather than on compliance with a set of *sui generis* principles allegedly shared in common between RCRA and CERCLA.

The Region also incorrectly relies on CERCLA § 106. This part of the statute authorizes district courts to "grant such relief as may be necessary to abate" releases of hazardous substances. Region Br. 31. This reference to "such relief as may be necessary" is language that appears in many statutes, and does not remotely grant courts independent authority to preempt

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[4] The Region also suggests that the RCRA appeal process affords "additional or greater opportunities for public involvement" via citizen appeals of the remedy, Region Br. 31, but whatever the benefits to the public, pre-implementation appeals of any kind are anathema to CERCLA.

state law – and all the more so with a statute like CERCLA, which has three separate clauses preserving state law, and a legislative history that disclaims any broad application of preemption of state law. *See* Muni. PFR 18-20; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("the historic police powers of the States are not to be superseded by [federal law] unless that [is] the clear and manifest purpose of Congress."). There certainly is no evidence that the Region's CERCLA § 106 argument was accepted by the district court in approving CERCLA permit preemption, and it should be rejected here.

Nor is it permissible, as the Region and GE apparently contend, for the parties to have used a CD to draft their way around Congress' strict parameters as to when CERCLA preemption may occur. The conclusory provisions relating to CERCLA Section 121 and to the NCP inserted into the CD and upon which the Region and GE now rely, Region Br. 32, GE Br. 7, simply cannot alter an act of Congress, particularly one that so carefully, thoroughly and intricately defined the conditions under which state law could be precluded. *See United States v. Akzo Coatings*, 949 F.2d 1409, 1454-58 (6th Cir. 1991) (analyzing CERCLA preclusion of state law where remedy is selected under CERCLA in compliance with NCP and issuance of ROD).[5]

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[5] Moreover, paragraph 22.z of the CD, upon which the Region relies, *see* Region Br. 31, does not, by its own terms, even trigger Section 121 until the Rest of River permit becomes effective and GE commences work: "EPA's modification of the Reissued RCRA permit to select such Remedial Action [with respect to the Rest of River] and O&M *that is effective at the time of initiation of the Rest of River Remedial Design/Remedial Action* shall be considered to be the final remedy selection decision pursuant to Section 121 of CERCLA…." CD ¶ 22.z (emphasis added). That stage has not yet arrived.

Finally, the Region points out that, while selecting the remedy, it consulted with the municipalities at "every stage of the process." Region Br. 32. The Municipal Committee appreciates the Region's efforts to communicate with affected municipalities during remedy selection. But this courtesy does not mean that the Region selected the remedy in accordance with the NCP. On the contrary, had the Region used the NCP, the Region would not be defending its consideration of state and community views from GE's legal challenges in what is shaping up to be lengthy litigation by a recalcitrant polluter. Instead, GE likely would be implementing a remedy (either voluntarily or under a unilateral administrative order) selected long ago by the Region in a ROD – a ROD issued, moreover, in the absence of the pressure GE has long brought to bear here, through the leverage granted to GE by its looming RCRA appeal. This is not how CERCLA cleanups occur. The Rest of River process, which affords so many unusual rights to GE to delay, argue and litigate, should not deprive GE's victims of their rights under state law – particularly where such deprivation is to "expedite" a cleanup that the Region long ago consented to prolong.

D. CERCLA Does Not Preempt the Siting Act Under Principles of Conflict Preemption.

The Region contends that, even though the express language of CERCLA does not preempt the Siting Act, GE should be excused from complying with this state law under obstacle preemption (a subcategory of conflict preemption). The basis of the Region's argument is that the Siting Act would cause delay and thereby interfere with one of CERCLA's "central purposes," *i.e.*, to "facilitate expedited cleanup." Region Br. 24 (citing *Weaver's Cover Energy v. R.I. Coastal Res. Management*, 589 F.3d 458, 472 (1st Cir. 2009)).

The Region's argument is fatally flawed. First, and critically, this is not a CERCLA remedy but, as the Region admits, an "unusual combination of EPA's authority under CERCLA and RCRA." Region Br. 2; *see also id*. at 30 ("hybrid"). Under this *sui generis* approach, the Region has deliberately opted into RCRA's pre-cleanup permit appeal process, which means the Region forfeited the right to make GE undertake an expedited cleanup under CERCLA; this vastly reduces if not eliminates any potential conflict. Second, there is no evidence that complying with the core Siting Act requirements would produce an unreasonable delay. The Region says only that there is "*potential* conflict" because the Siting Act "*could* delay" the remedy process, Region Br. at 27, 24 (emphases added), which is hardly the kind of irreconcilable conflict required under obstacle preemption. In fact, the Siting Act imposes a timetable on many key steps. *See* Mass. G.L. ch. 21D, § 15 (60-day negotiation window, 30-day window for selection arbitrator upon finding of impasse, 45-day window for arbitration to occur).

The cases cited by the Region precluding various state or local laws under CERCLA are easily distinguished. They involved litigation *after* the remedy had been conclusively selected *in a ROD*, either by someone contesting entry of the CD for performance of the selected remedy, or by someone bringing a new lawsuit to attack the remedy collaterally. *See, e.g., United States v. Akzo Coatings*, 949 F.2d 1409, 1458 (6th Cir. 1991) (precluding state from pursuing "independent state remedies" for injunctive relief different from those in the ROD); *Missouri v. Independent Petrochemical Corp.*, 104 F.3d 159, 162 (8th Cir. 1996) (rejecting belated attempt to change ARARs "'frozen' as of the date of the ROD"); *Rhode Island Resource Recovery Corp.*

v. Rhode Island Department of Environmental Management, 2006 U.S. Dist. LEXIS 56072, at *13 (D.R.I. July 26, 2006) (rejecting as untimely a state attempt to enforce a state law that would have required a PRP to literally rip up a cap constructed under a ROD; the state had not identified the law in the ROD process).

Here there is a key difference: the Housatonic CD – in stark contrast to a ROD that has already been "frozen" – requires the issuance of a *new* permit decision years after the CD was entered, *i.e.*, the Rest of River permit modification. Unlike the cases cited by the Region, in this proceeding the Committee is not seeking to enforce a state law outside the remedy process or to contest the initial entry of a CD. Instead, it is seeking to incorporate a state law in the remedy process, using a procedure specifically authorized by this unusual CD. The cases the Region cites say nothing to forbid this.[6] Other cases cited by the Region were decided on the basis of impossibility preemption, or deal with local ordinances rather than a state law like the Siting Act.[7]

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[6] The Region's lead case, *Akzo*, moreover, expressly states it was *not* basing its decision on conflict preemption: "We eschew use of the word preemption in this context …." *Id.* at 1458.

[7] *See, e.g., United States v. City & County of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996) (where municipality issued order under local ordinance to cease and desist from carrying out selected remedy, order was preempted because municipality "concedes that it is impossible for [the PRP] to comply with both Denver's zoning ordinance and the EPA's remedial order"; additional conflict preemption finding was thus dictum); *Town of Acton v. W.R. Grace & Co. -- Conn. Techs., Inc*., 2014 U.S. Dist. LEXIS 132684, at *27 (D. Mass. Sept. 22, 2014) (allowing enforcement of local by-laws would enable "literally thousands of different local governments to impose their own liability schemes") (quotation marks omitted).

At bottom, in none of the Region's cases was there a hybrid cleanup scheme employing RCRA to select a (slower) remedy, and the state-law conflict with the selected remedy was severe (e.g., *Town of Acton*, in which a municipality sought to require continued remediation after EPA granted the PRP permission to cease). That is not the case here, where the Region admits that there is mere "potential" for conflict and delay.

E. The Siting Act Is an ARAR.

Finally, the Region not only should have required GE to obey the Siting Act, it should have listed the Siting Act as an ARAR. The arguments of the Region and GE to the contrary are incorrect.

First, the Region and GE argue that the Siting Act was not "identified [to the Region] by the State in a timely manner," as required by CERCLA § 121(d)(2)(A)(ii). However, there is no question that the Region was aware of the Siting Act, as the Committee pointed out in its petition (p.23) and which the Region has not disputed. Moreover, the term "identify" in CERCLA section 121(d)(2)(A)(ii) is notably different from the standard term requiring formal notification, *i.e.*, "notify." The dictionary definition of "identify" includes, *inter alia*, merely to "point out," which suggests that the Region's actual knowledge of potential ARARs is the relevant inquiry. *See Kane ex rel. United States v. Healthfirst, Inc.*, 120 F. Supp. 3d 370, 385 (S.D.N.Y. 2015) (citing dictionary definitions of "identify"). Moreover, the requirement to "identify"

something (or someone) can be satisfied constructively.[8] Here, there is no dispute that EPA was well aware of the Siting Act since, among other things, the state listed a Siting Act regulation in its initial ARARs list. *See* Exhibit 1.

Next, GE and the Region contend that the Siting Act does not impose "a standard or level of control," as CERCLA § 121(d) supposedly requires. But if the Region and GE were correct, then most "facility siting laws" (which CERCLA expressly identifies as ARARs) would not be ARARs and neither would state wetlands and endangered species protections, which, consistent with standard EPA practice, the Region included here as ARARs. *See* Permit Mod. Table 1, C-5, C-8, C-16. Indeed, the NCP confirms the Committee's position here: it defines "applicable requirements" to include "limitations promulgated under … *state … facility siting laws that specifically address … a location, or other circumstances found at a CERCLA site*." 40 C.F.R. §300.5 (emphasis added).[9]

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[8] *See Idaho v. Interstate Commerce Comm'n*, 35 F.3d 585, 597 (D.C. Cir. 1994) (where regulation required agency to act upon "receipt of or concurrence with" endangered species list, agency's duty was triggered by circumstances giving it constructive notice of contents of list); *NRDC v. FAA*, 564 F.3d 549, 559 (2d Cir. 2009) (doctrine of "constructive notice" can be applicable to federal agency where public information is brought to its attention by commenters); *People v. McKinley*, 661 N.W. 2d 599, 604 (Mich. Ct. App. 2003) (statute requiring police officer to "identify" himself or herself as such is satisfied, under standard dictionary definition, merely by officer wearing uniform and badge and operating officially marked police car; rejecting argument to require oral means).

[9] The Region also incorrectly contends that the Siting Act is not of "general applicability," due to 990 Code Mass. Reg. 1.02(2)(f), which exempts DEP cleanups, but not federal ones. The

Finally, the Region also contends that the Siting Act is not an ARAR because it is purely procedural, and does not impose a substantive duty on GE to compensate municipalities. Region Br. 19. Not so: the Siting Act states that the siting agreement between the municipality and the developer has several optional terms, but *must* ("shall") include terms describing "the compensation, services, and special benefits that will be provided to the host community by the developer." Mass. G.L. ch. 21D, § 12. Moreover, if there is any dispute over the compensation term or any other term, the dispute is to be resolved by arbitration. *Id.* § 15. The duty to provide compensation is clearly stated, and is substantive, just as a tortfeasor's duty to compensate victims of his negligence is substantive, notwithstanding the process involved in determining the liability and the amount. Those portions of the Siting Act that are substantive are legally applicable under Section 121(d)(2)(A).

For these reasons – to the extent that CERCLA applies to this cleanup – the Siting Act should have been listed as an ARAR.[10]

Region cites no authority for the proposition that a single exemption in a broad statute renders the statute not "generally applicable."

[10] The Committee also reiterates its contention that it is impossible to tell whether the centralized dewatering/storage facilities are "on-site," because the site is still to be determined. GE cites cases supporting the proposition that areas within a certain distance are close enough, *see, e.g.*, GE Br. 8, but it is impossible to apply these cases to a purely hypothetical location.

F. There Is No Threshold Bar to Considering the Committee's Challenge on the Merits.

Finally, the threshold legal obstacles that the Region and GE have asserted do not bar the Committee's challenge.

1. The Committee's challenge is timely.

GE wrongly contends that this challenge is untimely. *See* GE Br. 11-12. To accept this argument would require the municipalities to have been clairvoyant. The municipalities would have had to have somehow foreseen, nearly twenty years ago, not only that the Rest of River permit modification would entail the construction of hazardous waste facilities in their communities (or abutting communities), thus triggering the Siting Act, they also would have had to have foreseen that the Region would shunt aside their rights under the Siting Act. Specifically, under GE's fanciful theory, the municipalities would have had to foresee GE's § 121(e) argument, and that the Region would fail to include the Siting Act as an ARAR under CERCLA section 121(d) – even though this provision of CERCLA expressly saves from preemption state "facility siting law[s]," and even though EPA has always construed this ARAR provision to include state laws that do not set numerical pollution limits (*e.g.*, wetlands, ESA). Indeed, under GE's theory, the municipalities would even have had to have foreseen the Region's contention that the Siting Act is nonetheless preempted by CERCLA under conflict preemption principles, notwithstanding the slowness of the RCRA process and the Tenth

Circuit's decision in *Colorado*, *supra* – a case that had been on the books for seven years when the CD was entered. GE's timeliness argument should be rejected as unsound and unfair.

Nor is GE's bare citation to Federal Rule of Civil Procedure 60(b) sufficient to establish that the Board is without jurisdiction to consider this challenge. Rule 60(b) (and the CD provision cited by GE) apply only to "parties," and neither the rule nor the CD says that it is the exclusive means of litigating issues covered by the CD, or otherwise purports to forbid subsequent litigation in another forum, above all by a non-party to the judgment. CD ¶ 211. Tellingly, GE does not even engage with the authority in the Committee's petition that expressly authorizes such collateral litigation. *See* Muni. PFR at 29 (citing *Restatement 2d of Judgments* § 12 & ch. 4, and CD § 189).

2. The Committee's challenge is not beyond the scope of the Permit Modification.

The Region wrongly contends that the applicability of the Siting Act is "beyond the scope of the permit" and therefore outside the Board's review, regardless of whether or not this issue was previously decided by the district court. Region Br. 21-22. But this argument ignores reality. Implicitly but unmistakably, the Region has taken the position – in the Permit Modification and more clearly still in its contemporaneous interpretations of it – that GE is not required to comply with the Siting Act. This position in turn is a "conclusion of law" embedded in the "permit decision" that the Board has jurisdiction to review under 40 C.F.R. § 124.19(a)(4)(i).

For example, the Permit Modification requires GE to submit on an "expedited" basis a work plan for the centralized dewatering and storage facility. Permit Modification II.H.1.d, at

65-66.[11] This work plan is to describe the evaluation of "potential locations" for the facility, the development of "site-specific construction plans," and a process to "coordinate with affected communities regarding the operation[s]" of the facilities at these locations. But the Siting Act requires something more than – and different from – mere "coordination" about the "operations" of a site that has already been selected and planned by GE on an "expedited" basis. Instead, GE is supposed to negotiate with these communities *before* the site is selected, not about its "operation" at a pre-designated location, but about whether the parties can agree on the compensation owed as part of the siting process. The Permit Modification makes no allowance for these negotiations to occur. It is undeniable that if the Siting Act really did apply, this part of the Permit Modification would have to be changed.

And the Region has implicitly admitted as much. In response to the Committee's comments contending that GE must comply with the Siting Act, the Region tellingly declined, on two occasions, to say that Siting Act compliance was beyond the scope of the Permit

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[11] The Permit Modification states that this plan must be submitted within 30 days of the submission of the Statement of Work. *Id.* The SOW in turn is to be submitted on a schedule to be submitted and approved by the Region immediately after the Permit Modification becomes effective (*i.e.*, at the end of the appeals process). CD ¶ 22.x, at 102.

Modification – instead, it strongly implied that GE should *not* undertake compliance with the Siting Act. In its first RTC response, the Region appeared to contend that the Siting Act did not apply as a matter of state law (because the central dewatering/storage facilities are allegedly not "disposal facilities"), and that the Act was also not an ARAR – statements that would be beside the point if the Region were really agnostic on GE's compliance with the Siting Act. RTC 296. In its second RTC response, the Region stated that it would comply with "the substance" of state and local regulations (*i.e.*, not the "permit" requirements), except where doing so would conflict with federal law or the Permit Modification. RTC 333. In its brief to the Board, the Region has made it clear that this second RTC passage should be understood as exempting GE from complying with the Siting Act: as the Region says in its brief, compliance with the Siting Act "potentially cannot simultaneously occur" at the same time the remedy is implemented, due to "delays in the process outlined in the Permit for the temporary storage of material." Region Br. 24. In fact, the Region goes so far as to say that Siting Act compliance conflicts with the whole purpose of CERCLA. This is an admission that GE should not comply with the Siting Act in carrying out the remedy. This conclusion is thus part of the "permit decision," and it is entirely proper for the Committee to ask the Board to decide whether this conclusion about the applicability of state law was erroneous.

3. The Committee's challenge is ripe.

The Region also is incorrect in contending that the Siting Act dispute is not ripe. A claim is not ripe if it rests upon "contingent future events that may not occur as anticipated," *Texas v. United States*, 523 U.S. 296, 300 (1998), or if there is no "hardship to the parties" from

withholding a decision. *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967). The Region contends that, "with no extant facilities" already built by GE, it is not certain that "the Siting Act will be violated," or that any violation that does occur will result in any "hardship" to the municipalities. *Id.*

First, by trying to force the municipalities to wait to raise the Siting Act until a facility is "extant," the Region is effectively undoing the Siting Act – the whole point of which is to require negotiation and payment *before* the facility has been built. Once the facility is "extant," it likely would be impossible for GE to comply with the Act. Second, there is nothing speculative about whether GE will violate the Act: as described above, the Region has already made it clear that GE must build a facility promptly, and that in doing so it should not pause to comply with the Act; there is zero chance that GE will disregard the Region's direction and voluntarily comply. Third, this dispute is no less premature than a typical post-ROD dispute over whether a state law is or is not an ARAR, yet CERCLA § 121(f) authorizes ARARs litigation by the affected state once the ROD is issued and before construction has begun. There is no reason to treat this dispute as any less ripe, since it is also about the applicability of a state law to a cleanup that is about to occur. Fourth, and finally, GE (which pointedly does not object to ripeness) obviously needs guidance now on whether it has to comply with the Siting Act as it attempts to design and site a temporary facility under the Permit Modification. Courts have held that a regulated party's need to decide whether or not to comply with a regulation warrants a prompt adjudication of any dispute over the regulation. *See Riva v. Massachusetts*, 61 F.3d 1003 (1st Cir. 1995) (uncertainty in making future financial plans constitutes adequate hardship); *Simmonds v. INS*, 326 F.3d 351,

358 (2d Cir. 2003) ("absolute certainty of injury is not required for a case to be constitutionally ripe"). For these reasons, the dispute is ripe.

II. The Region should have required GE to maintain the remedy in perpetuity.

The Region should have required GE to maintain the remedy, including but not limited to the caps over PCB contamination, in perpetuity. *See* PFR at 30-32. The Region and GE do not deny that perpetual maintenance is required, and also do not deny that Region 2, faced with an essentially identical problem, explicitly required GE to maintain the Hudson River caps in perpetuity. Instead, the Region and GE take the position that the remedy already requires perpetual maintenance. But this contention does not bear scrutiny.

The Region's primary argument is that the Region identified 40 C.F.R. § 761.61(a)(8) as an ARAR, and that it requires GE to maintain a site cap "in perpetuity." Region Br. 34. But this is a dubious guarantee. The Region's ARARs table merely cites the regulation as a whole, 40 C.F.R. § 761.61, and describes it as providing "specific options" for PCB cleanup, such as risk-based approval, without mentioning the provision requiring perpetual maintenance of caps; it nowhere states that GE must maintain the caps in perpetuity or otherwise comply specifically with 40 C.F.R. § 761.61(a)(8). There is no guarantee that this ARARs table will effectively require GE to maintain the caps in perpetuity, particularly if this regulation changes in the (many) years to come. Moreover, this cap-specific regulation says nothing about the perpetual duration of GE's obligation to maintain other parts of the remedy – as well as the protectiveness of the remedy as a whole. This is a significant problem in light of the volume of contamination

left in place, and the possibility that this contamination will be exposed, *e.g.*, by more frequent/intense flooding attributable to climate change. *See* Muni. PFR 30.

GE and the Region also incorrectly rely on the CD's provision that operation and maintenance obligations survive the Region's issuance of a "Certification of Completion of the Remedial Action." GE Br. 13, Region Br. 35. This provision is small comfort, because the Permit Modification does not define what these O&M obligations are: the Permit Modification requires GE to implement an O&M plan without specifying the content of this plan, or how long this "implementation" must be maintained. Permit Mod. 50-51. Both GE and the Region admit that under the CD, the Region can terminate O&M obligations when they have been "fully performed." CD ¶ 89(a). Given the vague definition of GE's O&M obligations in the first place, there is nothing in the Permit Modification or the CD to prevent the Region in the future from declaring victory and ordering just such a termination – and no clear remedy for the public were the Region to do so. In this way, the Permit Modification and the CD preserve a discretion that could never be reasonably exercised. This is a classically arbitrary and capricious permit condition.

CONCLUSION

The Committee respectfully requests that the Board grant review of this petition, and that it remand the Permit Modification to the Region to require GE to comply with the Siting Act and to maintain the protectiveness of the remedy in perpetuity.

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Respectfully submitted,

Housatonic Rest of River Municipal Committee

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(iv), this reply brief complies with the word limit set by the Board. According to the word count function in Microsoft Word, this Petition contains 7,000 words or fewer.

/s/ Benjamin A. Krass

Certificate of Service

I certify that on March 27, 2017 I have sent a copy of this reply brief, together with the attachment, to the counsel listed below.

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