

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

In re:

GENERAL ELECTRIC COMPANY

**Modification of RCRA Corrective Action
Permit No. MAD002084093**

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) **RCRA Appeal No. 16-01**
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**GENERAL ELECTRIC COMPANY’S REPLY TO
THE COMMONWEALTH OF MASSACHUSETTS’ RESPONSE
TO GENERAL ELECTRIC’S PETITION FOR REVIEW**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
TABLE OF ATTACHMENTS.....	iv
GLOSSARY OF TERMS.....	v
INTRODUCTION	1
ARGUMENT	1
I. The Out-of-State Disposal Requirement Conflicts with the Consent Decree and Is Clearly Erroneous.	1
A. State policy preferences cannot trump legal requirements established by statute and judicially enforceable agreements.	1
B. On-site disposal is as protective of human health and the environment as out-of-state disposal.....	4
C. Compliance with ARARs does not justify rejecting on-site disposal	7
D. An on-site disposal facility provides equivalent control of sources of releases as an out-of-state facility	10
II. The Remedy Selected for Woods Pond Conflicts with the CD and Is Clearly Erroneous	11
III. The MESA Conservation/Net Benefit Plan Requirement Is Overbroad and Violates the CD.....	13
CONCLUSION.....	15
STATEMENT OF COMPLIANCE WITH WORD LIMITATION	15
ATTACHMENTS (see List of Attachments)	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

	Page(s)
Federal Statutes	
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §7601 <i>et seq.</i>	
CERCLA §104(c)(9), 42 U.S.C. §9604(c)(9)	2
Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 <i>et seq.</i>	2
Toxic Substances Control Act, 15 U.S.C. §2601 <i>et seq.</i>	4
Federal Regulations	
Regulations on EPA Permit Procedures, 40 C.F.R. Part 124	
40 C.F.R §124.19	15
State Regulations	
Massachusetts Endangered Species Act Regulations, 321 CMR 10	
321 CMR 10.23	13-14
Massachusetts Hazardous Waste Regulations, 310 CMR 30.000	
310 CMR 30.501(3)(a)	8
310 CMR 30.708	8
Massachusetts Site Assignment Regulations for Solid Waste Facilities, 310 CMR 16.00	
310 CMR 16.40(4)(a)&(d)	8
Massachusetts Wetlands Protection Act Regulations, 310 CMR 10.00	9
Consent Decree in <i>United States et al. v. General Electric Company</i> (October 27, 2000) ("CD")	
Consent Decree	7, 8, 9
Paragraph 22.g	11-12
Paragraph 112.a.....	14
Paragraph 161.d(i).....	14-15

Paragraph 166.a.....15

Paragraph 166.e..... 14-15

Reissued RCRA Permit (reissued in October 2001 and again effective December 7, 2007)
("CD-Permit"), incorporated in CD7, 8, 10

Other

S. Rep. No. 11, 99th Cong., 1st Sess. (1985)2

TABLE OF ATTACHMENTS

- Attachment 1: Excerpt from *1993 Hazardous Waste Capacity Assurance Plan for the Commonwealth of Massachusetts, Phase 1*, Prepared by Massachusetts Department of Environmental Protection, transmitted to EPA by letter dated May 23, 1994
- Attachment 2: Excerpts from *Massachusetts 2010-2020 Solid Waste Master Plan, April 2013, Pathway to Zero Waste*, Prepared by Massachusetts Department of Environmental Protection
- Attachment 3: Letter from Lee Community Development Corporation to Ian A. Bowles, Secretary, Massachusetts Executive Office of Energy and Environmental Affairs, Re: Proposed Upper Housatonic River Area of Critical Environmental Concern (ACEC), February 6, 2009
- Attachment 4: Letter from Congressman John W. Olver to Ian Bowles, Secretary, Massachusetts Executive Office of Energy and Environmental Affairs, March 6, 2009
- Attachment 5: Letter from General Electric Company to John Fisher, Massachusetts Department of Environmental Protection, Re: Proposed Revisions to Massachusetts Hazardous Waste Regulations Respecting Areas of Critical Environmental Concern, August 23, 2013

GLOSSARY OF TERMS

ACEC	Area of Critical Environmental Concern
ARAR	Applicable or Relevant and Appropriate Requirement
CD	Consent Decree in <i>United States et al. v. General Electric Company</i> , Civil Action No. 99-30225-MAP <i>et seq.</i> (Oct. 27, 2000)
CD-Permit	Reissued RCRA Permit (reissued by EPA in October 2001 and again effective Dec. 7, 2007), incorporated into Consent Decree
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CMS	Corrective Measures Study
Comp/Analysis	EPA's Comparative Analysis of Remedial Alternatives for the Rest of River (May 2014)
EPA	U.S. Environmental Protection Agency
EPA.Resp.	EPA Region 1's Response to General Electric Company's Petition for Review (Feb. 14, 2017)
EPA.SOP	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 (Jan. 29, 2016)
GE	General Electric Company
GE Comments	Comments of General Electric Company on Draft Permit Modification and Statement of Basis (Oct. 27, 2014)
GE.Pet.	Petition of General Electric Company for Review of Final Modification of RCRA Corrective Action Permit Issued by EPA Region 1 (Nov. 23, 2016)
GE.Reply-to-EPA	General Electric Company's Reply to EPA Region 1's Response to General Electric's Petition for Review (Mar. 24, 2017)
MA.Resp.	Commonwealth of Massachusetts Response to GE Petition for Review (Feb. 13, 2017)
MESA	Massachusetts Endangered Species Act
mg/kg	milligrams per kilogram (equivalent to parts per million)
NIMBY	Not in my backyard

NRD	Natural resource damages
PCBs	Polychlorinated biphenyls
RCRA	Resource Conservation and Recovery Act
Stmnt/Basis	EPA's Statement of Basis for Proposed Rest of River Remedial Action (June 2014)
TSCA	Toxic Substances Control Act

INTRODUCTION

General Electric Company (“GE”) submits this reply to the Commonwealth of Massachusetts’ Response (“MA.Resp.”) to GE’s Petition for Review of Final Modification of RCRA Corrective Action Permit Issued by EPA Region 1 (“GE.Pet.”).¹ The Commonwealth’s Response only reinforces the merits of GE’s positions. In particular, the Commonwealth’s Response makes it clear that EPA has inappropriately deferred to the Commonwealth’s policy preferences, which is both inconsistent with the law and not grounded in the controlling criteria expressed in the legally binding agreements.

ARGUMENT

I. The Out-of-State Disposal Requirement Conflicts with the Consent Decree and Is Clearly Erroneous.

The Commonwealth tries, first and foremost, to bolster EPA’s decision to require that about a million cubic yards of sediments and soil be transported to and disposed of at out-of-state facilities.² MA.Resp. at 13-28. The Commonwealth’s opposition to landfills of any type within its borders is not an appropriate decision factor for EPA in selecting a Rest-of-River remedy for the reasons stated in GE’s Petition and its reply to EPA’s Response. *See* GE.Pet. at 20-25; GE’s Reply to EPA’s Response (“GE.Reply-to-EPA”) at 6-11.

A. State policy preferences cannot trump legal requirements established by statute and judicially enforceable agreements.

It is well established that it is the Federal Government’s role to ensure that no one State burdens the others with its wastes; and for more than 30 years, CERCLA has provided that each

¹ References to key documents have been provided in attachments to GE’s petition or EPA’s response to it. This Reply includes five new attachments. *See* above List of Attachments.

² The Modified Permit ostensibly requires disposal only in licensed “off-site” facilities, but the Commonwealth admits (and EPA does not deny) that there are no such facilities in Massachusetts. MA.Resp. at 15, n.5. Off-site disposal, then, means disposal in another state.

State must adequately assure the availability of hazardous waste disposal facilities with sufficient capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State. CERCLA § 104(c)(9).³ It is arbitrary for EPA to allow Massachusetts to avoid this obligation and veto a remedy that EPA has found effective and protective.

Massachusetts' most recent response to the CERCLA § 104(c)(9) mandate was in 1994, when it reported that it had no hazardous waste landfill capacity. *1993 Hazardous Waste Capacity Assurance Plan for the Commonwealth of Massachusetts, Phase I*, Table 4 (provided in Attachment 1 to this Reply). Nothing has changed since. In its final *2010-2020 Solid Waste Master Plan* (April 2013) ("MA Master Plan," excerpts provided as Attachment 2 to this Reply), the Commonwealth reported a steep decline in overall in-state landfill capacity that could be made up for by (1) preventing waste from being generated in the first place, (2) increasing recycling and composting, (3) developing new in-state disposal capacity, and/or (4) increasing its export of waste to disposal facilities in other states. MA Master Plan at 13-14. The Master Plan went on to say that "[t]he Commonwealth's policy is to meet our waste management capacity need primarily through the development of increased recycling and composting capacity," *id.* at 15; but composting and recycling are not options for the Rest of River sediment and soil. The Master Plan was equally blunt about the Commonwealth's continuing opposition to landfills, admitting that "Massachusetts has had a moratorium to limit certain forms of disposal capacity since 1990," and that, while the Commonwealth has since lifted the moratorium insofar as it

³ The Senate Report underlying Section 104(c)(9) of CERCLA stated: "While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them, This is the NIMBY syndrome (not in my backyard). Yet, if the [RCRA] and Superfund programs are to work – if public health and the environment are to be protected – the necessary sites must be made available." S. Rep. No. 11, 99th Cong., 1st Sess. (1985) at 23.

applied to landfills and will not re-establish a formal moratorium on new landfill capacity, “no new landfill capacity is projected to be developed over the next decade.” *Id.* at 47, 50.

Thus, the Commonwealth’s objection to on-site disposal is effectively a policy choice to shift burdens to other states. However, regardless of the Commonwealth’s policy preferences, it has a controlling statutory duty to assure that sufficient room exists for the disposal of hazardous wastes generated in-state, and its policy preferences cannot trump the legally controlling documents that govern EPA’s decision here.

EPA’s selected remedy will mandate the generation of a million cubic yards of sediment and soil, for which disposal capacity must be found or created somewhere. Initially, Massachusetts vehemently opposed removal of this magnitude in its 2011 comments on GE’s Revised Corrective Measures Study, which recommended on-site disposal. *See* MA 2011 Comments (provided in Att.4 to GE.Pet.). Now, years later, Massachusetts supports much more removal, and its associated adverse impacts. This reversal came only after EPA agreed to insist on sending the removed sediments and soil out of state at an additional cost to GE of up to approximately one quarter of a billion dollars. MA.Resp. at 12 and 13 n.2.

The Commonwealth’s arguments on the disposal issue in its Response are largely repetitive of arguments made by EPA in its Statement of Position in the dispute on EPA’s notification of its intended final decision (“EPA.SOP”) and/or in its Response to Comments. GE addressed those arguments in its petition. The Commonwealth’s arguments are also, in part, duplicative of arguments made by EPA in its response to GE’s petition (“EPA.Resp.”). GE anticipated some of these arguments in its petition and refuted the others in its reply to EPA’s response, as cited in the subsequent sections of this Reply.

B. On-site disposal is as protective of human health and the environment as out-of-state disposal.

Like EPA, Massachusetts now argues that out-of-state disposal is more protective of human health and the environment than on-site disposal. MA.Resp. at 14-18. But, like EPA, the Commonwealth cannot and does not explain the Agency's prior admission that on-site disposal in a properly designed and maintained facility "would provide high levels of protection to human health and the environment," EPA Statement of Basis ("Stmnt/Basis") at 35 (in Att. 5 to GE.Pet.), or the fact that EPA has selected on-site (or other local) disposal at numerous sites throughout the country, including in Massachusetts and at this very Site. *See* GE.Pet. at 12-13. In substance, moreover, the Commonwealth's arguments on protectiveness mostly echo arguments made by EPA and addressed elsewhere by GE.⁴

The Massachusetts Response does make a few additional points about protectiveness that warrant a separate reply. First, while GE has already dealt generally with the argument that on-site disposal would be less protective because leachate could be released from trucks carrying it to the GE water treatment facility in Pittsfield, *see* GE.Pet. at 16-17, the Commonwealth specifically asserts that such transport "could generate as much as 600,000 gallons of leachate per month for 10 to 20 years, requiring more than 1,000 truck trips...." MA.Resp. at 16. These numbers are inaccurate for two reasons. First, the Commonwealth's figures were drawn from EPA's estimates for a remedy that EPA did not choose (disposal of 2 million cubic yards of soil

⁴ *See* GE.Pet. at 14-16, GE.Reply-to-EPA at 13-14 (refuting arguments that an on-site disposal facility would not meet default landfill siting requirements under the Toxic Substances Control Act ["TSCA"]); GE.Pet. at 16-17, GE.Reply-to-EPA at 11-12 (discussing alleged potential for releases from on-site and off-site disposal facilities); GE.Pet. at 17, 19-20 (refuting argument that on-site disposal would alter existing habitats).

and sediments, not the 1 million cubic yards that will require disposal under the selected remedy). *See* EPA’s Comparative Analysis (“Comp/Analysis”) at 64 (in Att. 10 to EPA.Resp.).

Second, and more significantly, the Commonwealth fails to disclose that the quantity of **PCBs** in the leachate to which it refers will be miniscule. In fact, GE has shown that the total mass of PCBs transported by truck to the water treatment facility in Pittsfield would be approximately 0.2 ounce per month over the life of the Rest-of-River remedy (2 pounds over an assumed 13 years or 156 months). To avoid the “risk” of transporting 0.2 ounce of PCBs per month over a short distance, the Commonwealth readily accepts the long-distance transportation of 240 pounds of PCBs per month (38,000 pounds divided by 156 months). *See* GE Comments on Draft Permit Modification (“GE Comments”) at Table 2 (in Att. 7 to GE.Pet.). In other words, under this analysis, out-of-state disposal could expose nearly 20,000 times more PCBs by mass to accidental spillage during transport, over far greater distances, than the on-site alternative.⁵

GE could eliminate the need for **any** transport of leachate by constructing a water treatment plant at the disposal site itself; but even if it were to treat the leachate at its plant in Pittsfield, the tiny amount of PCBs that would be carried by truck is roughly equivalent to the amount of PCBs found in 16-24 fluorescent light ballasts manufactured in the pre-TSCA era, which are routinely transported by homeowners and others for disposal.⁶ If the Rest-of-River

⁵ EPA previously made the same argument the Commonwealth makes, Comp/Analysis at 61, 64, 68, 69 (in Att. 10 to EPA.Resp.); but after GE pointed out the comparison described in the text, EPA did not make this argument either in its submittal in the dispute resolution on EPA’s intended final decision or in its Response to this Board. *See* EPA.SOP (Att. 9 to GE.Pet.) at 52; EPA.Resp. at 16-18.

⁶ EPA estimates that there are 1 to 1.5 ounces of PCBs in the capacitor fluid in pre-TSCA fluorescent light ballasts. <https://www.epa.gov/pcbs/polychlorinated-biphenyl-pcb-containing-fluorescent-light-ballasts-flbs-school-building>.

remedial work lasted for 13 years, the risks attending the transport of leachate from an on-site disposal facility would be – at most – roughly equivalent to the risk of transporting one or two fluorescent light ballasts per year for a distance of about ten miles.

Second, Massachusetts argues that an on-site disposal facility would be located in an area with no known contamination, whereas out-of-state landfills already contain hazardous substances. MA.Resp. at 17. The Commonwealth does not and cannot explain why this difference would make the on-site disposal facilities unprotective. Moreover, its claim relies on the supposition that there is unlimited out-of-state landfill capacity in contaminated areas to manage remediation wastes. There is no support for this assumption. Nationwide capacity is not infinite. Even if the one million cubic yards of sediment and soil that would be generated in the course of the Rest-of-River remedy were placed in a previously used, and therefore contaminated, portion of an existing out-of-state landfill, Massachusetts would use up a million cubic yards of that other state’s landfill’s capacity, bringing it that much closer to the point at which it would have to either (1) open a new cell in an uncontaminated area or (2) shut down. And even if the out-of-state landfill could accommodate all of the soil and sediments from the Rest of River in areas of “known contamination,” that space would then be unavailable to receive waste from other sites, shrinking nationwide capacity.⁷ Once overall capacity is exhausted, a new landfill in an area with “no known contamination” will be required *somewhere* and, but for

⁷ There is a limited supply of hazardous and non-hazardous waste landfill disposal capacity. EPA’s latest National Capacity Assessment Report states that, although there is currently an adequate supply, “the industry is consolidating and restructuring as indicated by the existence of fewer landfills...[than previously reported]. *The dynamic hazardous waste market and the uncertainty of the permitting process make it difficult to guarantee that the current surpluses of hazardous waste management capacity will continue to exist.*” *National Capacity Assessment Report: Capacity Planning Pursuant to CERCLA Section 104(c)(9)* (March 25, 2015) at 12 (emphasis added).

the exercise of federal authority consistent with the CD, the Commonwealth will continue to make sure it isn't in Massachusetts. On-site disposal, on the other hand, will create new landfill capacity, and will ensure that remediation of the Rest of River does not exacerbate the national problem of creating and maintaining adequate landfill capacity for hazardous wastes.

Finally, the Commonwealth asserts that out-of-state disposal will allow the remedy to be implemented faster. MA.Resp. at 17-18. It provides no support for that assertion. The Board has been given no reason that an on-site disposal facility could not be built within the remedial design period, or that it would take significantly longer than building a rail loading facility and negotiating contracts with rail carriers and off-site disposal facilities. As GE has already shown, GE.Pet. at 21-22, GE.Reply-to-EPA at 7-9, "implementability" is really a stalking horse for EPA to accommodate Massachusetts' opposition to locating a new landfill anywhere within its borders, and that accommodation exceeds EPA's authority under the CD and makes the Agency's selection of out-of-state disposal arbitrary and capricious because of its reliance on an improper factor. *See also* GE.Pet. at 22-23, GE.Reply-to-EPA at 9-10 (refuting argument that EPA could consider state and local opposition to on-site disposal because CD-Permit authorized consideration of "other relevant information in the Administrative Record").

C. Compliance with ARARs does not justify rejecting on-site disposal.

The Commonwealth contends that on-site disposal would not comply with applicable or relevant and appropriate requirements ("ARARs"). In particular, it relies on the provisions of the Massachusetts hazardous waste and solid waste regulations prohibiting a disposal facility in an

Area of Critical Environmental Concern (“ACEC”). MA.Resp. at 19-21; see 310 CMR 30.708; 310 CMR 16.40(4)(d).⁸

Chronological context is important here. Before Massachusetts designated the Upper Housatonic ACEC in the Rest of River in 2009, there was no prohibition on siting a disposal facility there. By the time the Commonwealth made the designation, the CD was almost a decade old and GE had already submitted the Rest-of-River Corrective Measures Study (“CMS”) specified by the CD-Permit, in which it evaluated several potential disposal remedies, and specifically recommended on-site disposal, under the nine remedy-selection criteria specified in the CD-Permit. When Massachusetts designated the Upper Housatonic ACEC, moreover, the only prohibition on siting a disposal facility in an ACEC was in the state *solid* waste disposal regulations, which, as noted above, do not apply to the sediment and soil that would be subject to on-site disposal here. However, the Massachusetts Department of Environmental Protection amended its *hazardous* waste regulations in 2013 to include such a prohibition, 310 CMR 30.708, ensuring that the prohibition applied to an on-site disposal facility in the ACEC.

The chronology provides context for the Commonwealth’s regulatory intentions. The ACEC designation and the amended hazardous-waste regulations together were intended to buttress the Commonwealth’s opposition to on-site disposal, and, in essence, attempt to constrain EPA’s decision. That is exactly how the Commonwealth’s actions were contemporaneously perceived. For example, when it commented on the proposed ACEC designation in 2009, the

⁸ As discussed in GE’s petition and EPA admits, the Massachusetts solid waste regulations do not apply to wastes that contain PCB concentrations at or above 50 mg/kg or are commingled with such wastes, which are considered hazardous wastes and comprise the waste anticipated here. See GE.Pet. at 18; 310 CMR 16.01(4)(a). The provision of the Massachusetts hazardous waste regulations that prohibits disposal in an ACEC would apply to such wastes, although the remainder of those regulations would not. See GE.Pet. at 18 n.12; 310 CMR 30.501(3)(a).

Lee Community Development Corporation said it had been told that the ACEC “is a tool that may prevent” GE from “stockpil[ing]” PCBs or from creating “a PCB dump within the Housatonic corridor.” Attachment 3 hereto. Congressman John Olver wrote in support of the designation that “the ACEC and its accompanying regulations comprise [ARARs], and thus must be considered by the EPA and General Electric Company in its operations within the designated area,” and that “[t]his contingency is one of the greatest potential benefits of the proposed ACEC designation.” Attachment 4 hereto. Likewise, when it commented on the proposed 2013 amendments to the hazardous waste regulations, GE pointed out that the “proposed revision at this time seems calculated to interfere with EPA’s imminent selection of the Rest of River Remedial Action, and specifically to seek to circumvent the remedy selection criteria ... [which] compel the conclusion that sediment and soil removed from the Rest of River should be placed in a state-of-the-art landfill constructed for that purpose near the River.” Attachment 5 hereto.

The Board need not determine whether the CD allows the Commonwealth to influence the remedy-selection process by creating an ARAR for the Rest of River through the implementation of a regulation that acquires *post hoc* relevance to a proposed remedy. Even if the ACEC prohibition was a valid ARAR, it is no impediment to on-site disposal. Two of the three identified locations for an on-site facility are outside the ACEC.⁹ The Woods Pond Site is within those boundaries, but that site is a former sand/gravel quarry where on-site disposal would not affect any of the resources of the ACEC. Back in 2009, the Commonwealth assured EPA and local business interests that the ACEC designation would not be used “to delay or preclude

⁹ Massachusetts claims that on-site disposal at these sites would not comply with other ARARs which would need to be waived. MA.Resp. at 21. GE has already demonstrated that these claims are false. See GE.Pet. at 19, GE.Reply-to-EPA at 15 (showing that the facility at the Forest Street Site could be conducted in accordance with the state wetland regulations without the need for a waiver); GE.Pet. at 19-20, GE.Reply-to-EPA at 15 (responding to the claim that the Rising Pond Site is adjacent to a priority habitat of a rare species).

remediation” along the Rest of River, would not “impede development or redevelopment” in general, and in particular did not mean that redevelopment of an existing industrial parcel “is in any way incompatible with the protection of the natural environment.” Attachment 1 to GE.Reply-to-EPA at 17-18. Now, however, Massachusetts insists that “prior or current property use,” such as the use of the Woods Pond Site as a quarry, “is simply irrelevant” to the application of its putative ARAR. MA.Resp. at 20. The Board should not allow such a transparent ploy.

D. An on-site disposal facility provides equivalent control of sources of releases as an out-of-state facility.

Finally, the Commonwealth asserts that off-site disposal provides better control of sources of releases “since on-site disposal presents a risk of potential future releases to the Housatonic River Watershed, whereas off-site disposal presents no such risk.” MA.Resp. at 22; *see also id.* at 23. As GE has explained, GE.Reply-to-EPA at 11-12, this argument is inconsistent with the text of the CD-Permit and exposes the parochial motivations of EPA’s selection of out-of-state disposal. On-site and out-of-state facilities are equally protective, and that is certainly true with respect to their ability to control sources of releases. The only practical difference is that Massachusetts, as a matter of policy, prefers pass the theoretical risk of a release from a disposal facility on to another state while adding the risks of long-distance transportation.

Massachusetts admits that its purpose here is to keep the removed material out of its figurative backyard: “After all, if issues arise with off-site disposal, the Housatonic River watershed is unaffected, whereas the Housatonic River watershed will bear the negative impacts if issues arise with on-site disposal.” MA.Resp. at 23. The Commonwealth’s bias may be understandable, but EPA has no authority to accommodate it under the CD-Permit, which specifies “Control of Sources of Releases” – *not* “Control of Sources of Releases to the

Housatonic River Watershed” – as a General Standard, CD-Permit at Condition II.G, and which, for reasons GE has explained, does not allow the Agency to take state (or local) opposition into account when selecting a remedy. GE.Pet. at 20-25; GE.Reply-to-EPA at 6-11.¹⁰

II. The Remedy Selected for Woods Pond Conflicts with the CD and Is Clearly Erroneous.

In supporting EPA’s deep-dredging remedy for Woods Pond, the Commonwealth relies primarily on the fact that it will involve a large mass removal of PCB-containing sediments. MA.Resp. at 28-29. It does not deny that mass removal is not a Rest-of-River remedy-selection criterion. Nor does it dispute that a remedy with much less removal would achieve the same reductions in fish PCB concentrations and in direct contact and ecological risks as EPA’s remedy. Rather, the Commonwealth contends that mass removal in Woods Pond will have other benefits, as discussed below. These arguments do not withstand scrutiny.

First, it claims that “even if GE remains the dam owner in perpetuity, there is no guarantee that the dam will never breach or fail, including when factoring in unknowns or uncertainties associated with climate change,” and that mass removal is therefore “more reasonable and prudent.” *Id.* at 29, 30. The possibility of a dam breach or failure, however, remains entirely speculative, particularly given GE’s performance of the necessary monitoring and maintenance of the dam, which is critically important to GE since a failure or material breach would expose GE to claims for additional natural resource damages (“NRD”) that are not covered by its CD covenants. *See* GE.Pet. at 29. The parties agreed, and the CD provides, that

¹⁰ The Commonwealth’s arguments on the other criteria in the CD-Permit have been addressed in GE’s petition and its reply to EPA’s response. Regarding Massachusetts’ arguments on implementability (MA.Resp. at 23-26), *see* GE.Pet. at 21-23, GE.Reply-to-EPA at 7-9. Regarding Massachusetts’ argument on costs, including the claim that EPA rejected two disposal options that would have been more expensive than out-of-state disposal (MA.Resp. at 27), *see* GE.Pet at 11-12; GE.Reply-to-EPA at 6.

EPA would develop a PCB fate, transport, and bioaccumulation model to be used to evaluate various remedial alternatives so as to inform EPA's selection of a remedy. *See* CD ¶22.g.

During the course of the development and application of that model, Massachusetts had several opportunities to comment (*i.e.*, during three peer reviews of the model and on GE's proposal for and report on its CMS). If EPA or Massachusetts had believed that a dam breach or failure was a real risk, then EPA should have required, or the Commonwealth should at least have suggested, that that scenario be modeled, so that the impacts could be scientifically evaluated, rather than simply using it now as a speculative basis for deeper dredging. Yet neither EPA nor Massachusetts did so.

EPA's choice of more mass removal based on conjecture cannot justify the non-speculative and substantial increase in cost and adverse short-term impacts (e.g., greenhouse gas emissions) resulting from that extra removal.

Massachusetts also relies on the incremental reduction in downstream PCB transport resulting from the small increase in trapping efficiency from EPA's deep-dredging remedy. While the Commonwealth asserts that this small increase could be significant, MA.Resp. at 30, the fact is that the difference would not (according to model projections) affect whether the Downstream Transport Performance Standard is attained, and would not translate to *any* reduction in risks due to fish consumption, direct contact, or ecological impacts, and thus would not increase the protectiveness of the remedy. Accordingly, the Commonwealth's argument cannot justify the increased costs and short-term adverse impacts of EPA's remedy.

III. The MESA Conservation/Net Benefit Plan Requirement Is Overbroad and Violates the CD.

In its petition, GE challenged EPA's requirement that, where the implementation of the remedy would result in a "take" of state-listed species, GE must prepare and submit, under the Massachusetts Endangered Species Act ("MESA") regulations, a Conservation and Management Plan for providing a "long-term net benefit" to the species. GE.Pet. at 53-54. GE showed that, under the MESA regulations, the requirement to submit such a plan does not apply where the take would impact a significant portion of the local population, as it would for several species here. In these circumstances, the take is prohibited altogether and no plan is required.

The Commonwealth argues that the requirement to submit a Conservation and Management Plan applies separately and apart from the condition that the take impact only an insignificant portion of the local population, and that the Massachusetts Division of Fisheries and Wildlife ("MassDFW") has interpreted the regulations to require submission of a Conservation and Management Plan even where the take would impact a significant portion of the local population. MA.Resp. at 32-34. That argument cannot be squared with the plain language of the regulation itself. That regulation (321 CMR 10.23(2)) provides that the MassDFW Director

"may issue a conservation and management permit, provided:

- (a) The applicant has adequately assessed alternatives to both temporary and permanent impacts to State-listed Species;
- (b) An insignificant portion of the local population would be impacted by the Project or Activity, *and*;
- (c) The applicant agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species" (emphasis added).

The regulation thus makes clear that *all three conditions must be met* before a take can be permitted. Consequently, if there is a significant impact on the local population, the take cannot

be permitted and the requirement for a Conservation and Management Plan does not come into play. The MassDFW's interpretation to the contrary is arbitrary and capricious because it conflicts with the plain language of the regulation.¹¹

The Commonwealth also challenges GE's additional argument that the requirement to submit a Conservation and Management Plan providing a "long-term net benefit" to the species taken conflicts with the CD because it effectively constitutes a form of NRD, for which the CD provides a covenant not to sue from the Federal and State Governments. MA.Resp. at 34-36. First, the Commonwealth points out that, as part of the satisfaction of the Governments' claims for NRD, the Consent Decree requires "[p]erformance of the response actions required under this Consent Decree." *Id.* at 35, citing CD ¶112.a. That is an accurate recitation of the text, but a circular argument. While the CD requires, as part of the NRD settlement, that GE conduct the response actions required under the CD, it does not allow for the response actions to include the paying of compensation for a take – which is the issue raised by GE.

The Commonwealth similarly contends that, since the NRD covenants in the CD are contingent upon performance of the required response actions, they do not apply until the Rest-of-River Remedial Action is complete. MA.Resp. at 35-36. That is not so. Paragraphs 161.d(i) and 166.e provide that the covenants not to sue for "*future liability*" "shall be effective for each Removal or Remedial Action ... upon EPA's Certification of Completion for that individual Removal or Remedial Action" (emphasis added). However, that does not affect the timing of the NRD covenants not to sue for *past or current liability*. Paragraphs 161.d(i) and 166.e provide

¹¹ The Commonwealth also claims that EPA could waive this regulation's requirement that there must be an insignificant impact on the local population, but leave in place the requirement for a Conservation and Management Plan. MA.Resp. at 34. But EPA has not done so. And it could not do so since, as shown above, the regulation has three conditions all of which must be met. Thus, if EPA had decided to waive this regulation as an ARAR, it would have had to waive the entire regulation, not just one selective condition.

that those covenants took effect upon GE's payment of certain costs shortly after entry of the CD. For that reason, those covenants are applicable now, and neither the United States nor Massachusetts could today sue GE for recovery of NRD.

Finally, the Commonwealth relies on Paragraph 166.a.(iv)(A) of the CD, which provides that nothing in the covenants shall be interpreted as modifying GE's obligation to comply with ARARs. *Id.* Again, that contention is circular because it doesn't answer the question of whether the MESA requirement for a "net benefit" plan is an appropriate ARAR or an unlawful effort to recover additional NRD.

CONCLUSION

For the foregoing reasons and those set forth in GE's Petition, GE urges the Board to reject the Commonwealth's arguments.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R § 124.19(d)(1)(iv), undersigned counsel certifies that the foregoing Reply to the Commonwealth of Massachusetts' Response to GE's Petition contains 4,656 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, but not including the cover, Table of Contents, Table of Authorities, Table of Attachments, Glossary of Terms, Statement of Compliance with Word Limitation, or signatories; and thus this Reply meets the 7,000-word limitation specified in the Board's rules at 40 C.F.R. § 124.19(d)(3).

Respectfully submitted,

/s/ Jeffrey R. Porter

Jeffrey R. Porter

Andrew Nathanson

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Executive Counsel – Environmental
Remediation

GENERAL ELECTRIC COMPANY

159 Plastics Avenue

Pittsfield, MA 01201

Attorneys for Petitioner General Electric Company

Dated: March 24, 2017

Attachment 1

**Excerpt from *1993 Hazardous Waste Capacity Assurance Plan for the Commonwealth of Massachusetts, Phase 1*,
Prepared by Massachusetts Department of Environmental
Protection, transmitted to EPA by letter dated May 23, 1994**



Commonwealth of Massachusetts
Executive Office of Environmental Affairs
**Department of
Environmental Protection**

William F. Weld
Governor
Trudy Coxe
Secretary, ECEA
Thomas B. Powers
Acting Commissioner

May 23, 1994

John DeVillars
Regional Administrator
U.S. Environmental Protection Agency
Region I
J.F.K. Federal Building
Boston, MA 02203

Attn: Phase I Capacity Assurance Submittal Enclosed

Dear Regional Administrator DeVillars:

Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9604(c)(9)), requires as a condition for providing remedial action funding that states assure the availability of treatment and disposal facilities that have the capacity to treat, destroy, or securely dispose of the waste reasonably expected to be generated within their borders for 20 years.

The attached Phase I document demonstrates that the Commonwealth of Massachusetts has described its current hazardous waste management system, including ongoing waste minimization program activities; and has projected the commercial hazardous waste management capacity available within the Commonwealth of Massachusetts for the next 20 years. I certify that this information is accurate, complete, within the limitations of the data, and has been developed in good faith.

I hereby transmit this document, which, in addition to any Phase II and Phase III capacity assurance planning documents that may be required to address shortfalls in national capacity, will form the basis for the assurances required of the Commonwealth of Massachusetts under 42 U.S.C. 9604(c)(9).

Sincerely yours,

Tom Powers
Thomas Powers
Acting Commissioner

Attachment

1993 HAZARDOUS WASTE
CAPACITY ASSURANCE PLAN
FOR THE
COMMONWEALTH OF MASSACHUSETTS
PHASE I

Prepared by:

Massachusetts Department of Environmental Protection
Bureau of Waste Prevention
Division of Hazardous Materials
One Winter Street - 7th Floor
Boston, MA 02108

Thomas Powers
Acting Commissioner

This report has been completed in fulfillment of the requirements of Section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9604(c)(9))

TABLE 4:
 MAXIMUM OPERATIONAL IN-STATE COMMERCIAL SUBTITLE C
 MANAGEMENT CAPACITY - END OF 1991 (TONS)

CAP MANAGEMENT CATEGORY	MAXIMUM OPERATIONAL IN-STATE COMMERCIAL - SUBTITLE C MANAGEMENT CAPACITY
RECOVERY	
METALS RECOVERY	5452.7
INORGANICS RECOVERY	0
ORGANICS RECOVERY	11,380,868.4
ENERGY RECOVERY - LIQUIDS	0
ENERGY RECOVERY - SLUDGES/SOLIDS	0
TREATMENT	
STABILIZATION/CHEMICAL FIXATION	0
INCINERATION - LIQUIDS AND GASES	0
INCINERATION - SLUDGES/SOLIDS	0
FUEL BLENDING	45,871.6
HAZARDOUS WASTEWATERS AND SLUDGES TREATMENT	0
DISPOSAL	
LANDFILL	0
DEEPWELL/UNDERGROUND INJECTION	0
LAND TREATMENT/FARMING	0
TRANSFER/STORAGE	
TRANSFER/STORAGE	

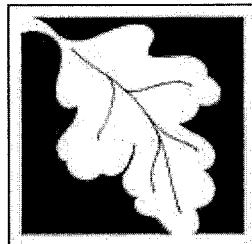
Attachment 2

Excerpts from EPA's from *Massachusetts 2010-2020 Solid Waste Master Plan, April 2013, Pathway to Zero Waste*, Prepared by Massachusetts Department of Environmental Protection

MASSACHUSETTS 2010-2020 SOLID WASTE MASTER PLAN

APRIL 2013

Pathway to Zero Waste



Massachusetts
Department
of
ENVIRONMENTAL
PROTECTION

**Massachusetts Department of Environmental Protection
Executive Office of Energy and Environmental Affairs**

To continue progress in increasing recycling we must address two challenges: first, working with global markets and demand for recyclable materials and second, increasing the supply of recyclable materials that are separated for use in recycling markets.

- *Changes in market demand*
Recycling markets have fluctuated widely over the last decade, presenting challenges for the recycling industry and for cities and towns that run recycling programs. After all-time highs in recyclable material values that were seen in 2006 through the first half of 2008, the value of recyclables dropped dramatically in the second half of 2008 along with the global economic recession. Since then, many recycling markets have rebounded. These rapid changes indicate the need to develop recycling programs that are based primarily on diverting material from disposal and the associated cost savings. These programs need to have the flexibility to cope with material values that fluctuate widely over time (rather than relying on expectations of recycling revenue that may or may not be realized). The establishment of new local and regional markets for diverted materials can help to buffer and absorb changes in export markets, which points to the need to develop home-grown industries that will use material diverted from Massachusetts' waste.
- *Flat supply of separated recyclables*
In Massachusetts, and most states around the country, recycling rates have remained level or dropped slightly in recent years. The fact that many citizens, municipalities, and businesses have embraced recycling as a way to protect the environment has resulted in tremendous gains. However, many of the initial gains have been made and further recycling advances require new strategies by the public, government, business, and the waste industry to maximize the separation of recyclables from trash. The *2010-2020 Plan* includes a series of success stories about municipalities, businesses, and institutions that have been able to increase their recycling and composting and, in many cases, save money at the same time. Massachusetts can make great strides in increasing recycling and composting by learning from and replicating these successful strategies on a broader scale.

Siting facilities that divert materials from disposal

There are materials which, when diverted from the solid waste stream, are more like raw materials than solid waste. For example, separated organics are well suited to producing compost and/or producing energy through anaerobic digestion. The limited capacity for making recyclables or organics into new products is an important barrier to increasing the diversion of these materials from disposal. For example, Massachusetts currently has few facilities that can receive and process organic materials such as food waste from restaurants, grocery stores, and institutions. MassDEP is working on eliminating the regulatory barriers to such facilities, while ensuring that these facilities are properly overseen to prevent them from polluting air and water and creating nuisance conditions.

Projected loss of in-state landfill capacity

Massachusetts landfill capacity is expected to decline from just under two million tons in 2010 to about 600,000 tons in 2020 as current landfills close and are not replaced. Without increased

source reduction, recycling, composting, or in-state disposal capacity, net export could rise from 1.1 million tons per year in 2009 to nearly 2.0 million tons per year, or about 18 percent of the projected annual solid waste generation, in 2020.

This capacity can be made up for by:

- Preventing waste from being generated in the first place;
- Increasing recycling and composting;
- Developing new in-state disposal capacity; and/or
- Increasing export of waste to disposal facilities in other states.

A loss of landfill capacity will also create issues for a number of special wastes that are currently managed (in part) at landfills. These materials, which are not generally tracked with MSW and C&D, include contaminated soil, residuals from vehicle shredding operations, dredge spoils, and some sewage sludge. Please see the text box on page 7 for more information on how these materials are managed. As there are fewer landfills in Massachusetts, in-state outlets for these materials are becoming scarcer. MassDEP will continue to track the status of how these materials are managed and identify and assess additional management alternatives.

Toxics in Products and Packaging

There is mounting scientific evidence and growing public concern about the hazards of chemicals contained in consumer products and packaging, their risks to users of the products, and risks from air and water pollution created when products are disposed. To address this, some states are following the lead of the European Union to assess and reduce the use of toxic chemicals in products and packaging. Massachusetts has a long-standing commitment to reducing the use of toxics through the Toxics Use Reduction Act (TURA). TURA requires large Massachusetts manufacturers to report their use of listed toxics and develop plans to reduce use of toxics and identify alternatives, significantly reducing the hazardous waste generated by these companies. In 2006, Massachusetts passed the Mercury Management Act that requires manufacturers of products containing mercury to collect “end of life” products and recycle the mercury, and bans the sale of certain products containing mercury. This approach has provided strong incentives for manufacturers to replace the hazardous materials in their products with more benign substances, and in some cases to redesign products and packaging to make them easier to recycle and/or to create less waste at the end of the product’s life.

A number of states are developing new legislative initiatives that would divert products and packaging that contain toxics from the solid waste stream and/or require the use of safer chemicals where practical. Governor Patrick’s Administration has worked closely with the legislature and stakeholders to develop a Safer Alternatives bill that will phase out products with toxic chemicals when economic alternatives are available.

1.5 OUR VISION FOR MATERIALS MANAGEMENT IN MASSACHUSETTS

The *Beyond 2000 Solid Waste Master Plan* established a broad vision for 2000-2010, including:

- Reducing the quantity and toxicity of our waste to the irreducible minimum, leaving as little waste as possible to be disposed,
- Disposing only residuals from recycling and other waste reduction efforts, and
- Ensuring that waste handling facilities are environmentally sound.

Ten years later, we are approaching the limits of what can be recycled under our current approach, and in-state disposal capacity continues to shrink. The Commonwealth needs a new set of strategies for advancing waste reduction and significantly decreasing the amount of waste which requires disposal.

Diverting more material from disposal is:

- An *environmental opportunity* that will help Massachusetts reduce greenhouse gas emissions, conserve natural resources, and supplement energy conservation;
- An *economic development opportunity* that can spur the expansion of businesses and jobs in the Commonwealth, using materials diverted from waste to make new products and competing the global marketplace; and
- An *opportunity to reduce disposal costs* for waste generators and municipalities

The *2010-2020 Solid Waste Master Plan* emphasizes a shift in thinking toward a more comprehensive and integrated approach that manages materials throughout their lifecycles. As such, our focus needs to be on:

- Promoting more efficient use of materials,
- Increasing recycling of materials that have served their useful purpose,
- Reducing the amount of waste requiring disposal,
- Reducing the toxicity of the waste requiring disposal, and
- Improving the environmental performance of solid waste management facilities.

It also lays the groundwork for a zero waste approach for the future, where all materials are efficiently used and then given a future use – whether in new products, nutrients returned to the earth, or energy.

New Initiatives

The Commonwealth's policy is to meet our waste management capacity need primarily through the development of increased recycling and composting capacity, instead of through the development of long-term disposal capacity. This Plan continues and/or expands a number of existing initiatives and includes several critical new initiatives to more effectively reduce the amount of waste that is generated and disposed. Major new initiatives include:

- Using recycling funding from municipal waste combustor renewable energy credits to fund recycling and composting initiatives through the Sustainable Materials Recovery Program.
- Establish a framework for a producer responsibility system. Work with Northeast states on a regional framework;

- Requiring haulers to provide full recycling services to their customers to ensure a level playing field for all waste haulers;
- Amending Massachusetts' siting regulations to streamline siting of recycling, anaerobic digestion and composting facilities while ensuring a high level of environmental performance;
- Expanding MassDEP's authority over problem landfills to step in and conduct site cleanup work if needed;
- Establishing more rigorous waste ban standards and requiring waste composition studies by municipal waste combustors and landfills; and

More detailed background information on solid waste management in Massachusetts is provided in the Plan's Appendices.

**CHAPTER FOUR:
IMPROVE THE ENVIRONMENTAL PERFORMANCE OF SOLID WASTE
FACILITIES
(OBJECTIVE 2)**

4.1 MUNICIPAL WASTE COMBUSTION MORATORIUM

Background and Objective

Massachusetts has had a moratorium to limit certain forms of disposal capacity since 1990. In 2000, Massachusetts lifted the moratorium for landfills, given that this disposal capacity could be constructed and implemented in short-term phases, but maintained the moratorium on municipal waste combustion due to concerns that such long-term fixed disposal capacity could result in overbuilding in-state management capacity.

When the moratorium was issued, it was intended for the technologies in existence at the time, which involved mass burn combustion of municipal solid waste. Since that time, a variety of alternative technologies (such as gasification and pyrolysis) have advanced. MassDEP is seeking to encourage the development of technologies for converting municipal solid waste to energy or fuel (e.g., gasification and pyrolysis) on a limited basis.

Action Item:

MassDEP will modify the moratorium on municipal solid waste combustion to encourage the development of alternative technologies (e.g., gasification and pyrolysis) for converting municipal solid waste to energy or fuel on a limited basis. The moratorium will remain in place for new capacity for traditional combustion of municipal solid waste. Total new capacity for gasification or pyrolysis of municipal solid waste will be limited statewide to 350,000 tons per year. This limit is set at ½ of the projected in-state capacity shortfall of approximately 700,000 tons if our disposal reduction goals are met, ensuring that we do not overbuild long-term disposal capacity. These technologies will be used for those portions of the waste stream for which reuse or recycling are not an option. Proposed projects will have to meet stringent emissions, energy efficiency, and upfront recycling standards. New facilities will be subject to the same site assignment rules as other facilities. MassDEP will seek stakeholder input while developing performance standards for municipal solid waste conversion facilities. Any new facilities will be required to employ state of the art processing technologies focused on removing recyclable materials to the greatest extent possible so that these facilities do not supplant recycling or re-use options.

Existing combustion facilities would be allowed to continue their operations within the limits of their current permitted capacity as established by their solid waste permit and air plan approval. If an existing facility needs to be rebuilt or repaired to the extent that it is defined as a facility “modification” under 310 CMR 7.08, then its reconstruction would be subject to the same moratorium restrictions as new facilities. This provision will not apply to upgrades of emission control equipment.

MassDEP will continue to assess the potential for using source-separated materials as fuels, including their air emissions and the environmental and health risks that each type of facility may pose. An assessment of the environmental and public health impacts of burning C&D materials for energy generation will be conducted when funding allows or an actual proposal is presented and other materials will be assessed over time as needed.

4.2 IMPROVE SOLID WASTE FACILITY WASTE BAN AND RECYCLING PERFORMANCE

Background

Waste bans are a key tool available in Massachusetts to reduce disposal of recyclable and compostable materials and increase recycling and composting. The waste ban regulations require landfills, municipal waste combustors, and transfer stations to develop and implement waste ban plans that include ongoing monitoring for banned materials, comprehensive inspections of waste loads, record-keeping and reporting, and notification to waste haulers and generators of failed loads. Through its own inspections, MassDEP continues to see high levels of banned materials and large numbers of failed loads, indicating the need to improve waste ban compliance and enforcement among all responsible parties – landfills, municipal waste combustors, and transfer stations, waste haulers, and waste generators. In a recent round of inspections at landfills, municipal waste combustors, and transfer stations, MassDEP staff inspected over 1,300 loads and determined that about 20 percent of these contained unacceptable quantities of banned materials. As a result, MassDEP issued notices of noncompliance to 78 waste generators and 23 notices of non-compliance to haulers.

While disposal facilities do not directly control how businesses, institutions and individuals manage their waste, effective compliance with waste ban plans by landfills, municipal waste combustors, and transfer stations is an important component of the waste ban system and can help minimize the disposal of banned materials. This section focuses on improving the role that landfills, municipal waste combustors, and transfer stations play in implementing waste bans. This work will be complemented by initiatives to improve waste ban compliance and increase recycling by waste generators and haulers, including filing legislation that would require haulers to play a stronger role in education and providing recycling services. These initiatives are described in Section 3.1.

Objectives

- Ensure that solid waste facilities comply with their waste ban plans.
- Increase the stringency of waste ban oversight and inspections at solid waste facilities, including transfer stations.
- Improve the quality of waste ban failed load record-keeping and reporting.
- Improve our understanding of the composition of the materials that are disposed of at disposal facilities in Massachusetts, including what portion are recyclable or compostable materials.

Action Items

- **Municipal Waste Combustor Renewable Energy Credit Requirements** – Implement expanded waste ban requirements for municipal waste combustion facilities that participate in the Class II Renewable Energy Credit (REC), or Waste to Energy Credit, program. (Note: These requirements are already incorporated into municipal waste combustion facility permits.) In order for these facilities to be eligible to earn these credits, they need to meet several requirements related to waste bans, including:
 - Establish and implement an electronic tracking system for waste ban-related information for all waste loads received;
 - Establish a contract with a waste ban compliance professional to assess the waste ban compliance by haulers and generators delivering loads to the facility; and
 - Conduct a waste composition study periodically on the waste received by the facility
- **Institute improved landfill waste ban compliance requirements**, similar to what is required of waste to energy facilities under the REC requirements described above.
- **Monitor landfill, municipal waste combustor and transfer station compliance** with waste ban plans and take enforcement where needed.
- **Review and analyze waste ban failed load data reported by** landfills, municipal waste combustors, and transfer stations on annual facility reports to ensure complete and accurate accounting of failed loads containing unacceptable levels of waste ban materials.
- **Review and revise MassDEP's regulations and guidance regarding facility waste ban plans** to drive more effective implementation of the waste bans at landfills, municipal waste combustors, and transfer stations. Specific issues include the number and type of inspections required and whether de minimis quantities that determine what constitutes a failed load should be changed.
- **Expand waste bans** to include additional materials such as commercial and institutional food waste, gypsum wallboard, and asphalt shingles.

4.3 IMPROVE ENVIRONMENTAL PERFORMANCE OF LANDFILLS AND MUNICIPAL WASTE COMBUSTORS

Background

Massachusetts regulations for landfills and municipal waste combustors are among the most stringent in the country. However, new opportunities may emerge to further improve the environmental performance of these facilities. MassDEP will continue to evaluate opportunities for improving the environmental performance of both landfills and municipal waste combustors. This includes reducing emissions, increasing separation and diversion of recyclables (also discussed in Section 4.1) and increasing the amount of energy generated by existing solid waste facilities. Although Massachusetts will not re-establish a moratorium on new landfill capacity,

no new landfill capacity is projected to be developed over the next decade, and in-state landfill capacity is projected to decline from just under 2 million tons in 2009 to just over 500,000 tons in 2020.

MassDEP recognizes that there are important concerns about disproportionate environmental impacts and risks in environmental justice communities. The Executive Office of Energy and Environmental Affairs (EEA) has established an Environmental Justice policy that addresses environmental justice concerns with facility siting for all types of facilities through the MEPA review process. MassDEP also is working to reduce environmental impacts on environmental justice communities through our strategy to reduce emissions from diesel vehicles, including trash and recycling trucks, that impact environmental justice communities.

Objectives

- Improve the environmental performance of existing landfills and municipal waste combustors.
- Improve MassDEP's authority to address pollution and threats of pollution at both currently operating and closed solid waste facilities.

Action Items

- **Municipal Waste Combustor Emission Reductions:** Develop regulatory revisions that would further tighten emission and air pollution control system requirements for municipal waste combustors based on best available control technology, for nitrogen oxides and other emissions of concern such as dioxin and mercury. These changes would be consistent with the EPA maximum achievable control technology rule. When possible within the parameters of existing facilities, enable facility modifications to improve the energy conversion efficiency of existing facilities.
- **Increased Authority over Problem Sites:** File and/or support legislation to amend M.G.L. c. 21H to allow the agency to use existing financial assurance mechanisms or state funds to conduct response actions at facilities when permittees are unwilling or unable to do necessary work. Legislative amendments would include provisions to authorize MassDEP to access sites and expend funds when facility conditions present a significant risk or harm to public health, safety, welfare or the environment or when a significant public nuisance warrants state intervention. Judicial review would be limited to the administrative record in a cost recovery claim after the completion of needed remedial actions.
- **Renewable Energy at Closed Landfills:** Encourage owners of closed landfill facilities to build renewable energy generation facilities (e.g., solar arrays and wind turbines) at those locations.
- **Landfill Oversight:** Building on the more stringent regulations that MassDEP established based in the Beyond 2000 Master Plan, MassDEP will work to ensure that both active and closed landfills comply with stringent environmental requirements and that any inactive landfill closure projects are safely implemented.

Attachment 3

**Letter from Lee Community Development Corporation to
Ian A. Bowles, Secretary, Massachusetts Executive Office of
Energy and Environmental Affairs, Re: Proposed Upper
Housatonic River Area of Critical Environmental Concern
(ACEC) (February 6, 2009)**



February 6, 2009

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Ian A. Bowles, Secretary
Executive Office of Energy and Environmental Affairs
Attn: ACEC Program, Department of Conservation and Recreation
251 Causeway Street, Suite 700
Boston, MA 02114

Re: Proposed Upper Housatonic River
Area of Critical Environmental Concern (ACEC)

VIA E-Mail and First Class Mail

Dear Secretary Bowles:

The Lee Community Development Corporation is a private non-profit economic development organization. The CDC often acts in a quasi-public capacity in assisting the town of Lee with projects and policies that generate jobs and investment. The CDC is also involved with economic development policy and coordination on a regional basis and works regularly with Berkshire Economic Development Corporation (BEDC), with regional agencies such as Berkshire Regional Planning Commission (BRPC), state agencies, such as the Massachusetts Office of Business Development (MOBD) and the Massachusetts Department of Housing and Community Development (DHCD).

The Lee CDC has developed several projects in the town of Lee, including the Lee Corporate Center and the Quarry Hill Business Park on Route 102. The CDC is currently assisting the town of Lee in economic development planning downtown and with priority development sites designated under MGL Chapter 43D.

In its capacity as an economic development organization, the CDC understands the importance of protecting Berkshire County's natural environment. In fact, we have recognized, along with our colleagues, that our economic development strategy for the region must include quality of life and natural resource protection as an integral part of that strategy (as referenced in regional economic development initiatives such as the *Berkshire Strategy Project* and the *Berkshire Blueprint*).

We also see the need for a closer interrelationship between sustainable economic development initiatives and environmental stewardship. We believe that the two can co-exist. What is more, this interrelationship as it develops may

be able to create synergies to promote solutions. An example is the opportunity that now exists to develop "green jobs" and energy projects in the region.

The Lee CDC cannot, however, support the current ACEC proposal. We believe that the proposed boundaries will have a substantially negative effect in discouraging economic development projects, job creation and investment in this industrial corridor. These industrial areas are where state and federal policy has indicated we should try to "re-develop first" by reprogramming already disturbed land rather than open space, re-using the existing built environment.

We believe that there are sufficient regulatory tools in place already and that another layer would invite unintended consequences and would be a barrier to creating jobs and investment.

Among the questions which the CDC believes should be answered are:

1. What will an ACEC accomplish relative to the current consent decree?

The basis used for proposing the Upper Housatonic ACEC according to Green Berkshires Inc. in a memo to the Lee Selectboard) is to "restore some influence" to the Commonwealth of Massachusetts and Berkshire communities in being able to deal with the provisions of the GE consent decree that is currently in place. The fear is that General Electric under the current consent decree will be able to stockpile PCB's or create a PCB dump within the Housatonic corridor. The ACEC we are told, is a tool that may prevent that from happening.

It may be that we should not take it on faith that the ACEC designation would prevent that scenario. There are some unanswered questions in that regard. Is there a record of legal dialogue that should be reviewed? Did the Attorney General's Office provide an opinion to any state agency relative to the consent decree?

Does any state agency have a legal opinion as to the efficacy of an ACEC designation to "restore influence" to the state or local communities when dealing with the consent decree? Does an ACEC designation restore or otherwise change legal standing to bring an action in the event that the local community disagrees with the method of cleanup that is prescribed in the consent decree?

2. If the ACEC is not an effective tool for restoring state influence, then why are we contemplating putting it in place here?

If the purpose is to further protect the area *in general* (without particular reference to the GE /EPA activities and the consent decree) then we are opposed on the grounds that there are adequate existing regulations that serve to protect the area proposed for the ACEC. Projects of all kinds, large and small already receive adequate scrutiny under the current law.

Even within the context of the present proposal for an ACEC, not enough attention has been given to the possibility that, on balance, an ACEC may seriously impede our ability to attract jobs and investment to the area and do little to further protect the area. The delineation of the

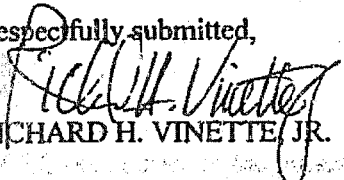
ACEC boundaries in the present proposal was not informed by a meaningful discussion of alternatives with the Town of Lee boards and organizations, business owners, and townspeople who will be affected. The boundaries were presented as a given, with no room for revision.

There needs to be a better balance of environmental issues with other parallel concerns, including those that have been proposed by other state agencies when we are urged to re-develop first, and to engage principles of sustainable development.

We are concerned that in the present proposal there may be great potential for unintended consequences which would hinder good economic projects and our efforts to restore the jobs lost in the past year with local mill closings. Because of these concerns, the CDC is not able to support the ACEC proposal as presently delineated.

We would, however support an ACEC designation which excludes important industrial areas as outlined by the Lee Planning Board and the Board of Selectmen and which is summarized in a letter from the Lee Selectboard dated February 6, 2009 to the EOEEA (copy attached).

Respectfully submitted,



RICHARD H. VINETTE, JR.

Copy: Sen. Benjamin Downing
Rep. William "Smitty" Pignatelli

Greg Bailecki, Secretary, Executive Office of Housing Economic Development
Richard Sullivan, Commissioner, Mass Dept. of Conservation & Recreation
Nat Karns, Executive Director Berkshire Regional Planning Commission
Deanna Ruffer, Economic Development Director, City of Pittsfield
David Rooney, President, Berkshire Economic Development Corp.
Town of Lee Selectboard
Lee Planning Board
Lee CDC Board of Directors

Attachment 4

**Letter from Congressman John W. Olver to Ian Bowles,
Secretary, Massachusetts Executive Office of Energy and
Environmental Affairs (March 6, 2009)**

JOHN W. OLVER
1ST DISTRICT, MASSACHUSETTS

COMMITTEE:
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INTERIOR, ENVIRONMENT, AND RELATED AGENCIES
ENERGY AND WATER DEVELOPMENT

SENIOR WHIP

Congress of the United States
House of Representatives
Washington, DC 20515-2101

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March 6, 2009

Ian Bowles
Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

Dear Secretary Bowles:

I am writing in regard to the recent request from the Environmental Protection Agency that its cleanup operations of the Housatonic River under the Consent Decree (CD) be largely exempted from the proposed designation of the upper river as an Area of Critical Environmental Concern (ACEC).

The EPA apparently wants to include a multitude of *potential* scenarios to be exempted from any impact of the ACEC designation, but one of the major advantages of the ACEC designation, as has been explained during public hearings, is its flexibility in not adversely affecting remediation under the CD. The requested exemptions would in effect negate the whole idea behind the ACEC as a layer of extra oversight to ensure that the river and floodplain be restored to its existing character to the greatest extent possible. Although the EPA refers to this same desired outcome in its letter, it does not appear to have been a guideline adhered to in the restoration of the initial two miles, a situation that forms much of the motivation behind the ACEC designation.

Providing exemptions based upon a host of potentialities is not good policy. In addition, some of the contingencies mentioned by the EPA raise further questions and concerns. Part C on Page 4, for example, requests clarification on a restriction of solid waste facilities that could be required by the EPA within the ACEC, but does not refer to the temporary aspect of such facilities that the public would demand. Part E requests clarification in regard to the state's position concerning "confined aquatic disposal facilities," a contingency I have not heard referred to before, and which is not described or explained in the letter.

I support the contention of *Save the Housatonic* and dozens of other environmental and recreational groups that the ACEC and its accompanying regulations comprise Applicable or Relevant and Appropriate Requirements (ARARs), and thus must be considered by the EPA and the General Electric Company in its operations within the

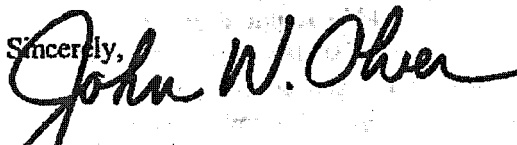
designated area. This contingency is one of the greatest potential benefits of the proposed ACEC designation. Failure by the EPA or GE to comply with the ACEC designation and its regulations as ARARs would provide you with the exclusive right to appeal such a matter. Consequently, the interests of all those towns and public and private landowners along the river who were excluded from the negotiations regarding the CD would gain a voice in the further plans to remove PCBs from the river and its floodplain.

In that regard, I noted that neither the Department of Fish & Game (DFG) nor the Division of Fisheries & Wildlife (DFW) were included in the dissemination of the EPA's letter. DFG and DFW have perhaps the largest stake among state agencies in the outcome of the cleanup operations. Both are firmly behind the ACEC designation, and should be included for important feedback in regard to the EPA request.

Hundreds of attendees at public hearings and dozens of significant environmental, recreational, and fishing and hunting organizations have expressed their strong support for the ACEC boundaries as proposed. Concerns that have been raised – the placement of a municipal water filtration plant within an ACEC, for example – can be resolved by simply referring to and looking at the impact of the many other ACEC designations within the state and Berkshire County. Although I commend the EPA for its difficult and crucial role in overseeing the cleanup of PCBs in the Housatonic River, it does not own the river, nor does it have exclusive domain over the people of Berkshire County who actually live along the river and its floodplain. It is the interests of the people of Berkshire County that should be paramount. Judging from the public testimony thus far, the people of Berkshire County want an ACEC designation that is not bureaucratically disempowered nor rendered moot for purely speculative reasons.

As a nominator of the ACEC designation, I hope you will give your fullest consideration to the wishes of the people of Berkshire County, its organizations and those state agencies overseeing the County's interests, as you act in your role to further protect one of our most scenic resources. To best do so, I urge you to hold the EPA to the applicable state laws and regulations and request that the ACEC designation be approved as nominated. I have enclosed copies of petition signed by several hundred County residents who also support this course of action. Thank you for your consideration of this important matter.

Sincerely,



John W. Olver
Member of Congress

JWO: rtd
Enclosures

Attachment 5

**Letter from General Electric Company to John Fisher,
Massachusetts Department of Environmental Protection,
Re: Proposed Revisions to Massachusetts Hazardous Waste
Regulations Respecting Areas of Critical Environmental
Concern (August 23, 2013)**



Ann R. Klee
Vice President
Corporate Environmental Programs

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August 23, 2013

Mr. John Fischer
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

Re: Proposed Revisions to Massachusetts Hazardous Waste Regulations
Respecting Areas of Critical Environmental Concern

Dear Mr. Fischer:

I am writing to express General Electric's (GE's) opposition to the proposed revisions to the Massachusetts Hazardous Waste Regulations, 310 CMR 30.0000, (hereafter referenced as the Hazardous Waste Regulations) that would prohibit any Hazardous Waste Facility, as broadly defined by the Hazardous Waste Regulations, from being located in or adjacent to an Area of Critical Environmental Concern (ACEC) designated by the Secretary of Energy and Environmental Affairs pursuant to Massachusetts General Laws Chapter 21A, Section 7, and the regulations at 301 CMR 12.00.

Contrary to the suggestion in the "background information" provided by the Department of Environmental Protection (DEP) in connection with its proposed revision of the Hazardous Waste Regulations, this prohibition is not necessary to "preserve, restore, or enhance the resources of [any] ACEC." In the Rest of River Corrective Measures Study, GE demonstrated that the disposal of sediment and soil removed from the Rest of River in a state-of-the-art landfill constructed for that purpose near the River would be fully protective of human health and the environment. In fact, the Commonwealth's proposed prohibition would, if effective, unnecessarily increase other environmental impacts including increased greenhouse gas emissions and other risks from transporting such materials away from the area. Such an outcome would compromise "public health, safety, welfare, and the environment," contrary to the purposes of the Hazardous Waste Regulations specified at 310 CMR 30.002.

DEP's proposed revision at this time seems calculated to interfere with EPA's imminent selection of the Rest of River Remedial Action, and specifically to seek to circumvent the remedy selection criteria that were specified in a court-approved settlement among EPA, Massachusetts, Connecticut, and the City of Pittsfield almost fifteen years ago. These selection criteria compel the conclusion that sediment and soil removed from the Rest of River should be

placed in a state-of-the-art landfill constructed for that purpose near the River. Such a facility would safely isolate that sediment and soil from the environment. Local disposal would also mean far less truck traffic and much lower greenhouse gas emissions. Finally, an on-site facility would mean a much lower likelihood of transportation-related accidents and injuries than would be associated with out-of-state disposal.

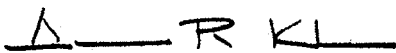
EPA's August 2012 Revised Comparative Analysis of Alternatives for the Rest of River confirms this conclusion. EPA recognized (on page 55) that on-site disposal "would provide protection of human health and the environment by permanently isolating the PCB-containing sediment and soil in an upland disposal facility, which would be constructed with [appropriate engineering protections]." Thus, such a facility would have no adverse impact on the resources of the Upper Housatonic ACEC. DEP's position should be consistent with the analyses that have been done and the permit criteria to which it agreed. Instead DEP is "unalterably opposed to a landfill in the Berkshires to take in the material from the [Rest of River] cleanup." See "DEP official: PCBs from Housatonic River won't be dumped in Berkshire County," *Berkshire Eagle*, May 14, 2013.

The Rest of River remedy selection criteria clearly favor local disposal of the sediment and soil from the Housatonic River. Accordingly, GE has identified three locations for a landfill for that purpose. One of those three locations, a sand and gravel quarry, is located within the boundaries of the recently designated Upper Housatonic ACEC. However, there is nothing about this former industrial site that would qualify it for inclusion in an ACEC. In fact, the construction of a landfill in this former quarry, which would be capped and revegetated, would likely improve its ecological value. Such improvements have occurred at other quarries in the Commonwealth that have been filled with sediment and soil.

DEP's proposed regulations are unnecessary in light of the protections already afforded by the ACEC regulations and Hazardous Waste Regulations, not to mention the other federal and state regulations relating to the disposal of sediment and soil from the Rest of River.

DEP is entitled to advocate out-of-state disposal for the sediment and soil from the Rest of River remedy. However, it should not make sweeping state-wide changes to its Hazardous Waste Regulations in an attempt to undermine the application of the Rest of River remedy selection criteria that the Commonwealth of Massachusetts agreed to when the Consent Decree was entered.

Sincerely,

Handwritten signature of Ann R. Klee, consisting of the letters 'A', 'R', and 'K' connected by horizontal lines.

Ann R. Klee

cc: Commissioner Kenneth J. Kimmell

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of March, 2017, I served one copy of the foregoing General Electric Company's Reply to the Commonwealth of Massachusetts' Response to General Electric's Petition for Review, with attachments, on each of the following:

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/s/ James R. Bieke

James R. Bieke