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

IN THE MATTER OF:	)	
General Electric Co.	)	Appeal No. RCRA 16-01
RCRA Permit No. MAD002084093	)	

AMICUS BRIEF IN SUPPORT OF OFF-SITE DISPOSAL

Submitted by the Housatonic Rest of River Municipal Committee,
And Joined by the Amici Listed in Exhibit 1

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INTRODUCTION

This amicus brief is submitted by Housatonic Rest of River Municipal Committee and joined by the governmental entities and NGOs listed in Exhibit 1. Amici support the Region's decision (also supported by the Commonwealth) to dispose of contaminated sediment at existing off-site facilities, and oppose GE's request to build an "on-site" PCB landfill in Berkshire County. What GE seeks is extraordinary: to exploit the designation of a long, beautiful New England river as a single cleanup "site" in order to put a massive PCB landfill miles away from the original contamination source, in forested areas that are uncontaminated, are zoned for residential/conservation uses, and are unsuitable for PCB disposal – or flatly prohibited – under multiple statutes. The Region's off-site decision should be upheld.

INTEREST OF AMICI

GE has proposed siting a permanent PCB landfill at one of three sites in Lee and Great Barrington. The amici include municipal entities representing these towns, as well as other entities described in Exhibit 1. These amici are "interested persons" authorized to participate under 40 C.F.R. § 124.19(e).

BACKGROUND

I. The Housatonic River cleanup.

The Municipal Committee's petition has described most relevant facts. A few points bear emphasis:

- ***GE's pollution.*** Between the 1930s and the 1970s, GE polluted the Housatonic River with up to 600,000 pounds of PCBs.[1]

[1] https://www.epa.gov/ge-housatonic/understanding-pcb-risks-ge-pittsfieldhousatonic-river-site.

- ***Five decades of cleanup.*** Cleanups by GE have been going on since the 1980s, and should continue into at least the 2030s. The "Rest of River" cleanup requires GE to dredge and cap large parts of the river over 13 years, and to clean up PCB contamination at residential properties. SB 24 (Exh. 9).

- ***The CD, the nine criteria.*** The "Rest of River" cleanup is governed by a CD (Exh. 12) between the Region, GE, Massachusetts, Connecticut, and the City of Pittsfield. All other municipalities, including those most affected by the Rest of River cleanup, were excluded from these negotiations. Under the CD, the Region is to use RCRA procedures to govern issuance and appeal of the "Rest of River" remedy selection – i.e., the process that has culminated in these proceedings. However, the CD also purports to confer CERCLA authority on GE to excuse the company's compliance with state and local law. Despite this assertion of CERCLA preemption authority, the CD (through its incorporation of a RCRA permit reissued to GE's defunct Pittsfield facility) sets out nine criteria, which are to be used by GE to evaluate remedies in the CMS. *See* Permit 20-23, § II.G (Exh. 8). Three are "general standards": protectiveness of human health/environment, source control, and ARARs compliance. The remaining six are "selection decision factors," which include long-term reliability, short-term effectiveness, implementability, and cost. These criteria make subtle departures from the CERCLA remedy-selection criteria, as described more below. Based on GE's CMS and "any other relevant information" in the administrative record, the Region is required to select a remedy in a modification to the Permit. *Id.* at 25, II.J. There is no language requiring the Region to make its selection based solely on the nine CMS criteria.

- ***The Allendale School and Hill 78.*** The Allendale Elementary School is a public school built in the 1950s in Pittsfield, on fill donated by GE. GE's fill was contaminated with PCBs, which were later discovered on the playground and other areas. GE covered these PCBs under a cap of the playground in the 1990s, instead of removing the PCBs. Inevitably, GE later discovered PCBs outside the cap and conducted additional clean-up, but even this second cleanup left children potentially exposed to "direct contact with hazardous substances in soils," including PCBs, dioxin and lead; the Region ordered GE to conduct a third cleanup.[2] Notwithstanding this history, the CD authorized GE to dump PCB waste at the Hill 78 landfill, which is right next to the school. CD ¶ 15.a. In 2006, all of Pittsfield's eleven pediatricians signed a letter protesting the operation of Hill 78 so close to the school. Nonetheless, some 200,000 cubic yards of PCB-contaminated materials were dumped in this landfill (and another nearby) and capped. Region Br.17; Exh. 3. This experience galvanized residents into opposing additional PCB landfills in Berkshire County. Region SOP-DR (Exh. 4), at 47-48.

- ***The beauty of Berkshire County; the opposition to on-site landfills.*** Despite the contamination, Berkshire County is famous for its charming towns and natural landscape. It is an international tourist destination, and the river is a popular recreational asset. The total annual impact of tourism in Berkshire County is $500 million -- a lifeline to an area hit hard by the closure of the GE plants. Muni. PFR 3. There have been several large public protests against GE's on-site proposal, and the Region received scores of comments against on-site disposal from local stakeholders.

[2] Action Memo (Exh. 2), at 5; https://www.epa.gov/ge-housatonic/allendale-school-ge-pittsfieldhousatonic-river-site.

II. The selected remedy.

River cleanup. The Region opted to dredge/remove an estimated 990,000 cubic yards of contaminated material, with 298 acres in the river to be capped. SB 21. This option removes almost three times less material than the most aggressive option, which results in a significant cost-savings for GE. SB 36. It still leaves high PCB concentrations in exposed areas – up to 50 ppm, "a significantly elevated concentration that results in substantial risk to the environment." RTC 106 (Exh. 10). Some 80% of the material to be removed is from Reaches 5 and 6, *i.e.*, the first few miles of river that are the most upstream part of "Rest of River," in Pittsfield, Lenox, and Lee.[3]

Disposal of contaminated material. The Region considered several comprehensive alternatives, including: off-site disposal in an existing facility, disposal at one of three local "on-site" facilities, and, potentially the most expensive of all, treatment. The Region selected off-site disposal. This option selected by the Region requires GE to ship an estimated 990,000 cubic yards of contaminated material "off-site," to "existing licensed facilities that are approved to receive such waste material." Permit Modification § II.B.5.a (Exh. 11). Once the Permit Modification goes into effect, GE is required to propose a specific facility or facilities to receive the waste, and to ship out waste via rail "to the extent practicable." *Id.* § II.B.5.b.

Costs. In present-value dollars, off-site disposal costs $183MM, assuming use of rail. SB 36-39. Adding $183MM to the dredging cost of $228MM yields a total cost of $411MM. *Id.* This is $150MM more than "on-site" disposal. However, the selected remedy is still

[3] RTC 106 ("substantial risk"); RCMS 6-290 (Exh. 6) (amount removed/reach). The remaining dredging is in Lee, Stockbridge and Great Barrington.

significantly less expensive than the most expensive set of alternatives, which would have had a total project cost of almost $600MM (almost $200MM more than the selected remedy). *Id.*

III. GE's three proposed sites for a new "on-site" disposal facility.

The "on-site" option favored by GE but rejected by the Region would create an entirely new disposal facility at one of three locations:

- ***Woods Pond Site – within an "Area of Critical Environmental Concern."*** The Woods Pond site is a 75-acre parcel on the Lee-Lenox border. About half of the site is now a sand and gravel operation with most of the rest upland forest and shrub swamp habitat. RCMS 9-42. To the west is a small town center known as Lenox Dale; to the south are residences in Lee; to the east is the largest state forest in Massachusetts.[4] The RCMS assumed that the landfill itself would be centered about ¼ mile from Woods Pond, and would be located partially in what is now the sand/gravel area and partially in a forested area. *See* RCMS, Fig. 9-4. This entire parcel is within a state-designated "Area of Critical Environmental Concern" – where state law flatly forbids putting any kind of disposal facility. GE PFR 18. It is also over an aquifer and near a drinking water source. RTC 239.
- ***Forest Street – a forested hillside by a stream.*** The Forest Street site is a 195-acre parcel in Lee, four miles south of the Woods Pond site. RCMS 9-65. The site is undeveloped and forested. There are a few dozen residences right next to the site, to the north and the east. The area to the south is prime forest; Goose Pond and Upper Goose Pond are approximately half a mile to the east (as is the Appalachian Trail section that passes by these picturesque lakes). The site is bordered to the north by

[4] Information on the landfills' surroundings is from Google Maps, which has been judicially noticed by many courts. *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012).

Goose Pond Brook, a resource protected under state wetlands law. GE PFR 19. The site is also on a hill – it has "steep topography with slopes ranging from 15% to 45%." RCMS 9-43. Despite the size of the site, the maximum landfill capacity is only 1.0 million cubic yards, which means it could not handle all the waste generated by the remedy if the estimated volume of waste (990,000 c.y.) is understated by more than 1%. RCMS 9-41. The site would have two separate landfills at different spots on the hill. RCMS Fig. 9-8.

- ***Rising Pond – near Wood Turtle habitat, farther from main contamination areas.*** This 106-acre site is in Great Barrington, 14 miles south of the main contaminated areas. RCMS 9-65. Like Forest Street, this site is heavily wooded, with some forested wetlands on the southwestern side. RCMS 9-43 to 9-44. To the west are residences and a cemetery. To the east is the "Rising Pond" section of the Housatonic River, where some dredging will occur (albeit less than 8% of the total). RCMS 6-290. Further east across the river, less than a mile away, is the Monument Mountain Reservation, which contains a trail to a summit view of the river, which draws 20,000 hikers annually.[5] The footprint of the proposed landfill is approximately ¼ mile away from the river. Approximately half the site (right next to the operations area) is "priority habitat" for the wood turtle, a species protected under the Massachusetts Endangered Species Act. RCMS 9-51 n.501.

IV. GE's environmental "commitment."

GE proclaims its "commitment" to a "comprehensive" cleanup that "fully protects" health and the environment. PFR 1. But GE sponsors advertisements in Berkshire County in

[5] http://www.thetrustees.org/places-to-visit/berkshires/monument-mountain.html?referrer=https://en.wikipedia.org/.

which its "expert" opines that "PCBs are not known to cause … any health effect. You shouldn't call them risks and you shouldn't talk about increasing risk or decreasing risk because you don't know that they're risks at all."[6] This contradicts EPA's determination that PCBs are a probable human carcinogen. Moreover, GE is notoriously recalcitrant: it has used its might to launch challenges to the Region's Housatonic decisions many times before today. For example, the Region approved the RCMS by noting numerous provisions that GE had failed to change in its long back-and-forth with the Region. Exh. 5. GE has also deluged EPA with FOIA requests, in an apparent effort to find anything to thwart requirements that, like off-site disposal, might cost GE money – all after GE profited for decades by polluting a priceless public resource. *See, e.g.*, GE v. EPA, 1998 U.S. Dist. LEXIS 21775 (D. Mass. Apr. 27, 1998); *GE v. DEP*, 429 Mass. 798 (1999). Notably, the lifetime cost difference between on-site and off-site disposal is close to the $119MM GE's top five executives made in 2015 *alone*.[7] GE's "commitment" rings hollow.

STANDARD OF REVIEW

GE argues that the Permit is a contract, and the Board must interpret this contract *de novo*, without deferring to the Region. But most GE challenges have nothing to do with conflicting interpretations of the Permit. For example, the Region determined that a landfill on a steep hill, or next to a river or wetland, was not as "protective" or "suitable" as off-site disposal. GE disagrees, but this is for technical reasons, not because of disputes about Permit language. And in technical disputes, the Board "typically" defers to the Region's "expertise and experience." *In re Town of Newmarket*, 2013 EPA App. LEXIS 48, *3-7 (Dec. 2, 2013).

[6] http://www.housatonicoptions.com/health-and-the-housatonic-river/ (third video).

[7] http://www.ge.com/ar2014/assets/pdf/GE_2015_Proxy_Statement.pdf, at v (calculation of SEC compensation).

Similarly, the Region's application of other laws (TSCA, wetland laws) and its factual determinations (*e.g.*, about delays associated with "on-site" disposal) do not turn on disputed Permit interpretations, and are reviewed for clear error. GE PFR 8. The Region's ultimate balancing of cost against other permit criteria, which is a discretionary decision, also is not a Permit interpretation, and is upheld if "reasonable" and "cogently explained and supported." *In re Ariz. PSC Ocotillo Power*, 2016 EPA App. LEXIS 42, *6 (Sept. 1, 2016). In fact, the *only* relevant disputes about Permit terms appear to be whether "zoning restrictions" should be understood to mean only "*off-site* zoning restrictions," and whether certain "implementability" criteria authorized the Region to consider state/community opposition to on-site disposal. The Region is correct that even these Permit interpretation questions are reviewed for clear error, as the CD itself says when it subjects the Region's decision to review under 40 C.F.R. § 124.19. Region Br. 13-14.

ARGUMENT

On-site disposal has many obvious practical and environmental disadvantages, and only one significant advantage: cost. The Region had ample discretion to select off-site disposal.

I. The unique disadvantages of creating a new "on-site" disposal facility.

A. PCB disposal facilities are not allowed in ACECs and on steep hillsides: ARARs violations, particularly at Woods Pond and Forest Street.

It is undisputed here that onsite disposal is an ARAR. On-site disposal therefore must either comply with all "applicable or relevant and appropriate requirements" (ARARs) imposed by state and federal law, or satisfy the conditions for a waiver under CERLCA 121(d); this is not

a balancing factor but an absolute requirement. Two of the on-site locations plainly fail this standard.

Woods Pond. The ARARs violation here is glaring. Massachusetts officials have designated part of the Housatonic River as an "Area of Critical Environmental Concern," including the Woods Pond disposal site. This designation subjects this "ACEC" to certain protections under state law, including a total prohibition on landfills. Specifically, the rules state that no disposal facility "shall be located where such location or any portion thereof: (1) Would be within an Area of Critical Environmental Concern (ACEC)." 310 Code Mass. Reg. 30.708. The same rule also prohibits disposal within buffer areas where this would affect "the resources of the ACEC." GE admits that the Woods Pond site is located "within the boundaries" of this ACEC (not the buffer area), and that this blanket prohibition is "theoretically applicable." GE PFR 18.

GE contends – incorrectly – that the Region's application of the ACEC rules is "pretextual," because there is already a sand/gravel pit at the Woods Pond Site, and converting the site into a landfill would affect no "resources of the ACEC." But the impact on ACEC "resources" is relevant only to buffer areas, not to areas actually within the ACEC, like Woods Pond. Thus the categorical prohibition on disposal "within" an ACEC is an "applicable" ARAR – and the Region has no discretion to disregard the prohibition. In any event, GE is wrong to view the gravel pit's existence as inconsistent with the state's interest in protecting the river/shoreline from expanded development and contamination.[8]

[8] In its reply brief, GE notes that the state's 2009 ACEC designation concluded that the designation should not be used to "preclude remediation, habitat protection, or restoration activities" and would not "impede" private business development. GE Reply 15-16, & *id.* Att. 1, at 17. According to GE, this shows that the ACEC designation was never intended to forbid a disposal facility. But the reference to advancing "remediation, habitat protection, or restoration activities" was certainly not a waiver of state law, which flatly forbids a disposal facility in an ACEC. On the contrary, the state designation

GE implies the Region should have waived the ARAR under CERCLA § 121(d)(4), but GE does not say why; instead it simply notes that the Region waived ACEC protections that interfered with other (essential) parts of the remedy. GE PFR 19. But in those instances there was a finding under CERCLA § 121(d)(4)(C) that it was "technically impracticable" to comply with the ARAR. For example, dredging must occur in an ACEC because that is where the contamination is. This "no choice" argument does not make sense for permanent disposal because there *is* a choice: off-site disposal, which even GE does not contend is "technically impracticable."

Fundamentally, GE's complaint is not with the Region's decision, but with the Commonwealth's ACEC designation. The ACEC rule disqualifies Woods Pond, regardless of cost-savings. The site is also near a drinking water source and an aquifer – which makes it illegal under state law to site a PCB landfill there. *See* Region Br. 20.

Forest Street. The Forest Street site also cannot serve as an on-site disposal site. The site is on a "steep" slope of between 15% and 45% – in parts, as steep as a black-diamond ski trail. The highest portion of the landfill would be on top of a hill about 1,600 feet above sea level, with the lowest part of the operations area ~600 feet below. RCMS Fig. 9-8. This topography is prohibited by the TSCA landfill siting rules, which state that a PCB landfill site "shall be located in an area of low to moderate relief," so as to avoid erosion, slumping and landslides. 40 C.F.R. § 761.75(b)(6). GE admits this noncompliance, but argues that the Region

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affirmatively *declined* a suggestion that cleanup activities be exempted from ACEC rules (which is what GE wants here). *Id.* Moreover, encouraging "remediation" and "restoration" of the ACEC is not remotely the same as encouraging "disposal" in the ACEC; in fact, the designation says the ACEC designation furthers these remediation/restoration "objectives" by "highlighting the important ecological value of this stretch of the river" – hardly an invitation to put a disposal facility in the ACEC.

should have waived this requirement (and three other requirements in the same regulation).[9] GE points out that the regulations authorize the Regional Administrator, "in his discretion," to waive siting requirements upon a showing by the landfill operator that the waiver "will not present an unreasonable risk" to health or environment. *Id.* § 761.75(c)(4); *id.* § 761.61(c) (similar). GE also cites several cleanup sites where TSCA siting requirements have been waived (without discussion of the circumstances), and has found three commercial landfills operating under waivers of other TSCA rules. GE PFR 15. But at none of these landfills did EPA waive the topography rule. Simply put, PCB landfills are not built on steep hills, and GE has not identified a single instance where this requirement has been waived. Moreover, GE's waiver proposal appears to have been pro forma – the RCMS merely describes "engineered measures ... to reduce the potential" for landslides and slumping. RCMS 9-49.

Second, the Forest Street site borders Goose Pond Brook, which connects Goose Pond to the Housatonic River. GE admits that landfill operations would extend into protected "riverfront" areas adjoining the stream, and that a road would have to be built over the brook, which is also protected. GE PFR 19. On this basis, the Region found that a CERCLA § 121(d) waiver of wetlands rules "may" be required at Forest Street. RTC 241-42, 250. GE's only response is to assert that the wetlands impacts, though sufficient to trigger the rule, are "negligible," and that the Region should therefore have found the site to be in compliance with the rule, without needing a CERCLA waiver. GE PFR 19. But "negligible" is GE's word; it cites no finding to this effect by the Region. Given that landfill operations would actually be

[9] There are three other TSCA criteria (soil permeability, water table proximity, connection to surface water) that all three sites cannot satisfy; these are considered in § 1.D below, on the risk of releases to the river. However, the topography criterion disqualifies only Forest Street and GE has not identified any site/facility where it has ever been waived, so it is considered separately here, as an absolute ARARs disqualification.

conducted inside a protected zone for years, it was reasonable for the Region to find that another ARAR waiver might be required – and that such a waiver would have been impossible to grant, given the viability of off-site disposal. RTC 250. This was another significant ARAR disadvantage, in addition to the topography disqualification.

Rising Pond. There is also a significant question whether the third site, Rising Pond, would be in compliance with the Massachusetts Endangered Species Act, because the site includes priority habitat for the wood turtle, which is protected by the Act; the operations area of the landfill would come right up against this habitat. RTC 242, Mass. Br. 17. Amici support the Region and the Commonwealth on this issue.[10] In addition, the RCMS found that the site "might not" meet state wetlands rules because of potential impacts on riverfront areas and forested wetlands. RCMS 9-50, 9-51 n.501.

B. Impacts on "nearby communities": Proximity to population centers, significant truck traffic.

Another major disadvantage of "on-site" disposal is that the sites (1) are close to population centers, (2) would result in massive extra traffic on local roads, and (3) would require daily leachate runs between the sites and a separate treatment facility in Pittsfield.

As an initial matter, two of the sites are near residential town centers. The Woods Pond site is 1,300 feet from Lenox Dale, which has a high population density. Rising Pond is

[10] ARARs aside, the permit also requires consideration of "any impacts on … environmentally sensitive areas." Permit 21, § 2.G.2.a.3.

immediately south of the village of Housatonic, a low-income area which has been designated by state officials as an "environmental justice" community.[11]

Moreover, local truck traffic is a major disadvantage at the Forest Street and Rising Pond sites, which are located far from the main dredging areas. The Region estimated that to build the facility and transport waste to the Forest Street site would result in approximately 5 million vehicle miles on local roads; for Rising Pond the total would be more than 3 million vehicle miles, and would include travel through the picturesque town of Stockbridge. By contrast, transport of waste off-site via rail would involve 861,000 miles on local roads – some four to six times less than at Forest Street and Rising Pond. RTC 255.

Additionally, the Region predicted that some 150,000 to 600,000 gallons/month of contaminated leachate would have to be trucked away from any of the three sites to a water treatment facility in Pittsfield. This is a drive of between 10 and 20 miles, resulting in multiple trips per day by large hazmat trucks on country roads for a period of up to 52 years – on top of the trips moving a million cubic yards of toxic sediment from areas upstream. RCMS 9-45, CA 64 (Exh. 7).[12] The leachate transport is significant, because leachate "could be released en route" by malfunctions or accidents, CA 69, and liquid spills "spread more quickly and may cause more environmental harm than spills of PCB solids," RTC 241. Depending on the site, this heavy truck traffic would go through the town centers of Lee, Lenox Dale, Stockbridge, and

[11] http://maps.massgis.state.ma.us/map_ol/ej.php.

[12] Another option would be to build a water-treatment facility at each of the three "upland" sites. However, GE's plans for the three sites appear to assume that leachate would be trucked off.

Housatonic. By comparison, off-site disposal would not require daily leachate trips to a separate facility, for some 50 years.

With all of this, GE's only response has been to insist that these complaints are NIMBYism, and that off-site disposal has supposedly equivalent impacts outside the Housatonic area. GE PFR 17. But local impacts are precisely what the Permit/CD authorize the Region to consider. For example, the Permit points to evaluation of "short-term impacts," defined to include "impacts to *nearby communities* ... or the environment." Permit at 22, § 2.G.2.d (emphasis added). Massive local truck traffic is an obvious "short-term impact."

Finally, it was reasonable for the Region to find that these community impacts are simply more significant, under any measure, than any similar off-site impacts. Only on-site disposal creates a needlessly risky setup with PCB disposal in one area, and leachate hauled 10-20 miles up local roads. Only on-site disposal requires so much traffic through a bucolic tourist destination that "has already endured decades of impacts," RTC 264, including aesthetic, recreational and economic impacts – with many more impacts to come. GE has not identified any existing off-site facility anywhere – and there are only a handful of candidates – that would likely suffer even remotely similar impacts.

For these reasons, the Region acted reasonably in finding that local truck traffic weighed significantly against on-site disposal, especially at Forest Street and Rising Pond.

C. Impacts to environment: "Prime" New England forest destroyed, plus wetlands and species impacts.

Another significant disadvantage of "on-site" disposal is that a PCB landfill would create an area of contamination where there is none, and result in the permanent loss of forest. Woods Pond is partially forested; Forest Street and Rising Pond are entirely forested. As the Region

noted with significant understatement, Forest Street and Rising Pond "contain prime forest land as designated by the State. … [T]he habitat value at these two locations, which are otherwise unimpacted by the site contamination, would be significantly decreased." RTC 241. These two sites also have wetland and species impacts described above.

These impacts go to at least three permit criteria: environmental protectiveness, "the impacts of ... disposal facilities ... on the environment," and "impacts to nearby communities ... or the environment." Permit § II.G.1.a, 1.d, & 2. And they also go to the "suitability" inquiry, described above. No such impacts would occur at an existing off-site disposal facility.

GE's only response is a footnote: it asserts that Woods Pond has a sand/gravel pit, and that the other sites have no "sensitive" habitats. But Woods Pond is disqualified for other reasons (*e.g.*, ARARs), and the assertion about the other two sites is contradicted by the Region's findings about wetlands, protected species, and "prime" forest habitat at Forest Street and Rising Pond. GE PFR 17 n.11. These findings were not clearly erroneous.

The Region acted reasonably in requiring use of an existing facility rather than siting a PCB landfill in the middle of a New England forest, the greenest of "greenfields."

D. The risk of a release in the Housatonic watershed is higher with onsite disposal – and would be a calamity.

Yet another major disadvantage of "on-site" disposal is that there is a greater risk of re-contamination within the Housatonic watershed. Specifically, all three sites would put PCB landfills in areas with a hydrological connection to surface water (*i.e.*, the river), which is prohibited by TSCA. 40 C.F.R. § 761.75(b)(3). This is a particular problem at the Woods Pond and Rising Pond sites, which are closer to the river. Worse, all three sites fail to comply with other TSCA requirements, including limits on proximity to the water table and soil permeability,

a problem exacerbated in this case by the underlying soluble karst geology.[13] *Id.* § 761.75(b)(2). The Region found that these defects created a higher risk that a release would reach the Housatonic River, and that this problem was especially significant in light of the amount of waste and the length of operation. RTC 239.

Here again we come to the TSCA waiver. GE argues (1) the Region should have waived these TSCA requirements, as has been done (supposedly) at three commercial facilities, (2) the Region erred in treating a spill in the Housatonic watershed as worse than a spill elsewhere, and (3) a spill is unlikely to occur. GE PFR 15-16. But GE misses the point: whether or not the Region could have granted GE a waiver, it is simply undeniable that (a) spills *do* happen under EPA oversight, which is why RCRA and TSCA enforcement programs exist, (b) a release at an "on-site" facility connected to a river is much likelier to reach a surface water body than at a commercial facility, and (c) a release into the Housatonic River, in particular, raises special concerns, given the value the river has, the immense difficulty involved in cleaning it up, and the decades of remediation impacts the area is already facing. The Region endorsed the Commonwealth's statement of the obvious: "on-site" disposal would "have extremely negative impacts to the communities surrounding the facility including economic, aesthetic, recreational, and potential health impacts should the facility fail." RTC 265. All these factors are relevant under the permit – for example, under the criteria related to protectiveness, source control, suitability, and impacts to "nearby communities."

The TSCA waivers that EPA has granted to three commercial facilities do not belie these basic points. All three involved a waiver of the rule requiring a 50-foot buffer between the landfill bottom and the water table – by far the TSCA criterion that is most frequently waived.[14]

[13] Karst geology: https://pubs.usgs.gov/of/2014/1156/pdf/of2014-1156.pdf.

GE Att. 13. None of the commercial-facility waivers cited by GE involved other TSCA site-characteristic waivers (namely a waiver of the prohibition on a connection to surface waters), and none involved waivers of multiple site-characteristic requirements, as here. Thus GE is posing the wrong question: it is not whether GE could have been granted a TSCA waiver, but whether an onsite facility is *as* protective and suitable as a commercial facility in a location that undeniably meets more of the TSCA siting rules, and that is not near a river with high recreational/aesthetic values.[15] The Region found that the answer to this question was no – a reasonable determination, and not "clearly erroneous."

E. All three areas are zoned residential and/or conservation, which is relevant to the "zoning" and "suitability" analyses.

In addition to the ARARs violations, another disadvantage is that all three "upland" sites include areas zoned for residential and/or conservation purposes. RTC 261. In fact, all three have homes nearby, and all are located near beautiful conservation/recreation areas, as noted above.

The Region properly took these surroundings into account. Specifically, the Region found that on-site disposal was not preferable in light of the "implementability" criterion, which

[14] As EPA once pointed out in an unsuccessful proposal to eliminate the buffer requirement: "in many areas east of the Mississippi River .... EPA Regional Administrators have had to ... waive this [50-foot buffer] criterion." 44 Fed. Reg. 31567, 31568 (May 31, 1979).

[15] GE similarly asks the wrong question in focusing on other cleanup sites with TSCA waivers. GE PFR 16. GE simply ignores the many sites where EPA selected off-site disposal. RTC 240. Moreover, GE does not establish that other sites are comparable to this site – whether they involved the storage of so much waste, or whether they affected a resource as significant as the Housatonic River. The best comparable for GE might appear to be dumps from earlier Housatonic cleanups, *e.g.*, near Allendale School. Yet this comparison crumbles under scrutiny: these dumps involved smaller volumes, RTC 240-41, and (far from being selected using the Permit criteria) were part of GE's agreement under the CD, which explicitly provided that "no aspect of this settlement should be considered precedent." CD ¶ 201. Ultimately, this *sui generis* Permit required the Region to compare on-site to off-site disposal, not to what EPA has done in the past, under different circumstances and using different criteria.

requires the Region to consider "zoning restrictions" and the existence of "suitable" on-site disposal facilities. RTC 260-62. GE's only response is to rely on CERCLA § 121(e)(1), which authorizes the Region to implement the remedy without complying with the zoning requirements that would otherwise apply to "on-site" actions. Therefore, says GE, when the remedy selection criteria require consideration of "zoning restrictions," this must really mean only "*off-site* zoning restrictions." GE PFR 22.

But GE's attempt to add the word "off-site" to the permit language would change the clear meaning of the Permit, which has no such limitation. As GE acknowledges, reading an "unstated term" into a contract is highly disfavored.[16] Moreover, the omission is unlikely to have been inadvertent: the NCP has analogous language requiring EPA to consider the need for "site approvals," but the NCP states that this consideration applies only to "off-site" actions – a qualification dropped from the permit.[17] GE argues that other departures from the NCP should be understood as deliberate, "site-specific choices"; just so here. GE PFR 10. GE is also wrong to imply that there is a conflict between the language as written and CERCLA permit preemption: just because the Region and GE agreed that the Region can override zoning laws in *implementing* the remedy does not mean zoning must be irrelevant to *selecting* a remedy; "can" is not "should." This is particularly so where the zoning regulation shows that the areas

[16] GE PFR 24 (unstated terms added only where "absolutely necessary" to effectuate intent).

[17] 40 C.F.R. § 300.430(e)(9)(F)(2) (EPA must consider "[a]dministrative feasibility, including ... the ability and time required to obtain any necessary approvals and permits from other agencies (*for off-site actions*)") (emphasis added).

surrounding these sites (particularly Forest Street and Rising Pond) are about as far from a typical industrial landfill site as can possibly be imagined.

Zoning is also relevant to the permit criterion that directs consideration of whether there are any "suitable" on-site disposal areas. Permit § 2.G.2.e.7. A similar part of the NCP requires EPA to evaluate whether there are "adequate" off-site disposal services, 40 C.F.R. § 300.430(e)(9)(F)(3), but this was replaced with "suitable," a higher standard – and another "site-specific choice." "Suitable" is defined by merriam-webster.com as "adapted to a use or purpose." It was reasonable for the Region to conclude that areas zoned for residences and conservation are not "adapted" to the "use or purpose" of PCB disposal.

In sum, the Region was authorized to take zoning and surrounding uses into account, and thus to find that the "zoning" and "suitability" evaluations favored off-site disposal. PCB landfills do not belong in conservation and residential areas.

F. It was appropriate for the Region to consider state and local opposition.

The final disadvantage is that residents and almost every relevant state and local official are adamantly opposed to "on-site" disposal, because of its devastating impacts on Berkshire County. GE admits this opposition exists, but argues that the Region should have ignored it, because the permit does not mention the state and community acceptance criteria that are in the NCP. GE is wrong.

First, the permit explicitly authorizes the Region to consider "coordination with other agencies" and "regulatory and zoning restrictions" in selecting the remedy. Permit § II.G.2.e(3), (6). GE argues that, despite this language, state and local officials matter only when it comes to "off-site" actions, because the CD purports to exempt GE from obtaining state and local permits. But as noted above, these parts of the permit differ from the NCP in that they do *not* limit the

Region's evaluation to "off-site" situations – an intentional departure. Moreover, the Region's authority to override permit requirements during remedy implementation does not preclude consideration of state and local views during remedy selection.

Second, it is undeniable that litigation risk/delay makes a remedial alternative less "implementable" under the permit. EPA properly found that on-site disposal "would have significant issues with the ACEC regulations, the Massachusetts Hazardous Waste Facility Site Safety Council Regulations, and the site suitability criteria . . . . [and] may be limited by opposition from state and local officials and regulatory issues." SB 38. GE responds by contending that the delay potential was the same no matter what the Region did: although state/community officials would have appealed any "on-site" disposal remedy, GE notes that there was always going to be an equally determined appeal by GE of off-site disposal as well. But GE fails to appreciate that not all appeals are equal. The risk of a *successful* appeal would have been much higher with on-site disposal, and a successful appeal means more delay – *i.e.*, a remand and possibly another around of appeals. More parties (including the Commonwealth) are opposed to on-site disposal, and they have stronger arguments than GE has here; states/communities that have "lost" at the remedy selection stage have, as the Region notes, a proven track record forcing EPA to change course. RTC 266.

Specifically, "on-site" disposal opponents would have strong arguments about ARARs, and equally strong arguments that these three sites are not actually "on-site" for purposes of the permit preemption provision – particularly where the "site" has been stretched to include 125 miles of river and uncontaminated areas around it. Forest Street and Rising Pond are miles from the main dredging area, and all three sites are uncontaminated and not "necessary" to implement the cleanup, given the viability of off-site disposal. *See* 40 C.F.R. § 300.400(e)(1) (on-site

means "areas in very close proximity to the contamination" and "necessary" to implement responses); *Lyondell Chem. v. Occidental Chem. Corp.*, 608 F.3d 284, 304 (5th Cir. 2010) (area ¼ mile from site did not meet this standard). Notably, the Commonwealth "does not concede" that these sites are on-site. Mass. Br. 26. There is also the question posed by the Municipal Committee's PFR, which is whether CERCLA permit preemption can be used to implement a remedy selected under RCRA.

These legal questions would be framed in the most sympathetic possible circumstances: far from being a situation where CERCLA has been used to bypass local laws that have arbitrarily blocked an otherwise logical cleanup, GE wants to put a PCB landfill where it would otherwise *never* be considered, overriding many basic environmental precepts and the state and federal laws that embody these precepts. In short, the Region was not clearly erroneous in finding that on-site disposal creates greater litigation risks/delay than off-site disposal.

Third, there is the criterion authorizing the Region to consider the "suitability" of on-site disposal facilities – *i.e.*, whether these sites are "adapted to the use or purpose" of being a permanent PCB disposal site. This permit-specific language is open-ended enough to authorize the Region to consider state/local views about how these areas should be used.

Finally, the permit does not require the Region to rely solely on the permit criteria in selecting a remedy. Instead, it requires GE to write a CMS that considers these criteria, and then authorizes the Region to select a remedy based on that CMS and "any other relevant information" in the administrative record. Permit § II.J. Put differently, had GE wanted to force the Region to limit itself exclusively to the nine criteria, it should have insisted on a clear statement in the Permit. Instead, GE now seeks to obtain from the Board what it could not get

from the Region when it negotiated the CD, *i.e.*, an ironclad limitation on the Region's remedy-selection discretion.[18]

In sum, if GE was trying when it negotiated the CD to limit the Region's remedy-selection discretion, it missed its mark. GE accepted permit language that authorized the Region to consider "coordination with other agencies" and "regulatory and zoning restrictions," while simultaneously deleting references about how these analyses applied only to "off-site" approvals. It allowed the Region to consider whether on-site disposal areas were not merely "adequate," but "suitable." And while GE required itself to use the permit criteria in writing the CMS, it did not require that the Region limit itself to these criteria when it came to selecting the remedy. GE also accepted language under which delay and litigation risk are indisputably relevant, knowing that an army of officials, NGOs and ordinary citizens can and would mount powerful challenges to on-site disposal. The Region had discretion to consider state/community views.

II. The Region reasonably determined that the $150MM cost differential did not outweigh these disadvantages.

The cost difference between "on-site" and off-site disposal is $150MM. SB 39. This is essentially the *only* factor favoring on-site disposal, compared to the serious disadvantages described above. But the Region had no discretion to consider the Woods Pond and Forest Street sites, because of ARARs disqualifications (*e.g.*, ACEC, topography); the only remaining site had many compelling disadvantages, including a strong possibility of being disqualified for ARARs reasons as well (species, wetlands).

[18] GE cites several occasions where the Region said it used the Permit criteria to select the remedy, which GE argues is an admission that these criteria are the *only* ones the Region was authorized to apply. GE PFR 11. But these statements do not say that the Region was *limited* to the criteria. Moreover, the Region explicitly stated that it could consider factors not specifically enumerated. RTC 260.

Fig. 1 -- Disadvantages of "On-Site" Disposal

Site	ARARs compliance?	Compatible with zoning & surroundings?	"Short-term" impacts (trucks on local roads)?	Risk of release to river?	State and local opposition?
Woods Pond	No (ACEC + drinking water + aquifer)	No + some destruction of "prime" forest	Moderate (leachate transport)	High (TSCA criteria)	High
Forest Street	No (topography, wetlands)	No + major destruction of "prime" forest + wetlands impacts	High (leachate, hazardous waste transport)	High (TSCA criteria)	High
Rising Pond	Potentially no (species, wetlands)	No + major destruction of "prime" forest + possible species impacts	High (leachate, hazardous waste transport)	High (TSCA criteria)	High

Weighing these disadvantages against dollars and cents is impossible to do with mathematical exactness, but it was the Region's job to do it. The Region did not abuse its considerable discretion.

Finally, GE argues that cost is "'centrally relevant,'" but its authorities are thin. GE's quotation comes from dicta in a decision on an air rulemaking. GE PFR 12. The permit criteria – which GE insists are the exclusive authority on this remedy selection, *id.* at 10 – say nothing of

the kind; instead the permit simply lists cost as the last criterion of all. GE also cites RCRA guidance that cost is "'an important consideration'" – but only if multiple remedies "otherwise satisfy the selection criteria" – not the case here. *Id.* at 12.

The Region's decision was "reasonable" and "cogently explained and supported"; it should be upheld.

CONCLUSION

The Region's off-site disposal decision should be sustained.

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Respectfully submitted,

Housatonic Rest of River Municipal Committee

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

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

/s/ Benjamin A. Krass

CERTIFICATE OF SERVICE

I certify that on March 27, 2017 I have sent a copy of this Amicus Brief in Support of Off-site Disposal, together with all attachments, to the counsel listed below.

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