

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ORAL ARGUMENT

: IN RE: : RCRA Appeal Nos.
: 16-01
GENERAL ELECTRIC COMPANY : 16-02
: 16-03
Permit No. MAD002084093 : 16-04

: 16-05

Thursday,
June 8, 2017

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, NW
Washington, DC

The above-entitled matter came on for
hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN
Environmental Appeals Judge
THE HONORABLE MARY BETH WARD
Environmental Appeals Judge

THE HONORABLE AARON AVILA
Environmental Appeals Judge

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ALSO PRESENT:
Eurika Durr, Clerk of the Board

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1 P-R-O-C-E-E-D-I-N-G-S

2 10:00 a.m.

3 MS. DURR: All rise. Environmental

4 Appeals Board of the United States Environmental

5 Protection Agency is now in session for oral

6 argument In Re General Electric Company, Permit

7 Number MAD002084093. RCRA Appeal Numbers, 16-01,

8 16-02, 16-03, 16-04, and 16-05. The Honorable

9 Judges Mary Beth Ward, Kathy Stein, and Aaron

10 Avila presiding.

11 Please turn off all cell phones and no

12 recording devices allowed. Please be seated.

13 JUDGE STEIN: Good morning. The

14 Environmental Appeals Board is hearing argument

15 today in five appeals of a RCRA Corrective Action

16 Permit that EPA Region One issued to General

17 Electric in October 2016.

18 Those appeals, docketed as RCRA Appeal

19 16-01 through 16-05, were filed by the General

20 Electric Corporation, the Housatonic River

21 Initiative, Mr. C. Jeffrey Cook, the Housatonic

22 Rest of River Municipal Committee, and the

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Adjourn.357

1 Berkshire Environmental Action Team, the latter

2 of whom is not appearing today.

3 The Commonwealth of Massachusetts and

4 the State of Connecticut will also present

5 argument, as will two additional entities

6 participating only as Amici, the City of

7 Pittsfield, and Green Berkshire, Inc.

8 The argument will proceed as outlined

9 in the Order Granting Oral Argument, dated

10 February 23, 2017, an Amended Scheduling Order

11 dated May 10, 2017, and as discussed by the

12 parties in a conference call that Board Counsel

13 held on June 6, 2017.

14 This is an important and a complicated

15 case. And the Board very much appreciates the

16 time and effort that each of you has expended to

17 come to Washington for this important argument.

18 We ask that you think of it today as

19 an opportunity to have a conversation with us

20 about the important issues in the case. You

21 should assume that we have read the briefs and

22 all of your submissions.

1 And therefore, we're likely to ask a
2 large number of questions that will assist us in
3 our deliberations. You should not assume that
4 the Judges have made any decisions concerning any
5 of the issues in the case.

6 But rather, we're going to use this
7 opportunity to listen, to probe your legal
8 positions, to be sure we understand your
9 position, and the legal and record support on
10 which the permit is based.

11 As you know, there are a large number
12 of issues in the time allocated. So we ask that
13 counsel and representatives promptly come to the
14 podium at the time allotted.

15 No photographing, filming, or
16 recording of any kind is permitted. The Board
17 will cover the first two issues this morning.
18 The law governing the Board's review of the 2016
19 RCRA permit and Region One's decision on disposal
20 and treatment.

21 The afternoon session will follow a
22 lunch break. And will first cover Region One's

1 decision on the extent of remediation, both
2 arguments that it is not extensive enough, as
3 well as arguments that it is too extensive.

4 And finally, we will cover issues
5 concerning Region One's decisions regarding the
6 Massachusetts Hazardous Waste Siting Act, and
7 other State and local issues.

8 Our courtroom technology has recently
9 been upgraded. For those of you who have
10 appeared before, you'll see greater clarity in
11 the screens.

12 And it's the first time we'll be
13 holding argument using the new technology. And
14 we expect it to proceed smoothly.

15 (Laughter)

16 JUDGE STEIN: A few additional items.
17 If you intend to reserve time for rebuttal,
18 please advise us at the beginning of each section
19 of the argument.

20 And finally, for the sake of clarity
21 and to avoid confusion, we would ask that you use
22 the following four terms for consistency:

1 2000 Permit. This is the RCRA
2 corrective action permit that was attached to the
3 Consent decree in draft form as Appendix G and
4 subsequently finalized and that took effect on
5 entry of the Consent decree.

6 Draft Modified Permit. It's intended
7 to refer to the draft modification to the RCRA
8 Corrective Action Permit that EPA Region One
9 circulated for public comment in 2014.

10 And the Final Modified Permit is the
11 Final Modified Corrective Action Permit that
12 Region One issued in October 2016.

13 And finally, the term nine criteria,
14 are collectively the three general standards for
15 corrective measures in the six selection decision
16 factors that are listed in Part Two, Section G of
17 the 2000 Permit.

18 Before we begin the first issue, I
19 would like all parties to introduce themselves
20 and who is accompanying them to the Panel. And
21 why don't, for simplicity, I start on the right-
22 hand side.

1 MR. PAWA: Good morning, Your Honors,
2 Matt Pawa, Pawa Law Group on behalf of the
3 Housatonic Rest of River Municipal Committee.
4 Thank you.

5 MR. COOK: Good morning. Jeffrey
6 Cook. I'm representing myself.

7 JUDGE STEIN: Thank you.

8 MS. COLE: Audrey Cole. The
9 Housatonic Environmental Action League. And
10 we're a party to the Brief of the Housatonic
11 River Initiative.

12 MR. DE FUR: I'm Peter de Fur. I'm
13 representing the Housatonic River Initiative.

14 MR. NATHANSON: Good morning. Andrew
15 Nathanson for General Electric Company and my
16 client, Jeffrey Porter.

17 MR. CONWAY: Good morning. My name is
18 Tim Conway. And with me is Samir Bukhari of the
19 Office of Regional Counsel. We're assisted by
20 Tracy Sheppard of the Office of General Counsel,
21 and David Dowden of the Office of Enforcement and
22 Compliance Assurance.

1 JUDGE STEIN: Thank you.

2 MR. MICKELSON: Good morning, Your

3 Honors. Jeff Mickelson from the Massachusetts

4 Department of Environmental Protection.

5 MR. LEHAN: Good morning. Richard

6 Lehan, General Counsel for the Massachusetts

7 Department of Fish and Game Environmental.

8 MS. DiBELLA: Good morning, Your

9 Honors. Assistant Attorney General Lori DiBella,

10 representing the State of Connecticut.

11 JUDGE STEIN: Thank you. Let's then

12 begin with the first issue, the law governing the

13 Board's review of the 2016 RCRA Permit

14 Modification. And the presenters that I have,

15 are General Electric for ten minutes, the Hous --

16 the Municipal Committee for ten minutes, and

17 Region One for ten minutes.

18 I guess the one question I have in

19 light of a clarification that's been made, is

20 whether the Housatonic River Municipal Committee

21 still wants to present on this issue or is going

22 to waive their time?

1 MR. PAWA: We can address the issue

2 for maybe one or two minutes.

3 JUDGE STEIN: That's fine.

4 MR. PAWA: Thank you.

5 JUDGE STEIN: All right. Let's begin

6 with General Electric. And are you reserving any

7 time for rebuttal?

8 MR. NATHANSON: Yes. I'd like to

9 reserve two minutes, please. Ready to go.

10 Good morning. I know time is tight,

11 so I will not belabor this. But I would like to

12 thank the Board for the amount of time that it's

13 giving us to discuss these issues.

14 And also for the guidance that it's

15 given us in its Order establishing a framework

16 for oral argument. These are truly extraordinary

17 events in my appellate experience. And I

18 personally appreciate them very, very much.

19 Your Honors, if I may, I'd like to

20 begin by reading a very short quote from a case

21 that we cited in our Petition. It's called

22 United States v. Armour & Company. It's a

1 Supreme Court case from 1971.

2 And we cited it for the proposition

3 that a Consent decree is a contract. Something

4 got left on the cutting room floor. I'd just

5 like to get out here, because I think it frames a

6 lot of what we're going to talk about with

7 respect to this issue and elsewhere today.

8 And here's the quote. "Consent

9 decrees are entered into by parties to a case

10 after careful negotiation has produced agreement

11 on their precise terms. Naturally, the agreement

12 reached normally embodies a compromise.

13 In exchange for the saving of cost and

14 elimination of risk, the parties each give up

15 something they might have won had they proceeded

16 with the litigation. For these reasons, the

17 scope of a Consent decree must be discerned

18 within its four corners and not by reference to

19 what might satisfy the purposes of one of the

20 parties to it."

21 JUDGE STEIN: Okay. So let me ask you

22 a question about that. Because as I read Section

1 4 of the Consent Degree, it provides that unless

2 otherwise expressly provided herein, terms that

3 are defined in CERCLA, RCRA, or the Regulations,

4 have the meaning assigned to them in CERCLA, RCRA

5 or the Regulations.

6 So doesn't that mean that when we are

7 interpreting CERCLA or RCRA terms, we should look

8 to RCRA, CERCLA or applicable guidance documents?

9 Even if we were to accept your argument that the

10 Consent decree should be construed as a contract?

11 MR. NATHANSON: Oh, yes. There's --

12 I mean, there's no question that both by virtue

13 of that particular provision, but also by virtue

14 of the fact that, I mean, it's a canon of

15 contract construction that you're supposed to

16 look to the circumstances that surround the

17 signing of the contract.

18 And look to the technical meaning of

19 terms that the parties might have used. So, I

20 don't believe there's any question about that.

21 But, with respect to certain

22 particular terms and the application of certain

1 terms to certain situations, you do need to look
2 to the structure of the entire Consent decree.
3 And for example, I know we're going to be talking
4 in a while about implementability.

5 Implementability may mean one thing
6 under RCRA, or with respect to an offsite action
7 under CERCLA. But, where you have a regulatory
8 framework or a contractual framework that
9 includes a permit exemption, and you're talking
10 about onsite action, then implementability would
11 mean something quite different.

12 JUDGE AVILA: Well, to what extent can
13 the parties in a consent decree agree to
14 something that would limit the agency's
15 regulatory authority under RCRA for instance?

16 I mean, could you -- could the parties
17 have agreed in the consent decree that the final
18 permit modification would not have anything --
19 would not have a cost over five hundred million
20 dollars?

21 MR. NATHANSON: Or, it would be a flip
22 of a coin? I mean, there are extremes that you

1 would certainly exceed. That would be a matter
2 for the district court that entered the decree to
3 determine.

4 And there certainly was an opportunity
5 when the decree was entered, for any party who
6 was interested who thought that there was
7 something either jurisdictionally defective, or
8 unfair, or otherwise wrong with the terms and
9 scope of the Consent decree to make their
10 objections known.

11 That happened 17 years ago. And that
12 is -- that would be if there were concerns, and I
13 know that this -- an argument along those lines
14 has now been withdrawn.

15 Those would be concerns for the
16 district court. And I think it would be too late
17 as well.

18 JUDGE AVILA: So because the district
19 court found it was just, fair in the public
20 interest, in your view that kind of answers the
21 question?

22 MR. NATHANSON: That makes the Consent

1 decree the law of the case. Or another way to
2 put it, and I've seen this, I don't think it's in
3 our brief, is that consent decrees create a kind
4 of private law that the parties have to operate
5 under.

6 And I think that's the intent of the
7 -- and the intent of that quote from Armour that
8 I just read you.

9 JUDGE STEIN: The Justice Department,
10 in its Motion for Entry of the Consent decree,
11 represented that the Decree was consistent with
12 both RCRA and CERCLA.

13 Given that representation, what should
14 the Board do if it were to find that a provision
15 that's in the Decree is not consistent with RCRA
16 or CERCLA?

17 MR. NATHANSON: I'm sorry, I think my
18 time is --

19 JUDGE STEIN: I think there -- I

20 JUDGE WARD: I think you get three
21 more minutes. I think it started at five.

22 MR. NATHANSON: Oh, okay.

1 JUDGE WARD: Yes.

2 JUDGE STEIN: I thought he just
3 reserved two minutes.

4 MR. NATHANSON: Okay. I wasn't sure.
5 It seemed kind of quick.

6 JUDGE WARD: Just two minutes for
7 rebuttal, right?

8 MR. NATHANSON: Yes. Two minutes for
9 rebuttal. I apologize. I'm sorry.

10 JUDGE WARD: You're not getting off
11 quite so fast.

12 MR. NATHANSON: The red light went off
13 and I thought, uh-oh. I really did say very
14 little in a lot of time.

15 Again, I think that that matter has
16 been determined. And so, the rules of the game
17 here are what's in the consent decree as approved
18 by the District Court.

19 JUDGE WARD: So even if we were to
20 find that the provisions of the permit were
21 authorized under RCRA, you would still argue that
22 if the Consent decree -- or if the permit terms

1 somehow constrained EPA's regulatory authority
 2 under RCRA, that's the standard that we apply?
 3 MR. NATHANSON: Absolutely. Yes.
 4 JUDGE WARD: Was that made known to
 5 the district court that that was how this process
 6 would proceed?
 7 MR. NATHANSON: I cannot answer that
 8 question from experience. But, I can't imagine
 9 that it was not something that the district court
 10 understood.
 11 Particularly with respect to the kinds
 12 of issues that we're going to talk about here
 13 today. The district judge who entered the
 14 decree, Judge Vonzer is a very experienced
 15 federal judge.
 16 And I'm sure he understood that for
 17 example, the list of criteria in RCRA, and the
 18 guidance -- the list of criteria in the NCP are
 19 different from what I'm going to call the nine
 20 criteria that are in the Consent decree.
 21 In addition, I mean, I think it's very
 22 clear that this Consent decree does have an

1 unusual structure. It has this kind of hybrid
 2 structure where it has brought in elements from
 3 RCRA and elements from CERCLA.
 4 So I am confident that this was
 5 something that was on the district judge's radar.
 6 I wasn't there. So, I can't speak from
 7 experience.
 8 JUDGE AVILA: Can I -- this might be
 9 neither here nor there. But, what's your
 10 understanding of what it means when the consent
 11 decree provides that the performance of the final
 12 permit shall be pursuant to CERCLA?
 13 I'm a little confused about what it
 14 means to perform something pursuant to CERCLA
 15 when it's a RCRA corrective action permit.
 16 MR. NATHANSON: I think it's a -- and
 17 again, I can't speak from what was in people's
 18 minds when they did it. But, just on the basis
 19 of the impact that it's a little bit of a belt
 20 and suspenders kind of thing.
 21 Because for example, the Consent
 22 decree includes the permit exemption from CERCLA.

1 It includes compliance with ARARs as a general
 2 standard, one of the nine criteria.
 3 And I think the purpose of saying that
 4 this was -- that the decision was selected, it
 5 was a selection decision under CERCLA. And it
 6 was going to implemented under CERCLA.
 7 Was to make sure that the application
 8 of the statutes themselves, Section 121(e), which
 9 provides an exemption where the remedial action
 10 is selected and carried out under CERCLA. Or
 11 121(d)(2)(a), which requires compliance with
 12 ARARs for remedial action selected under CERCLA.
 13 Again, I think -- although I think
 14 that it wouldn't have been necessary to do that,
 15 because once it's incorporated as a term of the
 16 consent decree, it has its own independent
 17 operative effect.
 18 But, I think that language was
 19 included in there to make sure that there was no
 20 question that it could -- it would apply under
 21 the statute as well.
 22 JUDGE WARD: In terms of the nine

1 criteria and implementability in particular, why
 2 should we read that as being guided by CERCLA as
 3 opposed to RCRA?
 4 MR. NATHANSON: I don't think you
 5 should read it being guided by CERCLA. I think
 6 you should read it as being guided by the Consent
 7 decree.
 8 And with respect to the particular
 9 argument that you're going to have in a little
 10 while, the issue is that implementability is
 11 constrained, the scope of the concerns is
 12 constrained by presence of the permit exemption.
 13 Now, it just so happens because CERCLA
 14 has the permit exemption that if you look at the
 15 NCP and it's definition of implementability, it
 16 will tell you that administrative feasibility
 17 includes things like the ability to get permits
 18 and approvals from local governments for offsite
 19 actions.
 20 But we're not asking you to apply that
 21 directly. We're asking you to apply the same
 22 logic. The reason why the NCP has that

1 limitation is because of the permit exemption.
2 There's no need to get those kinds of
3 approvals for onsite actions. And therefore they
4 couldn't affect implementability for onsite
5 actions.

6 So, while the logic is identical
7 because the term that's been incorporated, the
8 permit exemption, is from CERCLA. What we're
9 asking you to apply is the terms of the Consent
10 decree themselves -- itself. Themselves.

11 JUDGE WARD: So the Consent decree, as
12 Judge Stein mentioned, in Section 4, paragraph 4,
13 says the terms to be used consistent with RCRA
14 and CERCLA. The RCRA guidance does refer to
15 implementability as a criterion for remedy
16 selection.

17 And I think the Region, in their
18 response to comments, points to a 1994 guidance
19 document that includes state and local concerns
20 as possibly eliminating some remedial options
21 under the criterion of implementability.

22 Why isn't that guide out reading of

1 JUDGE STEIN: What authority does the
2 Board have to interpret a judicially entered
3 consent decree? I mean, the Board has authority
4 to adjudicate RCRA permits.

5 What authority does the Board have to
6 interpret this consent decree?

7 MR. NATHANSON: You were given this
8 authority in the consent decree. The
9 administrator agreed, and I think it's one of the
10 reasons why this was packaged as a RCRA permit,
11 to review the consent decree -- review the
12 modified permit that was issued under the consent
13 decree, pursuant to your delegation of authority
14 under 124.2, I think.

15 He delegated that authority to you.
16 He delegated the authority to you to do it
17 pursuant to 124.19. So it comes up as a 124.19
18 petition.

19 But it's still an appeal of a modified
20 permit that wouldn't exist but for the consent
21 decree. That can only be adjudged valid or
22 invalid against the criteria and the conditions

1 the permit in this instance?

2 MR. NATHANSON: Because that guidance
3 had no need to take account of the permit
4 exemption and the limitation that it imposes on
5 implementability. Implementability is -- I mean,
6 it's not a -- this isn't an abstract concept.
7 It's a practical concept. Can you get it done?

8 And under RCRA, where there no
9 preemption and there is no permit exemption,
10 implementability could be affected by the need to
11 get particular permits or whatever it might be.

12 That can't be the case here. Because
13 the parties included the permit exemption. And
14 again, it is, you know, a maxim of contract
15 interpretation that you've got to give effect to
16 -- you've got to read a contract as a whole. And
17 you've got to read it in a way that gives effect
18 to all of its provisions.

19 And so, I think that would be reading
20 the permit exemption out of the Consent decree.
21 And it's a very important term of the Consent
22 decree.

1 that are set forth in the consent decree.

2 And so, I mean, we wouldn't even be
3 here if it wasn't for the consent decree. So --

4 JUDGE STEIN: I guess I'm asking how
5 a federal judge can expand the Board's authority?
6 I mean, clearly we have delegated authority to
7 adjudicate RCRA correction action permits.

8 But to the extent, you know, what
9 authority does a federal judge have to expand on
10 our authority?

11 MR. NATHANSON: In the first instance,
12 it wasn't the federal judge who did that. In the
13 first instance, it was the administrator who
14 agreed to that term. The federal judge approved
15 it.

16 JUDGE AVILA: Okay. I just wanted to
17 -- sorry. I just wanted to follow up. But, so
18 even if we have the authority from whatever
19 source, what's the basis for us determining
20 whether the final modified permit is consistent
21 with the decree? As opposed too consistent with
22 RCRA and RCRA guidance and things like that?

1 It's a little odd for us to be
2 construing a consent -- or a little odd to be
3 construing a consent decree and trying to figure
4 out whether something's in compliance with a
5 court order.

6 MR. NATHANSON: I understand it's odd.
7 And I appreciate the difficulty of wrapping your
8 head around that concept. Because I've spent a
9 lot of time doing that myself.

10 But again, I don't want to sound like
11 a broken record, but it's because the consent
12 decree instructs you to do that. This is a
13 modified permit that would not exist but for the
14 consent decree.

15 And that draws its validity from its
16 consistency or inconsistency with the consent
17 decree. And therefore, that is the standard by
18 which it has to be judged.

19 JUDGE STEIN: There was a RCRA permit
20 before the consent decree, correct?

21 MR. NATHANSON: There was the 2000
22 permit. And I think that was actually a

1 predecessor permit.

2 JUDGE WARD: I was going to say, but
3 the consent decree in terms of this issue of
4 consistency with the consent decree terms itself,
5 the consent decree states, I believe, that the
6 Board's review is governed by "applicable law,"
7 which is a very general term.

8 But, I think the natural reading of
9 that is, consistent with our ordinary scope of
10 review, not consistency with a consent decree.

11 MR. NATHANSON: I would differ. I
12 think the natural reading of that is that the
13 consent decree is the applicable law.

14 Again, I go back to what I read at the
15 beginning. A consent decree creates, like any
16 contract actually, but it creates a universe of
17 law that is applicable to the relationship
18 between the parties.

19 And if it gives somebody authority,
20 then they have that authority. If it sets
21 parameters for the exercise of that authority,
22 then those are the parameters for their exercise.

1 JUDGE STEIN: The Board's standard of
2 review is abuse of discretion when we look at a
3 RCRA permit. Do you dispute that that's the
4 applicable standard of review that we should be
5 applying here?

6 MR. NATHANSON: I do, but with a
7 qualification. I -- because again, and this
8 comes from the consent decree.

9 The consent decree says that our
10 petition and our co-petitioner's petitions, will
11 be pursuant to 124.19. And the standard of
12 review in 124.19 is clear error or abuse of
13 discretion.

14 That's the top line standard of
15 review. And we don't think that's been altered.

16 But, in any situation, including this
17 one, the standard of review has to be applied in
18 light of the applicable law and the circumstances
19 in effect. And I'd kind of like to give you an
20 example that I hope will illustrate that.

21 Say that a federal agency had sued GE.
22 It could be EPA, it could be somebody else. But

1 they sued GE under a federal statute, in federal
2 court, in the district court.

3 And GE moved to dismiss and it won.
4 So, it goes up to the D.C. Circuit or the Second
5 Circuit. The top line standard of review for the
6 grant of a motion to dismiss would be de novo
7 review.

8 But, if the decision concerned the
9 interpretation of statute that was within the
10 purview of the agency that sued GE, then while
11 the appeals court would be applying a de novo
12 standard of review, it would be doing that with
13 the understanding that it had an obligation to
14 pay a certain amount of deference to the agency's
15 interpretation of the statute.

16 The standard of review doesn't change.
17 But the way it's applied is informed by who the
18 parties are and what's at issue.

19 And it's the same thing here except
20 the other way around. Because here, the consent
21 decree is a contract. Your standard of review
22 again, is the abuse of discretion or clear error.

1 But, since a contract has to be
2 interpreted according to standard contract
3 principals, and no deference is due an agency's
4 interpretation of its contracts, your standard of
5 review is informed by who's in front of you, what
6 the issues are, and what the sources of law are.

7 JUDGE WARD: So, back to the issue of
8 the nine criteria. And I think your agreement is
9 that EPA was constrained to follow those nine
10 criteria. And those are to be interpreted by
11 contract principals.

12 But what in the permit or the consent
13 decree require anybody to follow those nine
14 criteria and remedy selection? I see the permit
15 as setting forth those nine criteria as
16 applicable to the corrective measure study that
17 GE was to submit.

18 But I'm not seeing specific language
19 directing that EPA follow those specific nine
20 criteria in remedy selection.

21 MR. NATHANSON: Okay. First of all,
22 that hasn't been a controversial point. If you

1 look at the statement and basis, and I think
2 there were other places where the Region said
3 that it was using those nine criteria to select
4 the remedy.

5 So, I'm not sure that it's a live
6 argument. I would argue that it's been waived
7 since everybody agrees that those are the
8 selection criteria.

9 The fact that the second category was
10 called the selection decision factors also
11 suggests that these are not evaluation factors
12 alone, but they are selection factors. And there
13 is also, if you just give me one moment.

14 I'm sorry. I should have this at
15 hand. Two things. One is that in Section 2(g),
16 where (g) is instructed to provide information in
17 the corrective measure study report, it says that
18 we should take into consideration that the
19 corrective measures ultimately selected will be
20 implemented as a remedial action pursuant to
21 CERCLA and the consent decree.

22 As provided in special condition 2(j),

1 2(j) is the selection condition. So there is a
2 connection there.

3 And then of course, section 2(j)
4 itself says that EPA will propose performance
5 standards and corrective measures which, to my
6 mind, means select the remedy based on the
7 information that GE submits pursuant to this
8 permit. And that is the information that it has
9 collected according to the nine criteria.

10 JUDGE WARD: So, although I think EPA
11 argues in the alternative that the provision of
12 the permit talks about considering any other
13 information as kind of an alternative argument
14 for their view on implementability. So, I think
15 they are arguing at least to that extent --

16 MR. NATHANSON: In addition.

17 JUDGE WARD: That they're not
18 constrained.

19 MR. NATHANSON: I apologize.

20 JUDGE WARD: That's okay.

21 MR. NATHANSON: And this is water by
22 the way. I got it from the hotel mini bar.

1 (Laughter)

2 MR. NATHANSON: I can address that
3 here, but I think it is going to come up when we
4 just talk about disposal. So, it's up to the
5 panel.

6 JUDGE STEIN: I think what we'll do at
7 this point is since you've gone -- we've allowed
8 you to go way over your time, is we'll call upon
9 the Municipal Committee.

10 JUDGE WARD: Actually Judge Stein, if
11 I could ask just one more question.

12 JUDGE STEIN: Oh, that's okay.

13 MR. NATHANSON: Sure.

14 JUDGE WARD: And maybe we don't
15 answer, but just to kind of preview it. Along
16 the same line, I think the consent decree in
17 paragraph 22(n), directs EPA to issue a draft
18 permit modification, you know, pursuant to the
19 reissued RCRA permit.

20 Which I think is the 2000 permit. But
21 22(p) doesn't have that qualifying language. So
22 again, the same question. You can address it

1 either now or --

2 JUDGE STEIN: I think he has rebuttal.

3 JUDGE WARD: Or rebuttal time.

4 JUDGE STEIN: Rebuttal time.

5 JUDGE WARD: Okay.

6 MR. NATHANSON: Thank you.

7 MR. PAWA: Thank you for your time and
8 for the enormous effort that's gone into
9 preparing for this. Let me see if I can be brief
10 and cut to the chase on the question of the
11 standard of review.

12 We agree with EPA. But there was a
13 point that wasn't noted in the briefs, and let me
14 address that.

15 Consent decree paragraph 141(b)(ii)
16 refers to 124.19. We know that. But if you look
17 then at 141(b)(v), it says any proceedings in the
18 EPA, Environmental Appeals Board and the United
19 States Court of Appeals for the First Circuit,
20 shall be governed by applicable law and the rules
21 of such Board and Court.

22 Now, contrast that with paragraph

1 137(b), which is the provision that applied in
2 the federal district court case, United States v
3 GE that was cited by GE as supposedly
4 establishing the precedent that this is a
5 contract. And it's covered by contract
6 principals.

7 That provision is different. It says,
8 notwithstanding paragraph (r) of Section One
9 (background) of this consent decree, judicial
10 review of any dispute governed by this paragraph,
11 shall be governed by applicable principals of
12 law.

13 And it omits that last phrase that
14 says, and the rules of such Board and Court.
15 137(b) applied to that cost dispute that GE
16 cites, it doesn't apply here.

17 That is a significant difference. And
18 that's why EPA is right about the standard of
19 review. It's governed by Section 124.19. And
20 it's really inconceivable that the parties would
21 refer this matter pursuant to 124.19 and expect
22 the Board to apply a de novo standard of review

1 that it's probably never applied before to any
2 appeal.

3 That's my first point. My second
4 point very briefly is to agree wholeheartedly
5 with Judge Ward, that the nine criteria do not
6 constrain EPA.

7 They constrain the corrective measure
8 study. We noticed that as well preparing for
9 oral argument. If nobody made it in the brief,
10 I'm making it now.

11 JUDGE AVILA: Well, what in the record
12 suggests that the Region thought that those
13 weren't controlling?

14 MR. PAWA: I didn't hear the first
15 part of the question?

16 JUDGE AVILA: What in the record
17 suggests that the Region didn't think those nine
18 criteria were controlling?

19 MR. PAWA: Well, it considered any
20 other relevant information for one thing. And it
21 took into account anything that was in the
22 administrative record, including comments by a

1 wide variety of individuals on a wide variety of
2 topics.

3 But, the consent decree means what it
4 says, and says what it means. And EPA has acted
5 consistently with that view.

6 Maybe I can make up for some lost time
7 by sitting down, unless there are further
8 questions, Your Honors?

9 JUDGE STEIN: No.

10 MR. PAWA: Thank you.

11 JUDGE STEIN: Mr. Conway?

12 MR. CONWAY: Your Honors, thank you
13 for giving us the opportunity to participate.
14 The answers to your four questions taken together
15 show that this is just a straightforward review
16 of a RCRA permit modification pursuant to the
17 Board's usual procedures and the Board's usual
18 standard of review.

19 There is no reason to treat this
20 action any differently. Our view harmonizes the
21 consent decree and the 2000 permit.

22 And it's simply the decree itself sets

1 forth in paragraph 22(q) and paragraph 141(b), it
2 demonstrates that review is going to be pursuant
3 to 124.19. And the decree provides no basis, no
4 reason for deviating from that.

5 The rules of the Board and court are
6 part of that reference. The decree was also very
7 clear when the parties suggested pursuing a
8 different standard that's similar to what Mr.
9 Pawa said about paragraph 137.

10 Paragraph 10(c) of the consent decree
11 and paragraph 16 of the consent decree are both
12 examples of where the Board called -- the parties
13 called out using contractual methods instead of
14 another method.

15 Nothing like that was done here. GE
16 has not explained any mechanism that supports the
17 idea that the parties have abandoned 124.19 in
18 favor of a different standard.

19 JUDGE AVILA: Well, even if -- I mean,
20 124.19 can apply, right? And the question is,
21 what do we look at when applying it?

22 And it seems like we have to look at

1 the 2000 permit and see whether that was complied
2 -- the process that was envisioned in that permit
3 was complied with, right?

4 MR. CONWAY: Yes. The 2000 permit, in
5 terms of your interpretation, the 2000 permit is
6 absolutely part of what you need to be looking
7 at. As well as the consent decree.

8 They're both administrative record
9 documents that underlie the central focus of your
10 analysis. Which is the final permit
11 modification.

12 But in looking at those other -- those
13 documents like any other administrative record
14 documents or other predicate regulatory actions,
15 the Board should be looking at it through the
16 lens that this -- EPA's determinations have been
17 determinations of law.

18 And they should be viewed on a --
19 clearly erroneous standard of 124.19.

20 JUDGE STEIN: When you look at the
21 language on implementability that is in what was
22 Attachment G, that language is different than in

1 implementability language in the NCP. And it's
2 different then the RCRA corrective action
3 regulation.

4 And it's different from the 1994
5 guidance that you specified in your response to
6 comments. So, which version of implementability
7 should the Board look to in construing the
8 implementability factor?

9 MR. CONWAY: The Board should look to
10 the 2000 permit and the RCRA guidance supporting
11 it. As you noted, the 1994 guidance, also in the
12 1990 Subpart S proposal, and the 1996 Advanced
13 Notice of Proposed Rulemaking, there were
14 reference to the implementability factor.

15 The 2000 permit is even more explicit
16 then any of those as far as the role that -- of
17 State and community concerns as part of the
18 assessing implementability.

19 And I think that's significant that
20 the parties to the decree called out specific
21 sub-criteria within implementability.

22 Coordination with other agencies, regulatory and

1 zoning restrictions, the zoning isn't in the
2 guidance as to the extent it is here.

3 The suitability of onsite and offsite
4 disposal facilities. All of those sub-criteria
5 are part of the flexibility that the parties had
6 to develop the RCRA corrective action process
7 pursuant to RCRA guidance and the consensus
8 there.

9 JUDGE STEIN: Well, isn't your
10 argument really the same as Mr. Nathanson's?
11 Which is that we should just look to the
12 description of implementability in the
13 appendices?

14 MR. CONWAY: The description of
15 implementability is important. That is one piece
16 of it.

17 The second piece of whether some -- of
18 our review is the phrase that Judge Ward
19 referenced earlier, the any other relevant
20 information in the administrative record. That
21 was part of our analysis too.

22 And the third is the inherent --

1 inherent view of RCRA and the practice of RCRA to
2 consider community and State concerns as part of
3 RCRA corrective action.

4 Even during that time period where
5 RCRA guidance didn't include State or community
6 acceptance as specific criteria. The Region and
7 GE agreed on specific language for this permit,
8 which makes clear that those should be
9 considered.

10 But even if they weren't, the -- even
11 if they weren't the review of all the State and
12 community concerns as other relevant information
13 in the record and RCRA's own inherent
14 understanding of the need for community
15 involvement, all play a role.

16 JUDGE STEIN: Well --

17 JUDGE AVILA: Well -- go ahead.

18 JUDGE STEIN: What if any significance
19 should we attribute to the fact that in entering
20 the consent decree, the district court never
21 specifically mentioned RCRA?

22 MR. CONWAY: The district court -- the

1 significance -- I'm not sure I understand your
2 question. I'm sorry, Your Honor.

3 JUDGE STEIN: Well, in looking at the
4 court's order entering the consent decree, the
5 district court entered it under CERCLA, but --
6 and I could be missing something.

7 I didn't see any reference to the
8 district court's mention that it was also being
9 entered under RCRA. I'm asking, what if any
10 significance should we attach to that fact?

11 Assuming that I'm correct that that's
12 what the district court did.

13 MR. CONWAY: Yes. The -- and I can
14 check on the jurisdiction. But the consent
15 decree throughout involved -- it involves several
16 different statutes including CERCLA and RCRA.

17 And this was part of an existing RCRA
18 corrective action permit that was issued in 1991
19 and reissued in 1994. So, the purpose of -- the
20 use of RCRA for the Rest of River, for the 2000
21 permit was not a new part of this.

22 It was just a modification of the

1 existing RCRA corrective action permit.

2 JUDGE WARD: I think Mr. Nathanson had
3 argued that, and had quoted a decision to the
4 effect that in consent decrees or settlements,
5 parties can compromise. And so that, I think the
6 import of that in part was the argument that in
7 fact the agency could have constrained its RCRA
8 regulatory authority by virtue of the specific
9 terms it included in the 2000 permit attached to
10 the decree.

11 Do you agree that you could have
12 constrained your authority? Your RCRA regulatory
13 authority in the consent decree?

14 MR. CONWAY: Well the Board's review
15 is part of a federal regulatory structure that
16 the -- is not something that we have -- in our
17 consent decree we did not make any attempt to
18 alter that.

19 Whether -- if the parties -- we could
20 not have changed the Board's standards without
21 something an awful lot more clear from the
22 involved parties beyond the consent decree.

1 JUDGE WARD: I think I'm asking a
2 slightly different question.

3 MR. CONWAY: Okay.

4 JUDGE WARD: Which is whether you
5 could have constrained your permitting authority
6 under RCRA as part of the settlement?

7 MR. CONWAY: That's something I don't
8 know. And we never have to get there. Because
9 the decree and the 2000 permit are very clear
10 that the parties intended this to be done
11 pursuant to 124.19, the Board's rules.

12 And there's nothing in the decree that
13 indicates that the parties had any intention to
14 move away from that to abandon the Board's
15 regulatory structure for a different standard.

16 JUDGE AVILA: But I thought earlier
17 you kind of laid out how the decree very
18 specifically detailed things for implementability
19 that may not have existed at the time. And so,
20 isn't it possible that those things are some --
21 constrained your authority in some fashion?

22 I mean, --

1 MR. CONWAY: I think it's a -- in some
2 respects the -- what we are able to do pursuant
3 to the Board's precedent, and I think it's
4 referenced in the -- in EDA and PR that the
5 Region is given significant flexibility, wide
6 latitude in how it sets up the RCRA corrective
7 action process.

8 How it structures the process. And
9 how it makes remedies so action decisions
10 pursuant to the process.

11 So that is all the individual language
12 on implementability in our permit -- in our
13 permit is part of that our use of the wide
14 latitude given to inter -- to work consistent
15 with the RCRA corrective action guidance. And
16 have a site specific solution here.

17 But that's very different from taking
18 away the usual standard of the Board in a way
19 that is in no way indicated that the parties
20 agreed on.

21 JUDGE AVILA: Yes. I'm trying to get
22 away from the Board's standard. Instead what the

1 Region could have looked at when issuing its
2 permit.

3 So suppose Congress amended before the
4 final permit modifica -- about the final modified
5 permit came out, Congress amended RCRA and added
6 a new factor for the agency to consider before it
7 issued a RCRA corrective action permit that was
8 not in this consent decree or in the 2000 permit.

9 Would you have had to follow that new
10 statute? Or would you -- would the consent
11 decree have control?

12 MR. CONWAY: We were operating
13 pursuant to the consent decree. And it depends
14 on the -- if it is a new statute, we would have
15 to look at that and decide whether to move
16 forward or not.

17 I really -- we -- yes, I don't have
18 anything more on that.

19 JUDGE AVILA: And I just want to be
20 clear. Did the Region view itself as bound by
21 the nine selection criteria?

22 MR. CONWAY: We're bound as Section 2J

1 says, we're bound by nine criteria plus any other
2 relevant information in the administrative
3 record.

4 JUDGE AVILA: And so what is relevant
5 information in the administrative record? Isn't
6 that informed by the nine criteria?

7 I mean, you could -- someone couldn't
8 come in and say we want all the houses along the
9 river painted pink. Right?

10 MR. CONWAY: Right. That's
11 information in the record. But whether it would
12 be relevant to a remedy selection decision, I
13 would disagree.

14 But the -- what we see is that the
15 nine criteria on their own support the decisions
16 that the EPA has made on the extent of remedy and
17 on the disposal decision.

18 But even beyond that, RCRA, -- the
19 examples that you asked for of decisions under
20 RCRA as far as use of community involvement, they
21 make clear that even for orders and permits that
22 didn't have the same kind of detailed language on

1 implementability.

2 That community and State acceptance
3 were things that were considered following the
4 corrective measure study and following the public
5 comment. And that's consistent with the phrase
6 we have of any other relevant information in the
7 record.

8 JUDGE WARD: So just a follow up
9 question on that. I see that argument made in
10 the Response to Comments document. Did you make
11 that point or stake out that position at any
12 prior time?

13 MR. CONWAY: We -- I can check our
14 record on that. But our record was focused --
15 for the draft permit, focused on the clarity with
16 which the implementability sub-criteria include
17 State and community concerns.

18 And we can check on whether there's
19 anything beyond that as far as the other
20 information in the administrative record. So in
21 terms of that kind of involving State and
22 community concerns, it is important in three

1 things.

2 We have very specific language
3 consistent with RCRA guidance on
4 implementability. We have the clear agreement of
5 the parties to consider any other relevant
6 information in the record.

7 And we have RCRA's usual practice
8 where those things aren't present to consider
9 those in remedy selection.

10 JUDGE STEIN: I have one more question
11 on a slightly different point. Which is,
12 contrasting paragraph 141(b) of the consent
13 decree with paragraph 211, where paragraph 211
14 provides the district court with continuing
15 jurisdiction over the subject matter of the
16 consent decree for the duration of performance.

17 Does the Board retain with paragraph
18 141, which gives GE the right to seek review of
19 the permit modification before the Board, does
20 the Board retain any authority to hear future
21 disputes other than subsequent permit
22 modifications?

1 Or is the Board's jurisdiction limited
2 to reviewing permit decisions to determine
3 whether the Region has properly exercised its
4 authority?

5 MR. CONWAY: Well, Board precedent
6 indicates that the Board's primary role is to
7 determine if the permit was validity issued. And
8 if for example, there's a dispute five years from
9 now on how to implement a particular provision of
10 the consent decree, the consent decree provides a
11 dispute resolution in section 24 of the decree.

12 A dispute resolution section that
13 provides General Electric with at least as much
14 dispute resolution and even more then the Board
15 has found acceptable in other settings for
16 speculative disputes that might occur during
17 implementation. Things that we can't -- the
18 Board can't decide now.

19 So, for those things, the consent
20 decree would control. But before --

21 JUDGE STEIN: Would that give General
22 Electric the ability to go to federal district

1 court to have those disputes resolved in the
2 event that the parties are unable to reach an
3 amicable resolution?

4 MR. CONWAY: Right. First with, they
5 have the ability to go to EPA and then to federal
6 district court.

7 JUDGE STEIN: Anything else?

8 MR. CONWAY: Thank you.

9 JUDGE STEIN: And I think we have
10 rebuttal by General Electric. Mr. Nathanson?

11 MR. NATHANSON: There's a lot to say
12 about implementability. But I have a feeling I'm
13 going to be talking about that in a few minutes.
14 So I won't take up the rebuttal time with that.

15 I just -- I did want to make one point
16 that I think fits into one of Judge Avila's
17 questions about why you would be reviewing this
18 permit under the consent decree as opposed to
19 under RCRA or whatever the normal standard or
20 applicable law would be.

21 And I think a further answer to that
22 is, and I think Mr. Conway made some allusion to

1 this, there is a dispute resolution process that
2 we're currently right in the middle of. And the
3 next step is going to be reviewed by the First
4 Circuit.

5 And I'm confident that when the First
6 Circuit reviews that the final decision is,
7 they're going to be receptive to the argument
8 that the consent decree is a contract since the
9 Supreme Court tells it it is.

10 And so, it seems to me that there
11 would be a disconnect between your review and the
12 First Circuit's review if you were reviewing
13 under one set of standards and then the First
14 Circuit said well, that doesn't really do us any
15 good. Because we're going to interpret the
16 consent decree as a contract.

17 So, that's all I have to say about
18 that. You did have a question about a couple of
19 provisions in paragraph 22. And I don't know if
20 you want to pursue that now?

21 JUDGE WARD: Yes. I think -- and I
22 think it's in keeping with the point you were

1 just trying to make in terms of review under the
2 consent decree or review pursuant to RCRA
3 authority.

4 I think I was pointing to paragraphs
5 22(n) and 22(p). 22(n) addresses the draft
6 permit modification. And 22(p) addresses the
7 final permit modification.

8 And I see what might be viewed as
9 limiting language when it relates to the draft.
10 But that same language does not appear in terms
11 of issuing the final permit modification.

12 MR. NATHANSON: I can't -- I really
13 can't answer that question. I would say that I
14 think -- I don't know why it's not in 22(p), why
15 it's in 22(n) again is because I think primarily
16 for jurisdictional purposes, it may have been
17 other purposes, but that's one of them.

18 A RCRA permit was used as the vehicle
19 here in order to get us here. And then to the
20 First Circuit. And I assume that that language
21 is consistent with that.

22 That you -- that the Region is issuing

1 this pursuant to RCRA so that it's reviewable
2 pursuant to under 124.19. And then we can go to
3 the appropriate appeals court.

4 I assume so. But I honestly can't
5 answer the question any -- to tell that.

6 JUDGE WARD: Okay. But if we look to
7 the four corners of the document as a contract,
8 that's a distinction that might be a difference.

9 MR. NATHANSON: It's definitely a
10 distinction. I couldn't tell you what the
11 difference is. I mean, sorry.

12 Am I coming back?

13 JUDGE STEIN: Well, why don't you just
14 stay there. Unless you want to change books.
15 But, I think we've concluded our first session.

16 And I want to move now to EPA Region
17 One's decision on disposal and treatment. We're
18 going to first begin with General Electric's
19 argument in favor of onsite disposal.

20 General Electric will have 30 minutes.
21 Followed by Region One for 15 minutes, the
22 Commonwealth of Massachusetts for 10 minutes, the

1 Housatonic Rest of River Municipal Committee for
2 five minutes, and Green Berkshire for five
3 minutes.

4 MR. NATHANSON: And I would like to
5 reserve five minutes of rebuttal time on this
6 issue, please.

7 Okay. So, briefly put, our position
8 on disposal is that the Region violated the
9 consent decree because it selected a disposal
10 remedy that wasn't just more expensive, but
11 massively more expensive. Nine figures, high
12 nine figures more expensive than a comparably
13 effective and protective alternative.

14 And because it relied on a factor that
15 it wasn't authorized to consider in order to make
16 and certainly in order to justify its decision,
17 it violated the consent decree as well. So,
18 maybe I should step back and try to unpack that a
19 little bit before the questions come.

20 The comparison here is between
21 disposal in an onsite landfill, and disposal in
22 an out of state landfill. Since both

1 alternatives involve disposal in a landfill, it's
2 not surprising that the Region found, and this
3 was from the statement of basis, so this is at a
4 point where the Region has considered the
5 corrective measure study report, the revised
6 corrective measure study report, where GE
7 actually went back and looked specifically at
8 some very important factors relating to the
9 disposal remedy.

10 So after they considered all the
11 relevant criteria, the Region found that both
12 alternatives would provide high levels of
13 protection to human health and the environment.
14 And the Region has never disavowed that finding.

15 It's never said that onsite disposal
16 won't provide high levels of protection, it has
17 come up with a handful of differences between the
18 disposal remedies. But as we discussed in the
19 briefs, and I'm sure we're going to discuss,
20 those differences are minimal, with one big
21 exception.

22 And the exception of course is cost.

1 JUDGE AVILA: Am I correct that all
2 three of your proposed onsite alternatives needed
3 TSCA waivers?

4 MR. NATHANSON: Not waivers. All
5 three onsite -- they could get TSCA waivers, but
6 they don't need TSCA waivers.

7 All three onsite alternatives would
8 qualify for approval under the TSCA regulations
9 either with respect to the soil permeability
10 characteristics under the alternative regulation
11 that's embodied in the TSCA siting regulations
12 for use of a -- I'm going to forget what it is, a
13 synthetic membrane liner.

14 And by the way, that is exactly what
15 the Region told GE to go back and look at after
16 it had submitted the corrective measure study
17 report. One of the things it said to go back and
18 look at was, could you use a synthetic liner?

19 So that's something that was -- that
20 was in the Region's mind. And it was studied.
21 So with respect to that, it's just an alternative
22 form of approval or a qualification that's right

1 there in the regulation.

2 With respect to the topographical and
3 hydrological characteristics, although three of
4 the sites wouldn't meet -- all three of the sites
5 wouldn't meet one of those. And I can't remember
6 which one.

7 And one of the sites wouldn't meet the
8 third one. All of them would qualify for risk-
9 based approval under Section 761.61(c). And
10 that's not a waiver provision.

11 It's an alternative basis for
12 approval. And it is not phrased in discretionary
13 terms. It says that EPA will provide risk-based
14 approval upon a determination that -- I could get
15 the exact language if you'd like.

16 But it's upon a determination that the
17 alternative method will not pose a risk of injury
18 to human health or the environment. And GE has
19 built a record to show that disposal in these
20 sites would not pose such a threat.

21 But the Region has declined to make
22 that determination. It's declined to make the

1 determination that would trigger its obligation
2 to give risk-based approval.

3 That I would suggest is arbitrary and
4 capricious. And a clear error of law. If, you
5 know, you show up at customs and the rule is if
6 you show a United States passport, they have to
7 let you in.

8 And you walk up to the customs agent
9 and say here's my passport. And he says, I don't
10 see any passport, that's arbitrary and
11 capricious. And I think this is the same thing.

12 We are prepared to, we have made the
13 showing, the Region won't consider it. So
14 although we could get waivers.

15 And it's interesting to note that
16 other landfills in other places with at least
17 some of these similar site characteristics have
18 received waivers. Could even be the landfill
19 that this waste ends up going to, if you approve
20 out of state disposal and the First Circuit
21 agrees, have received those waivers.

22 So, but we don't need it.

1 JUDGE WARD: Is there somewhere in the
2 record where you -- or a document that we could
3 look at where you made the case that a risk-based
4 approval was appropriate for this site? Or for
5 these three sites?

6 MR. NATHANSON: I -- anybody want to
7 tell me? Yes. Yes.

8 JUDGE WARD: I would --

9 MR. NATHANSON: I assume it's in the
10 corrective measure study or in the revised
11 corrective measure study report.

12 JUDGE WARD: Okay. I think at least
13 in my reading of the revised corrective measure
14 study, it seems more conclusory than here is how
15 close we are to the water table. Here's the
16 nature of the surface water connection.

17 Here's the nature of how permeable or
18 not the soil is. It doesn't say -- I can't find
19 that kind of a --

20 MR. NATHANSON: Okay.

21 JUDGE WARD: Those pieces of
22 information in the record.

1 MR. NATHANSON: But of course the
2 Region has declined to even make the
3 determination if it engaged in that part of the
4 process. Then look, if we couldn't do it and
5 they said no, we think that this alternative
6 method would be injurious to human health and the
7 environment, then that would be one thing.

8 But they haven't even engaged in that
9 determination. So at this point the Region
10 hasn't built a record to show that it has carried
11 out its regulatory duties and made a
12 determination that it can't give risk-based
13 approval.

14 JUDGE AVILA: But under the
15 regulation, isn't it the owner or operator of the
16 landfill who has the obligation to submit the
17 evidence to prove that it's safe?

18 MR. NATHANSON: It has the obligation
19 to make the application. That's correct.

20 JUDGE AVILA: And I guess to dovetail
21 to Judge Ward's question, all I saw on the
22 record, and if you could maybe later point us too

1 sites that you proposed for the landfill, there
2 are issues about slope?

3 MR. NATHANSON: There are issues that
4 GE has submitted, can be addressed through the
5 use of engineering techniques. That would be
6 Fire Street, yes.

7 You know, something else that I think
8 should be pointed out here, because I think it's
9 a significant omission. The Region hasn't
10 identified these tasks or regulations as ARARs.

11 All they've said is that it's in some
12 way a marker for protectiveness. And so the
13 ability or inability to meet the specific terms
14 or to gain risk-based approval, at worst the way
15 that this has been set up, the way the record
16 categorizes these things might have some marginal
17 impact on protectiveness.

18 But again, the Region has never said
19 that these alternative sites, these onsite
20 locations will not be protected. That's
21 something else that's not in the record.

22 You know, the Region has said and we

1 somewhere in the corrective measure study, or the
2 revised corrective measure study.

3 All I saw was kind of a table that
4 showed other sites where there had been waivers.
5 But I have no way of knowing how your proposed
6 onsite sites relate at all to those other sites.

7 And so something that explained how it
8 is -- it's -- the risk-based approach is okay at
9 your site. It's beyond saying that EPA has done
10 it elsewhere would be helpful.

11 JUDGE STEIN: Related to that, I saw
12 in what you submitted that there were waivers
13 with respect to the ground water table and
14 perhaps soil permeability. Do you know of any
15 facility that's been granted a waiver on slope
16 limitations?

17 MR. NATHANSON: No, ma'am. No, I
18 don't.

19 JUDGE STEIN: You don't?

20 MR. NATHANSON: I don't.

21 JUDGE STEIN: And am I correct in
22 understanding that at least at one of the three

1 agree that the general standards are threshold
2 standards. And it has never said that any of
3 these sites won't meet any of these threshold
4 standards with the possible exception of one ARAR
5 with respect to one of the sites.

6 It simply said, or made the argument
7 that offsite disposal will somehow better meet
8 those standards. So, I'm not sure that the
9 inability to meet the specifics of the task
10 regulations would necessarily be something of
11 significant impact.

12 JUDGE STEIN: Well, rest assured that
13 some of the things you mentioned are on our list
14 to ask the Region about. So, we clearly have
15 noted that and are curious about the failure to
16 list the TSCA regulations as an ARAR, so.

17 MR. NATHANSON: I saw the smile.

18 JUDGE WARD: Could I follow up this?

19 MR. NATHANSON: I'm glad I -- I mean,
20 I'm really glad I said that, or really unhappy I
21 said that.

22 JUDGE WARD: I'd like to go back to,

1 I think, a point you made earlier that the regu -
2 - under the TSCA waiver provisions and this risk-
3 based determination that the Region had a duty
4 that it shall make this finding or make this
5 determination.

6 Which regulatory provision are you
7 relying on?

8 MR. NATHANSON: It's -- I can look it
9 up. But from memory it was 761.61(c). Oh, here
10 it is. I've got my cheat sheet.

11 And subsection (c)(2) says that EPA
12 will give risk-based approval upon the finding.
13 So, what I'm saying is that the giving of
14 approval is not discretionary.

15 JUDGE WARD: Uh-huh.

16 MR. NATHANSON: And that's explicit.
17 And I would argue that EPA -- that it would be
18 arbitrary if not capricious, but certainly
19 arbitrary to refuse to engage in the process that
20 would be necessary to make the finding, so.

21 JUDGE AVILA: I'm sorry, can you say
22 the citation one more time? What it was?

1 MR. NATHANSON: The?

2 JUDGE AVILA: The citation that is the
3 --

4 MR. NATHANSON: It's 40 CFR
5 761.61(c)(2). Does that make sense?

6 JUDGE AVILA: Okay.

7 MR. NATHANSON: Got it here.

8 JUDGE STEIN: 761.61?

9 MR. NATHANSON: (c)(2).

10 JUDGE STEIN: Do you have a page
11 number of the CFR there?

12 MR. NATHANSON: Yes. 761.61, I always
13 have trouble with the -- I can't follow them.
14 But it's at the end.

15 And it says, EPA will issue a written
16 decision in each application for risk-based
17 method for PCB remediation waste. EPA will
18 approve such an application if it finds that the
19 method will not pose an unreasonable risk of
20 injury to health or the environment.

21 Can I go back to cost? I think that's
22 important. Okay.

1 JUDGE WARD: Just a question. It may
2 or may not be in the record. But, if it's in the
3 record, can you give us kind of a proximate
4 figure for what the rest of the remedial work at
5 this site has and will cost?

6 Putting the Rest of the River aside.

7 MR. NATHANSON: I know it's well into
8 the hundreds of millions of dollars. I don't
9 know specifically whether it's cracked the
10 billion dollar mark. But it's hundreds of
11 millions of dollars.

12 I wanted to talk about cost because --
13 well, part of the reason I want to talk about
14 cost, is you asked about it. And you asked us to
15 provide examples from judicial rulings or EPA
16 final decisions illustrating how much weight was
17 given to the cost differentials of remedial
18 alternatives.

19 And before I get to those, I would
20 like to reiterate something that we said in the
21 brief. That if you look at the regulatory
22 background, you'll see that right out of the

1 guidance regs that cost is an important criteria.

2 And that's especially true when you're
3 selecting between otherwise comparable remedial
4 alternatives. The RCRA guidance says that if
5 more than one remedial alternative meets the
6 threshold criteria, then cost becomes an
7 important consideration.

8 The NCP requires the agency to select
9 the cost-effective remedy once the threshold
10 criteria are satisfied. But you asked for
11 specific examples, and I did find a few.

12 Here's at the Lower Fox River and
13 Green Bay Superfund site. The agency amended the
14 record of decision. It switched from all
15 dredging to a combination of dredging and
16 capping.

17 Because both alternatives meet the
18 threshold criteria. But the smaller remedy would
19 cost about 46 million dollars less while
20 generally achieving equivalent or better results.

21 Over on the Hudson River, the agency
22 selected a less extensive dredging remedy because

1 it cost 110 million dollars less without
2 substantially greater reductions in ecological
3 and human health risks. We suggest that they
4 were willing to accept this.

5 JUDGE STEIN: You say it was 10
6 million dollars?

7 MR. NATHANSON: One hundred and ten
8 million.

9 MR. STEIN: One hundred and ten
10 million dollars less.

11 MR. NATHANSON: And it suggests that
12 they were willing to accept some reductions in
13 ecological and human health risks.

14 And then finally, in the record of the
15 decision for the Chemfax site in Gulfport,
16 Mississippi, the Region selected monitored
17 natural recovery over a variety of active
18 treatment alternatives. Where M&R would meet the
19 threshold criteria, but it would cost somewhere
20 between two million and three million dollars
21 less.

22 Just two or three million dollar

1 difference. It depends on which alternative
2 you're comparing to.

3 And the agency selected the less
4 expensive alternative even though it had found
5 that it would provide a lesser degree of
6 protection, a lesser degree of long term
7 effectiveness in permanence, and I think a lesser
8 degree of reduction in toxicity, mobility and
9 something else of waste.

10 So, those decisions, I think,
11 exemplify the approach to cost that's in the RCRA
12 guidance and the NCP. That as long as the
13 threshold criteria are met, and there's no
14 argument that they weren't met here, cost is a
15 critical factor.

16 And it's the deciding factor if the
17 alternatives are equivalent or even comparable in
18 terms of effectiveness and protectiveness. And
19 the Chemfax decision shows you that.

20 That a significant cost saving on the
21 order of two or three million dollars will
22 justify even a lesser degree of effectiveness and

1 protectiveness. But I want to emphasize that the
2 Region didn't even have to make that kind of
3 trade off here.

4 I mean, the difference in cost here is
5 about a hundred times bigger than the difference
6 that was at issue at the Chemfax site. But the
7 Region didn't have to settle for a lesser degree
8 of protectiveness.

9 It knew that both alternatives would
10 provide high levels of protection to both health
11 and the environment.

12 JUDGE STEIN: With respect to your
13 cost figures, the cost figures reflect disposal
14 costs. Do they also reflect the cost of
15 constructing a landfill?

16 Or is that in a different box in
17 there?

18 MR. NATHANSON: My understanding is
19 that we're -- it's all in. That we are comparing
20 complete to complete. Although the components
21 are different. Because obviously for onsite
22 you're building and for offsite you're

1 transporting.

2 So, -- but that -- the totals match
3 up.

4 JUDGE WARD: So in terms of EPA's
5 application of the nine criteria, is it -- does
6 it involve just a quantitative assessment? Or
7 isn't there some qualitative judgement in
8 balancing the different factors?

9 MR. NATHANSON: Well, it's, I mean,
10 it's both qualitative and quantitative, I'm sure.
11 Cost is a quantitative assessment. Because
12 that's what cost is.

13 With respect to other factors, there
14 may be both quantitative, you know, the ability
15 to meet certain benchmarks or technological
16 things that I'm not competent to talk about. But
17 there may also be some sort of a gestalt,
18 holistic assessment.

19 But what we have here are two remedies
20 that are essentially the same remedy. We're
21 talking about disposal in a landfill and disposal
22 in a landfill.

1 Both are going to be, you know,
2 provide high levels of protection to human health
3 and the environment. And one costs at least 180
4 million dollars more and maybe a quarter of a
5 billion dollars more.

6 JUDGE WARD: So but are they really
7 quite the same? Because in the one, the landfill
8 presumably already exists or will exist for that
9 purpose.

10 Versus at the Housatonic site, you're
11 going to be taking, at least what I understand
12 from the Region's statements, that it will be
13 taking what is not now contaminated, and
14 disposing of PCB sediment there. So isn't that a
15 -- I mean, I think that's the difference that the
16 Region is pointing to.

17 And it does seem -- I mean, I guess
18 their argument is that is significant to, I
19 guess, offset the cost differential.

20 MR. NATHANSON: If the determination
21 has been made, and it has, that disposal in both
22 places is going to be protected. And I'm not

1 sure even in the first instance why that is a
2 significant difference.

3 But then there's the other point,
4 which we did make in our briefs. And I know
5 there's some outstanding motions to strike about
6 parts of it.

7 But the basic point is, this is a zero
8 sum game. I mean, if we send this off to a
9 disposal facility in New York State or wherever
10 it is that right now is an area of known
11 contamination, then that place is going to fill
12 up faster than it would have otherwise.

13 And someday somebody's going to have
14 to create more landfill capacity. And so you're
15 right back where you started from.

16 That in a way is a segue into what I'd
17 kind of like to spend the last few minutes of my
18 time talking about, unless you have additional
19 questions. Which is, what is the justification?

20 I mean, why did the Region select a
21 massively more expensive remedy?

22 JUDGE AVILA: Before you go onto that,

1 I wanted just to -- you suggest in your brief
2 that the location of adverse consequences is kind
3 of irrelevant.

4 That whether it's the risk of adverse
5 impacts to the environment offsite versus onsite,
6 it doesn't really matter. And that was a
7 significance in the Region's explanation.

8 And it does seem to me that the risk
9 of landfill failure or something like that at --
10 or something going wrong at an existing landfill
11 is slightly different than it going wrong in an
12 area that you just got done cleaning up.

13 Am I wrong about that?

14 MR. NATHANSON: I don't want to tell
15 you you're wrong about it. But I will tell you
16 that --

17 JUDGE AVILA: Or what am I missing?

18 MR. NATHANSON: That it rises -- the
19 argument rises to the level of a heuristic or
20 rule of thumb. But where is the record for that?

21 I mean, how do we know that that is
22 actually, you know, a significant, quantifiable

1 factor given A, the site characteristics given
2 here. And B, the characteristics of the sites
3 where this waste may end up.

4 And I know the Region has said, well,
5 that's not something you really look at. And
6 maybe generally you don't.

7 But here, we've come down to a
8 comparison between, you know, landfill disposal
9 here, landfill disposal there. A lot of money
10 here, way more money there.

11 I think that's a comparison that needs
12 to be made. And it means that the Region has not
13 considered it an important aspect of the problem
14 when it hasn't considered or made that
15 comparative analysis.

16 JUDGE AVILA: Well, I guess what I was
17 trying to get at is, assuming the risk at both
18 onsite and offsite are equal, the risk of
19 something going wrong, why isn't it rational to
20 say, if something is going to go wrong, whatever
21 the chance of it going wrong is, we'd rather have
22 it go wrong at an existing landfill rather than

1 right next to an area we just got done cleaning
2 up.

3 MR. NATHANSON: Well, let me break
4 that down and put a pin in one part of it.
5 Insofar as what you're making is a political
6 calculation there, we're here.

7 We're dealing with these communities.
8 There's a lot of opposition.

9 JUDGE AVILA: No. I --

10 MR. NATHANSON: I just want to -- I
11 know that's not what you're saying. But I just -
12 - but we think that's a part of it. We think
13 that's a big part of it.

14 And we think that's -- the Region
15 makes that clear in the way that it's defended
16 and try to justify this position.

17 But again, making the rough judgement
18 that here is better than there, I'm not sure that
19 that's necessarily the case. I mean, I'm
20 certainly no expert in landfill construction.

21 But what I do know is that if it goes
22 out of state, apparently it's going to go to a

1 landfill that was built a long time -- it was
2 built before. That already exists.

3 That may exist to take waste or
4 materials for a variety of purposes, as opposed
5 to here where GE is going to construct a purpose-
6 built landfill. And it will, because it's going
7 to be new, it will have the advantage over
8 whatever advances in the state of the art and you
9 know, may have occurred.

10 And so I don't think that's something
11 that you can simply blithely assume. I mean, if
12 that's something that the Region wanted to build
13 a record on, it could have, but it didn't.

14 JUDGE STEIN: But isn't there a
15 concern that's reflected in this agreement to be
16 sure that whatever remedy you come up with
17 protects against flooding? Now, the landfills
18 you're talking about building, I assume are close
19 to the river?

20 MR. NATHANSON: There's on the site.

21 JUDGE STEIN: They're onsite. They're
22 not in the river. But they're onsite.

1 Are landfills typically built next to
2 a river? I mean, I guess I'm asking a
3 hypothetical.

4 MR. NATHANSON: You're asking a
5 hypothetical question of --

6 JUDGE STEIN: I mean, I understand --

7 MR. NATHANSON: A hypothetical
8 question to the wrong person. But, be that as it
9 may, I think all of that gets wrapped up in the
10 discussion that we've already had about ARARs and
11 protectiveness and control of sources of
12 releases.

13 And if those are -- if there's a
14 record to support a distinction, then I assume it
15 would be in the Region's brief. But what we see
16 in the Region's brief is an argument that I
17 profoundly disagree with about control of sources
18 of releases.

19 This mention of TSCA as a marker for
20 protectiveness and nothing else, which we've
21 already discussed. And then, you know, a couple
22 of ARARs.

1 So, I mean, if that was -- if that --
2 again, if there was a record for that, I assume
3 we would have seen that. And if you send this
4 back and the EPA on remand can build that record,
5 then that, you know, then it may come up again in
6 a different posture.

7 But that's not the posture that it's
8 in right now.

9 JUDGE AVILA: Can I ask you about
10 implementability and community acceptance?

11 MR. NATHANSON: Well I have a minute,
12 yes. It's just a one minute topic.

13 JUDGE AVILA: Yes. It's a -- yes.
14 I'm sure we can do it before that light goes off.

15 Putting aside, as I understand your
16 argument, you say implementability is in the 2000
17 permit. It doesn't refer to community
18 acceptance.

19 And that's in contrast to the NCP,
20 which does refer to both implementability and
21 community acceptance. And therefore we should
22 read implementability not to include community

1 acceptance in the 2000 permit.

2 Is that the basic lead?

3 MR. NATHANSON: That's roughly it. I
4 mean, I think it's -- there's more than 27
5 seconds worth of detail to it. But, let me try.

6 But it is -- yes. That's roughly it.

7 But, our point is first that you -- when you read
8 the Region's statement of position and it's
9 response to comments and it talks about what I
10 will call public and community concerns, state
11 and community concerns, although what they're
12 talking about in large part is public opinion.
13 Okay?

14 So, and they go on for pages and pages
15 in the statement of position. It's on pages 47
16 to 50. And they talk about hundreds of public
17 comments, and protests at public meetings, and
18 letters to the editor, and city council
19 resolutions, and conferences and meetings.

20 And they even suggest that the ACC
21 designation itself, and the amendment of the
22 Hazardous Waste Regulations were actually

1 opinion at large. And what kind of public
2 concerns might affect implementability.

3 And while the Region has talked a lot
4 about letters to the editor, and people standing
5 up at public meetings and putting pressure on
6 political officials, it hasn't identified a
7 permit that GE couldn't get in order to build a
8 landfill here or there or elsewhere.

9 And remember, we're not in the
10 hypothetical realm when we're talking about these
11 sites. They've been identified. They've been
12 studies.

13 So, I would imagine that if they could
14 identify some sort of permit or approval that
15 would actually be required and might not be
16 gettable because of local concerns that they would
17 have. And they haven't.

18 So, that's the first part of it. And
19 that ties into the second part of it. Which is
20 of course, while the Region has made the point
21 that the enumeration of the subfactors of
22 implementability in section -- in condition 2(g)

1 examples of opposition to the location of a
2 disposal facility onsite. So we're talking about
3 public opinion writ large.

4 If you're talking about
5 implementability and the manner -- whether it's
6 under RCRA or it's CERCLA or under this consent
7 decree, the manner in which state or public
8 concerns could affect implementability, and this
9 goes back to a point that I made to you earlier,
10 implementability is a practical concern.

11 Can you get it done? And yes, and
12 both the RCRA guidance and the NCP and the
13 enumeration of criteria, the nine criteria in the
14 consent decree acknowledge that sometimes state
15 concerns, local concerns could present an
16 impediment to implementability.

17 For example, you need to get a permit
18 for something. You can't get the permit. That's
19 a state or local concern. And it may affect
20 implementability.

21 So, first there's a disconnect between
22 the argument and the justification, public

1 of the 2000 permit, just says the ability to get
2 permits and approvals, or something like that.

3 And it doesn't say anything about
4 onsite or offsite. That's not the end of the
5 inquiry.

6 Again, as I said before, when you're
7 reading a contract, you've got to read it as a
8 whole. And you've got to read it in a way that
9 gives effect to all of its parts.

10 And another part of this contract, of
11 the consent decree is the permit exemption. And
12 the reason why the Region can't identify some
13 local-based impediment too actually getting this
14 done is because of the permit exemption.

15 The permit exemption frees GE to
16 perform remedial actions onsite without the need
17 to jump through those hoops. So,
18 implementability isn't a broad enough category in
19 general to encompass all the kinds of concerns
20 that the Region appears to have based its
21 decision on, and certainly has justified its
22 decision on.

1 And implementability as it would have
2 to -- as it has application here, given the
3 permit exemption, has essentially no application.

4 And so we're left with where's the
5 reliance? And I know I'm way over time. I guess
6 I could bring this up on my -- I just wanted to
7 address state and community acceptance.

8 But it's real --

9 JUDGE STEIN: Take a -- no, why don't
10 you take --

11 MR. NATHANSON: It's real easy. It's
12 real easy, I let --

13 JUDGE STEIN: Why don't you take that
14 time in one minute.

15 MR. NATHANSON: Okay.

16 JUDGE STEIN: Can you look at zoning
17 requirements under implementability? I mean, why
18 couldn't you look at zoning requirements?

19 MR. NATHANSON: My understanding is
20 that the case law which we cited in our brief,
21 and I don't think it was addressed by the Region
22 is that local zoning requirements don't qualify

1 as ARARs.

2 And so they're not going to present an
3 impediment. This is not to say that the zoning
4 character of a particular place might not affect
5 not so much implementability, but other
6 legitimate factors.

7 For example, if you wanted to build a
8 cesspool in the middle of a neighborhood of high-
9 rise apartment buildings, it's not so much that
10 the zoning itself would present an impediment,
11 it's the fact that it's zoned this way. And
12 there's all these people living around there,
13 which means that that would not be a protective
14 remedy.

15 JUDGE AVILA: Well, I mean, under the
16 2000 permit, one of the examples under
17 implementability is regulatory and zoning
18 restrictions. Right?

19 MR. NATHANSON: Right.

20 JUDGE AVILA: I mean, we can take that
21 into account.

22 MR. NATHANSON: And they haven't

1 identified -- the Region hasn't identified any
2 zoning. They mentioned that it's zoned
3 residential.

4 But they don't say that -- now maybe
5 they may think that's not a nice thing. But that
6 doesn't mean that it's something that could
7 actually affect the implementability.

8 And again, we're talking about
9 implementability not preferability.

10 JUDGE WARD: But, what I take your
11 argument is, is that at least in reading
12 implementability it can't be based necessarily on
13 the requ -- you know, there's an impediment
14 because you'd have to get a permit since the
15 permits are accepted.

16 MR. NATHANSON: Which you can do.

17 JUDGE WARD: But, you can't -- well,
18 I would imagine the Region might argue you can't
19 completely write that out of the terms or the
20 criteria in the permit. And it is listed.

21 And so looking at the zoning
22 characterization of particular properties, to

1 whether that means it is or isn't suitable, if
2 it's zoned industrial, maybe a landfill is
3 appropriate. If it's zoned residential, one
4 wouldn't think that a landfill in an area zoned
5 as residential is appropriate.

6 Therefore, it's not suitable for --
7 that is something to be considered. I think
8 that's what I take the Region's answer to mean.

9 MR. NATHANSON: But again, and this is
10 a point we've made elsewhere when we were talking
11 about -- in our briefs. We haven't talked about
12 it here yet. About public comment.

13 Insofar as anything, any other
14 relevant information has -- bears on the
15 consideration of the factors that are actually in
16 the nine criteria, it's fair game.

17 And so the example you gave with
18 zoning, if it's going to affect protectiveness,
19 if it's going to affect the ability to control
20 sources of releases or long term effectiveness,
21 if it's going to affect cost, then that might --
22 that would be a legitimate thing.

1 But we don't have that here. What we
2 just have is well, implementability is a factor.
3 Zoning is a subfactor and then we don't have
4 anything else.

5 And so it's the same thing as public
6 comment. I mean, public comment is a very
7 important part of the process.

8 And if somebody gets up and says, this
9 isn't going to be an effective remedy because,
10 then that's certainly other relevant information
11 that the Region is entitled to take into account.
12 But if somebody gets up and says, I oppose this,
13 that's not.

14 JUDGE WARD: Can you give me an
15 example then as too under the factor, the
16 criteria of implementability, what would be a
17 legitimate, in your view, what would be a
18 legitimate regulatory or zoning restriction to be
19 considered within that factor?

20 MR. NATHANSON: Well, if you were
21 dealing with an offsite remedy where you don't
22 have the ARARs restriction, then I assume that

1 zoning might be fairer game. If not completely
2 fair game.

3 But onsite, you are limited to what
4 can qualify as an ARAR. And as a matter of law,
5 a local -- I mean an ARAR is a kind of impediment
6 to implementability when you think about it that
7 way.

8 And local bylaws don't qualify as
9 ARARs.

10 JUDGE WARD: Is there anything in the
11 consent -- I'm sorry in the 2000 permit in the
12 criteria to suggest that narrow application of
13 the sub-criteria and regulatory and zoning
14 restrictions? That only applies to offsite.

15 Is there anything you can point us to
16 in the record?

17 MR. NATHANSON: Yes. Again, I would
18 -- I'd say it is -- so, I mean, we're talking
19 about permits, it's the fact of the permit
20 exemption.

21 If you're talking about zoning
22 restrictions, it's the fact that although this is

1 a RCRA permit, nominally the parties imported the
2 concept of compliance with ARARs, which carries
3 with it, what I just said. I won't repeat it.

4 So, you read it as a whole to give
5 effect to all of its pieces. That's where it
6 says it. And that's the same thing in contract
7 terms, is it actually saying it in the same
8 sentence.

9 JUDGE AVILA: So just one last thing
10 on implementability. In the response to comments
11 the Region identified the 1994 guidance.

12 Which explicitly says, in some cases
13 state or local restrictions or concerns may
14 necessitate eliminating or deferring certain
15 technologies or remedial approaches from
16 consideration or remedy selection.

17 Isn't that exactly what they did here?

18 MR. NATHANSON: Again, the guidance
19 has no direct application here. The consent
20 decree says --

21 JUDGE AVILA: Well, why not?

22 MR. NATHANSON: Because the parties

1 negotiated the terms of the consent decree. And
2 I mean, you know, this goes back to the very
3 first question you asked me.

4 You said well, if it's defined in RCRA
5 or CERCLA, you give it that meaning. But what
6 happens when it's defined in RCRA and CERCLA?

7 And our point is, CERCLA defines state
8 and community acceptance separately. And the
9 parties --

10 JUDGE AVILA: And that was my first
11 question, right? About is your argument that
12 CERCLA defines community acceptance and
13 implementability separately.

14 MR. NATHANSON: Right.

15 JUDGE AVILA: And therefore if the
16 only implementability is mentioned in the 2000
17 permit that is of significance.

18 MR. NATHANSON: It's of dispositive
19 significance in our opinion. Because it means
20 that the parties said okay, here's the alphabet
21 that we're going to use in this contract. And it
22 listed 22 letters and it left out x, y, and z.

1 So that means they left out x, y, and
2 z.

3 JUDGE AVILA: So how far does your
4 argument go? Suppose there was no consent
5 decree. The proposed RCRA regulation only talks
6 about implementability, right?

7 MR. NATHANSON: Um-hum.

8 JUDGE AVILA: So, in any RCRA
9 corrective action permit, can the agency not
10 consider community acceptance?

11 MR. NATHANSON: I have -- I am
12 completely agnostic on that. Because we do have
13 a consent decree.

14 And so whether the agency when it is
15 operating directly under RCRA, feels free to read
16 community acceptance into implementability willy-
17 nilly, and is a completely different animal from
18 one where they painted stripes on it and didn't
19 put spots.

20 JUDGE AVILA: But let me -- it seems
21 like in the 2000 permit and in the CD, the
22 parties were pretty clear when they wanted CERCLA

1 to apply. So why wouldn't this provision have
2 said implementability as defined by the NCP?

3 I mean, there's all kinds of places
4 where the parties called out, we're going to do
5 this pursuant to CERCLA section so and so, or
6 CERCLA section so and so is going to apply. It
7 seems a little weird that --

8 MR. NATHANSON: They didn't do that in
9 the nine criteria. I mean they brought
10 compliance with ARARs in. And they didn't say,
11 as under CERCLA.

12 They just -- they --

13 JUDGE WARD: They did refer to the
14 NCP.

15 MR. NATHANSON: In?

16 JUDGE WARD: In the permit.

17 MR. NATHANSON: Yes, I mean --

18 JUDGE WARD: Right. Compliance with
19 ARARs, the -- and it refers to each all
20 alternative or combination of alternatives would
21 meet each requirement or when such a requirement
22 would not be -- met the basis for a waiver under

1 CERCLA and the NCP.

2 MR. NATHANSON: I was wrong. I'm
3 wrong about that.

4 JUDGE WARD: And just -- I think the
5 other -- I have one more question. I think when
6 you were referring to the cost criterion, your
7 argument was predicated in part on RCRA guidance
8 interpreting that criterion, but when it comes to
9 implementability, I think in response to Judge
10 Avila's question you said the guidance is
11 irrelevant, which I --

12 MR. NATHANSON: Yes, I --

13 (Simultaneous speaking.)

14 JUDGE WARD: -- two things.

15 MR. NATHANSON: And we cited the NCP
16 with respect to cost, too. And I know I am
17 walking a fine line, but I think there is a line.
18 My point here, as it was when I was talking about
19 the logic of the NCP provision that defines
20 implementability and administrative feasibility
21 as applicable only to off-site actions, it's the
22 same logic. I'm not saying that the RCRA

1 guidance or the NCP dictate that result, but the
2 same logic applies. When you have a set of
3 criteria, one of which is cost and the other
4 which are all more or less collectively markers
5 for effectiveness, then what you have is a cost
6 effectiveness calculation.

7 I also brought those up because the
8 specific question was asked for decisions
9 rendered under CERCLA, so I wanted to give a
10 context. But -- and I appreciate the question
11 because I want to be clear. We're speaking to
12 the consent decree. That is -- that's the alpha
13 and the omega of applicable law here insofar as
14 selection criteria are concerned. There may be
15 other places where -- I mean, this is a big
16 consent decree and it doesn't have to do with the
17 rest of -- I'm not going to make categorical
18 statements about that, but --

19 JUDGE STEIN: I think you're time is
20 up --

21 MR. NATHANSON: I think my time is
22 well up once again.

1 JUDGE STEIN: -- and if Mr. Conway can
 2 come up next?
 3 MR. NATHANSON: Thank you.
 4 (Pause.)
 5 JUDGE STEIN: Just bear with us for
 6 one moment.
 7 MR. CONWAY: Oh, sure.
 8 JUDGE STEIN: I think we're having
 9 some technical difficulties. My monitor isn't
 10 on.
 11 (Pause.)
 12 JUDGE STEIN: Thank you.
 13 MR. CONWAY: Thank you.
 14 JUDGE STEIN: So, Mr. Conway, I have
 15 a question, which I've been dying to ask since
 16 the last session.
 17 (Laughter.)
 18 JUDGE STEIN: Might not be exactly --
 19 why isn't 761.75 in ARAR for on-site disposal?
 20 Is there a reason that the region did not list it
 21 as such?
 22 MR. CONWAY: Because in our proposal

1 and final permit modifications we did not choose
 2 on-site disposal. So we evaluated the ARARs of
 3 the proposed and final remedies.
 4 JUDGE AVILA: But didn't the
 5 corrective -- the --
 6 JUDGE WARD: The Statement of Basis?
 7 JUDGE AVILA: Statement of Basis had
 8 ARARs in it, didn't it?
 9 JUDGE WARD: For all of the options.
 10 JUDGE AVILA: For all of the options.
 11 MR. CONWAY: It may have. I --
 12 JUDGE AVILA: And it didn't -- was
 13 TSCA. And so to -- I thought -- I didn't think
 14 your -- I thought your comparative -- the
 15 region's comparative analysis study also listed
 16 ARARs for all of the alternatives, and again
 17 didn't list TSCA. So I understand that the final
 18 modified permit only has the ARARs for the
 19 selective remedy, but prior to that there were
 20 ARARs listed for many alternatives that were
 21 considered including on-site disposal.
 22 MR. CONWAY: I don't -- the -- as far

1 as selecting the remedy we chose an off-site
 2 landfill alternative, so we didn't evaluate it at
 3 that time. As far as the Statement of Basis, I
 4 can get back to you with more detail on that.
 5 I just wanted to start off -- clarify
 6 that in coming to a decision on disposal, as with
 7 all aspects of the permit decision EPA acted full
 8 in accordance with RCRA's statutory and
 9 regulatory obligations, and in so doing we didn't
 10 and we couldn't constrain our authority to comply
 11 with RCRA obligations. The -- I think that's
 12 sort forth -- the -- under the consent decree the
 13 consideration of the nine criteria was necessary,
 14 but that -- the region still needs to ensure that
 15 we comply with the -- that the permit complied
 16 with the RCRA statute and the RCRA objectives.
 17 So just to clarify on that.
 18 But as far as the disposal argument,
 19 you -- in response to your questions on costs,
 20 implementability and community and state
 21 acceptance, we've reviewed considerable
 22 information, and I've provided that to the Board

1 and to the other parties.
 2 In reviewing the decision, the
 3 guidance and the case law, I think four
 4 overarching principles stood out for us: First,
 5 factors like cost and implementability are
 6 balancing factors. In the hierarchy of decision
 7 making, they're balancing factors and not
 8 threshold factors.
 9 Secondly, the community and state
 10 concerns are relevant information in the
 11 administrative record in all RCRA and CERCLA
 12 decisions, in all -- even those that don't have
 13 the more explicit recognition of it as we have in
 14 the 2000 permit. For us in the review each
 15 decision is being evaluated based on site-
 16 specific administrative record information as --
 17 JUDGE AVILA: On that, can you give me
 18 site-specific administrative record information
 19 that supports the parenthetical on the Response
 20 to Comments that says, "Although it is possible
 21 for TSCA site requirements to be waived, doing so
 22 would have to be based upon a determination by

1 EPA that is appropriate to do so, and EPA
2 believes that it is not appropriate to do so
3 here?" And that says to the three alternative
4 on-site disposal options.

5 There's a nice narrative that follows
6 that, but -- a couple of paragraphs, but what's
7 the record support for that parenthetical?

8 MR. CONWAY: For the parenthetical
9 that -- if you could repeat? I'm sorry.

10 JUDGE AVILA: The waiver that EPA has
11 -- believes it is not appropriate to issue a TSCA
12 waiver here.

13 MR. CONWAY: Is the -- I think it --

14 JUDGE AVILA: It's page 239 of the
15 Response to Comments, if that helps. The very
16 top of page 239.

17 JUDGE STEIN: It starts on the third
18 line.

19 MR. CONWAY: Great. Oh, as far as the
20 -- in the -- the record support would be in the
21 Corrective Measure Study, the revised Corrective
22 Measure Study and our analyses in the --

1 comparative analysis and the Statement of Basis.
2 As far as specifically --

3 JUDGE AVILA: But the Statement of
4 Basis doesn't refer to TSCA at all. I -- and I
5 think it's only GE's corrective measures study
6 that makes any reference to TSCA. The -- as I
7 recall --

8 MR. CONWAY: Yes.

9 JUDGE AVILA: -- the agency's
10 comparative analysis didn't make any reference to
11 TSCAs. So --

12 MR. CONWAY: I don't -- I'm not aware
13 of any TSCA waiver petition that's been
14 submitted. And the revised Corrective Measure
15 Study, GE said that the hydrological issues were
16 to be considered and investigated during the
17 design. We -- as far as the Response to
18 Comments, the overall comment was identifying
19 that under TSCA that the degree to which on-site
20 landfilling would need to require multiple TSCA
21 waivers is a significant factor to evaluate when
22 comparing it to already licensed, sited, existing

1 landfills off-site that have gone through that
2 process already.

3 JUDGE AVILA: Do we know if those off-
4 site facilities have waivers that would be the
5 same ones that might be granted to -- that would
6 need to be granted here?

7 MR. CONWAY: I don't think -- the
8 degree to -- the number of different potentially
9 necessarily TSCA waivers for the on-site
10 landfills was more than -- we haven't chosen an
11 off-site landfill, so as far as them -- some of
12 them do have TSCA waivers, but they are also
13 sited in areas where the -- they're not sited in
14 areas where they're right next to the river or
15 where they're zoned residential and where they're
16 prohibited by state law. They are in areas --
17 like one -- the one in Utah is -- I think there's
18 something on their web site about being so many
19 miles from the nearest water source.

20 JUDGE WARD: Is that in the record
21 before us?

22 MR. CONWAY: No, Your Honor. No.

1 JUDGE WARD: How -- I mean, I think
2 the -- at least as I read the Response to
3 Comments, you hadn't identified the site. I
4 think Judge Avila's question is how can you make
5 a comparison that the other site is safer than
6 the site -- than the disposal at this site?

7 MR. CONWAY: We -- what we're saying
8 is the other site is better suited based on the
9 entire nine criteria and the other information in
10 the administrative record. They're all --
11 they're better suited based on that information
12 including the likelihood that they would have
13 been through the process and been sited based on
14 being able to satisfy those requirements.

15 JUDGE WARD: Although I think Mr.
16 Nathanson, or at least in the record before us,
17 there are several numerous examples in which EPA
18 granted waivers elsewhere, including I think at a
19 disposal site at the one-and-a-half mile reach.
20 So it seems as if, at least from the record
21 before us, one might conclude waivers are granted
22 frequently.

1 MR. CONWAY: That -- the -- every
2 CERCLA and RCRA decision has to be decided based
3 on the site-specific and fact-intensive analysis.
4 The one in the -- on the on-site landfilling in
5 Pittsfield was at an already-existing landfill on
6 the GE property in Pittsfield that was judged at
7 that time as being an appropriate solution for
8 that matter. We had a whole different set of
9 criteria to look at here in terms of judging what
10 is the best-suited alternative based on the nine
11 criteria and the information in the
12 administrative record?

13 JUDGE WARD: So --

14 MR. CONWAY: Cost is not a controlling
15 criterion. These are not equally effective
16 alternatives between the GE alternative and off-
17 site landfilling. All three threshold criteria,
18 all three -- the -- all three of these threshold
19 criteria favor off-site landfilling.
20 Implementability is a -- it's not as
21 quantitative --

22 (Simultaneous speaking.)

1 JUDGE WARD: If I could just stick
2 with the TSCA waiver for a second. So for the
3 on-site disposal I think the record would say you
4 did find it was overall protective. You're
5 making distinctions between how protective
6 compared to off-site disposal, but you would
7 agree the record says it is protective, the on-
8 site disposal, which I presume would mean
9 landfilling it with the synthetic liners to
10 address the TSCA criteria. If you've made that
11 finding, how is it then inappropriate to make a
12 risk-based -- or to issue a risk-based waiver on
13 your TSCA? Don't those two things kind of go
14 hand in hand? If it's protective, then it means
15 it doesn't present an unreasonable risk.

16 MR. CONWAY: The -- our analysis was
17 to look at the five treatment disposition
18 alternatives and figure out which would be best
19 suited. And it's -- the -- there were
20 differences. The record shows there are
21 differences in protectiveness, differences in the
22 ability to control source of releases and

1 differences in ARARs. And so in terms of our
2 charge, which was to make a determination on the
3 best suited remedy, the -- they clearly favored
4 that.

5 JUDGE AVILA: At the risk of
6 belaboring this; I'm sorry, but on-site was found
7 to be protective of human health and the
8 environment to some degree, right? It met the
9 first general criteria, protective of health and
10 human environment. I don't understand how you
11 can make that conclusion if you couldn't grant a
12 waiver of the TSCA requirements. How could you
13 build an on-site landfill in that situation?

14 MR. CONWAY: It could be constructed
15 effectively in terms of the -- in terms of
16 constructing a landfill, but in terms of
17 comparing it to the off-site landfilling, it
18 wasn't -- the potential for a future release back
19 to the river from one of these landfills
20 overlooking the river made it less protective and
21 less -- has less control of the sources of
22 releases, and it certainly has more ARAR issues.

1 JUDGE AVILA: But how can you say it's
2 -- it may be less protective of the Housatonic
3 River, but if we don't know what the off-site
4 landfill is, how do we know what the risk at that
5 off-site landfill is and whether the risk to that
6 -- in that area is more or less than building an
7 on-site landfill?

8 MR. CONWAY: Well, those landfills
9 have already been approved. They've gone through
10 the process and they're -- it has to be a
11 licensed existing landfill off site. And so
12 they've been through the process already and
13 received approval. And this -- that has not
14 happened with GE's proposed options.

15 JUDGE STEIN: Can I -- I'd like to
16 read from the comparative analysis for a moment
17 at page 61 that says, "TD3," which is, as I
18 understand it, the on-site disposal option,
19 "would provide protection of human health and the
20 environment by permanently isolating the PCB
21 contaminated sediment and soil in an upland
22 disposal facility which would be constructed with

1 an appropriate double liner cover and double
2 leachate collection system."

3 I did not read the Response to
4 Comments as disavowing the comparative analysis
5 on this point. Is there a place in the record
6 where the Response to Comments disavows that
7 point? I mean, I realize you may not have your
8 fingertips on it right now, but to the extent
9 that that exists I'm very interested in seeing
10 that.

11 MR. CONWAY: Further on in the
12 comparative analysis in the same paragraph on
13 page 61, if the -- GE would have to construct,
14 operate and maintain the treatment facility, and
15 if they were not operated properly, potential for
16 releases, be it -- the paragraph as a whole shows
17 there are differences between what was TD1, the
18 off-site landfilling, and to TD3, the on-site
19 landfilling.

20 So it -- the Response to Comments
21 illuminates that the region's review was first --
22 the first thing is which is the most -- which is

1 the best on the threshold criteria, and then
2 among the balancing criteria a consideration of
3 the balancing criteria and then a comparison of
4 those against each other.

5 JUDGE AVILA: So at what point would
6 cost be -- would have been -- off-site disposal
7 would have been prohibitively expensive?

8 MR. CONWAY: Your Honor, I --

9 JUDGE AVILA: I mean, 500 million? A
10 billion?

11 MR. CONWAY: It's at -- if the -- I
12 don't -- I -- that's not before me. It wasn't
13 part of the analysis we did. We looked at the
14 facts on this site and --

15 JUDGE AVILA: Okay. So why is 2
16 million not cost-prohibitive?

17 MR. CONWAY: And in terms of the
18 overall looking at balancing -- after you have --

19 JUDGE AVILA: Two hundred million.
20 Sorry.

21 MR. CONWAY: Yes. As far as the --
22 after looking at the threshold criteria, if you

1 look at the balancing criteria, it impacts the
2 neighboring communities, the implementability
3 which is strongly in favor of off-site
4 landfilling, the long-term reliability and
5 effectiveness is also in there.

6 Cost, although it is quantitative and
7 having a large dollar sign makes it more real in
8 some respects than other qualitative factors,
9 those qualitative factors exist and the
10 implementability criterion exists to such a
11 strong extent on the other side of the equation
12 that it's really difficult to see how a -- that
13 -- the on-site landfilling would be appropriate
14 in terms of our analysis.

15 JUDGE WARD: So on implementability
16 one of the things that you address in the
17 Response to Comments was your -- the expected
18 delay if you were to choose on-site disposal and
19 that that was a factor, one of the
20 considerations, but is that really that weighty
21 here? Because if you had chosen -- I mean, in
22 some sense by choosing off-site disposal we're

1 here, isn't there delay really either way in this
2 case, or wouldn't there have been? And so it
3 kind of zeroes out as a -- zeroes that out as a
4 factor to be considered.

5 MR. CONWAY: I don't think it zeroes
6 it out. The off-site landfilling is our -- is
7 that licensed existing off-site landfilling, so
8 it wouldn't have to go through those processes.
9 And it would -- the implementability, also it
10 addresses state and community concerns. The
11 history, the other clean-up sites we listed in
12 our papers that show how strong opposition can at
13 times totally change the makeup of a -- render a
14 remedy totally un-implementable. You cannot
15 carry out a remedy in those situations. And
16 that's something we review. It's one of the six
17 balancing criteria after we looked at the three
18 threshold criteria in our analysis.

19 JUDGE WARD: And how would those --
20 how would the (inaudible due to coughing)
21 concerns have delayed implementation here? My
22 permits aren't required, so beyond that what

1 would be the nature of that delay?

2 MR. CONWAY: Delay could come from

3 people raising concerns in other venues. In the

4 Bloomington, Indiana case there was significant

5 concerns even though it wasn't an ARAR issue.

6 It's the -- there are other -- the New Bedford

7 situation it was a lot of local concern, strong

8 local --

9 JUDGE WARD: So what happened to slow

10 it down --

11 MR. CONWAY: The --

12 JUDGE WARD: -- in those cases that

13 you envision could have happened here?

14 MR. CONWAY: The parties can bring

15 their own lawsuits. They can bring their own

16 pressure in other forums to slow things down

17 regardless of permitting.

18 I -- if --

19 JUDGE WARD: Actually I did have

20 another question. It goes to implementability.

21 MR. CONWAY: Okay.

22 JUDGE WARD: And the question of any

1 other information that you've identified as a --

2 as in addition to the criteria as a basis for

3 your approach to implementability here, I think

4 in your response to a brief filed by the Houston

5 -- Housatonic River Initiative, one of the

6 arguments they made was that you should have

7 considered GE's financial worth in terms of the

8 permitting decision or the remedial clean up

9 decision to require they do more. And I think

10 your response there was, nope, we're limited to

11 the nine criterion. How does that position there

12 square with your position here as it relates to

13 implementability?

14 MR. CONWAY: Well, the -- in terms of

15 the -- the point we were trying to make is that

16 financial worth of the defendant, or the

17 permittee is not one of the criteria specifically

18 listed in the 2000 permit. This 2000 permit

19 specifically lists the nine criteria including

20 the eight sub-criteria of implementability. And

21 it specifically lists that we can consider any

22 other relevant information in the administrative

1 record. So it was a perhaps an unartful way of

2 explaining that. That particular concern of the

3 Housatonic River Initiative was not among the

4 factors that we reviewed.

5 JUDGE AVILA: Well, why under that

6 logic isn't the financial wherewithal of GE

7 relevant to implementability? I mean, is it --

8 how much money they have will tell you how

9 quickly the thing is going to get done and how --

10 I mean --

11 MR. CONWAY: Yes, I -- well, we looked

12 at the implementability pursuant to the sub-

13 criteria that were listed in the 2000 permit as

14 developed under the RCRA guidance and our own

15 judgments. So we looked at that and we didn't

16 see that that fit into the implementability

17 criteria.

18 JUDGE STEIN: Is there a place in the

19 Response to Comments where -- or in Statement of

20 Basis -- I guess I would be looking at the

21 Response to Comments where you have an analysis

22 of choosing off-site disposal. I mean, I see a

1 summary of various criteria, but is there a

2 particular place where you've kind of pulled all

3 together in an analytical framework that gives

4 the region's rationale for choosing off-site

5 versus on-site disposal?

6 MR. CONWAY: We believe that the

7 Statement of Basis and the Response to Comments

8 both provide sufficient framework for selecting

9 off-site disposal. I'm not sure what you mean by

10 an analytical framework. We did a thorough

11 evaluation, thorough analysis. Are you looking

12 for a chart or something?

13 JUDGE STEIN: I wasn't too much

14 looking for a chart as a section that kind of

15 pulled all -- you go factor by factor, but I was

16 looking for something that more precisely defined

17 what the basis for the decision is. I see the

18 summary --

19 MR. CONWAY: Yes.

20 JUDGE STEIN: -- but I don't see the

21 analysis. And part of it may be that there are a

22 number of different factors and you're applying

1 all of these factors, but if there is a place
2 where I could find such an analysis, I would
3 appreciate someone pointing that out to me.

4 MR. CONWAY: Well, we -- the analysis
5 we provided is sufficient for the purpose of what
6 we were -- for what we were charged with doing,
7 and there isn't a -- the particular weight -- the
8 -- it is a two-step process, the threshold
9 criteria and then the balancing of the balancing
10 criteria. And we didn't have a numerical basis
11 in terms of the relative success of alternatives
12 in -- on any of the criteria, but the narrative
13 we provided, I think is sufficient for
14 demonstrating that the region's approach was
15 rational.

16 It's the ANPR -- the EPA's guidance
17 that the exact emphasis placed on decision
18 factors will necessarily depend on the type of
19 risk posed by the facility and the professional
20 judgment of the decision makers. We think that
21 the RCRA guidance, the RCRA statutes' emphasis on
22 protectiveness and the administrative record

1 supporting our decision makes it clear that the
2 best-suited remedy for landfilling is the off-
3 site landfilling.

4 JUDGE STEIN: Is it uncommon when a
5 remedy is selected under these circumstances for
6 the disposal site not to have been selected at
7 this point, or is that --

8 MR. CONWAY: I don't think that's
9 uncommon. I think it provides a degree of
10 flexibility for the permittee or in the CERCLA
11 context the responsible parties to evaluate that
12 as they design the remedy. The permit is meant
13 to be sort of a framework to take it, transition
14 us to the next step where many, many things are
15 worked out in design following the permit
16 modification.

17 JUDGE WARD: I had one follow-up
18 question back on the waiver under TSCA. Mr.
19 Nathanson cited the provision. I think it's
20 761.61 is the governing provision in terms of
21 issuance of waivers, but I'm looking at the
22 Response to Comments, and the region's Response

1 to Comments cites 761.75. And the reason I'm
2 raising this is because I think the language at
3 761.75 as it relates to waiver states that the
4 regional administrator may in its discretion make
5 this finding, whereas -- I don't have 761.61 in
6 front of me, but I understood from Mr. Nathanson
7 that that had kind of a mandatory component on
8 the region.

9 So my question is which of these
10 provisions -- which waiver provision is
11 controlling -- not controlling, but which waiver
12 provision would you point us to here?

13 MR. CONWAY: And the -- the listing to
14 the Response to Comments is?

15 JUDGE WARD: It's again on page 239.
16 You've cited the -- at the top where you've cited
17 the regulation regarding waiver and then you have
18 the parenthetical saying a waiver wouldn't be
19 appropriate here.

20 MR. CONWAY: They -- in terms of that
21 we -- the -- definitely cited 761.75, and that's
22 -- I can get more information on that if you

1 need, but I don't have anything to the contrary
2 of that, but that's the -- that would be the
3 provision. The -- as far as any -- yes.

4 JUDGE WARD: Maybe Mr. Nathanson can
5 address which one or why 761.61 might be
6 controlling as opposed to .75 and -- on rebuttal.
7 JUDGE STEIN: All right. Let's next
8 hear from the Commonwealth of Massachusetts for
9 10 minutes.

10 MR. MICKELSON: Thank you, Your Honor.
11 This is Jeff Mickelson from the Massachusetts
12 Department of Environmental Protection.

13 I had intended to go through the list
14 of issues in the same order that they were
15 presented in the framework oral argument, but I
16 feel that maybe I should jump right into
17 implementability. I do think that EPA RCRA
18 guidance and the CD provision supports EPA's
19 position that state and community concerns are
20 appropriately considered under the
21 implementability factor.

22 The RCRA guidance in effect at the

1 time of the CD negotiations make clear that a
 2 cornerstone of the RCRA Corrective Action Program
 3 is meaningful public participation and that
 4 remedy decisions under and RCRA and CERCLA should
 5 result in similar remedial solutions. At the
 6 time of this guidance one of the five objectives
 7 of the 1996 Advance Notice of Proposed
 8 Rulemaking, which is part of the administrative
 9 record, was to enhance opportunities for
 10 meaningful public participation. In addition,
 11 the same guidance emphasized the concept of
 12 parity between RCRA and CERCLA programs stating
 13 that both programs should result in similar
 14 remedial solutions.

15 At the time CERCLA included state and
 16 community acceptance as a separate modifying
 17 criteria while RCRA guidance did not explicitly
 18 identify state and community concerns as one of
 19 the five balancing criteria. And yet, in order
 20 for there to be parity between remedial solutions
 21 under both programs it would be necessary for the
 22 state and community concerns to be included in

1 the evaluation of remedial alternatives under
 2 both programs. The only criterion under RCRA at
 3 the time that state and community concerns could
 4 logically fall would have been implementability.

5 I think the decision by EPA is
 6 supported not only by the RCRA guidance, but by
 7 the language in the consent decree that allows
 8 them to consider any other relevant information.
 9 Certainly the guidance I just referred to is part
 10 of that relevant information, and that was the
 11 prevailing guidance at the time that the consent
 12 decree was negotiated.

13 JUDGE AVILA: Why wouldn't be what's
 14 relevant to the nine criteria in the 2000 permit?
 15 The implement -- why would the additional
 16 information, additional relevant information in
 17 the administrative record -- why isn't it as it
 18 relates to the nine criteria in the permit as
 19 opposed to some other document outside the four
 20 corners of the 2000 permit?

21 MR. MICKELSON: Because if you were to
 22 interpret the phrase "any other relevant

1 information in the administrative record" to be
 2 defined by the nine criteria, it would render
 3 that language meaningless. You wouldn't need
 4 that language. It wouldn't add anything to what
 5 would be considered. It was in my opinion
 6 intended to provide additional discretion beyond
 7 the nine criteria.

8 JUDGE AVILA: Well, so what -- how
 9 would you define "relevant information" then?

10 MR. MICKELSON: I think relevant is --
 11 would be information that was in the
 12 administrative record that was appropriately
 13 considered by EPA, was rational and reasonable --
 14 a reasonable basis upon which they made their
 15 decisions and supported the remedy decision.

16 JUDGE STEIN: So the Response to
 17 Comments states that several commenters stated
 18 that we oppose any plan that would result in
 19 disposal of contaminated material at any site in
 20 Massachusetts. That's from page 236 of the
 21 Response to Comments. Should such a comment as
 22 this be given any weight?

1 MR. MICKELSON: I think it should. I
 2 think it is relevant in the context of any other
 3 relevant information. But I think it is also
 4 relevant in the sub-criteria under the
 5 implementability factor that's laid out in the
 6 consent decree. One is coordination with other
 7 agencies. First of all, state agencies have long
 8 been on record as opposing any disposal facility
 9 within the Berkshires. And that certainly comes
 10 into play as coordination with other agencies.

11 Secondly, agencies don't act in a
 12 vacuum. They represent the interests of their
 13 constituents. Their decisions are influenced and
 14 informed by their constituents. And when an
 15 agency is taking a position in opposition to a
 16 particular remedial alternative, it is in fact
 17 reflecting the position of the community.

18 JUDGE AVILA: I thought I heard Mr.
 19 Conway mention a potential off-site location in
 20 Utah. What if a citizen from Utah said --
 21 multiple citizens from Utah submitted a comment
 22 that says we oppose any plan that would result in

1 disposal of contaminated material at any site in
2 Utah? Would that be relevant?

3 MR. MICKELSON: Not to this case.

4 JUDGE AVILA: Why not?

5 MR. MICKELSON: Because I think we
6 need to look at the facts and the site-specific
7 circumstances of the RCRA permit at issue and not
8 some unrelated comment that has no bearing on
9 this particular site.

10 JUDGE WARD: Well, I think it would
11 have bearing because I think the notion of
12 implementability goes to both on-site and off-
13 site disposal. And so picking up on the
14 hypothetical, if in this instance the off-site
15 disposal facility for TD1 had been identified and
16 comments were received don't bring it here,
17 wouldn't those be concerns that -- local concerns
18 as to implementation of the remedy to the extent
19 it involves that locality? Why wouldn't be part
20 of the consideration?

21 MR. MICKELSON: Because the remedy
22 selection here has provided that it has to be

1 brought to existing licensed facilities. So
2 wherever it would be brought would already be in
3 existence and licensed. It wouldn't have to go
4 through a whole process of licensing a new
5 facility.

6 JUDGE WARD: Well, but since it hasn't
7 been identified, we don't necessarily know that.
8 And given the volumes of soil and sediment being
9 contemplated here, I suppose it's possible that
10 the off-site facility itself would need to get to
11 be expanded to accept this -- the PCB soils in
12 this instance. And so it could come up in that
13 context.

14 MR. MICKELSON: Well, I don't have a
15 specific reference right now, and I could provide
16 you, but within the record there is a study that
17 has concluded that there is adequate disposal for
18 PCB-type materials expected through I believe
19 2037 based upon 2015 analysis. So I don't think
20 that would be a concern.

21 JUDGE AVILA: But -- well, I don't
22 want to belabor the point, but you could equally

1 say I think, to pick up on a point that Mr.
2 Nathanson was making, that it's a -- we're
3 talking about a finite universe. And so someone
4 can say I want the landfill that exists in my
5 back yard to be available for stuff that's in my
6 state, not somewhere else, and therefore I oppose
7 this because I don't want hazardous material
8 filling up my landfill in my state because we
9 need that volume, right?

10 MR. MICKELSON: Well, are you saying
11 in a theoretical sense that someone in another
12 state may say at some point in the future we're
13 going to run out of landfill space and they may
14 want to hypothetically put one in my state, so I
15 oppose it? I think we need to really look at
16 what exists today. There is sufficient capacity
17 through 2037 and opposition by other states I
18 don't think is relevant to this decision.

19 JUDGE STEIN: Your brief stresses many
20 factors supporting off-site disposal other than
21 the TSCA landfill issue. Do those factors alone
22 justify off-site disposal? And if so, why?

1 MR. MICKELSON: Well, I think -- first
2 of all, I think the Wood's Pond facility is off
3 the table. It's clearly within an ACEC. It's
4 clearly -- the ARARs, the state ARARs has its
5 waste regulations, and solid waste regulations
6 categorically prohibit a hazardous waste/solid
7 waste facility within an ACEC. That's exactly
8 what we have here. So that I think leaves to
9 other potential sites.

10 The Forest Street site fails to meet
11 the TSCA hydrological requirements, the soil
12 characteristics and permeability requirements and
13 the slope requirements. In addition, the state
14 has not conceded -- and I know it's been raised
15 numerous times as maybe a key point for GE, but
16 the state has not conceded that those other sites
17 are on site. We have not conceded that they may
18 -- that they could just be put through and
19 approved without state and local approvals and
20 authority.

21 JUDGE STEIN: When you say the state
22 hasn't conceded that they're not on the site, do

1 they belong -- are they General Electric's
2 property? So is this a dispute about the site?
3 Is this land that GE owns and controls?

4 MR. MICKELSON: No, it's relevant
5 because the consent decree does say that any on-
6 site activities do not require state and local
7 approvals. And I think GE in its
8 implementability argument is saying the public's
9 against it, the state's against it, but it
10 doesn't matter because even though they're
11 against it, we don't need their approvals. It
12 doesn't affect the implementability. I'm
13 suggesting if they're not on site, it does affect
14 the implementability and they would have to go
15 through the regular procedures to site a PCB TSCA
16 landfill as anybody else would do on their own
17 property.

18 JUDGE STEIN: Did you raise that point
19 in your comments?

20 MR. MICKELSON: In our brief we
21 specifically said that we do not concede that the
22 site, that the locations identified by GE are on

1 site, that it involves a very fact-specific
2 analysis and that ultimately those type of
3 disputes can end up in court. There are a few
4 court decisions that define on site and off site.
5 In the context of this case on site is defined by
6 -- within the aerial extent of contamination or
7 in close proximity to the contamination in a
8 suitable location and necessary for the remedy.
9 I would argue that none of these sites is
10 suitable and that there is an off-site option.
11 And so these on-site facilities or proposed
12 facilities are not necessary for the remedy.

13 JUDGE WARD: But did you raise that
14 issue in your comments?

15 MR. MICKELSON: It's in our response,
16 yes.

17 JUDGE WARD: Not in your brief before
18 the Board? In your comments to the EPA on the
19 draft permit?

20 MR. MICKELSON: I don't believe we
21 did.

22 JUDGE WARD: Okay.

1 MR. MICKELSON: Someone else -- I
2 think the case of the New Bedford was raised
3 earlier about what impact state and community
4 acceptance or opposition had in that case. And I
5 just wanted to provide the Board with a little
6 bit more information on that, if I could. That
7 was a case in -- of the New Bedford Harbor
8 Superfund Site Hot Spot Operable Unit that was --
9 the remedy proposed in 1990 was incineration on
10 site.

11 After the remedy was issued, there was
12 very strong congressional opposition to an on-
13 site disposal -- on-site incineration. Three
14 community activist groups were formed to oppose
15 the incineration and the New Bedford City Council
16 passed an ordinance banning the transportation of
17 the incinerator within the city limits.

18 As a result of that, EPA in 1993
19 withdrew the remedy and decided to work with the
20 local community to try to come up with a
21 consensus-based remedy. And ultimately in 1999
22 the remedy was revised and it was -- a remedy

1 decision was made to dispose of the contaminated
2 material off site. The opposition locally and --
3 resulted in not only a change in the remedy, but
4 a delay in implementability of the remedy for 5
5 to 10 years.

6 JUDGE WARD: And are those details set
7 forth in the record in this case? I think there
8 are different sites that are mentioned, but are
9 those particular details provided in the record
10 here?

11 MR. MICKELSON: The New Bedford Harbor
12 Superfund Site is mentioned in the record. It is
13 explained -- essentially yes. It talked about
14 how the remedy was -- implementation of the
15 remedy was delayed, the change of the remedy and
16 it was a result of congressional opposition and
17 things like that. It didn't go into the -- as
18 much detail as I did, but it is in the record.

19 JUDGE AVILA: Which document in the --
20 is it in the Response to Comments, if you know?

21 MR. MICKELSON: I can provide that to
22 you. I think it's in the Response to Comments

1 and the Statement of Position by EPA in the
 2 dispute resolution.

3 JUDGE AVILA: Okay. Great. Thank
 4 you.

5 JUDGE WARD: If you could also provide
 6 us the cite to the record document that provides
 7 the details that you had mentioned in terms of
 8 off-site disposal facilities? You had mentioned
 9 earlier that there's a document in the record
 10 that provides some additional details. So if you
 11 could provide us that record cite that would be
 12 helpful. Perhaps this afternoon.

13 MR. MICKELSON: No, I think what I
 14 said was in our response we mentioned that we
 15 don't concede that these are site and that the
 16 decisions are fact-specific and ultimately can
 17 end up in court.

18 JUDGE WARD: I was referencing I think
 19 a statement you'd made earlier in talking about
 20 the availability of off-site --

21 MR. MICKELSON: Oh, yes.

22 JUDGE WARD: -- facilities. You

1 mentioned there was a record document that
 2 provided those --

3 MR. MICKELSON: Sufficient national
 4 capacity?

5 JUDGE WARD: Right.

6 MR. MICKELSON: Yes, I'd be happy
 7 to --

8 JUDGE WARD: If you could provide us
 9 that citation, that would be helpful.

10 MR. MICKELSON: I'd be happy to do so.

11 JUDGE WARD: Okay.

12 MR. MICKELSON: Thank you.

13 JUDGE STEIN: Anything else?
 14 (No audible response.)

15 JUDGE STEIN: Thank you very much.

16 MR. MICKELSON: Thank you.

17 JUDGE STEIN: And we'll now here from
 18 counsel for the Municipal Committee.

19 MR. PAWA: The record cite you're
 20 looking for on New Bedford and the other
 21 communities that have caused delay is at RTC,
 22 Response to Comments 264 to 266.

1 JUDGE STEIN: Thank you.

2 MR. PAWA: You're welcome. I
 3 represent Great Barrington, Lee, Lenox, Sheffield
 4 and Stockbridge. All of these communities have
 5 suffered from GE's toxic pollution and all these
 6 communities will suffer from the necessary clean
 7 up activities that must be undertaken.

8 Three of these communities: Lee, Lenox
 9 and Great Barrington, are either exactly where or
 10 almost exactly where GE proposes to locate a new
 11 permanent toxic waste site so that its pollution
 12 and risks of an accident can stay in Berkshire
 13 County forever. We encourage you to uphold EPA's
 14 decision for the following reasons: And I'd like
 15 to start if I may with cost and take the bull by
 16 the horns.

17 A hundred and fifty million dollars is
 18 the correct figure. If you look at the Statement
 19 of Basis, there's a chart at page 39. And when
 20 you use the net present value line of that chart,
 21 you get a difference in TD RR, Railroad, TD1
 22 Railroad, of \$150 million versus TD3 of \$33

1 million. So 183 minus 33 is \$150 million. So
 2 net present value is the way to look at it. GE
 3 has used a larger number in its brief of -- it
 4 says at least 160 million.

5 I believe that is not a net present
 6 value. That is not the correct way to look at
 7 it. And let's also keep in mind that figure is
 8 stretched over 13 years. That's from the
 9 Statement of Basis at page 2.

10 GE, as we pointed out in our brief, in
 11 a single year paid five of its executives \$115
 12 million. One year. If you look at GE's 10K on
 13 line, of which you can take judicial notice, if
 14 I'm reading it correctly, they had net earnings
 15 in 2016 of \$8.2 billion. A hundred and fifty
 16 million dollars is less than two percent of that.
 17 You can take that into account.

18 On the issue of judicial notice we
 19 would refer you to the EAB's decisions in In re
 20 Peace Industry Group, docket No. CAAHQ2014-8119
 21 at footnote 13. We'd also refer you to a case
 22 that GE itself cited from the 10th Circuit in its

1 opposition of the motion to strike, the D. Lyana
2 Castillon case. And finally, there's a case
3 directly dealing with the 10K that says you can
4 take judicial notice of it, which is a 3rd
5 Circuit case, Pension Trust Fund, etcetera at 730
6 F.3d, 263.

7 JUDGE WARD: If I could just --

8 MR. PAWA: Sure.

9 JUDGE WARD: -- jump in for a moment.

10 MR. PAWA: Yes.

11 JUDGE WARD: Whether we can take
12 official notice of external materials is one
13 issue. I guess the other issue is is it really a
14 factor under RCRA or CERCLA or the permit
15 criterion that the entity's financial health or
16 not has bearing on what remedy should be
17 selected. I don't see it there, but if you
18 could --

19 MR. PAWA: Well --

20 JUDGE WARD: -- identify that for us?

21 MR. PAWA: -- EPA is allowed to take
22 any other information into account. And whether

1 it did or not, common sense here doesn't go out
2 the window. I mean, this is not a mom and pop
3 operation. This is one of the biggest
4 corporations in the world. And EPA is allowed to
5 take into account any other information in the
6 record. And we submit that you're allowed to
7 take judicial notice of this fact. And this
8 number looks large, but when you take into
9 account that it's stretched out over 13 years and
10 compare it to GE's overall situation, it's not so
11 large.

12 JUDGE AVILA: Well, if were a mom and
13 pop organization that was responsible, would it
14 be appropriate to take into account their net
15 worth when setting the permit terms and what the
16 remedy was going to be?

17 MR. PAWA: Well, it very well might
18 be. It very well might be.

19 Let me also address a couple of --

20 JUDGE WARD: If I could?

21 MR. PAWA: Please.

22 JUDGE WARD: I could see perhaps based

1 on just the prevailing law as it relates to
2 environmental enforcement matters that financial
3 well-being might -- it wouldn't necessarily weigh
4 in on what remedy you would select. It might
5 have bearing on whether you could collect it all
6 from a less-well-off defendant, but I'm not sure
7 how it bears on the choice of a remedy. You
8 wouldn't say, well, the remedy will be less
9 protective because the particular responsible
10 party here can't afford the clean up.

11 MR. PAWA: Right. Well, GE has
12 indicated that the cost is so large that its
13 preferred remedy should be taken into account.
14 And our point is a modest one. When GE makes
15 that point, the relevant evidence surrounding
16 GE's ability to pay should be taken into account.
17 And there's also -- if you get on Lexis, you can
18 find decisions in state and federal court where
19 GE apparently has insurance for this.

20 In any event, let me talk about some
21 critical things for my clients. First, all three
22 sites have a hydrologic connection to the river

1 and all three sites are zoned conservation or
2 residential. People live there. We're talking
3 about large amounts of truck traffic going
4 through Lenox Dale, through Housatonic, through
5 villages that are within the communities that I
6 represent. We're talking about trips that would
7 not be necessary for a so-called off-site
8 facility to go take the leachate up to
9 Pittsfield, many, many trips.

10 People live in these communities. The
11 truck traffic will be there and there will be a
12 permanent waste site located somewhere near where
13 people live in areas that are zoned CR,
14 conservation residential. If you look up those
15 zoning regs, it says things like horticultural
16 and agricultural use is permitted but that,
17 quote, "large-scale commercial development is not
18 permitted." That's from the Great Barrington R2
19 Zoning Code. They allow homes and farms. This
20 is not where you put by any stretch a permanent
21 hazardous waste facility. There are existing
22 places that are appropriate for these facilities.

1 Next to a river?
 2 I believe Your Honor asked a question,
 3 do you -- is it relevant to take into
 4 consideration that this is going next to a river?
 5 Never. You would -- I river by definition is an
 6 environmentally-sensitive receptor. You don't
 7 put a hazardous waste facility near a river.
 8 That's why the TSCA regulations say what they
 9 say. All three of these sites have a hydrologic
 10 connection between the surface water and the
 11 groundwater. It makes no sense whatsoever to
 12 put --

13 JUDGE STEIN: If GE were to take the
 14 PCBs that were 50 parts per million and above and
 15 take them off site and take PCBs that were lower
 16 than 50 parts per million and leave them on site,
 17 would that alter your -- the views of your
 18 clients?

19 MR. PAWA: No, it's still toxic even
 20 if it doesn't meet that threshold definition, and
 21 it's still solid waste under the Massachusetts
 22 solid waste facility definitions. And again, you

1 don't put something like that next to a river.
 2 You don't plop it down in the middle of a
 3 community that's zoned residential where people
 4 live. This is why there are existing licensed
 5 off-site facilities.

6 It would be almost absurd if GE didn't
 7 have such amazing lawyers to be suggesting that a
 8 permanent hazardous waste facility would go in --
 9 would be jammed into these conservation and
 10 residential areas. And zoning is one of the
 11 things that's required to be taken into account,
 12 as you know, under the implementability factor,
 13 which is part of the permit.

14 So to these communities, to have this
 15 kind of disruption that's going on for decades
 16 when there are existing facilities simply to save
 17 \$150 million, which is apparently what this is
 18 all about, makes no sense. How long has GE had
 19 the benefit of having operated in these
 20 communities in order to be able to afford this
 21 kind of \$150 million expense? A long time.

22 These sites are -- two of them are

1 completely forested. Wood's Pond is not
 2 completely forested, but it's partially forested.
 3 Again, why would you put a new permanent
 4 hazardous waste facility in a place like that?

5 There are ecological attributes. I
 6 think the State of Massachusetts pointed out
 7 there was something like 32 endangered species or
 8 something, or threatened, rare species under
 9 state law in this area. It's been designated an
 10 area of critical environmental concern. If
 11 you've ever been there, you know what a special
 12 place Berkshire County is. It's a tourist
 13 destination. And the river is part of the
 14 tourist destination.

15 And there's a beautiful interaction
 16 between the communities that live -- and the
 17 people that live in these communities. And the
 18 river. And the forest. And the species. And
 19 the farms. And that is what defines my clients'
 20 very existence. Enough of the PCB contamination
 21 in Berkshire County.

22 EPA was wholly rational in saying this

1 is not a good place. EPA can easily meet the
 2 standard it has to meet under 124.19. This
 3 location would be laughed at of any other
 4 proceeding, even if the standard were much
 5 higher. This is just not where something like
 6 this goes under any stretch.

7 JUDGE WARD: If I could just --

8 MR. PAWA: Yes.

9 JUDGE WARD: -- ask a quick follow-up
 10 question.

11 MR. PAWA: Yes.

12 JUDGE WARD: So is there anything in
 13 the record before us that says how close these
 14 sites would be to the river, how close they would
 15 be to the -- I guess, the groundwater table, the
 16 nature of the soils and their permeability?

17 MR. PAWA: All three are less than 50
 18 feet because -- we know that because they are not
 19 in compliance with that TSCA reg. I can't tell
 20 you how many feet. And I'm sorry, the first part
 21 of the question was?

22 JUDGE WARD: How far --

1 MR. PAWA: Yes.

2 JUDGE WARD: -- or close are --

3 (Simultaneous speaking.)

4 MR. PAWA: So the one in Great

5 Barrington, which is the Rising Pond one, is 14

6 miles away from the river. And the other two are

7 very close to the river, in fact basically right

8 up against it. And I don't have the --

9 JUDGE WARD: And how close are they to

10 -- you mentioned that there were residential

11 communities nearby. How close are the -- what is

12 there in the record in terms of the proximity of

13 the residential communities?

14 MR. PAWA: Yes, so the village of

15 Housatonic, which is in Great Barrington, is

16 1,300 feet from the Rising Pond site. And Lenox

17 Dale is hundreds of feet from the Wood's Pond

18 site. Lenox Dale is a village within my client

19 Lenox. Housatonic is a village within my client

20 Great Barrington. And I don't recall the exact

21 number of feet for the other one. But again,

22 it's in our brief that these are all residential

1 areas where there are people living in proximity

2 to them. And that's why they're zoned that way.

3 And I -- if I could, just one final

4 point. I apologize. I know I'm over time. A

5 question came up before I think from Judge Avila

6 about whether or not -- if the risks are the same

7 of a release from a new facility versus an

8 existing facility, why incur the extra cost of

9 having a new facility?

10 And the answer to that is that the

11 question here is what's most protective of human

12 health and the environment, not whether or not

13 they're both protective of human health and the

14 environment at some level. The question here is

15 did EPA pick the most protective remedy in light

16 of all the factors it had to balance including

17 the cost?

18 And we submit to you that there's

19 absolutely no question that siting something

20 right next to a river where PCBs, if they get

21 out, or where trucks can get in accidents and

22 PCBs can flow into a river and go downstream,

1 that would be a natural catastrophe, and that is

2 the kind of thing that is not by any stretch the

3 most protective of human health and the

4 environment. And it was well worth every penny

5 of the \$150 million.

6 JUDGE STEIN: One final question for

7 you, at least from me. Does the record reflect

8 any information about flooding in the Housatonic

9 River?

10 MR. PAWA: I don't recall that. It

11 may. And may I follow up on that?

12 JUDGE STEIN: You may.

13 MR. PAWA: Thank you.

14 JUDGE STEIN: Thank you very much.

15 Mr. Cox?

16 MR. COX: Thank you and good morning,

17 or good afternoon, actually. My name is Bob Cox.

18 I'm here for the amicus Green Berkshire's, Inc.

19 Green Berkshire supports Region 1's permit, and

20 specifically with respect to its determination

21 not to waive compliance with ARARs that prohibit

22 the siting of hazardous waste or solid waste

1 facilities within ACEC.

2 I have limited time. There are two

3 points I'd like to make. The first is that GE's

4 petition with respect to EPA not waiving ARARs

5 that prohibit these facilities in ACECs -- GE's

6 petition does not meet your threshold standards

7 for review.

8 The second is even if it does, even if

9 you were to address the merits, GE has presented

10 nothing that shows there is anything clearly

11 erroneous that the region has done here or a

12 matter of policy or determination that would

13 merit the review.

14 First, if I may, some context: Green

15 Berkshire is a non-profit organization. It is an

16 environmental research and advocacy group. It

17 has a keen interest, as you can tell from our

18 brief and my presentation -- my presence here, in

19 protecting the areas of the ACEC.

20 The ACEC here is the Upper Housatonic

21 River. It's about 12,000 acres. More than that.

22 It encompasses 13 miles of the river. It

1 includes -- to be clear, it includes the Wood's
2 Pond site, or sometimes called the Lane
3 Construction site. One of the three sites GE
4 identified that does not include the Forest site
5 or the Rising Pond site.

6 As a matter of statute, ACECs are set
7 up -- there are about 30 of them in
8 Massachusetts, about almost 300,000 acres. Many
9 of them are down the Cape to protect coastal
10 areas. They're set up by statute by giving
11 authority to the Executive -- the Secretary of
12 the Executive Office of Energy and Environmental
13 Affairs to, quote, "take actions, administer
14 programs and revise regulations to preserve,
15 restore the natural and cultural resources of
16 ACECs."

17 That's what the secretary has done.
18 It has adopted regulations with respect to siting
19 locations for hazardous waste facilities, for
20 siting locations with respect to solid waste
21 facilities, prohibiting them in ACECs. And it's
22 a bright line test. If you're -- you propose to

1 put it in an ACEC, no, you can't put it there?
2 So as to Region 1's waiving these regulations,
3 ARARs prohibit the siting of hazardous waste and
4 solid waste facilities in ACECs.

5 GE's petition does not pass the
6 threshold requirement to substantially confront
7 or explain why the region's response to prior
8 objections was wrong. GE makes the same
9 complaints in the petition that it made in its
10 comments. And I'll give you an example with
11 respect to the Wood's Pond site, the Lane
12 Construction site.

13 GE's comment were, quote, "This is
14 located predominantly 90 percent within a
15 disturbed land used for quarry operations. It
16 would affect any outstanding resources of the
17 ACEC." That's their comment.

18 The region's response: "It's within
19 an ACEC." The regulations say no site is
20 suitable where located in an ACEC." Bright line
21 test that could say that. I'm saying this, it's
22 a bright line test. Prohibits the permanent

1 disposal within -- by the regulations.

2 GE's petition, the same comments. On-
3 site disposal will not affect the ACEC. It's not
4 appropriate for the Board's review of this where
5 GE has not passed the threshold in order to have
6 this matter reviewed before it. The rules are
7 clear. You've applied them consistently. You've
8 applied them to me when I've been here before in
9 other matters. And they should be applied here.

10 JUDGE STEIN: Am I correct that your
11 argument goes only to the Wood's Pond site and
12 not --

13 MR. COX: That is correct. Just to
14 the Wood's Pond site. That is the only one of
15 the sites within the ACEC.

16 JUDGE AVILA: And can ACEC
17 designations be challenged in court?

18 MR. COX: Well, I think they can. I
19 did not look at that. Certainly there are many
20 decisions by the Secretary of the Executive
21 Office of Energy and Environmental Affairs that
22 have been challenged, and challenged by

1 administrative review within Massachusetts. That
2 administrative review should take place within 30
3 days after the action, the final action occurred.
4 That has long passed.

5 JUDGE AVILA: Nothing occurred here
6 that you're aware of?

7 MR. COX: No, nothing occurred here
8 that I'm aware of. And I think if it -- I think
9 we would have seen this in the record here.

10 JUDGE STEIN: So you know why Forest
11 Street and Rising Pond sites were not included in
12 the ACEC? Is there anything in the record that
13 would tell us that?

14 MR. COX: I don't think -- well, the
15 only thing in the record that -- well, maybe it's
16 not in the record, but I provided appended to my
17 amicus brief is the ACEC determination. And the
18 ACEC determination was really looking at the
19 resources of this area, the resources of the
20 river. And I can't explain. I can't answer your
21 question.

22 With respect to whether the Board were

1 to consider -- get past this threshold issue and
 2 look at the merits, GE, for example, says with
 3 respect to the waiving of a temporary storage,
 4 but not for permanent storage, that that was
 5 arbitrary and capricious. It says that it is a
 6 distinction without difference. Well, the
 7 Board's rules, or really the Board's case law and
 8 law sets up how distinctions without a difference
 9 are decided. You look to the agency to see
 10 whether it has provided a clear rational basis.
 11 Well, the EPA has done so. And where technical
 12 issues are involved, you defer to the agency.
 13 Here what the region said with respect
 14 to this issue of arbitrary and capricious in
 15 waiving for temporary storage but not for
 16 permanent storage -- the region said, quote,
 17 "Technicality impracticability from an
 18 engineering perspective to perform clean up
 19 without waiving a ARAR because PCB contaminated
 20 river bed and banks in an ACEC must be dredged to
 21 control source release." And that's; I have in
 22 my notes, 309.

1 So the region gave cogent technical
 2 reasons for not waiving here. It gave cogent
 3 technical reasons for the other factors that are
 4 set forth in our brief. And here our view is
 5 that with respect to the ARARs and the ACA-
 6 protected areas we should support the region, as
 7 we do here, and that's why we're here, to support
 8 the region in their position.
 9 JUDGE STEIN: Thank you. Any
 10 questions?
 11 (No audible response.)
 12 JUDGE STEIN: Thank you very much.
 13 MR. COX: Thank you very much.
 14 JUDGE STEIN: Mr. Nathanson, do you
 15 have anything to say in rebuttal?
 16 MR. NATHANSON: I don't if it's
 17 counsel's -- an act of mercy or an act of
 18 contrition, but we're going waive rebuttal, if
 19 that's okay.
 20 JUDGE STEIN: That will be fine.
 21 MR. NATHANSON: Okay. We have just a
 22 little favor to ask the Court though. Can we

1 just take a break?
 2 JUDGE STEIN: Yes. Why don't we take
 3 a five-minute break. And then we have about
 4 another half an hour that we'd like to do before
 5 our lunch break.
 6 Okay. Let's take a five to seven-
 7 minute restroom break and then we'll come back
 8 and do -- there's one more half an hour segment
 9 this morning. And we'll come back and do that
 10 and then we'll break for lunch.
 11 (Whereupon, the above-entitled matter
 12 went off the record at 12:39 p.m. and resumed at
 13 12:40 p.m.)
 14 MS. DURR: All rise. Oral argument is
 15 back in session. Please be seated.
 16 JUDGE STEIN: Thank you very much.
 17 And we will now proceed with the last of the
 18 morning session, which is the Housatonic River
 19 Initiative's argument in favor of treatment. We
 20 have two presenters; first the Housatonic River
 21 Initiative, Mr. de Fur, followed by Region 1,
 22 each for 15 minutes.

1 MR. DE FUR: Good afternoon, Your
 2 Honors. My name is Peter De Fur. I'm here
 3 representing the Housatonic River Initiative and
 4 HEAL, Housatonic Environmental Action League.
 5 I'd like to reserve two minutes for possible use
 6 as rebuttal after EPA's comments.
 7 I'm a scientist, not a lawyer. I
 8 provide technical services to communities such as
 9 the one that we're talking about today over the
 10 clean up of contaminated sites around the
 11 country. I've been doing this for over 20 years
 12 and I've held faculty positions at three
 13 universities. I've worked for HRI for 14 years.
 14 And I grew up in Connecticut, so I have a
 15 personal history with the river.
 16 The community has long advocated with
 17 EPA to use treatment options for the contaminated
 18 material that's going to have to be either
 19 removed or treated in some fashion. They've
 20 looked for novel approaches. They've looked for
 21 biological treatment methods, chemical and
 22 physical, including thermal ones. And that's

1 what I'm going to spend of my comments here that
2 I want to say to you.

3 The thermal one is a method that EPA
4 has used. It's referred to as thermal
5 desorption. Thermal desorption is a method that
6 EPA has used in order to not incinerate, because
7 incinerator has become excessively unacceptable
8 at the community level and has technical
9 problems.

10 So thermal desorption involves taking
11 the contaminated material, putting it in a closed
12 large vessel, heating it to several hundred
13 degrees, capturing the vapors so that they can be
14 processed and disposed, and the remaining
15 material: soil or sediment, is then usable for
16 some other purpose because you heat it up until
17 your chemicals are driven off.

18 So an excellent example of the use of
19 this is at the Ward Transformer site outside
20 Raleigh, North Carolina. It's a site that has
21 PCB-contaminated soil. And they completed the
22 clean up of this using thermal desorption that

1 large vessel that looks like a big cylinder that
2 would fit in this room and --

3 JUDGE STEIN: If I understand Da Nang
4 correctly, that involved the treatment of
5 dioxins --

6 MR. DE FUR: Yes.

7 JUDGE STEIN: -- not PCBs.

8 MR. DE FUR: Yes, that's right.

9 JUDGE STEIN: And --

10 MR. DE FUR: And I can talk about --

11 JUDGE STEIN: -- I don't know if
12 there's anything in the record that would explain
13 why a treatment for dioxins would be relevant
14 both to PCBs and to the quantity that we're
15 talking about here.

16 MR. DE FUR: So the record that -- I
17 know the comments we submitted, that HRI
18 submitted includes potential treatment methods
19 that apply to both PCBs and dioxins and compares
20 the chemical and physical properties for
21 treatment so that it's clear that treating one
22 should be a potential option for treating the

1 treated 400,000 cubic yards.

2 JUDGE AVILA: When you say EPA has
3 used this before, that's an example of soil. Do
4 you have any examples where they've used it with
5 sediment?

6 MR. DE FUR: I don't know off the top
7 of my head.

8 JUDGE AVILA: Okay.

9 MR. DE FUR: I was looking and didn't
10 find them.

11 JUDGE AVILA: Okay.

12 MR. DE FUR: It's a method that's been
13 around for a while. Now the one used at the Ward
14 Transformer site at the time was the largest
15 example of treating PCB-contaminated soil.

16 The more recent one that the
17 Housatonic River Initiative included in their
18 brief is actually out of the country, but EPA had
19 their hands on it. It's at Da Nang Air Force
20 Base in Vietnam and it uses a modification of the
21 thermal desorption that I just described. What I
22 described is in a large container that would --

1 other. And in fact the method that has been used
2 I think has been piloted on sediments, but I'd
3 have to check that out.

4 I have an example here. So the
5 chemical and physical properties of dioxins are
6 very, very similar, particularly the fact that
7 they are persistent, they're highly chlorinated,
8 they both have the same sort of carbon ring. So
9 they're very common. Okay?

10 JUDGE STEIN: Going back to the
11 comments that were submitted, did your client
12 comment on thermal desorption in its comments on
13 the 2014 draft permit? I mean that --

14 MR. DE FUR: I know that --

15 JUDGE STEIN: -- is a threshold
16 requirement --

17 MR. DE FUR: Right.

18 JUDGE STEIN: -- that our Board looks
19 to as to whether the petitioner or anyone else
20 commented on thermal desorption during the
21 comment --

22 MR. DE FUR: They did comment on

1 thermal desorption, and they supported it. And
2 the reason they supported thermal desorption is
3 of the options that EPA had that was the best
4 one.

5 So the method in Vietnam is a slight
6 modification of the one that I talked about
7 because it's intended to be used on sediment as
8 well as soil, or sediment -- water that's so
9 saturated that it might as well be sediment. And
10 instead of bringing in a large container, they
11 built one on site that suited their specific site
12 needs. So the right size, the right shape and
13 the right location. And then they put thermal
14 rods to heat the contaminated material.

15 And that's underway right now. They
16 completed a single construction of a single
17 facility. They sealed it up, put in you vapor
18 capture -- capture, heated it up to 100 degrees
19 to drive off the water. And then they turned the
20 temperature up and they've been heating it up at
21 about 330 degrees ever since then.

22 So that method, which is being used by

1 a commercial firm, TerraTherm, also indicates
2 that they have used it at a number of sites in
3 the United States. It's been used --

4 JUDGE STEIN: So let me interrupt you
5 for one second. Am I correct in understanding
6 that you didn't reference the Da Nang clean up in
7 your comments?

8 MR. DE FUR: I don't know. I thought
9 that they did. I thought that HRI did refer to
10 Da Nang.

11 JUDGE STEIN: Da Nang in the comments?

12 MR. DE FUR: Yes.

13 JUDGE STEIN: Okay.

14 MR. DE FUR: So General -- there are
15 five examples that the company gives of where
16 they've used it in the United States: the General
17 Electric in Glens Falls, New York, which would be
18 the Hudson River; Missouri Electric Works
19 Superfund site in Cape Girardeau, Missouri; U.S.
20 Navy BADCAT in Vallejo, California; and the
21 remaining -- the other two projects are full
22 scale: the U.S. Army Corps of Engineers in

1 Saitan, West Pacific and the U.S. Navy
2 Centerville Beach site in California.

3 JUDGE WARD: And if I could interrupt
4 for just -- is that -- are you referencing or
5 referring to a document that's in the
6 administrative record that was before EPA?

7 MR. DE FUR: I do not know if this is
8 in the administrative record.

9 JUDGE WARD: Okay.

10 MR. DE FUR: This is research that I
11 was doing following on what was submitted last
12 fall, I think, or submitted by HRI about the
13 method used in Da Nang. I was looking for
14 further examples.

15 And the treatment for the PCB-
16 contaminated soil and sediment was very effective
17 where starting concentrations of PCBs were at or
18 above 20,000 parts per million and after
19 treatment at below remedial goals and below
20 detection limits. So it's been very --

21 JUDGE STEIN: Am I correct in
22 understanding that following treatment the

1 material would still need to be landfilled?

2 MR. DE FUR: No.

3 JUDGE STEIN: No?

4 MR. DE FUR: No, the if we use the
5 example of the Ward Transformer site that I've
6 referred to in my comments to EPA in the past, it
7 was treated to less than one part per million,
8 which doesn't require special landfill. It's a
9 big pile of dirt that they covered with topsoil
10 and they maintained so that -- for erosion and
11 sediment control purposes only. So it's treated
12 for -- to the extent that it does not require
13 landfilling, which changes the equation and
14 changes the decision making process about having
15 a landfill at all. It can be used for clean
16 purposes.

17 JUDGE WARD: I think the -- just to
18 follow up on that, I think in looking at the
19 region's response to the comments, which is part
20 of the record that's before us for review, there
21 is a statement at page 271 that makes the point
22 as to thermal desorption. And one of the reasons

1 it wasn't chosen is the likelihood that not all
2 of the treated material could be reused in -- it
3 couldn't be reused at the site, so it would still
4 have to be landfilled.

5 Our standard of review, we look at
6 whether the region's decision represents a clear
7 error. Where is the error in that conclusion?
8 What would you point to in the record to say that
9 that conclusion about the on-site reuse of the
10 soil is wrong?

11 MR. DE FUR: Well, the track record
12 for thermal desorption indicates that it doesn't
13 -- if it's treated to below regulatory standards,
14 then it doesn't need to be landfilled.

15 JUDGE WARD: So I think I'd take the
16 region's looking at the Statement of Basis as
17 well; and the region can speak to this, too, but
18 the thermal desorption hasn't been proven to
19 treat sediments. And you have soils and
20 sediments. And perhaps the -- and prove that it
21 can be treated to the point that it could be
22 reused as opposed to being landfilled. And I'm

1 looking at -- to the extent you can point to us
2 something in the record that would call that
3 conclusion into question, that would be helpful
4 for us to look at.

5 MR. DE FUR: Okay. I'd have to go
6 back and look specifically for that question,
7 because I didn't look for that material.

8 JUDGE WARD: Okay.

9 MR. DE FUR: I know that EPA in their
10 decisions about remedies will select a type of
11 remedy. So they'll do a type of -- they'll say
12 we want removal. So that either means dredging
13 or digging. And they will not necessarily and
14 frequently do not in the decision specify that
15 you're going to use this specific equipment for
16 removal. But that will come down the road. That
17 will come in later. So thermal desorption I
18 consider to be a type of treatment.

19 And the specific application about
20 whether it's rods that are placed in the soil,
21 which is called in situ thermal desorption, which
22 is another method that EPA has been using or

1 approved either at sites that are being cleaned
2 up elsewhere or that -- sites that EPA is
3 responsible because there's no potentially
4 responsible party. So those are -- that's
5 another method for thermal desorption. Either
6 take it out and put it in a cylindrical sealed
7 oven, or build this large container like they've
8 got in Da Nang, or use it with heating rods that
9 are placed in the soil called in situ.

10 JUDGE AVILA: And I should know this,
11 but what happens to the PCBs in this process?

12 MR. DE FUR: Well, there are two. The
13 first consequence is that they're heated to the
14 point where they're volatile, because PCBs like
15 dioxins, DDT, Kepone, a number of other highly
16 chlorinated organic chemicals are not terribly
17 volatile. They're either referred to as semi-
18 volatiles or something similar to that.

19 But you have to heat it enough. And
20 if you heat it enough, it becomes volatile. In
21 fact, EPA over the years has demonstrated that
22 simply having it out in the sunlight gets enough

1 heat to get some volatilization so that it
2 becomes airborne. EPA scientists have done this
3 in some of their research projects.

4 So what we're doing here in the
5 thermal desorption is concentrating it. So at
6 330 or 40 degrees centigrade pretty much anything
7 becomes volatile. And that's why the soil is
8 sterile when they're done.

9 JUDGE WARD: So what happens to the
10 volatilized PCBs?

11 MR. DE FUR: That's why it's in a
12 sealed container.

13 JUDGE WARD: Yes.

14 MR. DE FUR: You have a vapor capture
15 system. And after you capture it, then you
16 filter it and contain it, reduce the volume. And
17 then it goes to an appropriate landfill.

18 When they put in soil, in situ, they
19 put some sort of cover over the top and then they
20 put both heating units and basically vacuum tubes
21 in there to withdraw it hopefully from the soil.

22 If I could take just a couple of

1 seconds to wrap up, in conclusion some -- a
 2 treatment like this offers a lot of options and a
 3 lot of opportunities. Over the years the
 4 community has looked at biological treatments and
 5 encouraged EPA -- and there's a new biological
 6 treatment from a group in North Carolina that has
 7 been used at a number of sites that we've
 8 submitted that to EPA in our comments on the
 9 draft permit when that was issued, and wish that
 10 they would pilot that.

11 But the citizens have constantly
 12 encouraged EPA to pilot these new technologies
 13 because they will save the cost, they will save
 14 long-term operation and maintenance of a
 15 landfill, because a landfill that contains
 16 hazardous waste will have to be monitored in
 17 perpetuity, like a capped facility or anything
 18 else like that. It'll be forever. And it's
 19 expensive. So thank you very much.

20 JUDGE WARD: Thank you.

21 JUDGE STEIN: Thank you. Mr. Conway?

22 MR. CONWAY: First to clarify, in the

1 last discussion about the analytical framework
 2 you were asking for as far as the -- where it is
 3 in the record. We -- the framework for the
 4 review, the Response to Comments on -- in
 5 Response to Comment 576, page 269 of the Response
 6 to Comments, Statement of Position from the
 7 Dispute Resolution, page 51, and both have a
 8 description of that.

9 JUDGE STEIN: Thank you.

10 MR. CONWAY: As far as treatment
 11 technologies and HRI's concerns, the region --
 12 first of all, with -- as with other petitioners,
 13 there were significant procedural defects in
 14 HRI's position. And I think in our briefs we
 15 point out that that should preclude substantive
 16 review. But to the extent the Board continues to
 17 review it substantively, I'd like to make four
 18 points:

19 The first point is that the region
 20 thoroughly evaluated treatment alternatives from
 21 the Corrective Measure Study proposal all the way
 22 through the final permit modification.

1 Secondly, the permit modification
 2 takes into account permit and -- or treatment
 3 principles.

4 The permit, No. 3, is clear that the
 5 permit modification, final permit modification
 6 has significant opportunities for use of
 7 innovative treatment consistent with Mr. De Fur's
 8 concerns.

9 And then finally, as far as thermal
 10 desorption, it was thoroughly reviewed by the
 11 agency, evaluated under the same criteria as
 12 other alternatives. And we came to a different
 13 conclusion than HRI is now proposing.

14 JUDGE AVILA: So on your third point,
 15 how realistic is it that 5, 10 years down the
 16 road you're really going to change the remedy of
 17 thermal desorption? I mean, that seems like an
 18 awfully big shift in approach to the remedy.

19 MR. CONWAY: The idea isn't just
 20 thermal -- changing to thermal desorption. It's
 21 changing to something -- it would be any kind of
 22 a modification or lessons learned evaluation for

1 adaptive management as we go forward, something
 2 to make the remedy more efficient including the
 3 possibility of -- if there were an innovative
 4 treatment technology that worked for PCBs and
 5 sediments and would satisfy the criteria, that
 6 it's something that should be looked at. We have
 7 a specific adaptive management plan built into
 8 the final permit modification to take into
 9 account those possibilities.

10 It's -- how realistic is it? It's
 11 something that we are committed to in the final
 12 permit modification in terms of implementing this
 13 remedy. And I can't really say more than that as
 14 far as a particular technology. And as far as
 15 that goes, there's also in terms of in the permit
 16 modification we also changed the remedy for the
 17 vernal pool remediation to include more use of
 18 activated carbon in the first instance instead of
 19 excavation, which is another treatment method
 20 that we think is significant.

21 And important point I want to make is
 22 that we followed the process for review

1 throughout the Corrective Measure Study process
 2 from the proposal all the way through the final
 3 permit modification. In the Corrective Measure
 4 Study proposal that GE submitted there were
 5 several treatment technologies included including
 6 bioremediation, which is another one that HRI has
 7 pushed for. Those were included and many of them
 8 were screened out.

9 But two treatment technologies were
 10 among the five treatment technologies that we
 11 carried through all the way through the correct
 12 measure study up to the draft permit
 13 modification. One of them is thermal desorption
 14 that Mr. De Fur alluded to. The other is
 15 chemical extraction.

16 We evaluated them on the same basis as
 17 the other three treatment disposition
 18 alternatives and we did not select them based on
 19 that same nine-criteria review. So it's the --
 20 we've -- the RCRA process, we followed it step by
 21 step, we analyzed everything substantively based
 22 on site-specific information as far as the -- how

1 each of them, each of the alternatives dealt with
 2 the criteria and made our selections. And
 3 that --

4 JUDGE WARD: Mr. Conway --

5 MR. CONWAY: Yes.

6 JUDGE WARD: -- if I could interrupt.

7 I think the -- one of the issues that we had
 8 asked the Housatonic River Initiative was whether
 9 they had raised the issue of thermal desorption
 10 in their comments. Do you know if they did?

11 MR. CONWAY: We don't think they did.

12 JUDGE WARD: So then I guess the other
 13 question I have is -- there's a Response to
 14 Comments on page 270 that identifies some 21
 15 comments in -- and those 21 comments are
 16 described are ones that encourage the use of new
 17 and innovative technologies. Do you know if any
 18 of those comments raised the question or the push
 19 for thermal desorption to be used here?

20 MR. CONWAY: I don't know. I can
 21 check on that --

22 JUDGE WARD: Okay.

1 MR. CONWAY: -- but, yes.

2 JUDGE STEIN: JUDGE WARD: But you
 3 said that you did evaluate that option
 4 thoroughly?

5 MR. CONWAY: Yes, it was -- it's in
 6 the Corrective Measure Study from General
 7 Electric, the revised Corrective Measure Study
 8 and the Statement of Basis and comparative
 9 analysis.

10 JUDGE STEIN: Okay. And how about the
 11 new study that's been cited, the one at the Da
 12 Nang airport? Was that considered by the region?

13 MR. CONWAY: It was not considered by
 14 the region in the administrative record.

15 JUDGE WARD: Was it included in the
 16 administrative record?

17 MR. CONWAY: I don't know. I don't
 18 know if it was included in the administrative
 19 record.

20 JUDGE WARD: Okay. And I guess I have
 21 another question. How would you square your
 22 decision just on the focus of thermal -- focusing

1 on thermal desorption and the statement in the
 2 Response to Comments that that was not selected
 3 due in part to its high cost? So cost was a
 4 disqualifying factor there, but cost was not a
 5 disqualifying factor with respect to off-site
 6 disposal.

7 MR. CONWAY: Cost was used as a
 8 balancing factor for thermal desorption just as
 9 it was used as a balancing factor for the other
 10 four alternatives. The disposal alternative we
 11 selected is right in the middle. It's -- thermal
 12 desorption is more expensive than that. Thermal
 13 desorption also -- there is the -- the
 14 reliability of it being used for sediments is
 15 questionable and there's not any or much track
 16 record on using it in sediments. Thermal
 17 desorption can also, following that, have to find
 18 something to do with the residuals and putting
 19 them back in the river that the region didn't
 20 think was appropriate.

21 JUDGE AVILA: Just on -- I understand.
 22 That sounds like there's kind of three different

1 rationales, but just on the cost one; I'm not
 2 great at math, but it looks like the cost
 3 differential between thermal desorption with
 4 reuse (NTD)1 Railroad, the cost differential is
 5 about the same as the cost differential between
 6 on site and off site plus or minus a couple
 7 million here or there.

8 So is cost really that big a factor in
 9 getting rid of thermal desorption off the table,
 10 or is it the other things you mention, that it's
 11 an unproven or -- has it been used on the scale
 12 and hasn't really been used extensively, if at
 13 all, except for Da Nang and on sediment?

14 MR. CONWAY: The cost is -- as it is
 15 with the evaluation of any two treatment
 16 disposition factors cost is one of the balancing
 17 criteria. It doesn't rise to the level of a
 18 threshold criterion, and so it's -- it was
 19 balanced against the effectiveness and the other
 20 balancing criteria.

21 JUDGE STEIN: I had a question about
 22 the Ward Transformer site that was mentioned by

1 HRI which seems significantly larger than some of
 2 the other sites involving 400,000 cubic yards.
 3 Is that a site that the region evaluated and is
 4 that a site that was cited in the comments?

5 MR. CONWAY: I do not know of where
 6 the region -- of whether the region evaluated
 7 that. I don't know whether it was cited in the
 8 comments.

9 JUDGE STEIN: Okay.

10 MR. CONWAY: With that I have nothing
 11 more.

12 JUDGE STEIN: Rebuttal?

13 MR. DE FUR: Thank you very much. I
 14 don't know this is so much as rebuttal as it is
 15 further explanation.

16 HRI and the communities; and I join
 17 them in this, have long worked with EPA to look
 18 for new and novel solutions so that we do not
 19 have the only two options for these sort of
 20 situations. As the Region 2 administrator
 21 explained it in a public meeting, either dig it
 22 up or cover it up. She said by this time in life

1 you should have new options. And when those come
 2 along, we would hope that neither RCRA nor CERCLA
 3 is so prohibitive that some of them cannot be
 4 tried and tested to determine if they're going to
 5 be effective for the sites that we use. And so
 6 far as our experience is, EPA and the regional
 7 office and project managers here have been very
 8 willing to work with the community in looking at
 9 many of these.

10 But what Mr. Conway refers to with
 11 regard to the thermal desorption is that some of
 12 these developments have only occurred in the last
 13 seven years. So if they just started looking at
 14 them seven years ago, they might have missed the
 15 fact that whereas sediment had not been used at
 16 all, now it has been used by this new firm
 17 because they've got a slightly different approach
 18 to doing thermal desorption.

19 And whereas you couldn't us gravel and
 20 sand in a large container that's sealed like
 21 that, that would fit inside this room as I
 22 described, this new method where you pile it up

1 and you put the heating rods in it does permit
 2 that sort of material. So you can treat a wider
 3 range of materials and you can -- they've learned
 4 how to treat it to much lower concentrations and
 5 being far more effective.

6 So it's not as though these things are
 7 wrong, but I'd like to say that if we look at a
 8 complete record of that, we find that it's far
 9 more effective than it would have been considered
 10 even three or four years ago. Thank you very
 11 much.

12 JUDGE STEIN: Thank you. What time is
 13 it?

14 PARTICIPANT: 1:20.

15 JUDGE STEIN: Thank you very much.
 16 This has been a long morning for everybody. I
 17 think we will break for lunch now. The watches
 18 are not synced. Some say it's 1:15; some say
 19 it's 1:20. So why don't we take an hour lunch
 20 break to give people an opportunity to take a
 21 break, get something to eat. We will resume at
 22 2:20 with the afternoon session. And I don't

1 know if there's anything else.
 2 If you do go outside the building, you
 3 will need to come back in through security. I
 4 don't know whether they will allow you to take
 5 your little cards with you or not, but try to be
 6 back by 2:20. We obviously have a long
 7 afternoon, but hopefully we've covered a number
 8 of the key issues. So we'll try to move as
 9 expeditiously as possible this afternoon
 10 consistent with giving everyone an opportunity to
 11 let us know what they think is important about
 12 this case.

13 We are planning also to give each
 14 party two minutes at the end to just summarize
 15 anything they want to summarize. Since we've
 16 done things issue by issue, it's not time you
 17 need to take, but we will give each party an
 18 opportunity for two minutes at the end to say
 19 anything else they want us to know. I realize we
 20 may run late, but it's preferable than splitting
 21 this up over two days.

22 And we recognize that all of you have

1 put a lot of time, effort, money, many other --
 2 the concerns here are significant and we really
 3 want to have everyone have an opportunity to say
 4 what they need -- what they would like to say to
 5 us.

6 And with that, we will adjourn for
 7 lunch.

8 MS. DURR: All rise.

9 (Whereupon, the hearing was recessed
 10 at 1:19 p.m. to reconvene at 2:20 p.m.)

11 JUDGE STEIN: Thank you. This
 12 afternoon we have two topics scheduled to discuss
 13 beginning with the Region 1's decision on the
 14 extent of remediation. The first component is
 15 arguments by Petitioner Housatonic River
 16 Initiative that the clean up remedy is not
 17 extensive enough. And the presenters are
 18 Housatonic River Initiative for 20 minutes and
 19 Region 1 for 20 minutes.

20 MR. DE FUR: Thank you very much.
 21 Good afternoon. I wish to reserve two minutes
 22 for potential follow up to EPA's comments in

1 rebuttal.

2 According to EPA Region 1 technical
 3 documents that are on the record the first
 4 instance of this information is in the EPA status
 5 report for this site of May 2012, but then
 6 subsequent data exists in the other permanent
 7 documents. Four million cubic yards of
 8 contaminated sediment and soil are present at
 9 concentrations greater than one part per million
 10 in the watershed that includes both the sediment
 11 and in the river and in the flood plains. And
 12 that's in Massachusetts.

13 The June 2014 Statement of Basis for
 14 the RCRA permit indicates that 990,000 cubic
 15 yards will be removed by this permit action
 16 leaving more than 3 million cubic yards of
 17 contaminated soil and sediment in the
 18 Massachusetts segment of the river and its
 19 watershed.

20 Neither of these two volumes includes
 21 estimates of how much is present in Connecticut.
 22 And in Connecticut we know that there is a PCB

1 contamination problem because the fish are
 2 contaminated, and historical records and even
 3 those that are not so historical indicate the
 4 presence of PCBs behind the several dams on the
 5 Housatonic River. So we know the presence of
 6 those PCBs have not been included in this
 7 estimate of about 3 million cubic yards that are
 8 present.

9 So I'm asking the Board to consider
 10 two aspects of this massive amount of PCBs that
 11 are left behind in the river that will
 12 contaminate the river all the way down to Long
 13 Island Sound. One of them is that they're there
 14 for a very long time, possibly 1,000 years.
 15 Nobody knows. Two, and very importantly, there
 16 are restoration tools to both remove these
 17 materials and to restore the river to its natural
 18 run so that it's like it was before, maybe not
 19 exactly. And in this regard there is absolutely
 20 no scientifically justifiable reason on the
 21 record for leaving those PCBs in place and for
 22 not undertaking removal and restoration.

1 So it's clear that the Board is well
 2 aware of the toxicity of PCBs. And over the life
 3 of this project, which is getting longer by the
 4 day, it's been clear that the scientific research
 5 has only provided more information about greater
 6 toxicity and new toxic end points, not only for
 7 humans, but all sorts of wildlife. We now know
 8 from work; I'll refer again to the Ward
 9 Transformer site because I know if a very
 10 interesting piece of work, that freshwater clams
 11 have their reproductive systems impaired by PCBs
 12 that are in the water.

13 So know that that's going on now. We
 14 know that that's going to continue. And we know
 15 because of EPA's own analysis that the PCBs that
 16 are present will continue to leach and to erode
 17 into the river and into the sediments. And that
 18 even by their own admission in the permit and the
 19 basis document that a removal of the sort that
 20 they've envisioned, this 990,000 leaving 3
 21 million, will continue to leave PCBs going over
 22 the dam at Wood's Pond.

1 JUDGE AVILA: So how long would it
 2 take to implement the remedy that your client
 3 advocates for? It's like 50 years or --

4 MR. DE FUR: EPA has -- I think GE and
 5 EPA have independently estimated how much time
 6 for that longer remedy. And it's on the order of
 7 more than 35 years. And of course we all, EPA
 8 included, has taken these as estimates, because
 9 once we get on the water and once you start
 10 implementing a remedy of this sort, things
 11 change. I'm experienced with the Hudson River
 12 remedy that was wrapped up a year faster because
 13 EPA -- I mean, GE doubled the amount of equipment
 14 on the river. So they increased their effort and
 15 that worked out very well.

16 JUDGE WARD: But I think just a
 17 follow-up question in terms of our looking at the
 18 region's decision whether there was clear error
 19 in deciding to choose a remedy that achieved
 20 close to the same level of protectiveness in
 21 terms of downstream impacts --

22 MR. DE FUR: Right.

1 JUDGE WARD: -- but could be
 2 accomplished within I think it's 13 years as
 3 opposed to -- at least I read the record as 50.
 4 So 35 to 50 --

5 MR. DE FUR: Yes.

6 JUDGE WARD: -- years. And I think
 7 what's clearly erroneous or wrong about that
 8 judgment call.

9 MR. DE FUR: Well, my biggest problem
 10 there is that EPA's estimate of fish tissue
 11 concentrations of PCBs in the Massachusetts
 12 segment will leave 20 times more PCBs in fish
 13 tissues that EPA's own guidance permits. So the
 14 different is one part per million versus 0.05
 15 parts per million in fish tissue. So the current
 16 proposal does not remove enough to meet water
 17 quality in Massachusetts.

18 Now in Connecticut; I hope that
 19 Connecticut makes a comment on that at least some
 20 time in the afternoon because Connecticut is --
 21 they don't know when they will ever reach water
 22 quality standards because their fish tissue

1 concentration is based on a higher average
 2 assumed level of fish consumption on the
 3 Housatonic.

4 JUDGE WARD: And did you raise those
 5 concerns about the estimates in terms of the
 6 levels of PCBs remaining? Was that comment
 7 raised --

8 MR. DE FUR: Yes.

9 JUDGE WARD: -- to the agency?

10 MR. DE FUR: Yes, on numerous
 11 occasions in many fora, including in writing and
 12 on the record.

13 JUDGE WARD: And what was their
 14 response and what was wrong with their response,
 15 or did they not respond at all?

16 MR. DE FUR: Well, I think it would be
 17 best to check with them, but my read of their
 18 response is we think this is good enough. I
 19 mean, I think it is not good enough. I've looked
 20 at water quality standards and fish tissue
 21 criteria at other states and one part per million
 22 is an enormous -- it's a very, very high level.

1 EPA uses at the national level 0.05. And I know
2 that that's the concentration that EPA is
3 considering implementing out on the Duwamish
4 River where I also provide technical service,
5 which is a formal superfund site.

6 JUDGE WARD: I think the record
7 reflects; and again we can ask EPA this as well,
8 that its different risk assessments were in fact
9 peer reviewed, which is -- that's kind of a not
10 typical necessarily for a RCRA permit, but it was
11 done in this case. And the peer reviewers found
12 it -- found those assessments reasonable. Isn't
13 EPA reasonable to rely on both their own
14 independent evaluation as well as the peer
15 review, the fact that it was peer reviewed and
16 found supportable?

17 MR. DE FUR: The -- both the
18 ecological and the human health risk assessments
19 indicated that there are substantial risks to
20 both targets and both types of targets under
21 present conditions and remediation is necessary.

22 So I don't -- having reviewed both of

1 them myself as well, I don't know that either one
2 of them made a projection about what I would --
3 what I infer that you might be interested in is
4 how much -- what do we have to do to get the risk
5 down to point A or point B, to an acceptable
6 level?

7 So because having participated in a
8 number of those risk assessments that Housatonic
9 I reviewed; I was on the formal peer review for
10 the Hudson, normally the process is to assess the
11 existing risks and anticipate how the risks will
12 change under current conditions, if that makes
13 sense.

14 JUDGE AVILA: Would any -- I thought
15 the region concluded that all of the alternatives
16 wouldn't meet ARARs for water quality. So isn't
17 that true even of the alternative that your
18 client advocated for?

19 MR. DE FUR: Yes, HRI advocated for
20 that because when we get to the end of the clean
21 up here, when we get to the end of the remedy --
22 and of course we have to look at multiple points

1 in time when you get to the end of the remedy.
2 And then does the remedy -- is the remedy
3 immediately completed as we know that there are a
4 lot of them that require monitored natural
5 recovery? And so that period extends out in
6 time.

7 But I think it would have achieved --
8 if I remember correctly from the GE and EPA
9 documents, that the achievement of water quality
10 standards would have been faster at the end of
11 the construction period, which would have been of
12 course much longer, and that the water quality
13 standards principally for fish tissue
14 concentrations would have been met at lower
15 level.

16 So the --

17 JUDGE WARD: Could I address the issue
18 of volatilization I think that HRI raised as a
19 concern in its brief?

20 MR. DE FUR: It is a big concern, and
21 that's one of the issues about leaving things --
22 leaving PCBs in place. For a number of years

1 scientists did not think that PCB volatilization
2 was a big issue, but in the last at least 10
3 years it's turned out that this is a substantial
4 problem. And as I pointed out, EPA in fact has
5 done some of their own research showing that PCBs
6 and dioxins, because they're so similar, can
7 volatilize on a hot summer day in the sun and
8 then they can be -- they can move.

9 And we also know from the work of Dr.
10 David Carpenter at SUNY Buffalo, who's published
11 a number of peer reviewed papers, that PCB
12 concentrations in tissues of people living within
13 the vicinity of the Hudson River that he was
14 studying are higher.

15 We also know from the work of
16 Professor Jonathan Levy who is at Harvard, who is
17 doing work on the New Bedford site that we heard
18 about earlier this morning -- the New Bedford
19 site of course is the harbor, yet boys eight and
20 nine years old living in a neighborhood not
21 immediately adjacent to the New Bedford site, but
22 rather, if memory serves, it was a mile or so

1 away -- they had elevated concentrations of PCBs.
2 And those were associated with attention deficit
3 disorder and learning disabilities, which is a
4 common association with elevated PCB exposure in
5 young children.

6 JUDGE WARD: On the issue of
7 volatilization, at least I read in the record in
8 the agency's Response to Comments, that in the --
9 in conducting I guess the clean up in the earlier
10 phases of the clean-up that they had been taking
11 samples of the air to see if there were any
12 levels of PCB that raised a concern. And I took
13 from the Response to Comments that there weren't
14 both -- that was during the remedial phase. And
15 so doesn't that suggest that as to those soils or
16 sediments left in place you're not likely to have
17 volatilization at levels of concern?

18 MR. DE FUR: I don't think that the
19 data that EPA collected or had collected by their
20 consultants or by GE; because I don't know who
21 actually did the work, were designed to answer
22 that question about how far afield and at what

1 concentrations they occur. Because it's not just
2 what's in the sediment or the flood plain soils
3 that might be moving into the air and then
4 farther away, but it's also the action of the
5 river itself. So as the river churns, it can not
6 only spray water, but any chemicals that are
7 contained in that water can be volatilized. So
8 you have to design your sampling in order to
9 specifically address that question.

10 I know that at an earlier point they
11 were addressing whether or not there were PCB
12 vapors in homes, which of course could occur
13 through multiple pathways, because we know that
14 PCBs were found in the soil. There were PCB
15 drums buried in neighborhoods not far from the
16 river.

17 So we know that the mechanics of what
18 was going on with PCBs and soil contamination,
19 groundwater contamination and spillage was
20 different up in the immediate Pittsfield area
21 than down in the lower part of the river, so --
22 which requires that you do a different sampling

1 design. You have to look for those. And
2 sampling design might include not just sampling
3 in the air, but also in the soil. And during the
4 growing season, which we are in now, one would
5 also consider sampling leaves and foliage.

6 So the other point that I want to make
7 about the removal is that part of the removal
8 decision to cut back on how much is removed goes
9 to Massachusetts' claim that there are areas that
10 are so important habitats, which also happen to
11 have the highest concentrations of PCBs, by the
12 way -- that they're too important to disturb.
13 And I have submitted comments on that before to
14 EPA.

15 And I have two problems with that.
16 No. 1 is there's no documentation. Well, there's
17 a little bit of documentation. Massachusetts
18 submitted Appendix B to the permit. It consists
19 of a two-page letter most of which is description
20 of plants and habitats, two lists of species or
21 habitats, and four maps, Google photo maps.

22 I'm a scientist. I've been doing

1 this for more than 40 years and a proper
2 scientific submission, report, document,
3 anything, has so much more than that. It's just
4 a completely inadequate submission in order to
5 provide the technical basis for any decision. I
6 would never get away with that, ever. There's no
7 methods. There's no materials. There's no
8 description of what was done to determine. There
9 was no identifying information. There are no
10 references cited. There is -- there are no
11 components of a scientific document, of a
12 scientific report.

13 I've been on editorial boards for peer
14 reviewed journals. I've peer reviewed grant
15 proposals and reports for EPA, for USDA, for a
16 half a dozen scientific journals and I've never
17 seen anything that does not rise to the quality
18 the way this does. It's just -- there's nothing
19 there.

20 Subsequently I went to EPA Region 1
21 and I said is there something I'm missing? I
22 even submitted a FOIA request. And there was

1 nothing -- there was no reply because they said,
2 no, you've got what's there. It's -- there's
3 nothing there on which to base a decision.

4 In addition, they identify a series of
5 plants that are components of these habitats.
6 All but one of them are currently being cultured
7 within a short distance of the site, either in
8 Massachusetts or New York or Connecticut.
9 Anybody here in the room could go buy them from
10 the right nursery. In addition, for the one
11 plant that isn't being cultured because of its
12 legal status, there are two -- I don't remember,
13 I think they're heritage programs, that have
14 permits to collect the seeds and culture them.

15 GE had to go to local nurseries in New
16 York to get the plants cultured for their
17 restoration on the Hudson River, which they did.
18 The first time there were challenges, so they had
19 to go back for a do over. And they did. And
20 it's been working.

21 So I don't know what the technical
22 basis is that's on the record for identifying

1 core areas. There's nothing that the State of
2 Massachusetts has put in the record. I would be
3 thrown out of any proceeding and I would never
4 get a document submitted to a peer review journal
5 if I submitted something like that.

6 JUDGE WARD: So is your -- how does
7 your position go? Would you be advocating that
8 the permit required GE to remove any soil with
9 any measure of PCBs in it throughout the entire
10 system, or is there a limit to how much you'd ask
11 or call to be removed?

12 MR. DE FUR: No, I think that there's
13 -- I'm sure that there's a limit. There's a way
14 to parse this out, but part of it has to do with
15 making a sensible and accurate determination
16 about not only what concentrations are located
17 where, because probably at great depths it's the
18 lowest likelihood that it's going to be moved
19 away from where it is, but in this part of the
20 river every -- I'm sure the Court knows what a
21 meander is -- it's a meandering part. It will
22 continue to meander.

1 The heavy storms that we've had I
2 walked parts of that river, I've canoed other
3 parts of that river. It changes course. It has
4 changed course over the years that humans have
5 been there over the course of the years that
6 Europeans have been there documented by the
7 Massachusetts Audubon. It's going to change
8 course again when we get more storms. And
9 they're only going to get more severe.

10 So as the weather conditions and the
11 climatic conditions change, the course of the
12 river will change. It will mobilize PCBs through
13 erosion of contaminated settings. It's going to
14 move them. Now is the time to get them out of
15 there to the greatest extent possible.

16 JUDGE STEIN: We'll let you save the
17 rest for rebuttal.

18 MR. DE FUR: Thank you.

19 JUDGE STEIN: So one question I would
20 like you to address is how you respond to HRI's
21 argument that the remedy does not remove enough
22 PCBs to meet water quality standards in

1 Massachusetts.

2 MR. CONWAY: Okay. And thank you,
3 Your Honor. And I'll get to that. Could I first
4 -- one clarification from this morning? You
5 asked why TSCA was not listed as a ARAR for all
6 the alternatives in EPA's documents. It was
7 listed as an ARAR for the on-site landfilling
8 alternative.

9 JUDGE STEIN: I'm sorry. I'm having
10 trouble hearing you.

11 MR. CONWAY: You asked by TSCA was not
12 listed as an alternative, as an ARAR for all the
13 alternatives. And it was in GE's revised
14 Corrective Measure Study. It was listed as an
15 ARAR for on-site landfilling. Table T3C,
16 Appendix C. EPA did not duplicate that when we
17 were putting together our draft permit
18 modification.

19 JUDGE STEIN: Thank you.

20 MR. CONWAY: As for the extent of the
21 remedy, Your Honor, this is -- your point is very
22 important in that this is a -- EPA followed the

1 RCRA process step by step. EPA evaluated a large
2 amount of site-specific information in terms of
3 the extent of the remedy. We have put together a
4 tailored remedy consistent with the Board's
5 precedent and we've -- and the remedy is one that
6 balances the different aspects of monitoring the
7 natural recovery of the system in certain areas,
8 capping instead of excavation in certain areas
9 and excavation instead of capping or MNR in other
10 areas. It's a balanced remedy consistent with
11 some of the direction from the contaminated
12 sediments guidance from 2005.

13 But overall we -- the -- of the PCBs
14 that will not be excavated the record is clear
15 that they are -- the PCBs are going to be
16 addressed through one of the other mechanisms,
17 including a considerable amount of engineered
18 capping of the PCBs that are not being excavated.

19 JUDGE STEIN: So is HRI correct that
20 this remedy doesn't get you to Massachusetts
21 water quality standards, or are they incorrect in
22 that?

1 MR. CONWAY: The remedy gets us
2 towards Massachusetts water quality standards,
3 and I'm not sure of the exact date at which they
4 -- that it -- we're -- it envisions they would be
5 met, but it is -- removing the PCBs and isolating
6 them from movement downstream is a significant
7 step forward in terms of addressing water quality
8 risks.

9 And, Your Honor, we did an extensive
10 set of peer reviews of our modeling, three
11 modeling documents plus the human health and
12 ecological risk assessments, including virtually
13 of the Petitioners were able to present their
14 points of view to the independent peer review
15 panels. And the peer review panels, we followed
16 their guidance in terms of setting clean up goals
17 and then evaluating alternatives for clean up.

18 JUDGE STEIN: Did HRI have that
19 opportunity?

20 MR. CONWAY: Yes, they did.

21 JUDGE STEIN: And that's reflected in
22 the record?

1 MR. CONWAY: Yes, it is. Yes, HRI has
2 participated fully throughout the process.

3 The -- I would like to --

4 JUDGE WARD: Just to follow up on
5 that --

6 MR. CONWAY: Yes.

7 JUDGE WARD: -- I wasn't -- I'm not
8 sure I'm 100 percent clear on HRI's argument, and
9 perhaps it will be addressed on rebuttal, whether
10 the comment raised was we disagree with the
11 conclusions you're drawing from the ecological
12 and human health risk assessments, or whether the
13 disagreement is with the number crunching itself,
14 whether we -- whether the comment was we think
15 you're understating how much is left and what the
16 downstream effects are.

17 MR. CONWAY: The -- I'm not sure what
18 HRI was referring to, but as far as the -- the
19 agency is addressing nearly a million cubic yards
20 of PCBs in sediments and soils through excavation
21 and it's capping a large amount of the remaining
22 PCBs in the system. And we've chosen not

1 monitoring the natural recovery beyond that.

2 What we've done is pragmatically
3 tailored the remedy to accomplish protection of
4 human health and the environment, which is RCRA's
5 watch word, and at the same time we've taken into
6 account other things such as the protection of
7 the core areas of endangered species' habitat.

8 JUDGE WARD: And on that point I think
9 HRI's argument is that there's really not a whole
10 lot there in the record to support these
11 designations, the designation of the core areas.
12 What would you direct us to in the record that
13 identifies them as I'll call it more special
14 areas, areas that are deserving of greater
15 protection?

16 MR. CONWAY: I think the Massachusetts
17 Department of Fish and Game, the Natural Heritage
18 and Endangered Species Program, put together a
19 document that's attached to the final permit
20 modification that --

21 JUDGE WARD: This is the two-page
22 document?

1 MR. CONWAY: It's a document that
2 describes the core -- the different levels of
3 what they call core areas for additional
4 protection based on the presence of habitat for
5 threatened and endangered species.

6 JUDGE AVILA: But does the record
7 reflect how those areas came about to be
8 designated or -- I was just looking at it and it
9 describes four core areas, but how -- where in
10 the record is there evidence about how those core
11 areas were decided upon?

12 MR. CONWAY: I will look into that.

13 JUDGE WARD: I should remember this,
14 in the draft permit were core areas identified?
15 Was that part of what was proposed as well as
16 what --

17 MR. CONWAY: Yes.

18 JUDGE WARD: Okay.

19 MR. CONWAY: Yes, they --

20 JUDGE WARD: So was that two-page
21 attachment part of the draft permit modification?

22 MR. CONWAY: I believe it was. I

1 think it was an attachment.

2 JUDGE WARD: And did you receive any
3 comments from anybody calling that information as
4 insufficient for purposes of designation?

5 MR. CONWAY: Not that I know of. We
6 did not.

7 JUDGE WARD: Okay.

8 MR. CONWAY: The key point I wanted to
9 make was that we've followed the RCRA process
10 step by step with our site-specific review, and
11 our tailoring is the product of an almost
12 extraordinary level of public participation
13 through a year-and-a-half of discussions with
14 General Electric, a year's worth of discussions
15 with the two states, consistent long-term work
16 with the communities to hear their views
17 including the 2011 work shops and charette
18 leading up to the proposed remedy.

19 We have taken into account everybody's
20 concerns. We have a very large record that we've
21 reviewed in a lot of detail to come up with a
22 tailored approach that is protective and that

1 meets the three threshold criteria and in
2 consideration of the balancing criteria. It's a
3 very -- it's a balanced approach, but it's
4 consistent with the Board's precedent in terms of
5 looking at tailoring the solutions based on site-
6 specific conditions.

7 JUDGE AVILA: On that point, am I
8 right or wrong that the selected remedy only is
9 favored or ranked above HRI's preferred
10 alternative on three of the factors? Isn't that
11 right? Short-term impacts, implementability and
12 cost? And otherwise it's either a tie or it goes
13 to the --

14 MR. CONWAY: Yes, and it --

15 JUDGE AVILA: So just doing the
16 numbers it seems like the other alternative is
17 favored on more than the one that the region
18 selected.

19 MR. CONWAY: Yes, in that case we
20 looked at all the criteria and the -- our
21 analysis included the disparity in cost as it has
22 in the other parts of the remedy. And in this

1 instance the remedy evaluation included almost 10
2 different alternatives. And the one HRI proposes
3 is the most extensive and the most expensive.
4 The ones -- there are other remedies proposed
5 which have little or no clean up.

6 We looked at all of the factors and
7 arrived at one that doesn't agree with either GE
8 or HRI. It's somewhere in the middle. It's a
9 balanced approach. It's consistent with RCRA and
10 with the 2000 permit criteria.

11 JUDGE WARD: On the issue of
12 volatilization of PCBs is that -- what does the
13 record say in terms of whether once you've
14 removed a certain volume of sediment and then
15 capped it whether volatilization is still an
16 issue? Is there anything in the record on that
17 point?

18 MR. CONWAY: In Response to Comments
19 on page 339 -- on page 339 on the Response to
20 Comments we discussed volatilization, and we
21 mentioned it for the rest of river air
22 monitoring. We anticipate that GE will be

1 required to use engineering controls and best
2 management practices and to propose an air
3 monitoring plan with health-based action levels.
4 We feel that gets -- ensures the protectiveness.
5 And as that response also mentions, we have done
6 air monitoring at other aspects of the overall
7 site.

8 And monthly air monitoring indicated
9 between 2002 and 2006 no exceedances of the
10 action level with respect to a river clean up.
11 The mile-and-a-half river clean up was similar to
12 the work that would be done in the rest of river,
13 and it was done in those years 2002 to 2006. And
14 there were no exceedances of the action level and
15 only one sample that exceeded the notification
16 level.

17 JUDGE AVILA: Can you just clarify
18 when the Response to Comment says EPA anticipates
19 that GE will be required to use? What does --
20 are they required or not?

21 MR. CONWAY: They -- the -- those --
22 the specific remedial design documents have not

1 been submitted and approved and -- so we have not
2 made any formal requirements. We wanted to in
3 the Response to Comments point to the EPA view
4 that those things -- we anticipate that those
5 things would be required.

6 JUDGE WARD: Just to follow up on my
7 earlier question, I was focused on the ability of
8 the caps once in place to prevent the
9 volatilization. And you're pointing us to the
10 page 339 in the Response to Comments. And I'm
11 reading that section as -- it seems to me I would
12 read that at least initially as focused on
13 sampling while remediation is taking place, not
14 necessarily continuing for some period of time to
15 ensure that it's successful or that the PCBs are
16 contained in fact under the cap. So --

17 MR. CONWAY: No, that's -- yes.

18 JUDGE WARD: So is there anything else
19 in the record on that latter point?

20 MR. CONWAY: I don't know if there's
21 anything in the record on that point. It's
22 something that -- in terms of the design

1 deliverables submittals that we have in the final
2 permit modification it's one of the details that
3 would come up in there as far as what kind of air
4 monitoring would be needed and for how long.

5 JUDGE WARD: Or that the cap is
6 designed to keep them contained?

7 MR. CONWAY: It's definitely designed
8 to keep them contained, but as far as if there is
9 anything else needed to further ensure
10 protectiveness, that the -- it can be addressed
11 in those design documents.

12 And in terms of the extent of the
13 remedy, I've mentioned the process we've gone
14 through, the amount of information and the
15 extraordinary level of participation by the
16 parties here today, but in terms of reviewing
17 these we also have kept in mind paragraph 5 of
18 the consent decree, which claims that -- it
19 states the objectives of the parties to the
20 consent decree include remedies that are
21 protective of public health welfare and the
22 environment.

1 And RCRA 264.101, RCRA 3005C, that
2 RCRA remedies are to be protective of human
3 health and the environment. We have ensured that
4 every -- that the remedy here for sediment and
5 flood plain will be protective of human health
6 and the environment. Thank you.

7 JUDGE STEIN: Thank you.

8 JUDGE AVILA: Thank you.

9 JUDGE STEIN: Mr. De Fur, rebuttal?

10 MR. DE FUR: Thank you very much.

11 There's a point on which EPA and HRI do not have
12 any real substantive disagreement, and that has
13 to do with the risk assessments, both the human
14 health and the ecological risk assessment.

15 I was the principal reviewer for HRI
16 on both of them. It took a long time, a couple
17 thousand pages each. And the points that I
18 raised to the reviewers and to EPA are simply
19 valid points about the state of the art of both
20 risk assessments. There are simply things that
21 we do not yet know how to do. We didn't then and
22 some of them we don't know how to do now.

1 We're ineffective in our ability to
2 combine risks across different categories,
3 different chemicals, to get -- how do you combine
4 cancer and non-cancer things? How do you combine
5 things that are normally not found in the same
6 time at the same place? So those are problems
7 with risk assessment, and they're not any
8 fundamental issue that I raise.

9 But I do wish to point out that in
10 addition to the problem with the core areas being
11 identified without any documentation, EPA and HRI
12 have gone to the trouble of making sure to do
13 their research on what can be done to restore a
14 river. And the comments refer to a three-day
15 charette in which EPA brought in experts. And
16 EPA brought in excellent people about how you can
17 do these sort of things with little damage, how
18 you can restore.

19 And since that time companies across
20 the country have jumped at the chance to be able
21 to get involved with this, companies like --
22 there's one in North Carolina where a colleague

1 of mine now works, the company that is doing the
2 work on the Hudson River now puts that on their
3 front page about restorations. Solutions have
4 been -- were suggested at this charette by Keith
5 Bowers, Mike Palermo, Ed Garland, Mike Velu,
6 Susan Swersky -- all brought these in. She was
7 the project manager for Region 1.

8 So the notion that we don't know how
9 to restore a river is simply not true. And in
10 fact EPA did a great job on the first part of the
11 clean up. They got riverbanks restored, they got
12 vernal pools producing frogs and salamanders.
13 EPA oversaw that and made sure it happened right,
14 and it did. They know how to do it. So this is
15 not work that cannot be done. And there are lots
16 of people who would love to be doing it.

17 What we have to remember is that since
18 the 1930s when the PCBs were -- started to be
19 dumped into the river, released into the river, a
20 lot has accumulated. A lot has changed because
21 of those PCBs. There are no mink in the area
22 because of PCBs. Kingfisher populations. There

1 are several fish species that were identified in
2 independent scientific research by agencies that
3 have been affected. Amphibian species.

4 These need to be corrected. And it
5 takes removal of PCBs down to fairly low levels.
6 It's going to take time. As the citizens have
7 said, we've waited since the 1930s to get the
8 river cleaned up. We'd rather have it done right
9 if it takes a little bit longer than to get to
10 the end of the process and it's not done right
11 and it's going to cost more money to do it wrong
12 and it's going to take more time. They'll be
13 monitoring it forever if we don't get it right
14 now. Thank you very much.

15 JUDGE STEIN: Thank you.

16 Okay. Let's now move to the second
17 part of the third issue, which is arguments by
18 Petitioners General Electric and Mr. C. Jeffrey
19 Cook that the clean-up portion of the remedy is
20 too extensive. We'll hear first from General
21 Electric for 20 minutes followed by Mr. Cook for
22 10 minutes, Region 1 for 16 minutes, the

1 Commonwealth of Massachusetts for 7 minutes, and
2 the State of Connecticut for 7 minutes.

3 MR. NATHANSON: Thank you, Your Honor.
4 I'd like to reserve four minutes for rebuttal on
5 this.

6 JUDGE STEIN: Did you catch that,
7 Eurika?

8 MS. DURR: (Off microphone.)

9 MR. NATHANSON: Four.

10 JUDGE AVILA: Four minutes.

11 MR. NATHANSON: Ready? Thanks. I'd
12 like to talk first about a couple of aspects of
13 the consent -- I'm sorry, the modified permit,
14 which is too extensive in that the region has
15 given itself authorities that exceed its power
16 under the consent agree. I'm talking about the
17 downstream biota performance standards first and
18 then about these so-called future work
19 provisions. The arguments are very similar. Let
20 me start with the downstream biota performance
21 standards.

22 These performance standards have three

1 notable characteristics. They're numerical.
2 Downstream transport is measured in levels of PCB
3 flux over the dams. The biota performance
4 standard is measured by PCB concentrations in
5 fish.

6 The second characteristic is GE is
7 opposed to achieve them by conducting all of the
8 corrective measures set forth in the modified
9 permit.

10 And finally, the modified permit makes
11 provision for exceedances of both performance
12 standards. This is something that would happen
13 in the future after construction-related
14 activities on all of the corrective measures have
15 been completed. And exceedance occurs under the
16 downstream transport standard if the numerical
17 benchmarks for PCB flux aren't achieved in any
18 three years, in any five-year period and the
19 biota standards are exceeded if the numerical
20 benchmarks aren't achieved within 15 years of
21 completion of construction-related activities.
22 So we're talking about something that's going to

1 which is not just to state the performance
2 standards, but to identify the corrective
3 measures necessary to achieve those performance
4 standards.

5 And it would have the second advantage
6 of enabling you and the First Circuit to
7 determine whether that additional work is
8 appropriate and called for under the nine permit
9 criteria.

10 JUDGE STEIN: So what under the CD
11 constrains the region's ability to call for
12 future work? What would you point us to look at?

13 MR. NATHANSON: Okay. So I mean,
14 first of all there is Condition 2J of the 2000
15 permit, which does say that the modified permit
16 has to contain the -- has to state the
17 appropriate corrective measures necessary to meet
18 the performance standards. So saying any
19 additional work that we think you should do in
20 the future would be roughly analogous to a
21 modified permit that said, well, we want you to
22 remediate. Here are the performance standards

1 happen well into the future.

2 JUDGE AVILA: So what's the remedy
3 that you're looking for? I mean, doesn't that
4 suggest more removal of PCBs now?

5 MR. NATHANSON: Right.

6 JUDGE AVILA: I mean, just --

7 MR. NATHANSON: They might.

8 JUDGE AVILA: -- that's specified up
9 front?

10 MR. NATHANSON: Well, it might. I
11 mean, if you disallow the assertion of authority
12 in these provisions, then EPA would have two
13 choices: It could live with the provisions that
14 exist in the consent decree that enable it to
15 order or seek to order additional work in the
16 future, but those are limited and not as broad as
17 these exceedance provisions would give it the
18 power to do, or it could go back and decide what
19 additional work it thinks it needs to do now in
20 order to ensure that these exceedances don't
21 occur. That will have the advantage of requiring
22 EPA to do what the 2000 permit requires it to do,

1 and we want you to remediate. They're un-
2 judgable under the nine permit criteria. So
3 there's that. That's part 1.

4 Part 2 is -- I don't know which was to
5 go first. Let's start with the reopener
6 conditions. No, let's start with paragraph
7 39(a). Okay. Because that's what EPA has relied
8 on to a great extent. Paragraph 39(a) says that
9 the region can require a modification to the work
10 already specified in the Statement of Work or the
11 work plans that are promulgated thereunder. It
12 can do that merely in order to achieve the
13 performance standards, but it can modify the SOW
14 only to the extent that the modification is
15 consistent with the scope of the existing
16 apparently inadequate response action. Okay?

17 So what EPA has given itself the power
18 to do now exceeds the scope of that authority
19 because, let's say for example, right now -- and
20 this is a hypothetical example, but right now the
21 modified permit says do excavation on the
22 riverbanks at intermittent points along the

1 riverbanks to a fairly shallow depth.
 2 And then 15 years go by and an
 3 exceedance occurs and EPA comes back and says,
 4 you know what, we were wrong. Go all the way
 5 back up the riverbank. Excavate everything and
 6 excavate to it a considerable depth. That would
 7 not be permissible under 39(a) because it would
 8 not be consistent with the scope of the response
 9 action for which a modification is required. So
 10 they're constrained on one end that way.

11 Now on the other end there -- I'm
 12 sorry.

13 JUDGE WARD: I was going to say could
 14 I jump in because I --

15 (Simultaneous speaking.)

16 MR. NATHANSON: No, please, go ahead.

17 JUDGE WARD: So trying to understand
 18 exactly how the permit works both now and then
 19 into the future, there will be a Statement of
 20 Work prepared, or maybe multiple statements of
 21 work, but in terms of soil removals you'll come
 22 up with a plan that is intended to implement the

1 terms of the permit in terms of achieving a
 2 particular concentration level in the soil. And
 3 all of that I think is predicated on -- it has to
 4 be a prediction that that work to that level will
 5 achieve the necessary performance standards.

6 It seems to me it's not that strange,
 7 either under RCRA or under maybe a plain reading
 8 of paragraph 39, that should you submit that
 9 Statement of Work to do -- remove a certain
 10 amount of soil to meet the permit terms -- it's
 11 approved by EPA. You implement the work and it
 12 turns out that doesn't achieve, as had been
 13 predicted, the necessary downstream performance
 14 standards.

15 They're asking you to come back. And
 16 isn't that in a sense what's envisioned by
 17 paragraph 39? And I would say also paragraph 40
 18 of the consent decree, which states that nothing
 19 in the -- the consent decree constitutes a
 20 warranty, a representation of any kind that
 21 compliance with the work requirements set in a
 22 Statement of Work will meet the -- will achieve

1 the performance standards.

2 So I think there's almost envisioned
 3 in the consent decree itself that will set forth
 4 requirements that have to be met, an action plan
 5 that has to be submitted for approval. It may --
 6 with the design or the intent to meet those
 7 performance standards, but it may not. And if it
 8 doesn't, you have to go back and do additional
 9 work in order to meet the performance standards.

10 MR. NATHANSON: I agree with you
 11 completely when you said that there's all this
 12 division in the consent decree. The consent
 13 decree I think reflects a very careful division
 14 of what EPA can and cannot do under which
 15 circumstances.

16 And so for example with paragraph
 17 39(a), yes, if the performance standards aren't
 18 being met by the work that's being done under the
 19 Statement of Work, then 39(a) allows EPA to come
 20 back and say do something different. Modify.

21 JUDGE WARD: Or more.

22 MR. NATHANSON: What it doesn't allow

1 it to do is tell GE to do anything that exceeds
 2 the scope of the response action for which the
 3 modification is required, which of course
 4 logically would include not allowing EPA to tell
 5 GE to perform an entirely new response action.

6 And that proviso was important. I
 7 mean, it's a negotiated term and it's in there.
 8 That's as far as --

9 JUDGE WARD: But where is that line?
 10 It's hard for me -- can you give me an example of
 11 what would fall on the okay side of the line and
 12 what would be something that would fall -- would
 13 go past the line, cross the line in your mind?

14 MR. NATHANSON: Well, I mean, the
 15 example of something that would cross the line is
 16 the example that I just gave Judge Avila, that if
 17 EPA said, okay, we've looked at this stretch of
 18 riverbank and we think it's enough for you to do
 19 a little bit here and a little bit here, and then
 20 it came back 15 years later and said, no, pull
 21 the whole thing out and start all over again and
 22 -- that would exceed the scope of the response

1 action. I think that would be very clear that it
2 would exceed the scope of the response action.

3 Something that might be on the right
4 side of the line would be if some construction
5 technique were being used for capping or
6 something like that and EPA came back and said
7 you know what, we don't think that particular
8 construction technique is going to be okay, so do
9 the same job, but do it somewhat differently.
10 That's a modification to the work specified.

11 But it's -- the problem with the
12 exceedance provision is that it gives EPA the
13 ability to order any additional work simply to
14 achieve the performance standards without meeting
15 any other conditions. And that brings in -- I'd
16 like to bring up the reopeners, because that's
17 how it got divided up here. And then I do want
18 to talk about paragraph 40 as well. But let me
19 bring the reopeners in first.

20 The reopeners cover the situation
21 where EPA says, you know what, we think we need
22 further response actions. Okay? The big change.

1 But it's very carefully limited. Certain
2 conditions have to be made before the reopeners
3 can be invoked. For one thing the change has to
4 be based on the discovery of new information or
5 of previously unknown conditions.

6 Secondly, the work needs to be done
7 not simply because there's a numerical exceedance
8 or a failure to meet a performance standard, but
9 because there's a threat to human health or the
10 environment.

11 And then finally, procedurally while
12 paragraph 39(a) would simply require a
13 modification to the Statement of Work, requiring
14 GE to do -- perform further response actions,
15 then the reopeners would actually require a new
16 proceeding, whether in this lawsuit, in a new
17 lawsuit or through an administrative consent
18 order.

19 And so what this exceedance provision
20 does is it actually kind of -- it aligns those
21 distinctions, those divisions that you talked
22 about and enables EPA to get what it's entitled

1 to under the reopeners without actually have to
2 go through what the reopeners require. And so it
3 effectively nullifies the reopeners. It doesn't
4 nullify paragraph 39(a) because I'm sure that
5 there are any number of situations where the
6 Statement of Work says build a fence five feet
7 high and they come back and say build the fence
8 four feet high, or six feet high. And that's
9 what 39(a) is for. That's -- but if you want
10 something bigger than that, then you've got to go
11 to the reopeners.

12 And I did want to talk about paragraph
13 40, and I know that paragraph 44 and 46 have also
14 been thrown out there. Paragraph 40 just says
15 that nothing in here constitutes a warranty that
16 compliance with the work requirements will
17 actually achieve the performance standards. And
18 paragraph 44 actually says that EPA can determine
19 at any time -- if it determines at any time that
20 any of the response actions are not protective of
21 human health and the environment, it can select
22 further response actions for the site in

1 accordance with the requirements of CERCLA and
2 the NCP, because I suppose that's because it has
3 already been implemented.

4 So, yes, there's no warranty that the
5 work done by GE will achieve the performance
6 standards, and EPA can select further response
7 actions down the road, but here's what's missing
8 from the argument is paragraph 46, which says if
9 EPA selects further response actions for the site
10 pursuant to this section, settling defendant
11 shall undertake or fund such further response
12 actions to the extent that the reopener
13 conditions in paragraph 162 or paragraph 163 are
14 satisfied. It is a very neat division of
15 authority and protection. And the problem with
16 these exceedance provisions is that they cross
17 those lines.

18 JUDGE AVILA: But doesn't the
19 downstream and biota future work provisions -- I
20 thought they both said in the event you don't
21 meet the performance standards, you can -- you
22 will have to evaluate new things, and then EPA,

1 upon a reasonable opportunity for review and
2 comment by the states, will determine any
3 additional actions necessary to achieve and
4 maintain the performance standard in accordance
5 with the CD. So --

6 MR. NATHANSON: Yes, it does.

7 JUDGE AVILA: -- why isn't the -- you
8 know, why isn't the issue, especially in the
9 colloquy you had with Judge Ward trying to figure
10 out what the scope of the remedial action is, if
11 in the future you're ordered to do something, why
12 can't you go to district court and say that's in
13 violation of Paragraph 39 because what they're
14 ordering us to do is not within the scope of the
15 remedial action, and instead, they need to reopen
16 --

17 MR. NATHANSON: Well, there are --
18 there is a provision for a different kind of
19 administrative and judicial review down the line.
20 There -- there are a couple of problems with
21 that. One is that is not what we bargained for.
22 We bargained for review by the EAB and the First

1 Circuit, not by the regional administrator and
2 the district court.

3 But it's not just a matter of strict
4 contract construction. What we're doing right
5 now -- I mean, you hit on this, that, you know,
6 the remedy might -- the relief might be that EPA
7 has to go back, figure out what more work it
8 wants GE to do, and that -- and that would have
9 to be evaluated under the -- under the selection
10 criteria, under the permit criteria.

11 What -- what we are going through
12 right now, what we're in the middle of right now,
13 is I suppose you would call holistic review of a
14 holistic remedy, and the relief that's available
15 at this point would be for you to go -- send this
16 -- send everything back to EPA and say you need
17 to work this out holistically. And EPA could
18 say, well, okay, can we justify additional work
19 under -- under the permit criteria? Will it be
20 effective? Are there going to be problems with
21 ARARs? Will it be cost-effective? And then that
22 can get reviewed again.

1 And I would point out that the consent
2 decree does anticipate that your review and the
3 First Circuit's review may be an iterative
4 process. There are provisions that provide for
5 -- that provide for a second and even a third or
6 I don't know how many more stages of review. But
7 that's what we can get now. If we wait 15 years
8 and all we have is this, this one thing that EPA
9 now says is necessary to achieve the performance
10 standards, and we go to the district court, all
11 you can do is give a thumbs up or a thumbs down
12 on that, and that is not the kind of review that
13 the consent decree envisions.

14 I also would suggest that that might
15 not be -- that would be a dangerous kind of
16 review for both parties because I could see
17 pressures on the district court saying, well,
18 this is my only choice. If I say thumbs down,
19 it's not going to happen, and that -- that would
20 be bad for GE because we would be -- be forced to
21 do that. Or the district court could say, well,
22 you know, the contract said what the contract

1 said, and then EPA has no opportunity to go back
2 and work this out again. And I do see that my
3 time is up.

4 JUDGE WARD: Just let me ask one other
5 question. I think, you know, to the extent it
6 were crystal clear, conflict, that might present
7 an issue we could decide. I am not saying we
8 would, but what our earlier discussions suggest
9 is that where the line is between what would be
10 permissible additional work and what would not be
11 permissible additional work isn't -- didn't
12 strike me as terribly bright. And so for us to
13 issue a decision that says it can only go so far
14 and no farther in the abstract might not be the
15 best course either.

16 MR. NATHANSON: Well, but all we would
17 ask --

18 (Simultaneous speaking.)

19 MR. NATHANSON: I am sorry, go ahead.
20 I apologize.

21 JUDGE WARD: Go ahead.

22 MR. NATHANSON: All I -- all we would

1 be asking you to do is to clarify that EPA can't
 2 order any additional work, the language that it
 3 has used, that that goes too far. And at that
 4 point, I mean, if this wasn't in here, you would
 5 have the same issue. I mean, someday down the
 6 line, EPA comes back and says do this, and GE
 7 says that's -- that is beyond the scope. And you
 8 -- and you would have those kinds of disputes,
 9 and those disputes could get worked out under the
 10 consent decree. But what we have here, if you
 11 pass on this, is you are giving pre-approval to
 12 EPA saying do this and there is no recourse.

13 JUDGE STEIN: I want to switch topics
 14 on you if --

15 MR. NATHANSON: Sure.

16 JUDGE STEIN: -- you're -- if we have
 17 exhausted this and talk a little bit about Rising
 18 Pond.

19 MR. NATHANSON: Rising Pond, sure.

20 JUDGE STEIN: So the record indicates
 21 that Rising Pond Dam was built in the 1800s. Why
 22 isn't it reasonable for the Region to take into

1 account that the dam may fail? I mean, there is
 2 -- you know, in 2017, the Oroville Dam in
 3 California due to record rain. In 2015, we had
 4 18 dams breached in South Carolina in wake of
 5 huge storms drawing strength from Hurricane
 6 Joaquin. Obviously, in 2015, the Gold King Mine
 7 impoundment failed due to human error. So why
 8 shouldn't the Region be able to take into account
 9 the failure of this relatively old dam?

10 MR. NATHANSON: It's not that the
 11 Region can't take into account the possibility
 12 that any dam would fail, whether it is Rising
 13 Pond or Wood's Pond. And certainly the age of
 14 Rising Pond as opposed to say Wood's Pond might
 15 have something to do with it.

16 The problem here, and it is true with
 17 respect to both Rising Pond and Wood's Pond -- I
 18 think the logic of the argument is basically the
 19 same, although the specifics might vary a little
 20 bit -- is that the Agency has acknowledged that
 21 -- that the lesser remedy that GE has proposed
 22 will do the job for the time being, within

1 foreseeable time parameters, but it has insisted
 2 on spending a lot more money -- and again, we are
 3 talking about a lot more money -- with Rising
 4 Pond I think it's in the order of \$10 million
 5 extra dollars, and Wood's Pond, it's \$80-130
 6 million, so it is a considerable amount of money
 7 -- and yes, as the Region says, there is no
 8 guarantee that any dam won't fail.

9 But what we don't have is a record
 10 that quantifies or qualifies three things: one is
 11 the likelihood that the dam actually will fail.
 12 What we have is a statement that there's no
 13 guarantees, and one of the dams is old. The
 14 second is that we have no quantification of what
 15 the consequences of a dam failure might be. I
 16 mean, yes, you can say dam failures aren't good
 17 things, but again, we have no quantification of
 18 that.

19 And the third thing we don't have, and
 20 I think this is the most important point, is we
 21 have no modeling, no quantification of how --
 22 what kind of mitigating effect this more

1 expensive, more expensive remedy will have on --
 2 in the event that these consequences, which we
 3 don't know exactly what they are, come to pass,
 4 and we don't exactly know how likely they will
 5 be. And so you've got a layer of uncertainty on
 6 top of a layer of uncertainty on top of a layer
 7 of uncertainty that is being used to justify a
 8 much more expensive remedy.

9 JUDGE WARD: Just a follow-up
 10 question: I see in GE's briefings addressing the
 11 issue, I guess it was -- was it the 1992 incident
 12 is reflected in the Region's response to
 13 comments, but I didn't -- and on the issue of the
 14 risk of dam breach or failure, I didn't see a
 15 detailed response or addressing the rest of that
 16 response to comment. It continues past the 1992
 17 breach. Did you address that? Is it your view
 18 you --

19 MR. NATHANSON: I --

20 JUDGE WARD: -- addressed --

21 MR. NATHANSON: -- I --

22 JUDGE WARD: -- that --

1 MR. NATHANSON: -- I don't know. I
2 don't know --
3 JUDGE WARD: Okay.
4 MR. NATHANSON: -- the answer to that.
5 I am sorry.
6 JUDGE WARD: Okay.
7 JUDGE STEIN: I guess I -- I am
8 struggling a little bit with the notion that this
9 is as hypothetical as you make it out to be. The
10 -- the dam is over 200 years old. This is not a
11 dam that was built in the last 20, 30 years with
12 modern technology.
13 MR. NATHANSON: Yes.
14 JUDGE STEIN: We have -- I guess I
15 fail to see that this is such a hypothetical,
16 remote possibility that it isn't reasonable to
17 take that into account.
18 MR. NATHANSON: Well, it is also a dam
19 that GE has an obligation to maintain, and that
20 GE exposes itself to damages in the event that
21 there is a failure, so old dam, new owner, so
22 those are the kinds of things that I think need

1 to be balanced.
2 But again, while I suppose it is -- it
3 is reasonable to conclude, say, that the Rising
4 Pond Dam is more exposed to the risk of a failure
5 than the Wood's Pond dam given -- simply by
6 virtue of age, we still don't have those other
7 data points that would justify requiring a more
8 extensive remedy at a significantly greater
9 expense.
10 JUDGE STEIN: You also claim that a
11 no-dig cap won't change the flood storage
12 capacity of the pond, but if I understand it
13 correctly, the GE study on this assumed there
14 would be a six-inch cap, even though the cap
15 thickness hasn't been chosen. As I read the
16 response to comments, it identified some
17 significant issues with a six-inch cap. So can
18 you explain how your approach is equally
19 protective?
20 MR. NATHANSON: No, I can't.
21 JUDGE WARD: Can I switch topics to --
22 MR. NATHANSON: Sure.

1 JUDGE WARD: -- the issue of
2 restoration?
3 MR. NATHANSON: Sure.
4 JUDGE WARD: And I think that there's
5 a fair amount of discussion on that point, both
6 in the response to comments and then in the --
7 the briefing here. But the one thing that struck
8 me was the successive restoration at -- at this
9 same site in terms of earlier remedial work at
10 the half-mile reach. Why isn't that a -- again,
11 if our standard review is clear error --
12 MR. NATHANSON: Yes.
13 JUDGE WARD: -- on this kind of an
14 issue, what is clear error in the Agency's
15 relying on the success of the work upstream to
16 support -- or as a rationale for proceeding with
17 restoration to the degree it has here?
18 MR. NATHANSON: The -- the error in
19 that is that -- is that it is really functionally
20 no different than -- than the Region relying on
21 the success of restoration at other places
22 because there are different characteristics

1 upriver and downriver. We are talking about a
2 much more -- where the restoration has been done,
3 we are talking about a much more urban
4 environment. We don't have all the unique river
5 marine characteristics that we're talking about
6 on the rest of the river. So in terms of it
7 being comparable, it is really not any better
8 than anywhere else.
9 JUDGE WARD: So if I could just jump
10 in there --
11 MR. NATHANSON: Sure.
12 JUDGE WARD: -- in terms of, you know,
13 what in your comments or other comments that were
14 filed would suggest those distinctions make a
15 difference in terms of the success of
16 restoration? Is there something in the record
17 you could point us to?
18 MR. NATHANSON: I would have to say
19 that the problem is that -- that what we -- what
20 we lack is a record pointing to the likelihood of
21 success in this environment. I mean, we are not
22 attacking restoration. It is not a facial attack

1 on restoration. We understand restoration can
2 work, and it has worked elsewhere. But what we
3 don't have here -- I mean, if you look at the --
4 the provisions, the restoration provisions in the
5 modified permit, what we are talking about is
6 starting to do the sort of evaluative work that
7 would enable the parties to understand whether
8 restoration -- not only whether it will work, but
9 whether it will be compatible with the nine
10 permit criteria.

11 So they are talking about now we're
12 going to start doing a baseline restoration
13 assessment, and then we're going to develop
14 performance objectives and evaluation criteria,
15 and then we're going to come up with a
16 coordination plan, and then finally we're going
17 to do a restoration plan. This is a big element
18 of -- of this remedy. I mean, I can go back to
19 2011, when the Commonwealth was pointing out just
20 how intrusive this remedy was going to be and
21 expressing a great deal of skepticism about the
22 ability of restoration to -- to mitigate or

1 mollify those effects, and while the Commonwealth
2 may have changed its mind, I don't think the
3 remedy has gotten any less intrusive.

4 And so this is -- this is a big part
5 of it. If the remedy is actually going to make
6 sense, again, holistically, then restoration has
7 to work. And yet we don't know what restoration
8 is going to be. And so we can't even have begun
9 to do the kind of assessment with respect to
10 restoration that we have done with respect to the
11 excavation. What are the ARARs? What is the
12 cost? What is the long-term effectiveness? What
13 are the short-term effects? We're not even
14 getting -- we're not there yet. We are still
15 talking about getting there.

16 JUDGE WARD: Do we want to switch
17 topics to the -- just the maze of requirements?
18 I think you didn't address -- you didn't follow
19 up in your reply brief.

20 MR. NATHANSON: No, we didn't.

21 JUDGE WARD: Was -- was the Region's
22 response on that point, did that address the

1 concern that you raised? And if not, why not?

2 MR. NATHANSON: No. The reply brief
3 was too short.

4 JUDGE WARD: You ran out of --

5 MR. NATHANSON: Something --

6 JUDGE WARD: -- words.

7 MR. NATHANSON: -- something had to go
8 -- something had to go on the cutting room floor.

9 JUDGE WARD: So if you could address
10 that issue just very briefly?

11 MR. NATHANSON: Yes, sure. I -- as I
12 understand it, the -- the -- part of the plan
13 here is to avoid impacts to listed species and
14 their habitats, and then the modified permit
15 makes provision that if unavoidable impacts
16 result in a take of a state-listed species, then
17 EPA will invoke this visa regulation as an ARAR,
18 and it will require compliance with it, and what
19 it requires is conservation and management plan
20 providing for a net benefit.

21 The problem with that is that the
22 regulation itself only applies -- and so this --

1 this net benefit alternative can be employed --
2 only under three conditions. One of the
3 conditions is that only an insignificant take has
4 occurred. Only an insignificant portion of the
5 local population would be impacted. And GE has
6 shown -- it is in our comments, or maybe it's in
7 the corrective measures study, but I remember
8 seeing the chart -- oh, there is the chart, it is
9 Table 12 to something -- that there would be at
10 least nine significant takes. And so you can't --
11 -- you can't use that net benefit out alternative
12 in the case of -- of a significant take.

13 JUDGE WARD: And so how would you --
14 what would you have asked, or what would you ask
15 the Region to do in the permit --

16 MR. NATHANSON: They could --

17 JUDGE WARD: -- to change that?

18 MR. NATHANSON: They could waive the
19 ARAR.

20 JUDGE WARD: You would have asked for
21 -- did you ask for that in your comments?

22 MR. NATHANSON: I don't know. I don't

1 know.

2 JUDGE WARD: Okay.

3 MR. NATHANSON: We did, yes, we did.

4 JUDGE WARD: You did. Did

5 Massachusetts though -- I think they argue at

6 least in this case that you can use the net

7 benefit feature where there is a significant

8 impact. If that is -- if that is true, if that

9 were correct, would that satisfy your concern?

10 MR. NATHANSON: No, because -- because

11 Massachusetts would be wrong. I mean, this isn't

12 -- you know, you can defer to a state agency's

13 interpretation of its own regulations only so

14 far, and if the regulation says this only works

15 for an insignificant take, then it only works for

16 an insignificant take. At that point, the Region

17 would not be waiving the ARAR. It would be

18 rewriting the ARAR, and that is not appropriate.

19 JUDGE WARD: I guess one other -- I

20 think the other argument you raised was that this

21 conflicted with the natural resource damages

22 provisions of the consent decree. Another way to

1 look at it -- look at it is that those releases

2 really relate to the damages associated with the

3 original contamination, and I think what is at

4 issue here is the impacts -- something different,

5 arguably -- the impacts from your remedial work.

6 And so, putting -- let's assume that MESA allows

7 for this net benefit approach, even for

8 significant impacts: isn't that -- isn't that

9 allowed? Doesn't the NRDA -- the natural

10 resource damage releases don't really apply to

11 that activity?

12 MR. NATHANSON: I am going to turn

13 around and ask a question: is that true?

14 (No audible response.)

15 JUDGE WARD: Okay. You can address

16 that on rebuttal then.

17 MR. NATHANSON: Okay. Anything else?

18 JUDGE STEIN: No.

19 MR. NATHANSON: Thank you.

20 JUDGE STEIN: I think that you have

21 answered all of our questions at this point, and

22 I would like to now turn to Mr. C. Jeffrey Cook

1 for ten minutes.

2 (Pause.)

3 MR. COOK: Good afternoon, Your

4 Honors. I should start with a very brief

5 preliminary statement.

6 I have been practicing law over 50

7 years, and I have never done litigation, and I

8 have never had the privilege of appearing before

9 an appellate court, so I'm a little excited. But

10 I hope that you will be gentle with me to the

11 extent that I don't have 124-19 straight or any

12 of that.

13 I come to you as somebody who was

14 there at the beginning. I was part of a

15 community group that helped negotiate the consent

16 decree, and from there, I participated in

17 something called the Concerned Citizen Council,

18 which is in this discussion group, dominated by

19 HRI and other environmental organizations, and we

20 have been talking about this for a long time, and

21 there have been harangues and all kinds of stuff

22 that has gone on.

1 And I think you will find, if you ask

2 Dean Tagliaferro and Tim Conway and Bryan Olson

3 that I have been the person who has most often

4 stood up for your Agency in that process. I am a

5 little sorry to say that where I find myself

6 right now is with some real disappointment about

7 the subset of people who live in this area of

8 critical environmental concern -- I will defer

9 to other counsel about how that is described --

10 and what this cleanup means to us.

11 I happen to love the Housatonic River.

12 I have kayaked through it up and down every place

13 that is going to be affected by this. For those

14 who have not done it, it is easy to miss what an

15 unbelievable undertaking this is, and I just want

16 to read something to you that is -- this is a

17 January 31, 2011 letter from the Executive Office

18 of Energy and Environmental Affairs in

19 Massachusetts.

20 "After extensive review of the

21 remedial alternatives presented to date, the

22 Commonwealth has concluded that none of the

1 current combinations of alternatives achieve the
2 remediation goals without causing irreparable
3 harm to this unique, diverse, and vital ecosystem
4 that has been designated by the Commonwealth as
5 an area of critical environmental concern."

6 This letter is attached to my
7 comments. I ask you to please look at this
8 letter, the ten-page attachment and then the 31-
9 page report after that attachment entitled "Rare
10 Species and Natural Community Surveys in the
11 Housatonic River Watershed" that was prepared
12 through the National Heritage and Endangered
13 Species Program. And then I would ask you to
14 look back at the record today and read Mr. de
15 Fur's statements about how the Commonwealth has
16 approached these kinds of questions.

17 And I will tell you that I live among
18 a number of privileged neighbors very close to
19 Core Area 1. It is the area determined by the
20 State, and please take a look at how the State
21 documents this. It is the area that has the
22 highest concentration of priority habitats. It

1 sits on both sides of the river. So when this
2 river gets excavated, dredged, the banks taken
3 apart and rebuilt, the equipment to do that all
4 are going to be in this priority Core 1 habitat,
5 and that is what those of us who live along this
6 gorgeous river, that is what we see. That is
7 what we know.

8 And the idea that what has happened in
9 a channelized river in the City of Pittsfield
10 with nothing like these priority habitats is an
11 example of the capability to restore this river
12 is, if you take a look at the documents, it is
13 foolish. It is honestly foolish. So I ask you
14 to please look at the statements today. Look at
15 this letter and the attachments, and I would ask
16 Tim Conway to, when he responds to what I have to
17 say, that he talk a little bit about the
18 experience that we have had with the river with
19 verbal pools that has also been represented to
20 you today.

21 One of the things that has troubled us
22 in the -- the folks living in this area, in this

1 ACEC, is that the plans that have been presented,
2 first round we had these black rectangles on the
3 plans which showed staging areas. That's where
4 the equipment is kept. That's where the material
5 that comes from the river is dewatered, loaded
6 onto the vehicles. That is where the replacement
7 material is going to be, and there are access
8 roads shown to the areas of the river through the
9 floodplains, and -- and all of the people who I
10 live next to became very, very upset at looking
11 at that. Next round we are told that the
12 consideration of those factors, that is post-
13 permit, that is remedy stuff.

14 So where we stand today is that people
15 living in an area which is going to have 10,000
16 truckloads of material moved in and out a year --
17 just do the math -- and have significant doubt
18 that these -- these very sensitive environmental
19 areas, and the documentation is there in the
20 record, will be destroyed and not restored. We
21 have not been involved in this process now, and I
22 expressed to my friends at EPA that I really feel

1 that this is cynical and it is unfair.

2 You know the topography of the river.
3 You know the topography of the floodplains. You
4 know where the open fields are. Please know that
5 we have two residential neighborhoods with two
6 main roads that serve these residential
7 neighborhoods on both sides of this river, Reach
8 5A. And so there are many people --
9 approximately 400 families -- that are right
10 there in ground zero, but they have not had the
11 opportunity to see anything like what the impact
12 of this cleanup is going to be. No opportunity.

13 So here we are today, and you are
14 considering this appeal, and we have no idea what
15 is going to happen. Yet the topography isn't
16 going to change much. The priority habitats are
17 there. The river is where it is. Open fields
18 are where they are. And so we have a
19 neighborhood that has not been -- neighborhoods,
20 it is both Pittsfield and Lenox -- that really
21 have not been well-served by this agency that I
22 have so much respect for.

1 JUDGE WARD: Mr. Cook, if I could ask
2 a question?
3 MR. COOK: Yes.
4 JUDGE WARD: Is it your position that
5 there should be no soil removal or sediment
6 removal?
7 MR. COOK: That is not my position at
8 all.
9 JUDGE WARD: Okay. So would you --
10 because I think that at least in reading the
11 record here, there were some options considered
12 for much less soil removal, and even those didn't
13 sufficiently protect human health and the
14 environment, at least from the Agency's
15 assessment.
16 MR. COOK: Yes. I am not sure I --
17 JUDGE WARD: Would you oppose --
18 you're not opposing any soil -- soil or sediment
19 --
20 MR. COOK: I am --
21 JUDGE WARD: -- removal?
22 MR. COOK: -- I am -- I am opposed --

1 not opposing a -- a cleanup. I think Wood's Pond
2 has to be addressed. There are spots that have
3 to be addressed. But the naive idea that you can
4 have in -- dredge this river and have equipment
5 right next door to it that you're dredging and
6 you don't destroy the floodplain and the habitats
7 where that is, that whole notion has got to be
8 looked at, and the people who live in this area
9 should have the benefit, before this goes
10 forward, that we know what this is going to look
11 like. Right now, most people have no idea. And
12 so that is the part of this that is very
13 troublesome.
14 I want to make one other comment
15 because I think that the credibility of this
16 process is very important. The Housatonic River
17 Initiative disbursed about a quarter of a million
18 dollars to Mr. de Fur and others to do scientific
19 studies. Peter Carpenter is one of those guys,
20 the head of the group who got paid \$40,000 over
21 this period of time to coordinate this stuff.
22 I read everything. So Peter Carpenter

1 has a study, peer-reviewed, they say, that says
2 PCBs increase high blood pressure. In fact, it's
3 a cause. I read the report, and it says no, it
4 says they are just associated with, but nobody
5 can say that it causes it. And so a presentation
6 is made in Lenox, Massachusetts, and that man,
7 supported by this process, says it's caused by
8 that. So the things like -- the comments made
9 with regard to how the Commonwealth has looked at
10 these very important habitats and how they have
11 been identified, I urge you to please read what
12 the Commonwealth has done, which is very
13 workmanlike. I wish they had stuck to their guns
14 with the position that I read to you because I
15 think it really is where the focus needs to be in
16 certain very sensitive areas.
17 JUDGE WARD: And just if I could just
18 follow up in clarification: so is your primary
19 concern an objection that either the permit is
20 silent or they haven't yet addressed whether they
21 will or will not have equipment, say in the Core
22 Area 1 or vernal pools or other sensitive areas?

1 MR. COOK: The primary concern is the
2 destruction of the floodplains, and that is --
3 Core Area 1 is one of the floodplains.
4 JUDGE WARD: Yes.
5 MR. COOK: But the river is between
6 floodplains in this area of the city, and right
7 next to the floodplains are the neighborhoods.
8 And so the floodplains have got to be looked at,
9 and the notion that we're going to make it 5 --
10 50 parts per million instead of 5 as a way of
11 protecting the floodplains is really -- it is
12 almost laughable. And the -- and if you see it,
13 as I always see it, if you see it, you know, I
14 can't say that this is an abuse of discretion,
15 but I can tell you that the way this has
16 proceeded is an abuse of common sense, because
17 once you take a look at this area and really see
18 it, then you recognize that what is being
19 proposed is going to not ever get restored and is
20 going to be doing much more damage than benefit.
21 JUDGE STEIN: Anything else? Okay.
22 Thank you very much. Let's next hear from Region

1 I, Mr. Conway. Did I do this right? Okay.
 2 MR. CONWAY: Your Honors, the phrase
 3 was used earlier, what we bargained for. What we
 4 bargained for was, it's clear that what we
 5 bargained for was a process, pursuant to 40 CFR
 6 124.19 and RCRA principles, and RCRA objectives
 7 of ensuring that every remedy is protected if you
 8 would help the environment.

9 The, if I could first address the
 10 biota downstream transport performance standards,
 11 there's nothing in the consent decree, and
 12 nothing in the guidance that constrains EPA from
 13 crafting and tailoring a remedy to include these
 14 kind of provisions.

15 These provisions are consistent with
 16 the RCRA objective for protection. They're
 17 consistent with Paragraph 5 of the consent decree
 18 for protection of public health, welfare, and the
 19 environment. They're consistent with the Board's
 20 practice of remedies being tailored to take care
 21 of site specific situations.

22 We have tailored the remedy. And we

1 have -- But because the remedy includes a certain
 2 amount of residual PCBs in the system we have to
 3 have a way of ensuring that the remedy remains
 4 protective in the long run. And that the biota
 5 and downstream transport performance standards
 6 address that.

7 They ensure the assessment that the
 8 corrective measures that we have put into the
 9 final permit notification will be to a protective
 10 remedy. We can't be clairvoyant on what the
 11 future work will be.

12 So, we did not, it is not appropriate
 13 to, it would not have been an appropriate
 14 corrective measure to put into the final permit
 15 modification. We're supposed to put in
 16 performance standards, and appropriate and
 17 corrective measures. And we have done that.

18 It would not have been an appropriate
 19 corrective measure to have decided now, prior to
 20 knowing what the exceedance is with either of
 21 these standards, and prior to knowing what the
 22 circumstances are surrounding that exceedance.

1 It would not have been appropriate for us to name
 2 off corrective measures based on that.
 3 JUDGE AVILA: So, let me ask you what
 4 I asked Counsel for GE. I'm reading Page 13 of
 5 the final modified permit, and it says that "any
 6 additional actions necessary to achieve and
 7 maintain the performance standard will be done in
 8 accordance with the CD."

9 That seems to me like you have said,
 10 the Region has said, in the permit we'll comply
 11 with the CD. Is that --

12 MR. CONWAY: Yes.

13 JUDGE AVILA: -- a fair statement?

14 MR. CONWAY: Yes. We --

15 JUDGE AVILA: So, if GE thinks you
 16 aren't in compliance with the CD with any future
 17 work, do you agree that they could go through the
 18 dispute resolution, and ultimately go to District
 19 Court to find out whether, what the Region has
 20 ordered that's in violation of, for instance,
 21 Paragraph 39(a)?

22 MR. CONWAY: Yes. What we, the

1 process would be, GE would assess the, why the
 2 exceedance occurred. GE would propose what their
 3 response to that would be. And EPA has the
 4 approval authority. GE can then dispute EPA's
 5 approval of that.

6 JUDGE AVILA: And would one of the
 7 arguments available to GE in that process be that
 8 entire requirement of us doing additional work if
 9 the performance standards for biota are
 10 downstream, criteria are not met, were illegal
 11 because they were inconsistent with the decree,
 12 and they should have never been in there in the
 13 first place?

14 MR. CONWAY: The, if an exceedance
 15 occurs GE would have to do whatever EPA approves
 16 as necessary, subject to their right of dispute
 17 resolution.

18 Paragraph 39 is one of the avenues for
 19 under, for allowing EPA to modify the Rest of
 20 River's statement of work and work plans, to make
 21 sure to, that the remedy is effective, and
 22 meeting and maintaining the performance

1 standards.

2 JUDGE AVILA: Let me ask a that
3 question maybe a slightly different way. Could
4 GE make the very same arguments that they are
5 making before us, before the District Court when
6 they are ordered to do additional work?

7 MR. CONWAY: Yes. And Paragraph, the
8 two consent decree avenues that GE mentioned, the
9 re-opens, and Paragraph 39(a), it's important
10 that 39(a) is not, it puts limits on EPA.

11 What we have to do is ask to be
12 consistent with the performance standards already
13 set up. And it has to be necessary to carry out
14 the effectiveness in the remedy, or the, to meet
15 and maintain the performance standards. So --

16 JUDGE WARD: Just to follow-up though.
17 I think the point Mr. Nathanson was making is
18 that that only goes so far. That the additional
19 work has to still be consistent with the scope of
20 the response action --

21 MR. CONWAY: The --

22 JUDGE WARD: -- to agree with that as

1 apologize if I did not. And you can clarify in
2 rebuttal.

3 But, so for example, looking at the
4 remedial action in the final permit modification.
5 I'm looking at Page 24 of the permit, for the
6 backwaters. Just one of, I think this appears,
7 this kind of language appears throughout. But
8 the performance standard there is "remove surface
9 sediment to achieve a certain concentration
10 level."

11 So, if GE were to do that here and
12 elsewhere where that kind of remedial action is
13 required, and it still doesn't meet the
14 downstream performance standards, can you come
15 back and ask them to remove soil to either a
16 greater depth, or a lower concentration?

17 I think that's Mr. Nathanson's point,
18 that you can't require, you, in an effort to meet
19 the downstream standards you can't say remove
20 more soil upstream than was selected or
21 identified as the degree to which soil had to be
22 removed in the permit.

1 a limitation on the future work you would order,.

2 MR. CONWAY: I would not agree that
3 Paragraph 39 lists that as a limitation.

4 JUDGE WARD: I'm looking at the bottom
5 of Page 140 to the top of Page 141 of the consent
6 decree.

7 MR. CONWAY: Yes.

8 JUDGE WARD: Which says that "a
9 modification may only be required pursuant --

10 MR. CONWAY: Oh, I'm --

11 JUDGE WARD: -- to this paragraph, to
12 the extent that it is consistent with the scope
13 of --

14 MR. CONWAY: Sorry. Yes.

15 JUDGE WARD: -- this class action."

16 MR. CONWAY: I'm sorry. Yes.

17 JUDGE WARD: So, that is a limitation?

18 MR. CONWAY: Yes, yes. Right.

19 JUDGE WARD: All right.

20 MR. CONWAY: Correct.

21 JUDGE WARD: So, and I, if I, I think
22 I understood Mr. Nathanson's argument. And I

1 MR. CONWAY: If there is a, if it is
2 listed as a performance standard in the permit we
3 can't use Paragraph 39(a) to change that to
4 address the exceedances.

5 JUDGE WARD: So, they do what's
6 required. Again, just the example here on Page
7 24. It's for the backwaters adjacent to Regions
8 5, 6, and 7. Everybody agrees GE did what the
9 permit required.

10 EPA later concludes "it turns out we
11 think there and elsewhere we should have required
12 more in order to meet those downstream
13 standards." Your position is you cannot require
14 them to do more in the backwater reaches?

15 MR. CONWAY: We can. We can if it
16 satisfies the re-opener provisions. But not, we
17 can't use Paragraph 39(a).

18 JUDGE WARD: So, only under the re-
19 opener provision? Not under Paragraph 39?
20 Because it wouldn't be consistent with the
21 selective remedial action?

22 MR. CONWAY: Because it wouldn't, it

1 would require changing a performance standard.
 2 So, if there's a backwater performance standard
 3 that would have to be changed to meet, to address
 4 the exceedance, we could no use Paragraph 39(a)
 5 for that.

6 JUDGE WARD: Okay.

7 MR. CONWAY: Or a consistency issue as
 8 well. That would, if there was a disagreement on
 9 that, it would again go to the dispute resolution
 10 mechanism.

11 JUDGE WARD: Okay.

12 MR. CONWAY: One thing on the, in
 13 terms of Mr. Nathanson's discussion, Paragraph
 14 46, that is just for the periodic reviews of
 15 response actions that take place every five
 16 years. So, if we select further actions pursuant
 17 to that section, that's where Paragraph 46 comes
 18 in.

19 So, it may, that's a different item
 20 than a proper provision of the scope of work, and
 21 how we carry out that provision of the scope of
 22 work.

1 JUDGE STEIN: Can I ask you about
 2 Rising Pond, building on the questions I asked
 3 Mr. Nathanson? What is the general practice
 4 about taking catastrophic events, like dam
 5 failure, into account in designing a remedy?

6 MR. CONWAY: I --

7 JUDGE STEIN: If there is such a
 8 general practice.

9 MR. CONWAY: The, in this I think I
 10 can speak more to what we did her than the
 11 general practice. But in terms of the, this
 12 situation, the Rising Pond Dam was breached
 13 within the past generation with a significant
 14 exposure of PCBs downstream.

15 GE was involved with the dam, while it
 16 wasn't the dam owner at that point. But they
 17 were technically involved with the dam owner, in
 18 terms of that dam. But it, so it's not a
 19 hypothetical issue.

20 JUDGE AVILA: Can you explain that to
 21 me? I was actually a little confused on this
 22 breach of the dam, where it seemed like they were

1 going, I'm thinking of the right example. And if
 2 I'm wrong, tell me I'm wrong.

3 But it sounded like they were going to
 4 do maintenance on it. So, they did something,
 5 and there was water that came over as part of
 6 that maintenance work. And it turned out there
 7 were PCBs in it, right?

8 I mean, it's not a current dam got a
 9 hole in it and, or there was a failure of the
 10 dam. Wasn't it in the context of maintenance of
 11 the dam?

12 MR. CONWAY: Yes. I thought I
 13 described it as a breach of the dam, and --

14 JUDGE AVILA: But it --

15 MR. CONWAY: Yes, it was --

16 JUDGE AVILA: It wasn't an unexpected
 17 breach of the dam. It was like in the context of
 18 doing maintenance of the dam, a controlled
 19 breach.

20 MR. CONWAY: From what I understand,
 21 the impact downstream of the amount of PCBs that
 22 went downstream in 1992 was not a controlled, it

1 was not expected that Rising Pond Dam would let
 2 loose that much PCB.

3 JUDGE AVILA: Okay. I get that maybe
 4 the impact of the water that went down, the PCB
 5 contamination may not have been what was
 6 expected. But it was the event that caused the
 7 water to go beyond the dam, that wasn't an
 8 unexpected event.

9 MR. CONWAY: It wasn't a all of a
 10 sudden a break in the dam. But it was a, it was,
 11 you described it as more controlled. It was more
 12 controlled than that.

13 But the, if the parties had a
 14 controlled dam release, and they knew, and
 15 everyone knew that PCBs were in Rising Pond, in
 16 that impoundment, that's further reason why we
 17 have to take care of the dams, and have to make
 18 sure that we minimize any releases of PCBs
 19 downstream. We have several provisions in our
 20 permit to address that.

21 JUDGE STEIN: One additional question
 22 on Rising Pond. Is the sediment that's being

1 removed throughout Rising Pond solely so that the
2 cap does not reduce flood storage? Or are the
3 PCBs at levels of concern in that sediment?

4 MR. CONWAY: The excavation is to
5 allow for the appropriate cap, an engineered cap
6 of the appropriate thickness for Rising Pond.
7 So, the --

8 JUDGE STEIN: So, is it related to --

9 MR. CONWAY: It boils --

10 JUDGE STEIN: -- flood storage or not?

11 MR. CONWAY: Yes. It boils down to,
12 if you, do you protect against flood storage by
13 removing enough sediment so that the overall
14 water depth doesn't increase with the engineered
15 cap? Or do you not do that, and have the
16 engineered cap, whatever its thickness, add to
17 the water level? We thought it was more
18 appropriate to excavate, to make sure that the
19 water level doesn't change.

20 JUDGE STEIN: And is this reflected in
21 the record? I would appreciate a citation. You
22 don't need to provide it right now. But I would

1 like to --

2 MR. CONWAY: Okay.

3 JUDGE STEIN: -- know where in the
4 record I could find that.

5 JUDGE WARD: So, Mr. Cook had raised
6 a number of arguments. I think one of the issues
7 he raised was the future work, the removal of the
8 sediments in the river would necessitate having
9 heavy equipment in the flood plain areas, and
10 particularly, of particular concern, not
11 exclusively, Core Area 1.

12 How will that concern be addressed
13 going forward? Does the permit, the final permit
14 modification address that issue in any particular
15 way?

16 MR. CONWAY: The final permit
17 modification we, it has in it particular plans
18 that are to be developed to assist with the
19 quality of life of the people who are, who will
20 be impacted by the excavation, and by the
21 project.

22 The, let me see, I think the, rather

1 than trying to find that right now. The, we put
2 in, at the request of Mr. Cook and others we have
3 put into the final permit modification specific
4 plans for, to ensure that traffic impacts, other
5 impacts on the local neighborhoods of the, who
6 are affected by the remedy as it moves
7 downstream, that those quality of life issues are
8 taken into account, as far as the cleanup
9 progressing.

10 And in addition, we've made a
11 commitment that for Mr. Cook, and everyone on the
12 river that are, for any submittal that GE submits
13 throughout the design and implementation process,
14 that we're going to be soliciting the public's
15 views, as well as the state's views.

16 JUDGE WARD: Is there any specific
17 proviso concerning equipment being placed in
18 these more protected or special areas, Core Area
19 1, or other areas of the flood plain, in addition
20 to impacts on the neighboring communities?

21 MR. CONWAY: Certainly it would be
22 taken into account as we go forward, to ensure

1 that if there's impacts that can be avoided in
2 Core Area 1, that we try to identify that.

3 JUDGE STEIN: As I understood his
4 argument, it was both the, Mr. Cook's argument,
5 it was both the issue that Judge Ward just
6 addressed, as well as the scope of the cleanup.

7 And this is obviously a question we'll
8 address with Massachusetts. But what appears to
9 be a change in Massachusetts' position about how
10 much restoration should be done, and the impacts
11 that it would have. How do you respond to that
12 argument?

13 MR. CONWAY: Massachusetts has been
14 very consistent the last, since 2012. The status
15 report that was jointly authored by
16 Massachusetts, Connecticut, and EPA was very
17 clear as far as the type of remedy that was a
18 potential remedial approach that we intended to
19 seek public comment on.

20 That's, the 2011 letter predated an
21 eight to ten month period of negotiations and
22 discussions among the three, the two states and

1 EPA, in which we worked out particular technical
2 issues, to try to come up with a shared approach
3 to solicit public comment on.

4 It's a, and Massachusetts in 2014
5 strongly supported the remedy. And they formally
6 concurred on the remedy in 2016.

7 JUDGE STEIN: So, even assuming that
8 there wasn't a flip in position, you know that
9 post 2012 various states and EPA have been on the
10 same page. What's your response to Mr. Cook?

11 MR. CONWAY: That over the last 20
12 years EPA has been seeking the public's
13 involvement at every step of the way. We have
14 the experience, and the Agency has the experience
15 and expertise to make these decisions.

16 We apply that experience and expertise
17 to a very vast administrative record in making
18 the decisions. And an almost unprecedented
19 amount of discussion, peer review, technical and
20 legal discussions with all the parties led up to
21 our 2016 permit modification.

22 It's the, it all goes back to 124.19.

1 I wanted to start out by reiterating
2 that the Commonwealth does not agree that the
3 remedy is too extensive. As Mr. Conway
4 distilled, we have supported the remedy since
5 2012 when it was shaped out in concept with
6 Region 1, in consultation with the Commonwealth
7 and Connecticut.

8 The Commonwealth then publicly
9 supported the draft modified permit. And we
10 formally concurred in writing with the final
11 modified permit.

12 Both GE and Mr. Cook have referred to
13 the Commonwealth's comment letter on the revised
14 CMS in January 2011. Yes, first point is it
15 predated the 2012 status report.

16 But to put that letter into context,
17 at that earlier point in the remedy development
18 process, as reflected in the letter itself, we
19 were particularly concerned about ensuring that
20 Region 1 and the other stakeholders knew about
21 our concerns, and the information that we had
22 about the ecological uniqueness and sensitivity

1 We follow the process. We used site specific
2 information, reviewed it on the nine criteria,
3 and made a balanced, tailored decision.

4 As you can see, HRI doesn't like
5 everything about it. Mr. Cook doesn't like
6 everything about it. GE doesn't like everything
7 about it. It's our judgment of what is the best
8 suited remedy, based on all that information. I
9 think --

10 JUDGE STEIN: Anything else? Thank
11 you. I'd like to now hear from the Commonwealth
12 of Massachusetts, Mr. Lehan, for seven minutes.

13 MR. LEHAN: Thank you, Your Honors.
14 Richard Lehan, General Counsel of the
15 Massachusetts Department of Fish and Game. The
16 Natural Heritage Program is part of our
17 department.

18 So I would like to, as part of my
19 argument address the Core Area mapping approach.
20 And also, if I could, I'd like to respond to the
21 issue of MESA net benefit, and its statuses as
22 NRD, and so on.

1 of Rest of River, and the critical importance of
2 carefully considering what the impacts of the
3 range of remedy alternatives would be on this
4 ecosystem.

5 In particular, we were concerned about
6 some of the remedy alternatives, some of which
7 have been alluded to today. I think it's
8 referenced in HRI's petition, Set 8, FP 7, which
9 included removal of 2.9 million cubic yards of
10 soil and sediment. It envisioned remediating and
11 armoring 14 miles of river bank. And called for
12 substantially more excavation of flood plain
13 soil.

14 EPA Region 1, after our comments
15 invited both states, including Connecticut, which
16 is the other state affected by this remedy, to
17 engage for the first time in a series of detailed
18 technical discussions, where we talked about our
19 respective interests and concerns.

20 We discussed what our shared remedial
21 objectives and priorities. And it was a
22 constructive process on both ends. For example,

1 the Commonwealth got a more complete and
2 definitive understanding of the extent to which
3 the erodible river banks in Reg 5 are
4 contributing to the PCB loads. We learned that
5 they're contributing up to 45 percent of the PCB
6 loads.

7 We also got a better understanding
8 that within the NCP remediation framework, it
9 really doesn't contemplate relying solely on
10 institutional controls to address risks to fish
11 consumption. They can supplement, but not be the
12 sole remedial approach.

13 On our part we brought the expertise
14 of our Natural Heritage Program, to try to add
15 more specificity to the shared goal of seeking to
16 achieve a remedy that's protective for public
17 health, but trying to look at a variety of
18 targeted remedial approaches to minimize the
19 impacts on this dynamic river ecosystem.

20 The Core Area mapping approach was
21 proposed by Natural Heritage. I want to just
22 talk a little bit more specifically, to put the

1 letter from National Heritage, which is
2 Attachment B. It was Attachment B to the draft
3 and final modified permit.

4 The letter itself provides more
5 context of how this arose. It makes clear that
6 the Department and other Massachusetts'
7 stakeholders had been talking with Region 1 and
8 Connecticut for several months.

9 And part of that discussion focused on
10 us getting an understanding, particularly from
11 the Natural Heritage Program, what are the exact
12 remedial approaches that you're proposing for
13 these sensitive areas, the flood plain, the
14 vernal pool, et cetera?

15 The Natural Heritage's feedback was
16 very much specific to this remedy. The letter
17 refers to the fact that underlying the program's
18 identification of Core Areas is their MESA
19 regulatory program.

20 They're responsible for administering
21 the Mass Endangered Species Act. And as part of
22 that they delineate priority habitat for all of

1 our State listed species across Massachusetts.

2 JUDGE WARD: If I could just interject
3 a question? So, that's the two page document --

4 MR. LEHAN: Yes.

5 JUDGE WARD: -- that's attached to
6 the, was attached to the draft and the final
7 permit modification? Was there anything else
8 submitted that's in the record, that provides
9 some more detail in support of that two page
10 letter, that you're aware of?

11 MR. LEHAN: Well, I would point out
12 that the letter itself makes reference to
13 guidelines that the Natural Heritage Program
14 uses. It provides a link to its MESA regulatory
15 program.

16 And think of this letter as a
17 distillation of some extended technical
18 discussions that had, that occurred between
19 Natural Heritage technical staff and Region 1
20 technical staff.

21 Underlying it is established
22 approaches for developing priority habitats. And

1 what the program did was, getting a more precise
2 understanding of the exact potential remedial
3 approaches. Then making a cut about what are the
4 highest priority habitats that need to be
5 protected.

6 For example, the list that's included
7 in this letter makes clear that for Core 1 it's
8 not only specified species. But it's within a
9 context of natural communities. We're talking
10 about mature flood plain forest, and unique
11 wetland areas.

12 And so, I think of this as the Natural
13 Heritage Program underlying its already
14 established MESA regulatory program, including
15 delineating priority habitat, responding more
16 specifically to the types of remediation
17 approaches to those priority habitats. And then
18 saying, we're going to prioritize this.

19 So, Core 1 is mostly State listed
20 plant species that are immobile, and therefore
21 particularly affected by disturbance of soil.
22 They rely on, for the most part, flood plain

1 habitat. Core Area --

2 (Off the record comment)

3 MR. LEHAN: Yes.

4 JUDGE WARD: We're, I think you're

5 over your time. I wanted you, if you could

6 address the MESA requirement? That was the other

7 issue I think was --

8 MR. LEHAN: Okay.

9 JUDGE WARD: -- would be helpful to

10 the Board.

11 MR. LEHAN: There are three

12 performance standards for authorizing a take of a

13 State listed species under our MESA regulations.

14 A proponent of an activity that will cause a take

15 has to show that they've done an adequate

16 assessment of alternatives.

17 They have to show that the activity

18 will not cause a significant portion of the local

19 population of State listed species to be

20 impacted. And they have to provide a net benefit

21 to the affected State listed species as a whole.

22 From an ARAR perspective there are

1 three separate and distinct substantive

2 performance standards.

3 Now, outside of this unique Rest of

4 River site, where CERCLA applies, and Region 1

5 has the ability to waive an otherwise applicable

6 substantive ARAR standard, the Natural Heritage

7 Program would not allow the take to proceed if it

8 was going to cause an impact on a significant

9 portion of the local population.

10 The proponent would have to redesign

11 the project, or it simply would not be allowed to

12 go forward. That's completely different from

13 this situation.

14 We're talking about a situation where

15 in a site specific location EPA, in consultation

16 with our Natural Heritage Program, has made a

17 determination that in order to implement the

18 response action it's technically impractical to

19 avoid an impact on a significant portion of the

20 local population. And they get to waive that

21 particular substantive performance standard.

22 But what's key is what happens next.

1 The response action goes forward, and it causes a

2 take. Not only does it cause a take of an

3 individual State listed species, but it

4 significantly impacts the local population.

5 The separate and distinct net benefit

6 conservation mitigation requirement still

7 applies. Because the take has occurred. This is

8 core to the fundamental purpose of our statute.

9 The fact that EPA would waive the

10 significant impact on local population because

11 it's technically impractical doesn't thereby

12 waive the application of the net benefit

13 standard. There's no finding that it's

14 technically impractical.

15 The other point I wanted to make is

16 that the consent decree is unambiguous. The

17 Commonwealth's covenant not to sue is not

18 satisfied until GE implements the remedy in

19 accordance with all ARARs.

20 The consent decree is explicit, to the

21 extent it says that nothing in the Commonwealth's

22 covenant not to sue, or in Paragraph 22, which

1 sets out the requirements for the Rest of River

2 remedy, shall modify or affect GE's obligation to

3 implement the remedy in accordance with all

4 ARARs.

5 MESA is a location specific ARAR, just

6 like the Federal Endangered Species Act, the

7 Federal Clean Water Act.

8 JUDGE AVILA: Just so I make sure I

9 have this straight. You're saying that

10 Massachusetts' position is that as things exist

11 in this permit scenario, they don't have, it

12 doesn't matter if there's a significant impact.

13 Even if there is or isn't, they have to come up

14 with a net benefit?

15 MR. LEHAN: Yes.

16 JUDGE AVILA: And whereas under

17 regular Massachusetts law, outside of this

18 context, someone who had a significant impact

19 couldn't go forward?

20 MR. LEHAN: That's right. No take

21 would occur.

22 JUDGE AVILA: Okay.

1 MR. LEHAN: That's the key difference.
 2 JUDGE AVILA: Thanks.
 3 MR. LEHAN: Thank you.
 4 JUDGE STEIN: Thank you. And finally
 5 we hear from the State of Connecticut.
 6 (Off the record comments)
 7 JUDGE STEIN: You finally get to
 8 speak.
 9 MS. DIBELLA: Yes. Good afternoon,
 10 Your Honors. Thank you for affording Connecticut
 11 the right to be heard today. We are going to
 12 first be heard on whether the remedy is too
 13 extensive.
 14 Connecticut disagrees that the remedy
 15 is too extensive. I think as someone had quoted
 16 a little earlier, in the May 12th status report
 17 it was estimated that there's 4 million cubic
 18 yards of PCB contamination that's over 1 part per
 19 million in Massachusetts. And that the remedy as
 20 set forth in the June 2014 statement of basis is
 21 going to remove 990,000 cubic yards, or just 25
 22 percent of that.

1 So, while that's true, Connecticut
 2 clearly did not choose to bring its own petition
 3 here. We participated in GE's petition. And the
 4 reason for that is that we believe, as we state
 5 in our comments, that the remedy, once fully
 6 implemented, it should achieve a significant
 7 reduction in downstream transport into
 8 Connecticut, which is of course one of
 9 Connecticut's primary concerns.
 10 But we do want to stress that the
 11 removal level in the permit is probably the
 12 minimum that Connecticut could have supported.
 13 There's clearly a lot of contamination left
 14 behind.
 15 And the reason we were able to support
 16 that is, as RCRA dictates, there are protective
 17 measures in the permit when you're leaving a
 18 significant amount of contamination in place.
 19 For example, the downstream transport
 20 standard, the biota standard, the future work
 21 provisions, and also the maintenance of dams in
 22 Massachusetts. All of these provisions will

1 reduce either the downstream transport of
 2 additional PCBs, or the mobilization of PCBs that
 3 have already gone downstream.
 4 So, it with these protections that
 5 have been built in, and with the provisions that
 6 we would rely on, like 39(a). If one of these
 7 standards were not met, that we were able to,
 8 although the amount of PCBs being removed is
 9 clearly not too extensive, and not -- If it were
 10 lower we couldn't have supported it.
 11 It's with these protections that we
 12 were able to. And that's why it's so critical
 13 that these protections are upheld. And we don't
 14 believe that any of them are clearly erroneous,
 15 or beyond the authority granted in the consent
 16 decree.
 17 And to address the point that was
 18 raised a little earlier. Just to clarify about
 19 Paragraph 39(a), and whether something would be
 20 outside the scope of the response. I mean, I
 21 don't know what we're calling the response.
 22 If we're not changing a performance

1 standard, for example, the flux standard, and
 2 it's not being met, then are we equating the
 3 scope of the response with only removal? Or are
 4 we equating the scope of the response with the
 5 entire permit, and all of the things it's meant
 6 to achieve, including the performance standards?
 7 So, I think that that discussion was
 8 sort of an oversimplification of what the scope
 9 of the response is. And I don't think
 10 Connecticut concedes that you couldn't use 39(a)
 11 to require additional work from the universe of
 12 possibilities of a modification of the work plan
 13 under 39(a), if for example, the downstream
 14 transport standard were not met, or the biota
 15 standard were not met.
 16 JUDGE WARD: Do you have a view on
 17 whether that's something the Board needs to
 18 address now? Or is it something that could be
 19 addressed in the future, if and when a dispute
 20 arises?
 21 MS. DIBELLA: I think that it could
 22 probably be addressed either time. I think that

1 it's not something that could not be addressed in
2 the future when the dispute arises. If, because
3 we don't know that there's going to be an
4 exceedance.

5 And also, when there is an exceedance,
6 there's an evaluation that has to take place of
7 why there was an exceedance, and then what might
8 have to be done because of it. For example, the
9 downstream transport.

10 So, I think not knowing those things
11 it is a little difficult to say now. Especially
12 not knowing how bad it would be. Maybe
13 exceedance isn't, you know, a significant one.
14 Or maybe it's related to some one time event.

15 Without knowing what it is, it is hard to say.

16 So, I think it could be addressed at
17 either time. But it certainly wouldn't be
18 prevented from being addressed. I think as EPA
19 acknowledged, under the dispute resolution
20 provisions, and eventually before the District
21 Court.

22 But after it went through the process

1 that in order to have to do that work, that the
2 citizens of Connecticut might have to initiate
3 individual suits. But I think what we said in
4 our brief is that GE is responsible for its
5 contamination where it went.

6 And I think as EPA also pointed out in
7 its sur reply, in the CD permit they had agreed
8 not to contest that PCBs were transported
9 downstream from their facility. And I think that
10 would be against that agreement that occurred in
11 the permit.

12 JUDGE AVILA: But if the consent
13 decree resolved their CERCLA and RCRA liability,
14 isn't the question then whether in the consent
15 decree you can require the future work?

16 It's not an, it doesn't seem to me an
17 answer to say that you can require future work
18 because they were once liable under RCRA and
19 CERCLA. Because that liability was resolved by
20 the consent decree.

21 So, the question is seems like is,
22 does the consent decree allow for future work?

1 of identifying what went wrong, why it went
2 wrong, what could be done about it. Because
3 that's what the permit dictates in the first
4 instance.

5 JUDGE AVILA: And do you agree with
6 the Region that after that all takes place, if it
7 has to go to District Court, that GE could make
8 the same arguments it's making here, to the
9 District Court, as to why the additional work is
10 not required?

11 MS. DIBELLA: Yes. I think that that
12 would be their right under the consent decree.

13 JUDGE AVILA: In your brief I thought
14 I recall you stating that GE could be required to
15 do additional work because they're liable under
16 CERCLA and RCRA. But isn't that the very thing
17 that the consent decree resolved?

18 MS. DIBELLA: Well, I think that was
19 related to something else. I think that was
20 related to the future work provisions.

21 JUDGE AVILA: Right.

22 MS. DIBELLA: Because they were saying

1 MS. DIBELLA: I don't think the
2 consent decree prevents the Region from requiring
3 them to clean up PCBs that were already
4 transported downstream. And I actually think
5 that the future work provision actually limits
6 what they might have to do.

7 Because it provides a threshold. And
8 it says if this threshold is exceeded, then you
9 would have to address it. As opposed to just
10 saying, remove it all now.

11 So, I actually think that what was
12 done, they have authority for under the CD. And
13 it actually provides a limitation in the work
14 that could have been required.

15 JUDGE STEIN: In your brief you state
16 the petitioner specifically acknowledges that
17 under previous ownership of Wood's Pond Dam
18 repair actions undertaken at the dam led to
19 release of contaminated sediments downstream.
20 Are you referring to the Wood's Pond Dam or the
21 Rising Pond Dam?

22 MS. DIBELLA: Thank you. That was

1 actually an error in our brief. It was Rising
2 Pond. And there was some repair work done under
3 a prior owner that in the years following that
4 work there was an uptick in downstream transport
5 as a result, and additional releases of PCBs.

6 JUDGE STEIN: Thank you for that
7 clarification.

8 MS. DIBELLA: Thank you.

9 JUDGE STEIN: Next. Thank you very
10 much. We're going to have rebuttal by General
11 Electric. But I am going to start off with a
12 question.

13 MR. NATHANSON: Could I just -- What
14 was that? No, you dropped it down. Okay.

15 JUDGE STEIN: Given that landfills are
16 fenced, closed to the public, out of a 500 year
17 flood zone, isn't it reasonable for the Region to
18 conclude that PCBs in a TSCA compliant landfill
19 are better controlled than PCBs capped in the
20 river?

21 MR. NATHANSON: As we go to the more
22 --

1 JUDGE STEIN: Well, I, this is --

2 MR. NATHANSON: -- dredging?

3 JUDGE STEIN: -- on the extent of
4 cleanup.

5 MR. NATHANSON: Yes.

6 JUDGE STEIN: And the idea that the
7 river has unrestricted public access. You've got
8 water moving in and out. I'm just asking you to
9 respond to a judgment the Region made here.

10 MR. NATHANSON: Well --

11 JUDGE STEIN: And I may have, be in
12 the wrong section. So --

13 MR. NATHANSON: And I am certainly not
14 going to disavow our belief that disposal in a
15 landfill is fully protective. And so, I can't
16 say that you're wrong. Is that, I would like to
17 try to answer your question about --

18 JUDGE STEIN: Yes, thank you.

19 MR. NATHANSON: -- natural resource
20 damages, now that I've had a little bit of help.
21 So, Paragraph 112 of the consent decree satisfied
22 plaintiff's claims for natural resource damages,

1 all of them.

2 And I am informed by a source that I
3 consider unimpeachable that under Department of
4 Interior regulations, natural resource damages
5 are defined to include damages caused by
6 remediation, as well as by past releases. So, it
7 would all get wrapped up together. Does that --

8 JUDGE STEIN: Yes. That's helpful.

9 MR. NATHANSON: -- answer your
10 question? Okay.

11 JUDGE AVILA: Is that in the four
12 corners of the decree? I mean --

13 MR. NATHANSON: I don't believe so.

14 JUDGE AVILA: Do I have to --

15 MR. NATHANSON: This is --

16 JUDGE AVILA: Do I have to go to DOI's
17 regulations to figure that out? And is that
18 appropriate, given the other arguments that have
19 been made about staying within the four corners
20 of the 2000 permit, and the consent decree?

21 MR. NATHANSON: This is an issue that
22 Judge Ward raised. It wasn't even raised in

1 anybody's brief. So, that's why we didn't
2 address it.

3 JUDGE AVILA: Okay.

4 JUDGE WARD: Okay. Well, just to
5 follow-up on perhaps where you're going with that
6 question, Judge Avila, is putting that aside,
7 that, you know, the issue of, what's the scope of
8 the release.

9 At the same time the 2000 permit does
10 require, you know, does require in your view that
11 ARARs be considered as part of the remedial
12 selection. And this was one that was identified.

13 And if that was, if it is an ARAR,
14 don't you have to comply with it by virtue of the
15 consent decree and the terms of the 2000 permit?

16 MR. NATHANSON: Except that it's not
17 compliable with in the event of a significant
18 take, right? To that point I just want to point
19 out, here is the reg. And my understanding from
20 the State is that they see this as three separate
21 and distinct regulations.

22 But in fact, it's one regulation which

1 says that "the Director may issue a conservation
2 management permit provided A, the applicant has
3 adequately assessed alternatives, B, an
4 insignificant portion of the local population
5 would be impacted by the project or activity, and
6 C, the applicant agrees to carry out a
7 conservation and management plan that provides a
8 long term net benefit."

9 So, it's A, B, and C. These are not
10 distinct regulations where one can be waived, and
11 the others can be left intact. It's one
12 regulation. It's either waivable or it's not.
13 And that's our point.

14 I just wanted to respond very quickly
15 to Mr. Conway's statement that the Region can't
16 be expected to be clairvoyant. That's exactly
17 what the re-opener provisions are there for.

18 They were crafted to respond to the
19 fact that you can't always be clairvoyant. And
20 that sometimes unknown conditions will arise, or
21 unknown, previously unknown information will come
22 to light that may indicate that there's a threat

1 to human health or the environment. And that is
2 when the Region's entitled to invoke the re-
3 openers. And my time is up.

4 JUDGE WARD: Just one further question
5 on the MESA issue. Can't that be, couldn't that
6 be addressed in a future dispute resolution
7 before the District Court, depending on how it's
8 applied, depending on perhaps what the State law
9 requires at the time if the regulations are
10 amended to allow for this as an option?

11 MR. NATHANSON: Well it's a bit, if
12 State law is amended, I mean, I can't be
13 clairvoyant about that. I mean, if the State
14 determines that they're going to change the law,
15 and then they had, there's another option.

16 But right now there's a problem in the
17 permit. Because there's an ARAR that can't be
18 met, and hasn't been waived.

19 JUDGE WARD: I suppose it could be
20 addressed in the future. And depending on how it
21 plays out with this specific remedy, and whether
22 it could be avoided in some fashion.

1 MR. NATHANSON: Our position is that
2 the consent decree provides for review now of the
3 entire thing, so that if something specific needs
4 to go back, the entire permit can be reworked,
5 revamped, looked at, and reassessed, so that it
6 works as a whole.

7 JUDGE WARD: Okay.

8 MR. NATHANSON: Thank you very much.

9 JUDGE STEIN: I'm going to suggest we
10 take a brief seven to ten minute break at this
11 point, and be back here, I have 4:30 p.m., at
12 4:40 p.m., at which point we will do the fourth
13 issue. And everyone will have their two minute
14 closing statements if they wish.

15 And we hope to conclude shortly after
16 5:30 p.m. I know it's been a long day for
17 everyone. But I think we would all benefit from
18 a break at this point.

19 BAILIFF: All rise.

20 (Whereupon, the above-entitled matter
21 went off the record at 4:31 p.m. and resumed at
22 4:41 p.m.)

1 MS. DURR: Oral argument is now back
2 in session. Please be seated.

3 JUDGE STEIN: Thank you, everyone.
4 Let's now proceed with the last session before
5 concluding remarks, which is Region 1's decision
6 regarding the Massachusetts Hazardous Waste
7 Siting Act, under Mass General Laws, Chapter 21D,
8 and other State and local issues.

9 We first have ten minutes for the
10 Housatonic Rest of River Municipal Committee,
11 City of Pittsfield five minutes, State of
12 Connecticut five minutes, General Electric five
13 minutes, and Region 1 ten minutes.

14 MR. PAWA: Thank you very much.
15 First, before we start, Your Honor, I'd like to
16 apologize for transgressing your rules about not
17 using my phone in the courtroom.

18 I was emailing to get you the record
19 cites, some of the record cites that you asked
20 for. That was the sole purpose of me doing that.
21 And I know it was visible.

22 So, I have one thing that was, I can't

1 remember which of the Judges asked. But the
2 question was asked earlier today, this morning,
3 about whether or not the TSCA issue was raised in
4 the comparative analysis, or any of the other
5 documents.

6 So, if I may just very quickly. The
7 comparative analysis talks not in those words
8 about TSCA. It doesn't reference TSCA. But it
9 does talk about the risk of release to the
10 Housatonic River at comparative analysis Page 61,
11 62, and 64 and 65.

12 The statement of basis, same thing.
13 It doesn't expressly refer to TSCA, talks about
14 the risks to the river at Page 36. And then GE's
15 revised corrective measures study talks expressly
16 about the TSCA regulations. And acknowledges the
17 failure to comply with them at Pages 948 and 949.

18 And then argues those regs can be
19 waived, or that there is a risk based analysis
20 that would allow EPA to determine that there's no
21 unreasonable risk of injury to human health or
22 the environment.

1 The same is waiving it. So, either
2 it's a risk based analysis or you're waiving it.
3 But under either one of those regs, same
4 standard.

5 You also asked earlier about how close
6 the various temporary facilities are to homes. I
7 understand that the Wood's Pond site, the closest
8 home is 400 feet. The second closest home is 600
9 feet. I don't have a record cite for that. I
10 think that comes from Google maps, which you
11 could probably take judicial notice of. We'll
12 follow-up on that one. Thank you.

13 In thinking about, and looking
14 carefully at the 21(d) argument, and at the
15 permit that we're discussing and debating today,
16 it really jumps out from EPA's brief that they
17 argue that this issue is beyond the scope of the
18 permit.

19 In fact, the words they use are, "It's
20 far beyond the scope of the permit." Now, we had
21 read the permit to implicitly, but quite
22 certainly preclude GE from complying with the

1 terms of the Massachusetts Hazardous Waste
2 Facility Siting Act, Chapter 21(d).

3 And I'd like to show you the piece of
4 the permit that led us to believe that that was
5 the meaning of the permit. And I have extra
6 copies. But if this, is this active? May I use
7 this?

8 (Off the record comments)

9 MR. PAWA: So, this is the 2016
10 permit, Page 65. Not working?

11 (Off the record comments)

12 MR. PAWA: This provision of the 2016
13 permit calls for GE to submit a SOW, a Statement
14 of Work. And then to deliver expedited
15 deliverables thereafter. And the expedited
16 deliverables include --

17 JUDGE WARD: Oh, excuse me. Just,
18 what page of the 2016 final permit modification?

19 MR. PAWA: Sixty-five.

20 JUDGE WARD: Okay. Here we go.

21 MR. PAWA: Right. And so --

22 JUDGE STEIN: I think it's working

1 now.

2 MR. PAWA: The expedited deliverable
3 says, "The permittee shall submit the following
4 plans for EPA review and approval, 30 days after
5 submittal of the Statement of Work."

6 And that includes, as you can see down
7 at D, the work plan for the siting of the
8 temporary centralized contaminated materials
9 processing transfer location.

10 So now, we could be wrong. But we
11 read that as a directive to GE not to comply with
12 the Siting Act. It says, after this appeal is
13 exhausted, and you submit the Statement of Work,
14 follow what we're saying in the permit. And this
15 implicitly tells us you don't have to comply with
16 21(d).

17 Now, EPA could be right, that that's
18 not what that means. Maybe there is nothing in
19 this permit that precludes GE from complying with
20 the State Hazardous Waste Facility Siting Act.
21 In fact, that may well be true.

22 EPA is going to be standing before you

1 in a few minutes. And we would ask you to ask
2 them. If they say that our argument is far
3 beyond the scope of the permit, we need to know
4 if this permit, if there's anything in this
5 permit that prohibits GE from complying with that
6 particular State law. If not, that's good for
7 our clients.

8 JUDGE WARD: So, I think I read their
9 argument. And we can, we will ask them when they
10 get up to speak. The decision, or the issue that
11 was decided in the context of the permitting
12 decision is whether this Siting Act, and I guess
13 specifically Section 12, is an ARAR. And whether
14 that had to be followed or considered in
15 selecting the remedy.

16 I think I read their position as, and
17 that's all that was decided. We did not decide
18 that it wasn't, that it was a permit that is
19 accepted under the CERCLA provisions that except
20 permits for on site activities, and is addressed
21 in the consent decree.

22 The go on, they do argue that it's

1 preempted. But I'm not sure those issues are
2 ones that we need to decide one way or the other.

3 MR. PAWA: They may not be. EPA has
4 argued however, conflict preemption. EPA has set
5 in motion a process that seems to leave the
6 Siting Act in the dust. And this is our chance
7 to appeal.

8 And we're doing what we thought the
9 permit required us to do, which was to come here
10 and exhaust administrative remedies. And, you
11 know, before we go to court and we get hit with
12 primary jurisdiction arguments, to follow what
13 the permit says. And come here and make these
14 arguments.

15 And we don't just argue that it's an
16 ARAR. In fact, this leads to my next point. I
17 think the best way to do the Siting Act is the
18 way U.S., the 10th Circuit viewed the Colorado
19 Hazardous Waste Statute at issue in U.S. v.
20 Colorado.

21 In that 10th Circuit decision the
22 statute there was applied, notwithstanding the

1 fact that there was a CERCLA cleanup. And the
2 Court found that it was in between an ARAR and a
3 permit.

4 I think that's really the right way
5 the view this statute. That the best way to view
6 this is that it's somewhere in between an ARAR
7 and a permit. And EPA is wrong about conflict
8 preemption. The U.S. v. Colorado decision
9 rejects that kind of a preemption analysis.

10 And there's a couple of more cases I'd
11 like to call to your attention. In particular
12 one that we didn't cite in the briefs. A 3rd
13 Circuit 1991 decision, Manor Care v. Yaskin, Y-A-
14 S-K-I-N, 950 Fed 2nd 122.

15 There was a New Jersey statute. And
16 new Jersey issued administrative orders under the
17 State's Spill Act, to a PRP requirement to pay
18 money. Just the way the Siting Act is a
19 compensatory scheme as well.

20 And the 2rd Circuit held no conflict
21 preemption, directly addressed conflict
22 preemption.

1 Also, a 9th Circuit case cited by EPA
2 in its brief, Fireman's Fund v. City of Lodi,
3 which is a city in California, 9th Circuit 2002.
4 Also held no conflict preemption on the City of
5 Lodi's attempt to enforce MERLO, which was a
6 local ordinance. It required PRP to pay NRD
7 damages. It was a compensatory statute.

8 And again, no conflict preemption for
9 that portion of the ordinance. EPA cited it
10 because other portions of the ordinance did
11 conflict with what EPA was doing.

12 JUDGE AVILA: I guess my question is,
13 what does this have to do with the permit? I
14 mean, what would you want the permit to say
15 differently? Why isn't that just a question of
16 what background? Just like speeding limits,
17 construction requirements for temporary roads.
18 If GE doesn't comply with them, whatever happens
19 happens. You know --

20 MR. PAWA: Right. Well, again, we
21 read Page 65. And it looked to us like a
22 statement telling GE not to obey speed limits. I

1 mean, as if the permit had said, you have to
 2 deliver the leachate to Pittsfield in ten
 3 minutes, but it's 20 miles away.

4 Well, that would be an implicit
 5 instruction to GE to disregard local background
 6 law. And the EPA comes in and says, well, that's
 7 beyond the scope of the permit. And we say,
 8 okay, fine. We'll litigate that in court. But
 9 in the meantime, what does this permit mean?

10 And then, EPA comes here and argues to
 11 you conflict preemption. And asks you to decide
 12 conflict preemption. So, you know, we feel like
 13 we're doing what we're supposed to do under the
 14 permit to come here. And that this issue is teed
 15 up.

16 JUDGE AVILA: So, I guess you want
 17 clarity as to what Paragraph or Subpart D on Page
 18 65 means?

19 MR. PAWA: Correct, Your Honor. I
 20 mean, if it's totally agnostic on the Siting Act,
 21 it's, then it's totally agnostic on the Siting
 22 Act. And, but meanwhile, they're arguing

1 conflict preemption to you. And we have to deal
 2 with that.

3 And there's important, very important
 4 federalism concerns at issue here. I mean, the
 5 Lorillard Tobacco case, Bates v. Dow
 6 Agrosiences, LLC, U.S. Supreme Court cases, make
 7 it clear the burden is on the Federal Government
 8 to show that this conflict preempts --

9 They're saying there's an obstacle
 10 here to achieving the full purposes of what
 11 Congress intended. There is nothing in this
 12 permit as I read it that would prohibit GE with
 13 complying with its obligations under both the
 14 Siting Act and CERCLA and RCRA, and the consent
 15 decree.

16 And the only thing EPA argues is that
 17 there could potentially be delay. That's their
 18 words, there could be delay. Well, that's
 19 ironic, because delay is the one, speed is the
 20 one thing that EPA gave up when it entered into
 21 this sui-generous consent decree.

22 It gave up a rod. It gave up the

1 ability to force GE to get moving quickly. And
 2 so, here we are today, because of that very trade
 3 off.

4 And so, the idea that this statute is
 5 an obstacle to the purposes of Congress is
 6 completely at odds with what EPA has done here in
 7 giving up the very speed that it would have had
 8 under CERCLA, had it not cut this unusual deal.

9 JUDGE WARD: Just a follow up
 10 question, so if there were no consent to create a
 11 new permit, what would be the avenues for you to
 12 pursue a claim under the Siting Act?

13 MR. PAWA: The first part of the
 14 question was?

15 JUDGE WARD: If there were no consent
 16 to create and there's no permit, what would be
 17 your avenues for pursuing a claim under the
 18 Siting Act?

19 MR. PAWA: I suppose we'd sue in state
 20 court or federal court.

21 JUDGE WARD: And is that - are you
 22 foreclosed from doing that now?

1 MR. PAWA: I don't think so, but yet
 2 we're faced with this, you know, this odd
 3 Hobson's choice of, you know, how to read the
 4 permit, and EPA makes a conflict preemption
 5 argument here which tells us that they think that
 6 the permit somehow prohibits GE from doing what
 7 it's doing, but at the same time, EPA says this
 8 is far beyond the scope of the permit.

9 Let me, if I may, quickly distinguish
 10 a few of their conflict preemption cases. I'm
 11 over time and I'll be very, very brief. They
 12 fall into a few different categories. One of
 13 them are cases where there's a severe conflict
 14 where a state, or a city, or a county comes in
 15 and literally issues an order to, you know, stop
 16 a CERCLA cleanup.

17 We're not doing that, and the Siting
 18 Act wouldn't allow us to do that. That's like
 19 the City and County of Denver case from the 10th
 20 Circuit, a different 10th Circuit case from the
 21 one I was talking about earlier. That's also
 22 similar to the Rhode Island Resources case.

1 Other cases are ones where there was
2 a rod and someone is trying to attack the rod
3 after having had a chance to be a part of that
4 process. Well, there's no rod here. I mean, we
5 have a RCRA permit with an appeal process, so
6 this case is procedurally different.

7 And then there's the ACSO case from
8 the 6th Circuit which is a case not where the
9 court found that there was a conflict between
10 CERCLA or a federal statute and a local law, but
11 between the particular terms of that consent
12 decree and local law. So all of the cases cited
13 by EPA fall into these different buckets of, you
14 know, severe conflict, or an attack on a rod, a
15 belated attack on a rod. They gave up the right
16 to a rod here.

17 They gave up the right to speed, and
18 so for EPA to come in and say, "There's a
19 conflict here because you're slowing things
20 down," it doesn't make sense to us. GE could get
21 going very quickly on complying with its duties
22 under the Siting Act.

1 And I want to also clarify since both
2 GE and EPA said that they interpret our argument
3 to mean we thought only Section 12 of the Siting
4 Act applied. We think it's like the U.S. versus
5 Colorado case. We think the whole statute
6 applies and that it's in between.

7 The best way to look at it is in
8 between an ARAR and a permit. It falls into that
9 zone, and the entire statute applies. Thank you,
10 Your Honors, very much.

11 JUDGE STEIN: And the award for the
12 most patient counsel goes to Mr. Dohoney from the
13 City of Pittsfield, and thank you for appearing.

14 MR. DOHONEY: Thank you very much to
15 the Board for both accepting our amicus brief
16 hearing from the city today. As you know, the
17 city did not file an appeal. A review of the
18 permit found no clear error with any of the
19 matters, which we did issue comments during the
20 comment period, but we did have some serious
21 concerns of the interplay between the final
22 permit and both local regulatory concerns and

1 local concerns in general that we want to address
2 to you today.

3 There's been the issue on the setting
4 of disposal sites. An interplay between local
5 regulations and local concerns obviously have
6 been well briefed and argued pretty extensively
7 here today, so that's not going to be the focus
8 of my comments, but we do feel that implicit in
9 the permit is an acceptance of the fact that
10 there should and must be some local controls with
11 regard to the remedial work that's done.

12 An issue that's - an example that's
13 brought up is particularly zoning regulations
14 that exist. This is, just to be clear, there's
15 no - none of the disposal sites that were
16 proposed by GE are within the city, but 25
17 percent, over 25 percent of the sediment is going
18 to be removed within the city.

19 As the Board's aware, the whole first
20 phase of this cleanup took place within the city,
21 and that was predominantly in industrial zones.
22 What we're seeing now here with the second phase

1 is moving into, as you heard from Attorney Cook,
2 very densely populated residential zones which
3 raise new and more challenging issues from the
4 local compliance standpoint.

5 I was very happy to hear Attorney
6 Nathanson use the term, "Zoning is fair game
7 outside of the site," and that's really the
8 message that I - one of the major messages I came
9 here to deliver is that any activities conducted
10 outside of the site are by requirement from the
11 city's position subject to all controls including
12 particularly zoning.

13 I'll make note that the City of
14 Pittsfield's zoning ordinance controls parking
15 areas. It has controls for storage facilities.
16 It has particular controls for heavy equipment
17 storage facilities, many of which are prohibited
18 within residential zones, and it's our position
19 that those do in fact apply, and I think the term
20 "fair game" used by Mr. Nathanson is appropriate
21 for that.

22 But also within - and that gives rise

1 to two concerns, an issue that was raised by the
2 Commonwealth earlier as well is there are some
3 subjectivity to the definition of the site and
4 where specifically the municipality will have
5 control and will not have control.

6 One thing I would like to point out to
7 the Board is that the Massachusetts Zoning Act
8 and many of the other local regulations which may
9 or may not apply are not prejudicial. You don't
10 submit yourself to the jurisdiction of the
11 municipality or to the Massachusetts courts
12 simply by making permits.

13 You reserve all of your rights, so
14 it's our position that any questionable issue
15 with regard to the siting of storage facilities,
16 equipment storage facilities should go through
17 the proper municipal boards and channels for
18 proper permitting approval, and that General
19 Electric or anyone else does not waive any rights
20 they have to contest whether that is appropriate
21 under the permit at that stage.

22 That's the best way to resolve these

1 issues and maintain the same level of
2 coordination we saw in the first phase of the
3 cleanup with regard to the second phase.

4 In our brief, we have requested very
5 early stage submission to the city of all
6 remedial plans and permits. I did hear earlier
7 from EPA, which I was happy to hear, that they
8 were going to look for early public and early
9 state comment on those plans.

10 We want it expressly understood that
11 those should be submitted, formally submitted to
12 the city for what we have as a pre-development
13 review, which is not a permitting. It's not a
14 formal permitting format, but just to ensure that
15 all local permits are applied for.

16 And as I say, the issue that concerns
17 us the most is the subjectivity as to what is
18 onsite and what is not onsite given that most of
19 the site is contained within a residential
20 neighborhood, so we feel that the best way to
21 maintain those local controls is for early
22 submission of all of those plans to the city for

1 consideration.

2 JUDGE WARD: And if GE were to
3 disagree or that they proceeded without following
4 those steps that you've outlined, what are your
5 available remedies?

6 MR. DOHONEY: The city is the
7 enforcement authority for zoning which is
8 probably the most classic example. The City of
9 Pittsfield has exclusive jurisdiction enforcement
10 of its own zoning act under the state zoning act
11 which includes enforcement within the superior
12 court.

13 JUDGE WARD: When they seek then to
14 take that to the federal court or the district
15 court to have decided whether it's onsite or
16 offsite work, I think the - I'm going to ask EPA
17 this as well and other parties if they have the
18 answer to this. Does the consent decree or any
19 other document provide the contours or the
20 outlines of what is the site, or is that not
21 precisely defined?

22 MR. DOHONEY: It's not. There's not

1 a metes and bounds description of it that would
2 be particular. It's a verbatim description
3 involving close proximity necessary to the permit
4 and things of that nature, which is that's where
5 our concern comes from.

6 As I said, we'd be far more
7 comfortable with a clear delineation of where our
8 controls affirmatively and where they get more
9 murky, and I don't concede that zoning should not
10 still be a factor on the site, but I think it's a
11 clear delineation as acknowledged by GE earlier
12 today that it is fair game outside the definition
13 of the site.

14 And I will concede that also what
15 frequently happens is where unfortunately the
16 Massachusetts Zoning Act involves resolution of
17 federal law questions if there's jurisdiction
18 within the federal court as well, to resolve
19 issues involving interpretation of local and
20 zoning requirements.

21 JUDGE WARD: Okay.

22 JUDGE STEIN: Thank you very much.

1 MR. DOHONEY: Thank you very much.

2 JUDGE STEIN: Now, it's my

3 understanding that the Commonwealth of

4 Massachusetts has waived their time here. Am I

5 correct on that?

6 MR. MICKELSON: That's correct, Your

7 Honor.

8 JUDGE STEIN: Okay, thank you. State

9 of Connecticut?

10 MS. DIBELLA: Good afternoon again,

11 Your Honors. Just to clarify, Connecticut

12 intended to use this time as a catch all to

13 address its state issues as is stated toward the

14 end of this, and not to weigh in on the facility

15 siting law unless the Board wanted to hear from

16 Connecticut on that. We didn't really feel we

17 were the best suited on that, so if that's okay -

18 JUDGE STEIN: That's what we figured.

19 MS. DIBELLA: - that's how I'd like to

20 proceed.

21 JUDGE STEIN: We wanted to give you an

22 opportunity at the same time -

1 MS. DIBELLA: Thank you.

2 JUDGE STEIN: - to talk about any

3 issues that might be unique to Connecticut.

4 MS. DIBELLA: Thank you. So when we

5 left off, we were addressing some of the issues

6 that were of most importance to Connecticut, and

7 one of the ones that I didn't get to touch on

8 much was the maintenance of dams in Massachusetts

9 and the importance of that to Connecticut in

10 further controlling downstream transport of PCBs.

11 Because the reason, as we touched on,

12 that it's so important to maintain these dams is

13 that in the event of a failure, or sometimes in

14 the event of work, PCBs like with Rising Pond

15 have been released, and that increased downstream

16 transport, and it increases impacts in

17 Connecticut to our river body.

18 And one of the things related to this

19 that I should also stress is that Connecticut is

20 relying on the consent decree and the permit here

21 to come into compliance with our clean water

22 requirements to have a fishable, swimmable

1 Housatonic River in Connecticut, and EPA is well

2 aware of this as far as other branches of EPA, so

3 we're relying on this remedy here to also satisfy

4 our requirements there, and we haven't given up

5 on having a fishable swimmable river, which we

6 don't right now.

7 And so one of the issues that had been

8 raised by GE with respect to the maintenance of

9 dams is a purported conflict between FERC

10 regulations and Massachusetts regulations, and we

11 don't think that there's actually any

12 interference between those regulations and what's

13 proposed by the permit at all, and we don't think

14 that that's been demonstrated.

15 In fact, GE has a choice under the

16 permit that if they would rather than

17 coordinating these maintenance activities with

18 owners of dams that are not GE, they could opt to

19 just remove the PCBs. That is an option under

20 the permit. They have the choice.

21 In addition, GE failed to address in

22 the regent's comments, the possibility that they

1 could be relieved of the monitoring and

2 maintenance requirements for the dams if there

3 was an owner who had an acceptable plan in place.

4 So we don't think that GE's met their

5 burden there, and we don't think that it was

6 clearly erroneous for the Board to include - I'm

7 sorry, for EPA to include that requirement,

8 excuse me, so I wanted to make sure that we had a

9 chance to touch on that because that's also very,

10 very important to Connecticut.

11 JUDGE WARD: Just a follow up

12 question, if there were a conflict in the future,

13 if FERC regulations change and somehow there's

14 some conflict between that and what EPA is

15 requiring under the permit, could they bring that

16 issue to the district court to resolve as a

17 dispute?

18 MS. DIBELLA: It's hard to say if it's

19 a regulation that's not in place now, although I

20 suppose if it were in place when they were

21 implementing that part of the remedy, they could

22 seek that out. It's just hard to say because

1 it's not based on something that's at law now
2 when the permit is being approved, so.

3 JUDGE AVILA: Could they seek a
4 modification of the permit, a further
5 modification, a modification of the modified
6 permit?

7 MS. DIBELLA: I'm sure they could, but
8 they also, like I said, have the option of if
9 there was a conflict, the permit does give them
10 the ability to just remove the PCBs behind the
11 dams, and then they don't have to worry about
12 that any longer, so there is sort of an escape
13 hatch.

14 JUDGE WARD: To me, it seems like a
15 pretty big escape hatch to go through in order to
16 deal with a separate legal requirement perhaps.

17 MS. DIBELLA: But there isn't any real
18 conflict now. It would have to be a pretty
19 significant change, and that's also very
20 speculative -

21 JUDGE WARD: Okay.

22 MS. DIBELLA: - that that would occur.

1 Just to go back on a couple of other points on
2 the issues I've addressed like on the downstream
3 transport, and I know we've talked about 39(a)
4 and 40 a lot, and obviously we believe, like I
5 said, that additional work could be required
6 under the provision.

7 But I just want to say that we also
8 feel that there has been undue reliance on 44 and
9 46 and 162 and 163, and perhaps because those
10 would be more burdensome on the government to
11 require the additional work, and so, you know, we
12 really believe that that additional work could be
13 required under 39(a) and 40 for the reasons we've
14 stated.

15 JUDGE STEIN: Thank you. General
16 Electric?

17 MR. NATHANSON: I'll be very, very
18 brief, I hope. I'll be brief in part because on
19 the Chapter 21(d) issue, I think we can defer to
20 the region in large part. Our brief basically
21 adopted arguments that they made. We did add
22 one.

1 In the region's brief, they did drop
2 a footnote alluding to the possibility that the
3 Siting Act approval process is a permitting
4 process as well, and therefore would be subject
5 to the permit exemption. They didn't pursue that.

6 We have pursued that, and it's a very
7 simple argument. If it looks like a permit, and
8 it walks like a permit, and it quacks like a
9 permit, it's a permit, and that's what's going on
10 here. The Chapter 21(d) requires the approval of
11 a couple of regulatory bodies.

12 You have to go to - the state has it
13 as a waste site facility counsel which has to
14 make several determinations and approvals, and
15 then declare that the siting agreement is
16 operative, and then you have to go to a local
17 assessment committee which is empowered to
18 negotiate and execute a siting agreement, and you
19 can't construct the facility without the siting
20 agreement which is - that's a permit.

21 JUDGE WARD: Is that something though
22 that we need to decide? It seems to me the issue

1 before us is, "Is it or isn't it an ARAR?"

2 MR. NATHANSON: I agree.

3 JUDGE WARD: If we've just decided
4 it's not an ARAR -

5 MR. NATHANSON: I agree unless - the
6 possibility seems to have been raised that there
7 is some sort of gray area between ARARs and
8 permits, and if you find yourself wandering in
9 that area, then the next place to go is it's a
10 permit, but, yes, otherwise that's why -

11 JUDGE AVILA: And if it is a permit,
12 does that then turn on whether this is - the
13 facility would be considered onsite or not?

14 MR. NATHANSON: It would, but we're
15 talking about the temporary waste siting
16 facilities. This is the stuff that's coming up
17 out of the river or out of the ground.

18 JUDGE AVILA: No, but I just wanted to
19 be clear that -

20 MR. NATHANSON: Yes, no, it would have
21 to be onsite, but I don't think there's any
22 reasonable possibility that this would not be

1 onsite.

2 JUDGE WARD: If we don't reach that, if
3 we decide we don't need to reach that or we
4 shouldn't reach that question because it's not
5 before us, what avenues does the municipal
6 committee have to pursue an argument that either
7 it's not onsite or it is - it's not a permit,
8 it's something else, there's no exemption?

9 MR. NATHANSON: I do not know what
10 enforcement mechanisms are available under the
11 Siting Act. My understanding, and I may be
12 wrong, is that the council is defunct, and so I'm
13 not exactly sure how they would pursue that, but
14 presumably if there are Massachusetts regulatory
15 or judicial processes that would enable somebody,
16 a municipality to enforce its rights under the
17 Siting Act, they could do that.

18 JUDGE WARD: Okay.

19 MR. NATHANSON: That's all I have.
20 Thank you very much.

21 JUDGE STEIN: Region 1?

22 MR. CONWAY: Your Honors, I have

1 another clarification from one of your earlier
2 questions, a citation on flood storage and
3 capping in Rising Pond, response to comments
4 number 640 at page 185. It's also discussed pages
5 30 and 31 of the region's response brief to the
6 Board.

7 JUDGE STEIN: Thank you. We're going
8 to give everyone a one-week opportunity to give
9 us a one to two-page list of citations for all of
10 the citations we've asked for or that you have
11 offered to provide us, no argument, just a list
12 of citations, and I will say due Monday, June 19.
13 You can submit it early, but that should give you
14 sufficient time to provide the list of citations.

15 MR. CONWAY: Great.

16 JUDGE STEIN: But thank you.

17 MR. CONWAY: Your Honors, as far as
18 the Siting Act is considered, we've made it very
19 clear that the permit requires us to identify
20 ARARs in the final permit modification. We did
21 identify them in Attachment C.

22 We did not identify this because the

1 ARARs are limited to substantive environmental
2 requirements, and this did not meet that
3 standard. In addition, the Commonwealth has not
4 named it as an ARAR, has not identified it as an
5 ARAR.

6 JUDGE AVILA: Can I ask you about
7 that? Does a state have to identify something as
8 an ARAR in order for EPA or the region to include
9 it as an ARAR?

10 MR. CONWAY: The statute discusses the
11 state identifying ARARs. If the state doesn't
12 identify one and the region does, I don't know
13 the answer to that. For this purpose, the
14 state's decision was in accordance with the
15 review of the Siting Act versus the standards for
16 determining ARARs under CERCLA.

17 JUDGE WARD: In your brief, I think
18 you make an additional argument about general
19 applicability or the lack thereof with respect to
20 the Siting Act. Is that a point that you made in
21 the record below in the response to comments? I
22 didn't see it there, but I -

1 MR. CONWAY: No, I don't think it had
2 been there. In the record below, we discussed
3 the fact that it's not a substantive
4 environmental requirement and that it had not
5 been identified by the state.

6 In terms of the substantive
7 environmental requirements, if you look at the
8 preamble to the proposed NCP in 1988, EPA may
9 consider several factors to determine if a
10 requirement is substantive or administrative,
11 including the basic purpose of the requirement,
12 any adverse effect on the ability of the action
13 to protect human health and the environment if
14 that requirement is not met, and classification
15 of other similar or identical requirements as
16 substantive or administrative in other
17 situations.

18 The adverse effect on the ability of
19 the permit modification to protect human health
20 and the environment if the Siting Act is not
21 included as an ARAR, the adverse effect is zero.
22 The Siting Act is not an environmental

1 requirement.
2 The municipal committee's brief
3 describes it as a process of brokering an
4 agreement which is far afield from a standard, or
5 cleanup standard, or level of control in a
6 federal or state statute.

7 JUDGE WARD: So if the Board reached
8 that question, reaches the question about whether
9 it is or isn't an ARAR, and if the Board were to
10 agree with you on that point, does the Board need
11 to go any further? Do we need to deal with, you
12 know, whether it's a permit that's exempted under
13 CERCLA or whether it's preempted?

14 MR. CONWAY: No, you do not. The
15 region's charge in the 2000 permit was to
16 identify ARARs. We've done that. We analyzed
17 particular ARARs and we've identified that ones
18 that met the standard.

19 JUDGE WARD: And would a decision in
20 your favor on that point, would that foreclose
21 the municipal committee from thereafter pursuing
22 whatever remedies they have under state law to

1 enforce the Siting Act?

2 MR. CONWAY: To quote Mr. Nathanson,
3 I'm not agnostic on that point, that it would
4 cause delay, which we mentioned in our brief, but
5 as far as whether it would foreclose it, our
6 point today is that the Board can determine that
7 the permit was validly issued based in part on
8 the Siting Act not being an ARAR.

9 JUDGE WARD: So to come full circle on
10 that point in response to the argument by the
11 municipal committee where they were reading, I
12 believe, the permit to foreclose them from
13 pursuing other remedies, your point is the only
14 determination that you've made is that it's not
15 an ARAR and that the region interprets that
16 language not to foreclose them from additional
17 remedies? Is that correct?

18 MR. CONWAY: The language on page 65
19 of the permit modification has no - there was no
20 intent to have any effect one way or the other on
21 the Siting Act.

22 JUDGE WARD: Thank you.

1 JUDGE AVILA: So this permit in the
2 region's view could not be used as a shield in an
3 action to enforce, or you're agnostic on that, or
4 could the permit not be used as a shield to a
5 lawsuit seeking compliance with the Siting Act?

6 MR. CONWAY: We have pointed out that
7 there can be delay associated with brokering the
8 agreement, so there can be - the region, at
9 present, the region is saying it's not properly
10 an ARAR, shouldn't be in the permit, and then as
11 far as - we would have to research further the
12 effect on the - depending on what kind of action
13 was brought and how it was framed.

14 JUDGE STEIN: So I'm a little confused.

15 MR. CONWAY: Okay, I could tell.

16 JUDGE STEIN: I thought I heard you
17 say that the determination that the region made
18 is that it's not an ARAR, and that I think page
19 65 of the permit, I don't have the permit in
20 front of me, that the region had no intent to
21 speak one way or another in this permit to any
22 broader questions about that law. Is that a

1 correct statement?

2 MR. CONWAY: Both of those are
3 correct, thank you, yes.

4 JUDGE STEIN: Thank you.

5 JUDGE WARD: Could we turn to the
6 question of perpetuity or in perpetuity? And I
7 think that this is another issue raised by the
8 municipal committee. I just want to make sure I
9 understand the region's position. Does the
10 permit at least end specifically as it relates to
11 operation and maintenance or O&M? Does that
12 continue in perpetuity or not?

13 MR. CONWAY: We have put no end dates
14 on the permit requirements, so as far as we've
15 concerned, unless there's something to the
16 contrary in the future, there is no end date on
17 those requirements.

18 JUDGE WARD: In terms of paragraph, I
19 think it is paragraph 89 of the consent decree, I
20 think I'm reading GE's brief as suggesting that
21 these requirements could continue indefinitely,
22 but that there is the possibility, some set of

1 circumstances in which a certificate of
2 completion could be issued, including with
3 respect to O&M. Do you read the consent decree in
4 that paragraph, the consent decree in the same
5 way?

6 MR. CONWAY: The certification of
7 completion section has two different
8 certifications. The second one, paragraph 89,
9 completion of all work for the site, that is not
10 complete until all work other than, I think it's
11 retention of records, all work, and O&M would be
12 included in the term "work."

13 JUDGE WARD: So it's possible that a
14 certification of completion could be issued at
15 some point in the future under paragraph 89 to
16 include operations and maintenance, O&M?

17 MR. CONWAY: If there was a
18 determination at some point that operation and
19 maintenance could end, and that would certainly
20 depend on, you know, what are the circumstances
21 at the site? How much additional PCBs have been
22 removed beyond the final permit modification?

1 It's not a situation we're in right
2 now where we would say that, but as far as
3 paragraph 89 goes, that certification cannot be
4 done until all - EPA has approved completion of
5 all work other than retaining records.

6 JUDGE STEIN: Let me confer with my
7 colleagues for a moment. We have one additional
8 question that I don't think the region has
9 responded that we're not clear on the region's
10 response, but I'm curious about an exposure
11 analysis bearing on exposure of humans to PCBs
12 from direct contact in the floodplain and in the
13 river. GE raised this issue as to a 2002 survey,
14 and can you tell us where we might find that in
15 the record?

16 MR. CONWAY: It's an exposure analysis
17 in the floodplain?

18 JUDGE STEIN: On exposure of humans to
19 PCBs from direct contact in the floodplains and
20 in the river.

21 MR. CONWAY: If it's -

22 JUDGE STEIN: I think GE raised this

1 as to a 2002 survey, and if at least in your list
2 of citations that you provide -

3 MR. CONWAY: We'll find that for you.

4 JUDGE STEIN: Provide that for us.

5 MR. CONWAY: Our risk assessments in
6 that time period were very extensive, very site
7 specific, and very detailed with nine, ten, 11
8 decision endpoints of different ecological and
9 human health risk factors.

10 JUDGE WARD: So I think in particular,
11 but not exclusively, but in particular, I think
12 we'd like to know whether the peer reviewers who
13 reviewed the human health risk assessment,
14 whether they had before them, whether they were
15 aware of this 2002 floodplain survey.

16 MR. CONWAY: 2002 floodplain, okay, we
17 will.

18 JUDGE WARD: If I could ask the
19 municipal committee to address one question,
20 again this is on in perpetuity, I guess the
21 question is would you be satisfied with or are
22 you satisfied with the manner in which the region

1 has described how the permit and the CD provision
2 will operate going forward? Is that sufficient
3 for your purposes or do you still have a concern
4 with the permit on that point?

5 (Off mic comment)

6 JUDGE WARD: Because you don't want it
7 to ever end no matter what the circumstance is,
8 even if it's no longer necessary for example?

9 (Speaking off mic)

10 MR. CONWAY: -- definition of the
11 site. It's at page 35 in the consent decree.

12 JUDGE WARD: All right, thank you.

13 JUDGE STEIN: Thank you very much.
14 What I would like to do now is to go to closing
15 statements. Everyone will have two minutes and
16 we'll proceed in the following order. General
17 Electric will go first, followed by the
18 Housatonic River Initiative, followed by Mr.
19 Cook, followed by the municipal committee,
20 followed by Green Berkshire, City of Pittsfield,
21 and then Connecticut, Massachusetts, and Region
22 1. You are free to waive your time or you are

1 free to use your two minutes, but that should get
2 us out of here in about 20 minutes.

3 Mr. Nathanson?

4 MR. NATHANSON: Maybe 19. I couldn't
5 possibly try to sum all of this up, so all I want
6 to do is thank the Board and its staff for what I
7 am sure is an extraordinary amount of work that
8 went into preparing for this hearing which was
9 unique in my experience, but unique in a good
10 way, and I just want to thank the Board for
11 giving me and my clients such a fair hearing.
12 Thank you very much.

13 MR. DE FUR: Thank you very much, Your
14 Honors, on behalf of the Housatonic River
15 Initiative and the Housatonic Environmental
16 Action League. I want to thank you for all of
17 your work here today and for hearing us out.
18 There are a couple of points that I want to make
19 based on your comments, and you've enlightened me
20 a great deal.

21 There are several things that I think
22 EPA needs to fix in the permit, and we can call

1 those errors and omissions or errors or
2 omissions. The first one is Connecticut is
3 omitted. The remedial action has no work in
4 Connecticut. It doesn't have any additional
5 sampling, any characterization. There's no work
6 in Connecticut.

7 Second of all, the remedial action
8 accepts the completely inadequate submission by
9 the State of Massachusetts about these core
10 areas. There's no real substantive material upon
11 which to base any decisions there.

12 Third of all, their treatment analysis
13 needed to have been done with updated information
14 so that they would understand the full capacity
15 of thermal desorption, and then as pointed out by
16 the State of Connecticut, the water quality
17 analysis and what they've done in terms of how
18 water quality will be protective of human health
19 and the environment doesn't reach the logical
20 conclusion that it should.

21 You've asked a lot about community
22 acceptance, and I would be remiss if I didn't

1 comment upon it because I've been involved with
2 too many community organizations that would say
3 their community has accepted and not accepted
4 remedies and have made all the difference in the
5 world.

6 The one that I would point out most
7 readily is where on the Duwamish River an early
8 action was going to involve disposal of
9 contaminated sediments. The citizens at the place
10 where it was originated and where it was destined
11 both protested so vehemently, EPA changed their
12 decision, so I want to thank you for that.

13 And finally, a topic that is dear to
14 some of the folks in EPA's heart and mind,
15 cumulative risk. Cumulative risks not only
16 matter for what happens in time, but also the
17 psychosocial consequences of having a
18 contaminated site or a landfill in your backyard
19 exert powerful emotional consequences on the
20 community. Thank you very much.

21 JUDGE STEIN: Thank you. Mr. Cook?

22 MR. COOK: Your Honors, I want to thank

1 you for your graciousness in my late debut in
2 appellate advocacy. I am very impressed by the
3 preparation that's gone into this, and the very
4 thoughtful way you have addressed the issues that
5 have been presented. The only comment I would
6 make with regard to the residents of the, I guess
7 we could say the impact zone, is that it's one
8 thing to not be able to sell your home for some
9 years.

10 It's another thing to go through
11 several years of 10,000 truckloads, but if what
12 we get at the end of it is a destroyed river,
13 then that's really the point that I wanted to
14 make today, not that there shouldn't be cleanup,
15 but I think that there is a tremendous
16 underestimation of what it takes to be able to do
17 what is being prescribed here and not destroy
18 that resource.

19 And so I would ask that there be a
20 focus on the balance of that because if we go
21 through it and my worry turns out to be true,
22 then that would be a betrayal of the people that

1 I care about and whom I'm representing here
 2 today. Thank you very much.
 3 MR. PAWA: Thank you very much. I
 4 wholeheartedly join Mr. Nathanson's sentiments in
 5 thanking you. Having practiced law and litigated
 6 for over 20 years, I've never seen judges as
 7 prepared as this. It's kind of stunning, and I
 8 appreciate the care and attention you've given to
 9 this.

10 Very briefly, accidents happen,
 11 whether it's Three Mile Island, or the BP oil
 12 spill, or the Santa Barbara oil spill, think of
 13 the iconic environmental disasters or the
 14 unsinkable Titanic.

15 GE is telling you, "Don't worry about
 16 it. This facility will be safe right here, you
 17 know, tucked into a residential and conservation
 18 zoned area in Berkshire County, and don't worry
 19 about an accident because an accident's no more
 20 likely here than someplace else."

21 But it will be worse if it happens
 22 here compared to someplace else, much worse

1 because this is not an existing licensed facility
 2 in a place where it should be. They're asking
 3 you to make exceptions to put this in a place
 4 where it clearly should not be.

5 On the question of 21D, we would ask
 6 you to keep in mind the important principles of
 7 federalism here and the rights of the communities
 8 under state law, and to allow the communities to
 9 continue to be able to exercise their rights
 10 under state law.

11 With respect to whether this is a
 12 permit, it's a contract. It's a bilateral
 13 contract. It is not a permit. So again, thank
 14 you for your time, and please keep in mind just
 15 how special this area is.

16 It's like the Capen Islands. It is
 17 one of the most special areas of Massachusetts,
 18 and it's different from places around the country
 19 where there are existing licensed hazardous waste
 20 facilities in places where they actually belong.
 21 Thank you.

22 JUDGE STEIN: Thank you. Mr. Cox?

1 We'll move onto the City of
 2 Pittsfield, Mr. Dohoney.

3 MR. DOHONEY: Once again, I'd like to
 4 thank you for hearing the city's comments today.
 5 Before I get into my brief closing, I do want to
 6 point out an issue that we did mention in our
 7 brief, but I didn't mention in my earlier
 8 comments, is that the city shares EPA's position
 9 articulated here today that the lack of a
 10 durational statement regarding the O&M program
 11 should be read to be maintained in perpetuity,
 12 and the city strongly encourages that
 13 interpretation that the O&M program remain in
 14 perpetuity.

15 And as I said, it was particularly
 16 important for the city to be addressed here today
 17 because the local concerns that we have going
 18 forward with regard to the actual administration
 19 of this cleanup are far from political
 20 grandstanding or trying to interfere in what are
 21 really, we understand to be, federal government
 22 issues.

1 The City of Pittsfield is in a
 2 precarious place right now in a lot of ways, not
 3 just environmentally, and I understand that's
 4 this Board's concern, but the degree of this
 5 cleanup has the potential to have a disastrous
 6 socioeconomic effect on the City of Pittsfield.

7 We are blessed in the city to have a
 8 number of people from the mayor, to citizens like
 9 Mr. Cook and others who care very deeply about
 10 ensuring that the City of Pittsfield continues to
 11 succeed, and I hope that that consideration,
 12 while I know it's not your primary charge, is
 13 always in the back of your mind as you're making
 14 these decisions as to what level of consideration
 15 the local government should have on some of these
 16 minor issues, but I can tell you it can be
 17 critical to the future of the city. Thank you.

18 JUDGE STEIN: Thank you. State of
 19 Connecticut?

20 MS. DIBELLA: Based on all that you've
 21 heard today, I believe that the Board could
 22 conclude that there was no clear error in

1 including the downstream transport standard, the
2 future work requirements in Connecticut, and the
3 maintenance of dams in Massachusetts requirements
4 with the caveat that with the future work in
5 Connecticut, we did raise a procedural issue in
6 our brief, so assuming you reach that on the
7 merits.

8 And other than that, I'd just like to
9 say thank you for forwarding Connecticut the
10 opportunity to be heard today on these very
11 important issues to us, particularly being the
12 downstream state that's impacted by all that's
13 gone on at the site and in Massachusetts. Thank
14 you.

15 JUDGE STEIN: Thank you.
16 Massachusetts?

17 MR. LEHAN: Your Honors, the
18 Commonwealth thanks you for your thorough and
19 careful consideration of all of the issues
20 associated with this remedy decision, and for
21 your consideration of the input of the
22 Commonwealth and all of the parties.

1 In summary, the Commonwealth believes
2 that the administrative record supports EPA's
3 basis for the selection of this remedy which we
4 consider a balanced, but protective remedy for
5 Rest of River. Thank you again.

6 JUDGE STEIN: Region 1, Mr. Conway?

7 MR. CONWAY: Thank you all very much.
8 Thank you all. Over the past more than 15 years,
9 EPA has done its best to carefully assess the
10 large and complex administrative record
11 underlying remedy selection in this permit to
12 make tailored, site-specific judgments against
13 that record, and to select a remedy that is
14 reasonable.

15 EPA's best here is sufficient to pass
16 muster under the Board's regulations, including
17 its standard of review. EPA's overall remedy
18 selection, which is a quintessential technical
19 judgment, is worthy of the Board's highest level
20 of deference.

21 To be clear, the standard of review in
22 this RCRA permit proceeding is clear error, or of

1 fact or law, or abuse of discretion. Even where
2 the region was required to interpret revisions of
3 the consent decree as part of this RCRA
4 proceeding through the application of contract
5 law principles, that resulting legal judgment
6 must be reviewed for clear error under the terms
7 of 124-19.

8 On the issue of cost, EPA does not
9 accept GE's premise that the remedies are equal
10 from the standpoint of the three threshold
11 criteria. To the contrary, EPA has pointed out
12 specific facts and differences that favor EPA's
13 approach.

14 Consistent with the Board's precedent
15 in Delco, the cost does not become determinative
16 where the remedies are not equally protective, or
17 in this situation, equally well-suited. This was
18 a choice that relies fundamentally on EPA's
19 technical judgment.

20 GE at most has offered an alternative
21 technical theory, not the kind of compelling
22 demonstration necessary to carry its burden with

1 the Board.

2 Although GE may now complain that EPA
3 did not provide a detailed framework or
4 methodology, the parties agreed in the CD that
5 only the costs must be considered and balanced in
6 assessing the overall remedy. Our approach was
7 exactly the qualitative multi-factored assessment
8 called for by the CD.

9 And finally, we would ask that the
10 Board be mindful of the nature of this RCRA
11 permit modification. On page one, the permit
12 expressly states that the permit must conform to
13 the RCRA statutory requirements as well as the
14 consent decree.

15 It is meant to be a framework for
16 remedy selection and a transition to
17 implementation. We're hopeful that this long-
18 running process will continue toward that point
19 with all possible expedition. Thank you.

20 JUDGE STEIN: Thank you very much. I
21 would like to just briefly take the opportunity
22 on behalf of my colleagues on the Board to thank

1 you for your careful preparation and your
2 endurance.

3 For those of you who don't appear
4 before us on a regular basis, we do not typically
5 hold all-day oral arguments, but given the
6 complexity of the record and the significance of
7 the dispute, we felt that we really needed to
8 allocate more time than usual to review of the
9 record.

10 Supplemental citations based on
11 questions that have gone back and forth today, we
12 would like to review by June 19, and I just want
13 to say thank you to all of you who have come so
14 far.

15 I know we have a range of people from
16 interested corporations, to citizens, to
17 municipalities, to commonwealths, and states, and
18 EPA, and we really appreciate it, and with those
19 remarks, we stand adjourned.

20 MS. DURR: All rise.

21 (Whereupon, the above-entitled matter
22 went off the record at 5:40 p.m.)

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