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

In the Matter of:	)	
	)	
GENERAL ELECTRIC COMPANY	)	**RCRA Appeal No. 16-04**
Modification of RCRA Corrective Action	)	
Permit No. MAD002084093	)	
	)	

REGION 1'S RESPONSE TO PETITION OF THE HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE FOR REVIEW OF FINAL PERMIT MODIFICATION OF RCRA CORRECTIVE ACTION PERMIT ISSUED BY EPA REGION 1

Respectfully Submitted,

(s) Timothy M. Conway
Timothy M. Conway
Joanna Jerison
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109
P: 617-918-1705; 617-918-1781
F: 617-918-0705; 617-918-0781
Conway.tim@epa.gov; Jerison.joanna@epa.gov

Of Counsel:

Tracy Sheppard
U.S. Environmental Protection Agency
Solid Waste and Emergency Response Law Office
Office of General Counsel

David Dowton
U.S. Environmental Protection Agency
Office of Site Remediation Enforcement
Office of Enforcement and Compliance Assurance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Environmental Appeals Board Decisions

TABLE OF AUTHORITIES (CONTINUED)

Federal Statutes

Federal Regulations

State Statutes

State Regulations

TABLE OF AUTHORITIES (CONTINUED)

Federal Register Notices

EPA Guidance Documents

Other

TABLE OF ATTACHMENTS

TABLE OF ATTACHMENTS (CONTINUED)

*Cross-references with AR numbers indicate the document numbers in EPA's Administrative Record for the October 2016 Final Modification of the Reissued RCRA Permit. SEMS numbers are for documents in the GE-Pittsfield/Housatonic River Site file, but not in the Rest of River Administrative Record.

GLOSSARY OF TERMS

ANPR	Advanced Notice of Proposed Rulemaking
AR or Record	Administrative Record
ARARs	Applicable or Relevant and Appropriate state and federal Requirements
Board or EAB	Environmental Appeals Board
CA or Comparative Analysis	EPA's Comparative Analysis of Remedial Alternatives for the GE-Pittsfield/Housatonic River Project Rest of River
CD or Decree	Consent Decree in *United States et al. v. General Electric Company* Civil Action No. 99-30225-MAP *et seq.* (October 27, 2000)
CD-Permit	Reissued RCRA Permit (reissued by EPA in October 2000 and again effective December 7, 2007), incorporated into Consent Decree
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
C.F.R.	Code of Federal Regulations
CMR	Code of Massachusetts Regulations
CMS	Corrective Measures Study
DEP	Department of Environmental Protection
Draft Permit	2014 RCRA Corrective Action Draft Permit Modification
E.A.D.	Environmental Appeals Decision
EPA	U.S. Environmental Protection Agency
ERA	Ecological Risk Assessment
Fed. Reg.	Federal Register
FERC	Federal Energy Regulatory Commission
FP	Floodplain
GE	General Electric Company
HHRA	Human Health Risk Assessment
IMPG	Interim Media Protection Goals
MGL	Massachusetts General Laws
Municipalities	Housatonic Rest of River Municipal Committee
NCP	National Contingency Plan
NPDES	National Pollutant Discharge Elimination System

GLOSSARY OF TERMS (CONTINUED)

OM&M	operation, maintenance, and monitoring
O&M	operation and maintenance
OSWER	Office of Solid Waste and Emergency Response
Permit	2016 RCRA Corrective Action Final Permit Modification
PCB	polychlorinated biphenyl
Pet.	Petition
RCRA	Resource Conservation and Recovery Act
Region	U.S. Environmental Protection Agency
RTC	EPA's Response to Comments on Draft Permit Modification and Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River "Rest of River"
SED	sediment
SEMS	Superfund Enterprise Management System
SOP	Statement of Position
States	Massachusetts and Connecticut
Status Report	EPA's "Potential Remediation Approaches to GE-Pittsfield–Housatonic River Site 'Rest of River' PCB Contamination," released May 2012
Stmt/Basis	Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River "Rest of River," released June 2014
T/D	treatment and/or disposition
U.S.C.	United States Code

I. INTRODUCTION

This appeal arises from EPA Region 1's October 2016 issuance of a Permit Modification ("Permit", Attachment ("Att.") 1) to General Electric Company ("GE") concerning a portion of the Housatonic River ("Rest of River") pursuant to a 2000 consent decree ("Consent Decree," "Decree" or "CD"). CD, Att. 2. The Permit was issued pursuant to a process set forth in the Decree that provides that the remedy for the Rest of River will be selected and reviewed as a RCRA permit and implemented as CERCLA cleanup.[1] Att. 2, CD ¶22.q (review of Permit Modification and remedy selection under RCRA), CD ¶22.z (remedy implementation under CERCLA). In selecting the remedy set forth in the Permit, EPA relied upon its scientific, technical and policy expertise, following a decade and a half of analysis, modeling, risk assessments, independent external peer review, and internal EPA reviews. To arrive at the appropriate level and method of cleanup for Rest of River, including different components of the remedy, EPA first evaluated a large and complex Administrative Record ("Record" or "AR")[2] comprised primarily of scientific and technical material. The Region then exercised its scientific and policy discretion to select among the range of possible outcomes. This lengthy scientific analysis was informed by an extraordinary degree of public participation. EPA repeatedly sought the input and involvement of GE, the States of Massachusetts and Connecticut (collectively, "the States"), and the public.

[1] Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§6901 *et seq.*, and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§9601 *et seq.*, respectively.

[2] The Record is comprised of information EPA considered or relied on for the Rest of River remedy evaluation, proposal and selection. These materials have been assigned AR numbers. The Record is a subset of the overall Site file for the GE-Pittsfield/Housatonic River Site, that also includes information related to the other response actions undertaken pursuant to the Decree, as well as compliance, enforcement, cost recovery and other Site-related information. These other materials have generally been assigned SEMS numbers.

The Housatonic Rest of River Municipal Committee ("the Municipalities") essentially challenge the Permit on two grounds. First, the Municipalities erroneously contend that, pursuant to Massachusetts General Laws ("M.G.L.") c. 21D §12, the Permit must require GE to compensate communities for hosting hazardous waste facilities for the temporary storage or staging of excavated soils and sediments prior to transportation off-site. Second, they contend EPA erred when it did not use the term "in perpetuity" with respect to GE's remedy maintenance obligations. The Municipalities' Petition ("Pet.") does not warrant Board review because first, it seeks monetary relief beyond the scope of, and not eligible under, EPA's Permit, and second, the Permit is sufficiently protective regarding operation and maintenance responsibilities over time. Accordingly, these challenges to the Permit are not justified, as discussed below in greater detail.

II. STATEMENT OF THE CASE

The Board has jurisdiction to review the Permit as a RCRA permit modification. 40 C.F.R. Part 124: Section 7006 of RCRA.

II.A Statutory and Regulatory Background

This case involves an unusual combination of EPA's authority under CERCLA and RCRA. In 1980, Congress enacted CERCLA in response to the serious environmental and health risks posed by industrial pollution. CERCLA was designed to promote the "timely cleanup of hazardous waste sites" and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination. *Burlington Northern and Santa Fe Ry. v. United States*, 556 U.S. 599 (2009). CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. "We are therefore obligated to construe

its provisions liberally to avoid frustration of beneficial legislative purposes." *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1st Cir. 1986).

Enacted in 1976, RCRA empowers EPA "to regulate hazardous wastes from cradle to grave…." *Chicago v. EDF*, 511 U.S. 328, 331 (1994). As part of RCRA, Congress established a permitting program for facilities that treat, store or dispose of hazardous waste and directed EPA to implement the program. 42 U.S.C. §6925. In 1984, Congress amended RCRA, providing that any person seeking a RCRA permit must perform any "corrective action" necessary to clean up releases of hazardous wastes or hazardous constituents from any solid waste management unit at the facility. 42 U.S.C. §6924(u), (v).

II.B Factual and Procedural Background

II.B.1 The Housatonic River and the "Rest of River" Contamination

The Housatonic River begins immediately north of Pittsfield, Massachusetts, and continues through Massachusetts and Connecticut to Long Island Sound. Att. 1, Permit, Figure 1. In Pittsfield, the River flows adjacent to the former GE facility, where GE used PCBs extensively from 1932-1977. Att. 3, EPA Statement of Position ("SOP"), at 5. PCBs are classified as a known human and animal carcinogen, and have been linked to a number of other adverse health effects in humans and animals. EPA Response to Comment ("RTC") Response 42 *et al*., at 39-42, Response 85 *et al*., at 43; Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River, "Rest of River" ("Statement of Basis" or "Stmt/Basis"), at 14-18, Att. 4 and Att. 5 respectively. During this time, the Transformer Division manufactured and repaired transformers containing PCBs. Att. 3, SOP, at 5. Significant amounts of PCBs and other hazardous substances were released to soil, groundwater, Silver Lake, the Housatonic

River and were disposed of within and around the facility in landfills, former river oxbows, residential yards, and other locations, including migrating downstream. A former GE manager estimated that 1.5 million pounds of PCBs entered the river system. AR512751. GE itself estimated that between 111,000 and 576,000 pounds of PCBs remain in sediment and floodplain. AR260320, Tables 2-7, 2-8. In light of the foregoing, EPA concluded that PCBs have contaminated the riverbed, riverbanks, floodplain, fish, ducks, other biota, and their habitats, and have created unacceptable risks to human health and the environment.

II.B.2 Decree and CD-Permit

In 2000, Plaintiffs the United States, States, and Defendant GE, entered into a Decree to address PCB contamination from the former GE facility in Pittsfield. The Decree provides for investigation and cleanup of PCBs and other hazardous substances released from GE's former Pittsfield facility, which migrated to numerous areas in Pittsfield and the Housatonic River. The Permit is one component of the Decree. The "Rest of River" is defined under the Decree to include approximately 125 miles of riverbed and banks, and the associated Floodplain and Backwaters. Att. 1, Permit, Figures 1 and 2.

Many of the areas requiring investigation and/or cleanup under the Decree incorporate Performance Standards and corrective measures for addressing PCBs and other hazardous substances. Att. 1, Permit, II. However, at the time of Decree entry, the Rest of River investigation was not complete. Therefore, the Decree included a RCRA permit to govern the Rest of River investigation, corrective measures alternatives analysis and remedy selection process. Att. 2, CD ¶22; Att. 6, CD-Permit Appendix G. The Decree also provides that, as part of this process, EPA would modify the CD-Permit to address the risks posed by GE's PCBs in

the "Rest of River" through the Permit. Att. 2, CD ¶22.p. Following issuance of the Permit and resolution of any challenges to the Permit, GE was required to perform the Permit's selected Rest of River Remedial Action and operation and maintenance, pursuant to CERCLA and the Decree. Att. 2, CD ¶¶ 22.p.,z.

II.B.3 Rest of River Remedy Selection Process

The Decree established a process for selecting a cleanup for the Rest of River. This process, which spanned more than a decade, included efforts by EPA (beyond those called for by the Decree) to solicit and respond to the views of the public, including the Municipalities.[3] Technical/scientific milestones included EPA's river modeling (AR258097), Human Health Risk Assessment ("HHRA") (AR219190) and Ecological Risk Assessment ("ERA") (AR215498), and five independent peer reviews of the modeling and risk assessments. After each peer review, EPA issued a Responsiveness Summary and revised document.[4] This body of scientific evidence demonstrated unacceptable threats to human health and the environment in the Rest of River system. Att. 4, RTC 42, *et al*. at 39-42. Also, GE submitted its analysis of the nature and extent of Rest of River contamination (RCRA Facility Investigation, AR49294), its identification of preliminary cleanup standards (Interim Media Protection Goals, AR248143), and, in 2008 and 2010, two versions of a Corrective Measures Study to analyze different remediation alternatives. AR283374, 472605. GE's recommendation from its 2010 Revised Corrective Measures Study (RCMS) opted for the alternative with the second-least amount of PCB removal from Rest of River, with on-site disposal of the PCB-contaminated material. Att. 8, RCMS at 11-1 to 11-2.

[3] For more details on the specific public involvement steps afforded by EPA, see Att. 7, Timeline for Public Comments.

[4] HHRA (AR204922, 219190), ERA (AR204922, 215498, 580279, 580280, 580281), Modeling (AR65093, 204991, 65093, 229322, 237323, 252993, 258098).

Based on that work and public input, EPA in 2011 presented a potential remedy for review by two national EPA advisory review boards. AR487308. Following that review, EPA entered into technical discussions with the States. In May 2012, the EPA/States' discussions yielded a jointly-prepared Status Report of potential remediation approaches. Att. 9, Housatonic River Status Report.[5] Following the Status Report's issuance, at GE's request, EPA and GE entered into seventeen months of remedy discussions above and beyond the process opportunities afforded in the Decree. AR558617.

In May 2014, EPA proposed a Rest of River remedy for public comment. Draft Permit Modification ("Draft Permit"), AR558619. The rationale for the proposed remedy is documented in EPA's Comparative Analysis of Remedial Alternatives ("Comparative Analysis" or "CA") Att. 10, and the Statement of Basis, Att. 5.

EPA's remedy proposal followed its evaluation of a wide range of alternatives to address the unacceptable risks posed by GE's PCB contamination. Att. 5, Stmt/Basis; Att. 10, CA. The CD-Permit describes nine criteria for consideration. There are three threshold "General Standards" to be met: (1) Overall Protection of Human Health and the Environment ("Protectiveness"); (2) Control of Sources of Releases; and (3) Compliance with ARARs.[6] And there are six additional "Selection Decision Factors" to be balanced against one another including: (1) Long-Term Reliability and Effectiveness; (2) Attainment of Interim Media Protection Goals;[7] (3) Reduction of Toxicity, Mobility, or Volume of Wastes; (4) Short-Term

[5] "Potential Remediation Approaches to the GE-Pittsfield-Housatonic River Site 'Rest of River' PCB Contamination" ("Status Report"), released May 2012.
[6] ARARs are Applicable or Relevant and Appropriate state and federal Requirements.
[7] Interim Media Protection Goals, or "IMPGs", are media-specific protection goals to be used in the Corrective Measures Study as part of the evaluation of remedial alternatives.

Effectiveness; (5) Implementability; and (6) Cost. CD-Permit II.G. EPA evaluated all the alternatives against these criteria (referred to herein as "CD-Permit criteria" or "nine criteria") and any other relevant information in the Record.

EPA conducted a multi-layered analysis of the remediation and disposal alternatives against the CD-Permit criteria. For remediation of PCB contamination in sediment and floodplain, EPA reviewed nine separate remediation alternatives (denoted as "SED/FP" alternatives). Att. 10, CA at 10, Table 1, Combination Alternatives Matrix. Similarly, in evaluating alternatives for treatment/disposition of the excavated PCB-contaminated material, EPA evaluated five alternatives (denoted as "T/D" alternatives). Att. 10, CA at 59-78. Based on that comprehensive review, EPA proposed a remedy referenced in EPA's Comparative Analysis as "SED 9MOD/FP 4 and TD 1/TD1 RR" that was in its judgment best suited to meet the CD-Permit's General Standards in consideration of the CD-Permit's Selection Decision Factors, including a balancing of those factors against one another. Att. 10, CA at 59, 77.

The distinction between the threshold General Standards and the balancing Selection Decision Factors is an important consideration. The CD-Permit describes the process as determining which corrective measure or combination of corrective measures "is best suited to meet the *general standards* … in consideration of the *decision factors*..., including a balancing of *those factors* against one another." Att. 1, CD-Permit, II.G.3 (emphasis added). Accordingly, the Region's evaluation of the three threshold criteria – Protectiveness, Control of Sources of Releases, and Compliance with ARARs – requires that those standards be met.[8] In contrast,

[8] See also, 1990 Proposed Subpart S (proposed 40 C.F.R. §264.525(a), Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30798 (Jul. 27, 1990) specified that remedies must meet the threshold criteria); "Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities Advanced Notice of Public Rulemaking" ("ANPR"), 61 Fed. Reg. 19431 (May 1, 1996) (AR593978).

EPA's consideration of the latter six Selection Decision Factors includes the balancing of those factors against one another. EPA's RCRA Corrective Action guidance includes a very similar structure, establishing a two-phase evaluation for remedy selection: "During the first phase, potential remedies are screened to see if they meet "threshold criteria; remedies which meet the threshold criteria are then evaluated using various "balancing criteria" to identify the remedy that provides the best relative combination of attributes." "Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities, Advanced Notice of Public Rulemaking" ("ANPR"), 61 Fed. Reg. 19431 (May 1, 1996).AR593978. With respect to the Selection Decision Factors, or balancing factors, no one factor is preeminent among them. EPA has stated, any one of the balancing criteria might prove to be the most important at a particular site. ANPR, at 19449. AR593978.

CERCLA's National Contingency Plan ("NCP") structure, while not identical, is similar.[9] It has two threshold criteria (Protectiveness, and Compliance with ARARs) that relate to statutory requirements that each alternative must satisfy in order to be eligible for selection, and another set of "balancing criteria." "The Feasibility Study: Detailed Analysis of Remedial Action Alternatives," OSWER # 9355.3-011FS4 (March 1990).

[9] While the Comparative Analysis was performed in accordance with RCRA, reference to general guidance under CERCLA can be instructive in light of the Agency's desire for parity between the programs. ANPR at 19439 (AR593978): As a general philosophy, EPA believes that the RCRA and CERCLA remedial programs should operate consistently and result in similar environmental solutions when faced with similar circumstances. ANPR II.F.5 (AR593978). Referencing a 1990 RCRA proposal, EPA stated that one of the Agency's primary objectives was "to achieve substantial consistency with the policies and procedures of the Superfund remedial program. The logic behind that concept is that since both programs address cleanup of potential and actual releases, both programs should arrive at similar remedial solutions. EPA's position is that any procedural differences between RCRA and CERCLA should not substantively affect the outcome of remediation." ANPR III.B.1 (AR593978).

During the more-than-four-month public comment period, EPA received over 2,000 pages of comments from over 140 commenters, including from the States.[10] Following EPA's review of the comments, but prior to issuance of the Permit and the Response to Comments, the Decree required EPA to identify to GE EPA's Intended Final Decision, and allow GE the opportunity to contest the Intended Final Decision in informal and formal administrative dispute resolution. Att. 2, CD ¶22.o. For purposes of the Intended Final Decision (AR582991), and to address GE's and other comments on the remedy proposal, EPA made several modifications to the remedy. The Decree's dispute resolution process included an informal period administered by a neutral third-party mediator, followed by a formal dispute, including written SOPs by GE (AR586218, 587218) and EPA (AR586286).

That process concluded on October 13, 2016 with the decision by the Regional Counsel of EPA Region 1 that supported EPA's decision-making process. The Regional Counsel provided that "[g]iven the scope and variability associated with a site of this size and complexity, EPA's development of a cleanup approach overall is entirely reasonable and is supported by the data and information in the administrative record." Att. 11, EPA Final Decision at 10. The Regional Counsel concluded, "…I find that overall EPA's reasoning, rationale and analysis are sound and adequately supported by the data and information it has carefully considered." *Id.* Later that month, the Region finalized its Permit to include the Region's selected remedy, and issued its Response to Comments. That remedy relies on a combination of cleanup approaches to address PCB contamination, reduce downstream transport of PCBs, reduce PCBs in fish tissue

[10] Public comments are at AR565679, 567442, 568076, 568088, 568410, 568471, 568474, 568476 to 568479, and 579608 to 579621.

and allow for greater consumption of fish, and avoid, minimize or mitigate impacts to sensitive areas, species and habitats. Att. 12, 2016 EPA Fact Sheet.

II.B.4 Position of the States

The selected remedy reflects EPA's coordination with, and support from, both States. Both States worked with EPA in developing the remedial approach outlined in the 2012 Status Report, and those key principles remain integral components of the selected remedy. Connecticut's 2014 supportive comments on the remedy note that "when fully implemented [the remedy] will reduce the downstream migration of PCBs to Connecticut to an acceptable level." AR568089. In 2014, Massachusetts provided its written support of the proposed remedy. AR568093. In 2016, Massachusetts formally concurred with the remedy. Att. 13, Commonwealth Concurrence. Neither State challenges the Permit before the Board.

II.C Standard of Review

Under the Decree, the Board's review of the Permit is governed by the requirements of 40 C.F.R. Section 124.19. Att. 2, CD ¶22.q. EPA's intent in promulgating these regulations was that this review should be only sparingly exercised. *In re West Bay Exploration Co.*, UIC Appeal No. 15-03 (EAB Jul. 26, 2016), 17 E.A.D. ___, citing Consolidated Permit Regulations, 45 Fed. Reg. 33290, 33412 (May 19, 1980), and *In re Beeland Group, LLC*, 14 E.A.D. 189, 195-96 (EAB 2008).

The Board will deny review and not remand unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R. 124.19(a)(4)(1)(A)-(B); *In re City of Taunton Dept. of Public Works*, NPDES Appeal No. 15-08, slip op. at 8 (EAB May 3, 2016), 17 E.A.D. ___,

citing *inter alia*, *Sierra Club v. United States EPA*, 499 F.3d 653 (7th Cir. 2007), "Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board," 78 Fed. Reg. 5281, 5282 & 5284 (Jan. 25, 2013).

The board will uphold a permitting authority's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *City of Taunton* at 8, citing *In re Guam Waterworks Auth*., 15 E.A.D. 437, 443n7 (EAB 2011).

On matters that are fundamentally technical or scientific in nature, the Board will defer to the Region's technical expertise and experience, as long as the Region adequately explains its rationale and supports its reasoning in the Record. *City of Taunton* at 8-9, citing, *inter alia*, *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006).

As a whole, the record clearly demonstrates that the Region duly considered the issues raised in the comments and has adopted an approach – the selected remedy – that is rational in light of all information in the record. *City of Taunton at 8*, citing, *inter alia*, *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002), *In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001), *Penn Fuel Gas, Inc. v. United States EPA*, 185 F.3d 862 (3rd Cir. 1999). Further, where the Region has exercised its discretion in the Permit, the reasonableness of such efforts is cogently explained and supported in the record. *City of Taunton*, at 8, citing, *In re Guam Waterworks* at 443n7, *In re Ash Grove Cement Co*., 7 E.A.D. 387, 397 (EAB 1997).

Finally, as the Record clearly shows, many of the matters underlying this Permit are fundamentally technical or scientific in nature. On matters that are fundamentally technical or

scientific in nature, the Board will defer to the Region's technical expertise and experience, as long as the Region adequately explains its rationale and supports its reasoning in the AR. *City of Taunton*, at 8-9, citing, *inter alia*, *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006). For such matters, EPA has adequately explained its rationale with support in the Record, thus warranting deference to EPA's technical expertise and experience.

III. ARGUMENT

The Municipalities challenge the Permit on essentially two grounds. First, the Municipalities erroneously contend that, pursuant to M.G.L. c. 21D §12 ("21D §12"), the Permit must require GE to compensate communities for hosting hazardous waste facilities for the temporary storage or staging of excavated soils and sediments prior to transportation off-site. Second, they contend EPA erred when it did not use the term "in perpetuity" with respect to GE's remedy maintenance obligations. Neither of these challenges to the Permit is justified as discussed below.[11]

III.A The Siting Act Is Not a Basis to Remand the Permit

The Municipalities claim that the Permit is clearly erroneous because it does not require GE to pay compensation to host communities for the temporary transfer, processing, and storage of hazardous waste excavated from the Rest of River, as 21D §12 allegedly requires before such

[11] In addition to these two arguments, the Municipalities cite another issue, with which the Municipalities agree with the Permit. The Municipalities note that if the off-site disposal decision "is overturned or remanded by the Board in response to a petition by GE and/or others, this outcome would represent a serious injury to the Committee members' interests and the Committee would expect to seek to defend offsite disposal in further proceedings." Pet. at 10, n.7. The Municipalities express opposition to the possibility of GE's appeal of the selected remedy leading to disposal of excavated sediments and soils on-site or in Berkshire County. EPA acknowledges the Municipalities' position. The Permit provides for off-site disposal at an existing licensed landfill designed to handle the wastes.

waste is transferred off-site. Pet. at 1-2. To support this argument, the Municipalities make three claims, of which none are justified as summarized and then explained more fully below.

First, the Municipalities argue that the Siting Act is allegedly enforceable because it is not preempted by CERCLA Section 121(e) (providing for permit preemption) because the Act is not a permit. Pet. at 18. This argument rests upon a false premise: Because EPA determined that the Act is not an applicable or relevant and appropriate requirement ("ARAR") under CERCLA Section 121(d), the Municipalities mistakenly assume that EPA views the Act to be "a permit" waived under CERCLA Section 121(e). Pet. at 18, 20-21. However, EPA never made a determination whether 21D §12 is a permit or not, and furthermore never construed the statute to mean that any law that is not an ARAR is meant to be a permit.[12] Instead, EPA simply concluded that 21D §12 is not an ARAR under CERCLA Section 121(d). Att. 4, RTC at 297.

Against this backdrop, the Municipalities then argue that, even if 21D §12 is not an ARAR, it serves as a type of enforceable background law, like speed limits. Pet. at 21. Because application of the requirement to potentially pay host communities under 21D §12 could delay the implementation of the federally mandated cleanup set forth in the Permit, thereby conflicting with CERCLA and the Decree, any such requirements are preempted under well-established principles of conflict preemption discussed below. Alternatively, the Municipalities contend that 21D §12 is an ARAR because it includes the alleged "substantive duty to pay for socioeconomic harms." Pet. at 24. However, the alleged obligation to pay compensation here is not an ARAR because, *inter alia,* the Commonwealth—the actor who can request the listing of a state law as an

[12] Had EPA construed 21D §12 to be a permit, CERCLA Section 121(e) would provide for its waiver. 42 U.S.C. §9621(d).

ARAR—has not requested that 21D §12 be listed as an ARAR for the Rest of River. Indeed, there is no basis to list 21D §12 as an ARAR. The Act does not even apply to Massachusetts Department of Environmental Protection ("DEP") and EPA-authorized cleanups of hazardous waste sites like this Site, 990 CMR 1.02(f), and the provisions allegedly requiring payment to host communities are merely procedural and not related to human health or the environment.

Second, the Municipalities argue that the Permit is unlawful because it allegedly follows an unlawful process required by the underlying Decree, which requires selection of the cleanup pursuant to RCRA, and implementation under CERCLA. Pet. at 24-30; Att. 2, CD ¶22.n&q (selection under RCRA) & ¶22.z (implementation under CERCLA). The logical consequence of this baseless argument is that the Decree from the United States District Court exceeds the Court's jurisdiction. Pet. at 29 ("parties are not bound by judgments entered without jurisdiction"). However, the EAB has no jurisdiction to challenge or question the authority of the Decree; the EAB's jurisdiction is limited to consideration of the Permit undertaken pursuant to the Decree. Att. 2, CD ¶22.q; RCRA §7006; 40 C.F.R. Part 124.

Here, EPA is adhering to the process set forth in the Decree: In accordance with CERCLA, the Decree explicitly authorizes the Permit to impose or waive ARARs and to waive the obligation to obtain permits. Att. 2, CD ¶¶8, 9. In selecting the Permit, EPA, therefore, is simply complying with the terms of the Court's approved Decree, including the authority to make determinations about the application of ARARs and permit requirements. *Id.*

Third, the Municipalities contend that 21D §12 is not preempted because the record is not clear as to whether any hazardous waste facilities will be entirely onsite. Pet. at 30. However, it is both unnecessary and premature to make such determinations at this stage of remedy selection.

As shown in more detail below, there is no mistake of fact or clear error of law regarding 21D §12 and the Permit.

III.A.1 The Municipalities' Argument that "the Siting Act is not preempted because it is not a 'permit'" Fails to Warrant Remand of the Permit

Because EPA determined that 21D §12 is not an ARAR, the Municipalities now mistakenly allege that EPA concluded that 21D §12 is therefore a permit preempted or waived by CERCLA 121(e)(1). Pet. at 18, 20-23. However, EPA never determined whether 21D is a permit or not, because such a determination was not – and is not – required. Att. 4, RTC at 297. This entire argument, including the Municipalities' analysis of CERCLA Section 121(e) and EPA's Guidance Manual, Pet. at 18-24, is wholly irrelevant since EPA never adopted this reasoning.

EPA explained its reasoning in its Response to Comment as follows:

> The State did not propose MGL c. 21D as an ARAR. EPA concurs that it is not an ARAR; the provisions of 21D do not include substantive standards of control.

Att. 4, RTC at 297. [13]

Additional detail supporting EPA's reasoning is discussed below.

[13] Although EPA did not make a determination about whether 21D §12 constitutes a permit and is therefore waivable under CERCLA Section 121(e)(1), courts conclude that the requirement of written approval by a governmental body constitutes a "permit" for the purposes of Section 121(e)(1). *See Town of Acton v. W.R. Grace & Co. Conn., Techs.*, 2014 U.S. Dist. LEXIS 132684 at *36-37 (D. Mass. Sept. 22, 2014 (citing Black's Law Dictionary 1176 (8th ed. 2004)); *R.I. Res. Recovery Corp. v. R.I. Dep't of Envtl. Mgmt.*, 2006 U.S. Dist. LEXIS 56072 at *13-15 (D.R.I. July 26, 2006). Under 21D §12, a siting agreement is inoperative until the agreement and the rest of the final project impact report are approved by the state, M.G.L. c. 21D §10. Therefore, 21D §12 is arguably a waivable permit under Section 121(e)(1). Furthermore, if 21D §12 were deemed a "permit" and waived as a "permit," the only substantive requirements that would apply are substantive requirements that are ARARs. This principle is summarized in EPA guidance:

> > While Superfund cleanups will comply with all the substantive requirements that permits enforce, on-site CERCLA cleanups are not required to obtain the actual permit papers, or to obtain the approval of State or local administrative boards. Instead, ... the Administrative Record will document that the substantive requirements of other Federal and State laws have been identified and will be complied with.

CERCLA Compliance with Other Laws Manual: Interim Final, at 1-11 to 1-12 (Aug. 8, 1988). As explained herein, 21D §12 contains no applicable substantive provisions, i.e., ARARs, within the meaning of CERCLA.

III.A.1.a 21D §12 Is Not an ARAR

EPA determined that 21D §12 is not an ARAR. As set forth in CERCLA Section 121(d)(2), an ARAR is an applicable or relevant and appropriate requirement for the remedy. 42 U.S.C. §9621(d)(2); *see also* Att. 2, CD ¶8. The Municipalities argue that 21D §12 qualifies as an ARAR by relying upon CERCLA §121(d)(2)(A) for the proposition that ARARs are expansive enough to include "any…facility siting law," Pet. at 8, and because of the alleged "substantive duty" to compensate communities that host hazardous waste facilities. Pet. at 22. Because the Municipalities only focus on the alleged requirement of 21D §12 to provide compensation to the Municipalities as host communities, the other provisions of 21D are not addressed and not relevant here. As explained in the preamble to the NCP, the identification of an ARAR must "provide a list of requirements with specific citations to the section of law identified as a potential ARAR, and a brief explanation of why that requirement is considered to be applicable or relevant and appropriate." National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8746 (March 8, 1990). Here, it is assumed that the Municipalities are requesting that 21D §12 be listed and applied and that the other provisions of 21D are not at issue. Turning to the merits, for at least four reasons, 21D §12 is not an ARAR.

First, as defined by the NCP (the regulations implementing CERCLA), "applicable" or "relevant and appropriate" requirements are "[o]nly those state standards that are identified *by a state* in a timely manner …." 40 C.F.R. §300.5 (emphasis added); *see also* 40 C.F.R. §300.400(g)(1) ("The lead and support agencies shall identify requirements applicable to the release or remedial action …."). The fact that the Municipalities are requesting that 21D §12 be treated as an ARAR is very different from the Massachusetts DEP making the request. "The plain language of CERCLA's definition of 'state' does not encompass political subdivisions such

as municipalities." *Bedford v. Raytheon Co.*, 755 F. Supp. 469, 470 (D. Mass. 1991) (citing 42 U.S.C. §9601(27)). Under CERCLA, the statutory definition of "state" is easily contrasted with the definition of "person," because a "state" includes only the several states and does not include municipalities, local governments, or political subdivisions.[14] In short, towns, villages and cities are not considered to be a state within the meaning of CERCLA. *See, e.g., Village of Fox River Grove v. Grayhill, Inc.*, 806 F. Supp. 785, 792-93 (N.D. Ill. 1992); *City of Toledo v. Beazer Materials & Servs.*, 833 F. Supp. 646, 650-52 (N.D. Ohio 1993); *Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039, 1048-49 (D. N.J. 1993); *City of Heath v. Ashland Oil*, 834 F. Supp. 971, 976-77 (S.D. Ohio 1993). That conclusion holds equal force regarding EPA's determination that potential local payment obligations are not ARARs.

Second, as further defined by the NCP, an ARAR must also be "promulgated" and be of "general applicability." 40 C.F.R. §300.400(g)(4). This "general applicability" requirement is meant to avoid imposing disparate state-based requirements on cleanups conducted pursuant to federal authority. Here the Act was never intended to apply to DEP regulated cleanups. Indeed, the regulations implementing 21D specifically exempt remediation activities for "the clean-up of spills and discharges of oil, hazardous material or hazardous waste by [DEP] or by a contractor or transporter licensed by [DEP]." 990 CMR 1.02(f). Because DEP cleanups are exempt under the Act, its requirements are not "promulgated" and of "general applicability." The exemption for DEP cleanups precludes the argument that 21D §12 is "generally applicable" to all remedial situations and therefore 21D §12 cannot be an ARAR.

[14] Person is defined as "an individual, firm, … State, municipality, commission, political subdivision of a State, or any interstate body," 42 U.S.C. §9601(21), whereas State is defined as "the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, … and any other territory or possession over which the United States has jurisdiction." 42 U.S.C. §9601(27).

Third, just as DEP cleanups are exempt under the Act, so too are EPA cleanups conducted with DEP's endorsement. As explained by the Supreme Judicial Court of Massachusetts, the legislature's goal was not the imposition of additional regulation upon governmental cleanup of existing contamination, but rather the creation of safe hazardous waste facility capacity for ongoing operations within the Commonwealth. *Warren v. Hazardous Waste Facility Site Safety Council*, 392 Mass. 107, 112, (1984) (noting the intent of 21D is "to facilitate the siting of safe facilities for the disposal and treatment of the wastes generated by schools, hospitals, government, and industry in Massachusetts by denying municipalities the right to veto facilities outright."). Accordingly, the regulatory exemption for DEP-regulated cleanups is interpreted to apply with equal force to EPA when acting with DEP's concurrence, as is the case here. Indeed, DEP has clarified and codified that hazardous waste sites are "adequately regulated" when the cleanups are undertaken in accordance with CERCLA and/or RCRA, and DEP concurs in the selected remedy, as is the case for the Permit under the Decree. 310 CMR 40.0111(1), 40.0112(1). Here, DEP actively participated in the development, and concurred in the selection, of the remedy set forth in the Permit,[15] rendering 21D §12 inapplicable and therefore not an ARAR.

Fourth, ARARs are limited to "substantive requirements" including related to protecting human health and the environment. *See* 40 C.F.R. §300.5 (defining "applicable" and "relevant and appropriate" requirements to include "substantive requirements"); *Ohio v. United States EPA*, 997 F.2d 1520, 1527 (D.C. Cir. 1993) (concluding that "the NCP limitation of ARARs to

[15] *See* Section II.A.7 above in this Response regarding DEP participation in developing the remedy, and Massachusetts letter formally concurring with the Permit: also *see* Att. 7 to this Response regarding EPA's efforts to maximize public involvement generally.

substantive standards certainly represents a reasonable and permissible construction" of CERCLA Section 121(d)). The Municipalities are wrong to assert that 21D §12 "imposes a substantive duty on GE to pay for socioeconomic harms" within the meaning of CERCLA's ARAR provisions. Pet. at 24. As an initial matter, any payment obligation is not mandatory: Section 12 only requires that negotiations occur with a local committee; discretion is vested in that committee as to whether an agreement can be reached regarding payment of compensation; and any siting agreement is inoperative until approved by the state.[16] The purpose of consulting with the local community and possibly paying compensation relates to a procedural requirement, with no mandatory underlying substantive obligation. Therefore, the requirement is procedural, not substantive.

More significantly, ARARs under CERCLA do not include requirements for the payment of monetary damages. For example, ARARs are generally designed for standards of environmental control:

> [I]f… any promulgated…requirement …under a State environmental or facility siting law that is more stringent than any Federal standard, … is legally applicable to the…contaminant concerned, …, [then] the remedial action…shall require, at the completion of the remedial action, *a level or standard of control* for such hazardous substance…which at least *attains* such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation.

42 U.S.C. §9621(d)(2)(A) (emphasis added).

[16] 21D §§7, 10, 12-15. Furthermore, the Municipalities concede that a siting agreement under 21D §12 "may" include, but does not require, payment of compensation. Pet. at 15.

Accordingly, the NCP limits ARARs to "cleanup standards, standards of control, and other substantive requirements, criteria, or limitations."[17] And the D.C. Circuit upheld this NCP interpretation in that "EPA [has] reasonably interpret[ed] CERCLA's reference to "a level or standard of control" to be directed at those environmental laws governing "how clean is clean"--that is, the level or degree of cleanup required to remedy various types of toxic contamination." *Ohio v. United States EPA*, *supra*, at 1520, 1527; *see also* 40 C.F.R. §300.400(g)(1) ("The lead and support agencies shall identify requirements applicable to the release or remedial action contemplated based upon an objective determination of whether the requirement specifically addresses a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site.").

In contrast, the requirement here that a town approve an agreement (leading to potential compensation) fails to specify a "level or standard of control" regarding hazardous substances. Although the Municipalities assert that 21D §12 is a "substantive rule," Pet. at 22, whether or not the town is compensated has no impact on levels or standards of control of contamination. Even if procedural requirements like compensation did help ensure control levels are met, that "does not compel EPA to impose these requirements under CERCLA." *Ohio v. United States EPA*, *supra* at 1527. The potential compensation requirement of 21D §12 is therefore outside the

[17] The NCP defines "applicable requirements" as follows: "*Applicable requirements* means those *cleanup standards, standards of control, and other substantive requirements, criteria,* or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically *address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance found at a CERCLA site*. Only those state standards that are identified by a state in a timely manner and that are more stringent than federal requirements may be applicable." 40 C.F.R. §300.5 (emphasis added).

scope of an ARAR under CERCLA 121(d), because 21D §12 is properly viewed as procedural state law, not a substantive ARAR.[18]

Indeed, the Municipalities have not identified a single instance where 21D §12 has been applied at other sites DEP and EPA authorized to clean-up hazardous waste. It can hardly be a clear error of law not to list 21D §12 as an ARAR when the Commonwealth has not identified it as an ARAR, when it is not "promulgated" with respect to DEP and EPA lead cleanups, when it contains no substantive provisions for the protection of human health or the environment, and when the Municipalities fail to point to any other case demonstrating its use at a site regulated by EPA under CERCLA.

III.A.1.b If the Act Is Considered a "Background Law," It Is Either Unripe for Review or It Is Preempted

The Municipalities also contend that even if 21D §12 is not an ARAR, it is akin to laws like worker's compensation or speed limits, which are neither ARARs nor permits. They assert that CERCLA does not preempt such state background law. Pet. at 21. Initially, however, even if this was an applicable state background law, it is far beyond the scope of the Permit, with authority to select "…Performance Standards, and the appropriate corrective measures necessary to meet the Performance Standards, to address PCBs and any other hazardous waste and/or hazardous constituents that have migrated from the GE Facility to the surface waters, sediments, and floodplain soils in the Rest of River area." Att. 6, CD-Permit, II.J. at 23. Background laws are beyond the scope of the Permit. *See In re Bear Lake Properties, LLC*, 15 E.A.D. 630, 643 (EAB 2012) (municipality concerns regarding rapid population growth and economic impacts of

[18] Even if the Siting Act were considered an ARAR, which it is not, EPA could waive the ARAR. 42 U.S.C. §9621(d)(4); CD ¶8.a.

wells are outside the scope of the UIC program because the concerns are not "criteria set forth in the [SDWA] and its implementing regulations."); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1 (EAB 2000) (denying review of petitioner's enforcement of opacity limit claim "because this issue is not a requirement of the federal PSD program and the petitioner has not shown that the issue otherwise falls within the purview of the federal PSD program).

Additionally, the Municipalities' argument fails because either their claim for compensation is premature (since no facility exists to incur the cognizable harm necessary for a case or controversy) or it is flatly preempted under the well-established laws of conflict preemption, since enforcement of the Act could delay the CERCLA clean-up.

The Municipalities' claim that 21D §12 constitutes a form of "background" law that must be enforced, rests on the assumption that the Siting Act will be violated. Generally, a claim is not ripe for adjudication "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Tex. v. United States*, 523 U.S. 296, 300 (1998). Courts must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" so as to "prevent the courts . . . from entangling themselves in abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). The Municipalities fail both prongs of the *Abbott Labs* test because they fail to allege a violation of the Siting Act and any direct hardship that has occurred therefrom. For example, the mere fact that the Permit omits mention of background laws, such as speed limits, does not mean that a violation of the speed limit has occurred. Similarly, with no extant facilities, it is speculative what hardship would occur and whether a compensatory remedy is necessary. Failure to meet even just one prong is sufficient to dismiss the Municipalities' case, *see Ernst & Young v.*

Depositors Economic Protection Corp., 45 F.3d 530, 535 (1st Cir. 1995), and the Municipalities meet neither.

Assuming *arguendo* that the preemption issue is ripe for review, then 21D falls under conflict preemption because compliance with 21D §12 could delay or obstruct implementation of EPA's Rest of River remedy. While the Decree calls for EPA to provide the public meaningful involvement in the process of considering and choosing a remedy, Att. 2 CD ¶22, that process does not permit a municipality to apply laws or requirements in contravention of EPA's final determinations. Att. 2, CD ¶¶8.a, 9 (providing authority to waive ARARs and permits). For example, EPA may incorporate state cleanup requirements that meet criteria set forth in CERCLA and the NCP, including those that are more stringent than federal standards, as ARARs for the remedy. Att. 2, CD ¶8.a. If not so incorporated, however, these alternative cleanup standards -- whether more stringent or not -- may not be separately or independently enforced. Att. 2, CD ¶8.a; *Missouri v. Independent Petrochemical Corp.*, 104 F.3d 159, 163 (8th Cir. 1996) (local ordinance inapplicable to CERCLA cleanup because "once a consent decree is entered by a federal court under CERCLA, alternative state remedies may not be pursued." (citations omitted)); *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1454-55 (6th Cir. 1991) (same); *R.I. Res. Recovery Corp. v. R.I. Dep't of Envtl. Mgmt.*, 2006 U.S. Dist. LEXIS 56072 at *12 (D.R.I. July 26, 2006) ("other remedies based on state law are in effect preempted by the federal and state law embodied in the decree through a mechanism incorporating the federal standards and any relevant more stringent state standards"). As explained by the court in *Fort Ord Toxics Project, Inc. v. California EPA*, 189 F.3d 828, 831 (9th Cir. 1999), "[b]ecause CERCLA only requires that cleanups comply with state law that is an ARAR, it clearly imposes no obligation to comply with non-ARAR state law when conducting a CERCLA cleanup."

To the extent that any state or local requirements conflict with the remedy chosen by the Region according to the court-ordered process set forth in the Decree, any such requirement is preempted. Here, EPA explained the application of the doctrine of conflict preemption as follows:

> [EPA] will ensure compliance with the substance of state and local bylaws, regulations, and permit requirements for on-site remedial action, *except where those requirements conflict with federal law or the terms of the Final Permit Modification.*

Att. 4, RTC at 333 (emphasis added) (citing discussion of conflict preemption under CERCLA in *Town of Acton v. W.R. Grace & Co. -- Conn. Techs., Inc.*, 2014 U.S. Dist. LEXIS 132684 at *24-35 (D. Mass. Sept. 22, 2014)).[19]

It is well established that conflict preemption applies where compliance with local law stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Weaver's Cove Energy, LLC. v. R.I. Coastal Res. Mgmt.*, 589 F.3d 458, 472-474 (1st Cir. 2009) *(*state process preempted when conflicted with FERC authority); *Arizona v. United States*, 132 S. Ct. 2492, 2500-2501 (2012).

Here there is a conflict because compliance with 21D §12 and implementation of the Permit potentially cannot simultaneously occur. For example, the Siting Act calls for a notice of intent and local negotiations before a hazardous waste facility can be sited in a host community. 21D §§7, 12. Such local negotiations could delay the process outlined in the Permit for the temporary storage of materials generated during the remediation and cleanup of the Rest of River. By contrast, one of the central purposes of the Permit, the Decree, and CERCLA is to facilitate the expedited cleanup of hazardous substances and to avoid uncertainty with regard to requirements that would apply through the application of local standards or requirements.

[19] The Municipalities only partially quote this response, omitting all of the italicized words cited above. Pet. at 22.

Therefore, the Siting Act would stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona* at 2501 (citations omitted); *see also Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 948 (9th Cir. 2002) (because the "fundamental purpose and objective of CERCLA is to encourage the timely cleanup of hazardous waste sites," application of a local ordinance that sets more stringent cleanup standards than established by EPA present "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (citations omitted); *United States v. City & County of Denver*, 100 F.3d 1509, 1513 (10th Cir. 1996) (Denver zoning ordinance that imposes inconsistent requirements from CERCLA remedy preempted under conflict preemption). In denying the application of a local ordinance, one court explained that "[a]llowing local governments to impose disparate requirements upon responsible parties would thwart, or at least pose a significant obstacle to the accomplishment of, CERCLA's objectives." *Town of Acton* at *27. Accordingly, under the Decree and CERCLA, EPA's decisions govern the ultimate cleanup for the Rest of River, and 21D §12 is preempted.[20]

Nevertheless, the Municipalities cite CERCLA's "savings clauses," which provide for the application of certain state law, as a basis to say that 21D should not be preempted. *See* 42 U.S.C. §§9614(a), 9652(d), §9659(h); Pet. at 18-19. These CERCLA savings provisions, however, do not protect a local authority from being preempted where the law at issue conflicts with either the express provisions of CERCLA or its statutory purpose. *See New Mexico v. GE*,

[20] The Municipalities also argue that the Permit should be remanded for determination of whether the centralized and temporary locations for the storage of dredged material will all be entirely "on-site." Pet. at 30. However, these determinations will be established during the design stage, and therefore it is premature and unnecessary to require such determinations during remedy selection. *See* Att. 4, RTC at 329-330. Additionally, as described above, 21D §12 does not apply to an EPA-led cleanup. However, to the extent it was determined that 21D §12 did apply, the Permit affords the Municipalities significant opportunities for input throughout the remedial design process. Att. 4, RTC at 331-332.

467 F.3d 1223, 1247 (10th Cir. 2006) (CERCLA's savings clauses do not override conflict preemption under CERCLA); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (CERCLA's savings clauses merely dispel any inference that the statute is intended as an exclusive remedy for all harms and it "is not intended to allow specific provisions of the statute that contains [them] to be nullified."). As explained by one court, "CERCLA has specific and exclusive mechanisms to incorporate more stringent state regulations." *Town of Acton* at *28 (denying enforcement of local ordinance in the context of CERCLA cleanup). Accordingly, these clauses are over-ridden or inapplicable under principles of conflict preemption.[21]

Finally, the Municipalities point to *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993) to argue that the Siting Act should apply regardless of conflict preemption. Pet. at 20-21. In that case, however, the United States delegated its authority to implement RCRA to Colorado. However, no such delegation has been made to Massachusetts for the Housatonic River Site, and EPA retains its authority to implement RCRA here.[22] More significantly, in *United States v. Colorado*, there was no conflict that required reconciliation:

> While [CERCLA's Section 121(e)(1) no permit] provision arguably conflicts with … when a state has been authorized to issue and enforce RCRA permits, *the facts of this case do not require us to reconcile the potential conflict.*

United States v. Colorado at 1582 (emphasis added).

[21] These principles of conflict preemption hold equal force under RCRA. *Feikema v. Texaco*, 16 F.3d 1408, 1415-1416 (4th Cir. 1994) (RCRA consent order preempts conflicting state common-law claims for injunctive relief); *Blue Circle Cement v. Board of County Comm'rs*, 917 F. Supp. 1514, 1518-1522 (N.D. Okla. 1995) (local ordinance preempted because it otherwise thwarts RCRA's objectives). To the extent that the Municipalities rely upon cases arising under the Clean Water Act, FIFRA, and Clean Air Act, such cases are irrelevant to this RCRA/CERCLA cleanup.

[22] EPA has delegated its authority to administer RCRA to the Commonwealth, with a few site-specific exceptions. Massachusetts: Final Authorization of State Hazardous Waste Management Program Revisions, 73 Fed. Reg. 5753 (Jan 31, 2008). This delegation of authority carved out the GE-Housatonic River Site, and therefore EPA retains its authority to administer RCRA corrective action authority at this Site. *Id*. at 5759.

In stark contrast, here there is potential conflict between 21D §12 and the work required by the Permit because the requirements of 21D §12 could delay or obstruct the Rest of River cleanup. *United States v. Colorado* is therefore inapposite and serves as no precedent in this case.[23]

III.A.1.c Any Alleged Deficiencies in the Consent Decree Do Not Override Existing Law on Preemption

The Municipalities also argue that 21D is not preempted because of the Consent Decree's allegedly deficient provisions pursuant to which the Permit was issued. Pet. at 24. As discussed below, the Municipalities are wrong to view the Decree as deficient, but in any event, the Decree is a binding court order, and its validity is not subject to review by the Board.

In terms of the allegedly deficient provisions, the Municipalities contend that because *some* of the Decree's procedural requirements may prolong the ultimate cleanup (or the time until which the remedy becomes protective), EPA thereby forfeited its ability to otherwise expedite the cleanup by relying on CERCLA's statutory authorities, like ARAR and permit waivers set forth in CERCLA Sections 121(d) & (e), and well-established principles of conflict preemption. Pet. at 24-28. This argument ignores the fact that the Decree represented a compromise designed to avoid greater delay from protracted litigation, and the Court found this compromise to be in the public interest. *United States et al. v. GE,* No. 99-30225 (D. Mass. Oct. 27, 2000), slip opinion at 3-4, Att. 14 (the settlement "properly reflects the relative strengths and weakness of the Government's litigation position," and "is consistent with the goals of CERCLA

[23] The same holds true for the case of *New York v. Hickey's Carting, Inc.*, 380 F. Supp. 2d 108 (E.D.N.Y. 2005) relied upon by the Municipalities for the claim that the duty to pay compensation to host communities is "conceptually similar to other remedies that are not preempted by CERCLA." Pet. at 22. In the *New York* matter, however, the court found there was "no actual conflict" between the state's claims and CERCLA. *Id.* at 119.

and in the public's interest."). When EPA agreed to (and the Court approved and entered) the Decree, EPA retained its ultimate rights and authorities to protect human health and the environment in the public interest, including the right to waive ARARs, permits, and other state or local requirements under the Decree and CERCLA when deemed necessary by EPA. Att. 2, CD ¶¶8.a, 9; 42 U.S.C. §§9612(d)&(e); *United States et al.* v. *GE,* No. 99-30225 (D. Mass. Oct. 27, 2000), slip opinion at 4, Att. 14 ("The Decree promptly and effectively protects human health and the environment by providing a comprehensive and expeditious cleanup of the contamination at issue"). Nowhere in the Decree did EPA relinquish, nor did the Court strip EPA of, its statutory authority to make the ultimate decision regarding how to cleanup and address contamination in the Rest of River. To the contrary, the Decree specifically provides that "the activities conducted pursuant to this Consent Decree, if approved by EPA, shall be deemed to be consistent with the NCP." Att. 2, CD ¶8.a.

Moreover, it is well established that once a court has entered a final judgment requiring injunctive relief, third-parties may not impose additional requirements. "[T]he language of CERCLA and the legislative history of that act indicate that once the consent decree is entered by a federal court—giving the decree the force of law—alternative state remedies may not be pursued." *Akzo Coatings* at 1454-1455 (citing 42 U.S.C. §9621(f)). *See also id.* at 1456-57 ("Congress has provided for state standards to become part of federal consent decrees, while preventing states from pursuing conflicting relief apart from the terms of a final decree."); *Missouri v. Independent Petrochemical Corp.* at 163 (local ordinance inapplicable to CERCLA cleanup). The time for the Municipalities to have argued against any objectionable Decree terms was over sixteen years ago, when EPA originally sued GE and provided the opportunity to comment on the proposed Decree. Indeed, several entities commented on the Decree, and some

also intervened in the action to oppose approval and entry of the Decree. Although these opportunities to object to the Decree were available to the Municipalities, they remained silent. After careful consideration of the public comments and the opposition to the Decree from other third parties, the Court entered the Decree as a final judgment and order. *United States et al. v. GE,* No. 99-30225 (D. Mass. Oct. 27, 2000), slip opinion at 4, Att. 14. In entering the Decree, the Court found that "the Decree is consistent with the goals of CERCLA and in the public's interest." *United States et al. v. GE,* No. 99-30225 (D. Mass. Oct. 27, 2000), slip opinion at 4, Att. 14. Its terms are now binding on the process for issuing EPA's Permit.

In sum, the Municipalities cannot seek to enforce a local procedural obligation that may delay or otherwise stand as an obstacle to the objective of expeditiously cleaning up the Housatonic River under CERCLA pursuant to a federal Permit issued under a federal Consent Decree. Under the Decree, State or local laws that are in conflict with EPA's determinations are preempted.

III.A.2 The Permit Is in Accordance with a Lawful CERCLA Consent Decree

The Municipalities also claim that the Consent Decree establishes an unlawful process for selecting and implementing the cleanup and therefore EPA's adherence to the Decree process is unlawful. Pet. at 24-29. The Municipalities base this extreme claim upon the fact that the Decree generally sets forth a process for selecting the cleanup for the Rest of River under RCRA and implementing it under CERCLA. Att. 2, CD ¶22n.&q (RCRA selection process), ¶22.z (CERCLA implementation). This argument is no justification for overturning the Decree and remanding the Permit.

Setting aside that their untimely challenge is more than a decade-and-a-half late and that the Board has no jurisdiction to review the merits of the Consent Decree, there is no basis to find that the Decree is an unlawful usurpation of legislative power, as claimed by the Municipalities. Pet. at 29. The complaint in this matter was brought under RCRA and CERCLA, including pursuant to Section 106(a) of CERCLA, 42 U.S.C. §9606(a). Complaint: *United States v. General Electric Company* ¶¶1, 41, Att. 16. Section 106 of CERCLA authorizes the President to bring an action "to secure such relief as may be necessary to abate [the] danger or threat" posed by the release or threatened release of hazardous substances. 42 U.S.C. §9606(a). Here, EPA made a determination that the Site may present an imminent and substantial endangerment to human health or welfare or the environment under CERCLA and RCRA. Complaint ¶¶40, 45, Att. 16. In such circumstances, Section 106 of CERCLA not only delegates the power to the President to seek "such relief as may be necessary to abate" the threat posed by hazardous substances, but vests the Court with "jurisdiction to grant such relief as the public interest and the equities of the case may require." 42 U.S.C. §9606(a). Ultimately, the Court concluded, in authorizing the remedy selection and implementation process set forth in the Decree, that it is appropriate and in the public interest. *United States et al.* v. *GE,* No. 99-30225 (D. Mass. Oct. 27, 2000), slip opinion at 4, Att. 14 ("The Decree promptly and effectively protects human health and the environment by providing a comprehensive and expeditious cleanup of the contamination at issue.").

Accordingly, the Court issued an order "granting relief in the public interest" that included this hybrid RCRA/CERCLA process, wherein the remedy will be selected under RCRA with the understanding that it will be implemented under CERCLA. Att. 2, CD ¶¶22.n&q

(selection), 22.z (implementation). There are several reasons why this approach is appropriate and supports the public interest here.

First, the process of selecting a remedy under CERCLA is generally similar to the process of selecting a remedy under RCRA, and the Decree explicitly provides that the selection of the Permit is the equivalent of a Record of Decision under CERCLA. Att. 2, CD ¶22.z. But the Decree vests the public with even greater opportunity for input under the RCRA selection process compared to the CERCLA selection process. For example, RCRA and the Decree provide for the immediate right of appeal of a remedy decision to the Board and First Circuit, whereas CERCLA does not. *Compare* Att. 2, CD ¶22.q, RCRA Section 7006(b), 40 C.F.R. §270.41 and Part 124 (providing immediate rights of appeal of remedy selection) *with* CERCLA Section 113(h), 42 U.S.C. §9613(h) (banning review of remedy selection until an enforcement action is brought). In other words, the remedy could have been selected and implemented entirely under CERCLA, but the process set forth in the Decree provides additional or greater opportunities for public involvement during remedy selection. Att. 2, CD ¶22.q.

Second, to the extent that the Municipalities are objecting that the Decree provides for relief that is not available under RCRA, it is available under CERCLA. The Court has not created some new form of relief from whole cloth. Rather the Decree incorporates the allegedly objectionable relief, namely the power to make determinations regarding ARARs and waive permits, as is set forth in CERCLA Sections 121(d) & (e), 42 U.S.C. §9621(d) & (e). Att. 2, CD ¶¶8.a, 9. Surely the power to obtain and grant equitable relief under Section 106 of CERCLA, 42 U.S.C. §9606, includes the power to grant relief specifically provided for in the statute, such as the power to waive ARARs and permits. *See United States v. Ottati & Goss*, 900 F.2d 429,

436 (1st Cir. 1990) (noting the significant authority courts have in granting injunctive relief under CERCLA Section 106, 42 U.S.C. §9606, that "the public interest and the equities of the case may require.").

Third, the Decree is clear that the remedy to be selected and implemented will be as a CERCLA remedy pursuant to the authorities provided by CERCLA. Att. 2, CD ¶22.z. For example, the Decree explicitly includes the authority to waive permit requirements under CERCLA Section 121(e)(1), 42 U.S.C. §9621(e)(1), and the NCP for the Rest of River cleanup, Att. 2 CD ¶9, and the Decree explicitly includes the authority to select and/or waive ARARs under CERCLA Section 121(d)(4), 42 U.S.C. §961(d)(4) and the NCP for the Rest of River cleanup. Att. 2, CD ¶8.a. The Court further established that "the activities conducted pursuant to this Consent Decree shall be deemed to be consistent with the NCP." Att. 2, CD ¶8.a. In selecting the cleanup set forth in the Permit, EPA adhered to the process set forth in the Court-ordered decree.

Fourth, in entering the Decree, the Court also provided for many procedural safeguards. This process spanned over a decade and included extraordinary efforts by EPA to solicit and respond to the views of the public at virtually every step. For more details on the specific public involvement steps, *see* Att. 7, Timeline for Opportunities for GE and the Public to Comment during Rest of River Process. In essence, during every stage of the process in selecting the Remedy, EPA has consulted with the Municipalities to obtain input. EPA will continue to do so. Att. 4, RTC at 331-335. Because "the Consent Decree establishes a process intended to ensure that the Remedial Action to be selected for the Rest of the River will be protective of human health and the environment," CD ¶8(c) (Att. 2), and is in the "public's interest," *United States et*

al. v. GE, No. 99-30225 (D. Mass. Oct. 27, 2000), slip opinion at 4 (Att. 14), under CERCLA Section 106, there is no basis to find the Decree -- or the Permit that complies with the Decree -- to be unlawful.

III.A.3 It Is Premature to Make On-Site or Off-Site Determinations Regarding the Centralized, Temporary Locations for the Hazardous Waste Facilities

The Municipalities also argue that the Permit should be remanded for determination of whether the centralized and temporary locations for the storage of dredged material will all be entirely "on-site." Pet. at 30. However, these determinations will be established during the design stage, and therefore it is premature and unnecessary to require such determinations during remedy selection. *See* Att. 4, RTC at 329-330. Additionally, as described above, 21D §12 does not apply to an EPA-led cleanup. However, to the extent it was determined that 21D §12 did apply, the Permit affords the Municipalities significant opportunities for input throughout the remedial design process. Att. 4, RTC at 331-332.

Accordingly, the Municipalities fail to establish a clear error requiring remand of the Permit.

III.B Concerns Related to Operation, Maintenance, and Monitoring Are Not a Basis to Remand the Permit

The Municipalities assert that the Permit should have explicitly required GE to conduct responses "in perpetuity," citing the Record of Decision issued by Region 2 for the cleanup of PCBs in the Hudson River, which stated, "The OM&M [Operation, Maintenance and Monitoring] program for engineered caps shall … continue in perpetuity" and required monitoring of caps "in perpetuity." The Municipalities are concerned that, once caps over PCB waste are in place, there is nothing to require GE to continue to maintain protectiveness on a

permanent basis; that, once EPA has certified completion of the "Remedial Action" when Performance Standards are met, GE's obligations will end.

The Municipalities misunderstand GE's obligations under the Permit. Although the Permit does not explicitly use the term "in perpetuity," there is no end date to GE's obligations to inspect and maintain the caps, to perform Operation and Maintenance, and to monitor and maintain all the elements of the cleanup. As to the engineered caps: included among the Permit's ARARs, with which GE must comply pursuant to Decree Paragraph 8.a, is an "Action-Specific" ARAR entitled "Toxic Substances Control Act Regulations on Cleanup of PCB Remediation Waste," 40 C.F.R §761. It states: "When a cleanup activity conducted under this section includes the use of a fence or a cap, the owner of the site must maintain the fence or cap, *in perpetuity*." 40 C.F.R. §761.61(8) (emphasis added). Maintaining the caps "in perpetuity" is therefore an obligation of the Permit. Att. 1, Permit, Appendix C-18. Likewise, "the requirements for Operation and Maintenance to be implemented upon completion of the Remedial Action includes inspection and maintenance of Engineered Caps and inspection and maintenance of other corrective measures to ensure that Performance Standards are maintained. Att. 1, Permit Section II.C. There is no termination date for these requirements in the Final Permit Modification." Att. 4, RTC 26 at 200-201.

The same is true for monitoring as the Region explained:

> Section II.B.4. of the Final Permit Modification requires monitoring to be conducted throughout the Remedial Action to ensure that Performance Standards are achieved and maintained, and to monitor the effectiveness of the Corrective Measures. In addition, the Final Permit Modification clarifies that an O&M Plan is required to be developed and implemented upon completion of the Remedial Action for Rest of River. See Section II.C. of the Final Permit Modification. Among other requirements, the O&M Plan requires GE to monitor surface water, sediment and biota.

> The Decree and the Final Permit Modification, should monitoring indicate that Performance Standards are no longer being met, include provisions to require GE, as appropriate, to take additional response actions necessary to meet and maintain the Performance Standards. See for example, Final Permit Modification Section II.B.1.a. and b., Decree Section XXVI, and Decree Paragraph 39.

Att. 4, RTC 133 at 233. There is no termination date set for these monitoring requirements.

EPA's certification of completion of the Remedial Action does not change these obligations: the Decree specifies that certification of completion of the Remedial Action does not eliminate the requirement of Operation and Maintenance; Operation and Maintenance obligations continue after the Certification of Completion of the Remedial Action, and as referenced immediately above, there is no termination date. Finally, where, as here, contamination will remain at the site, CERCLA requires EPA to conduct periodic reviews to ensure that human health and the environment are being protected. CERCLA §101(c), 42 U.S.C. 9601(c); Att. 2, CD ¶43(c). The Decree provides that EPA can require GE to take additional response actions in the event that previously unknown conditions or information indicates that the remedy is not protective of human health or the environment. Att. 2, CD ¶¶162-63; *see* Att. 4, RTC 133 at 233, above.

IV. CONCLUSION

For all the foregoing reasons, the Petition for Review Submitted by the Housatonic Rest of River Municipal Committee should be denied.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that the Region's Response to the Petition for Review in the matter of General Electric Co., RCRA Appeal No. 16-03, contains less than 14,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Respectfully submitted,

Dated: February 14, 2017

(s) Timothy M. Conway
Timothy M. Conway

REQUEST FOR ORAL ARGUMENT

In accordance with 40 C.F.R. § 124.19(h), EPA Region 1 requests oral argument in this matter.

Dated: February 14, 2017

(s) Timothy M. Conway
Timothy M. Conway

CERTIFICATE OF SERVICE

I, Timothy M. Conway, hereby certify that true and correct copies of EPA Region 1's Response were served via EPA's e-Filing system and email on February 14, 2017, and Federal Express on February 15, 2017:

Via the EPA's E-Filing System and Federal Express to:

Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, D.C. 20004

Via Federal Express to:

For General Electric Company (per discussion with GE counsel, Region providing GE counsel with hard-copy of Attachments and certified Administrative Record index for Response to GE Petition, but not for other four responses):

Jeffrey R. Porter
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.
One Financial Center
Boston, MA 02111

James R. Bieke
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Roderic J. McLaren
Executive Counsel – Environmental Remediation
General Electric Company
159 Plastics Avenue
Pittsfield, MA 01201

For the Housatonic Rest of River Municipal Committee:
Matthew F. Pawa
Benjamin A. Krass
Pawa Law Group, P.C.
1280 Centre Street
Newton, MA 02459

For Massachusetts:
Jeffrey Mickelson
Deputy General Counsel
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

For Connecticut:
Lori DiBella
Assistant Attorney General
55 Elm Street
Hartford, CT 06141-0210

(s) Timothy M. Conway
Timothy M. Conway