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March 24, 2017

BY Federal Express

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

Re: Final Modification of RCRA Corrective Action Permit,
GE-Pittsfield/Housatonic River Site, "Rest of River", U.S.EPA ID No. MAD002084093

Dear Sir/Madam Clerk:

Enclosed for filing is an Amicus Curiae Brief of the Massachusetts Audubon Society ("Mass Audubon") with respect to the above-reference U.S. EPA Final Modification of RCRA Corrective Action Permit to General Electric-Pittsfield for remediation of the Housatonic River, "Rest of River" Site.

Kindly bring it to the attention of the Environmental Appeals Board.

Thank you for your assistance in this matter.

Very Truly Yours,



Kathleen E. Connolly

Enclosure

cc: Attached Service List
Bryan Olson, Director Office of Site Remediation and Restoration, U.S.EPA
Rod McLaren, General Electric Company
Michael Gorski, MassDEP
Betsy Harper, Massachusetts Attorney General's Office
Matthew Beaton, Massachusetts Executive Office of Energy and Environmental Affairs
Susan Peterson, CT DEEP
Mayor Linda Tyer, City of Pittsfield
Corydon Thurston, Pittsfield Economic Development Authority
Addie Fiske, U.S. Department of Justice
Mark Barash, U.S. Department of Interior
Tom Chapman, U.S. Fish and Wildlife Service
Ken Finkelstein, National Oceanic and Atmospheric Administration

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GLOSSARY OF TERMS

| | |
|----------------------------|---|
| ANPR | Advanced Notice of Proposed Rulemaking |
| AR or Record | Administrative Record |
| ARARs | Applicable or Relevant and Appropriate state and federal Requirements |
| Att. | Attachment |
| 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 <i>United States et al. v. General Electric Company</i> Civil Action No. 99-30225-MAP <i>et seq.</i> (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 |

GLOSSARY OF TERMS CONTINUED

| | |
|--------|--|
| FP | Floodplain |
| GE | General Electric Company |
| HHRA | Human Health Risk Assessment |
| IMPG | Interim Media Protection Goals |
| MGL | Massachusetts General Laws |
| Muni | Housatonic Rest of River Municipal Committee |
| 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 |
| U.S.C. | United States Code |

IDENTIFICATION AND INTEREST OF AMICUS CURIAE

Amicus curiae Massachusetts Audubon Society, Inc. ("Mass Audubon"), founded in 1896, is among the oldest and largest private non-profit conservation organizations in New England. Mass Audubon's mission is to protect the nature of Massachusetts for people and wildlife. With 125,000 members, Mass Audubon stewards nearly 37,000 acres of conservation land, provides educational programs for 225,000 children and adults annually, and advocates for sound environmental policies at the local, state, and federal levels of government. Mass Audubon's statewide network of 100 wildlife sanctuaries welcomes visitors of all ages and serves as the base for its conservation, education, and advocacy work.

STATEMENT OF FACTS and PROCEDURAL HISTORY

On October 24, 2016, the United States Environmental Protection Agency, Region 1 ("EPA"), issued a Final Modification of RCRA Corrective Action Final Permit ("Final Permit") for the GE-Pittsfield/Housatonic River Site, "Rest of River" ("the River") requiring General Electric ("GE") to remediate contamination it caused to the River, its property, and abutting properties, including Mass Audubon's property. On November 21, 2016, Mass Audubon filed a Notice of Interested Party Status because it does not wish to appeal the Final Permit, but wishes to maintain involvement in the appeal and to maintain its standing in any further court proceedings. While Mass Audubon believes it has standing in this appeal because it owns property abutting the GE subject property, including its Canoe Meadows Wildlife Sanctuary which is part of the site, and because some of its property will be subject to the cleanup requirements, it wanted to preserve its rights. Mass Audubon had participated in the public comment period and was among the recipients of the Final Permit on October 24, 2016. Mass

Audubon has been closely engaged in the planning process for the cleanup of polychlorinated biphenyls (“PCBs”) from the River for many years as a landowner directly affected by GE’s PCB contamination that is the subject of the Final Permit.

Mass Audubon has a vested interest in the proceedings given the location of Mass Audubon-owned property along the River and the occurrence of PCBs related to GE’s activities on the property. In conducting work under the Final Permit, GE will conduct work directly on Mass Audubon property. In addition, the remedial work on GE property and River property will have impacts on Mass Audubon property. Residual PCB contamination will remain on Mass Audubon’s property and adjoining properties. GE will need to work with Mass Audubon to obtain easements and related agreements in order to enter Mass Audubon land and to conduct work affecting its land and to conduct ongoing monitoring and maintenance of containment measures post-remediation. Procedures and agreements also need to be defined for GE’s responsibilities in relation to activities Mass Audubon may need to conduct on its property such as the use, maintenance, construction, or relocation of trails, boardwalks, or other access facilities. Mass Audubon is a party aggrieved by the actions of GE and will continue to be affected by the corrective actions required by USEPA’s Final Permit. 40 CFR 21.30 provides that the EAB “shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion” contained in the decision being reviewed (if EAB even accepts the request for review). EAB will give discretion to the particularized knowledge of the agency that issued the decision. See, e.g., In re Chempace Corp., 9 E.A.D. 119, 134 (EAB 2000).

The Housatonic River and adjacent lands contain extensive, significant natural resources as recognized in the designation by the Commonwealth of the Upper Housatonic River Area of

Critical Environmental Concern (ACEC). Mass Audubon has an interest in the conservation and restoration of the entire Housatonic River ecosystem for the benefit of both people and wildlife. The Final Permit and supporting documents reflect considerable progress toward finalizing a cleanup plan. Important refinements include: a commitment to off-site disposal; better recognition and mapping of the most sensitive habitat areas; acknowledgement of the Massachusetts Endangered Species Act as an applicable or relevant and appropriate requirement (ARAR); a commitment to stabilization with a preference for bioengineering; and dredging of Woods Pond. As further discussed below, therefore, Mass Audubon supports many of the provisions EPA has included in the Final Permit which provisions GE challenges. In addition, Mass Audubon requests two revisions to make the Final Permit even stronger and clearer, as discussed below. Specifically, Mass Audubon requests that the Final Permit explicitly require: (1) GE's ongoing responsibility in perpetuity to monitor, maintain remediation measures and be responsible for residual contamination; and (2) a provision for affected landowners and the communities to review and provide comments on the draft detailed plans for remediation including: a work plan, schedule and sequencing of work; access points, material and equipment stockpiling locations and haul roads; community health and safety plans; restoration plan; adaptive management plan; dam operation and maintenance plan; invasive species control plan; institutional control plan; and plan for further response actions.

STANDARD OF REVIEW

Pursuant to 40 C.F.R. §124.19(a)(4), General Electric ("GE") as a Petitioner must demonstrate that its challenges to EPA's Modified RCRA Final Permit are based upon "(A) a finding of fact or conclusion of law that is clearly erroneous or (B) an exercise of discretion or an

important policy consideration that the Environmental Appeals Board (“EAB”) should, in its discretion, review.”

When evaluating a petition that claims a clear error, the Board examines the Record to determine whether EPA exercised its considered judgment. In re City of Taunton, slip op. at 8, citing inter alia, In re Steel Dynamics, Inc. 9 E.A.D. 165, 191, 224-25 (EAB 2000). The Board will uphold a Final Permitting authority’s reasonable exercise of discretion if that decision is cogently explained and supported in the record. In re City of Taunton, slip op. at 8, citing, In re Guam Waterworks Auth., 15 E.A.D. 437, 443 n7 (EAB 2011), In re Ash Grove Cement Co., 7 E.A.D. 387, 397 (EAB 1997). On matters that are fundamentally technical or scientific in nature, the Board will defer to EPA’s technical expertise and experience, as long as EPA adequately explains its rationale and supports its reasoning in the AR. In re City of Taunton, slip op. 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). This heavy burden promotes the policy imperative of ensuring “that the locus of responsibility for important technical decision making rests primarily with the Final Permitting authority, which has the relevant specialized expertise and experience.” In re Peabody W. Coal Co., 12 E.A.D. 22, 33 (EAB 2005). The Board will not substitute its judgment for the judgment of the decision maker with the particularized expertise to make such decisions.

ARGUMENT

EPA’s selection of the Final Permit requirements are consistent with and supported by the Consent Decree and the regulations.

1. Off-Site Disposal is More Protective of Health and the Environment and it is Not Clearly Erroneous

Mass Audubon supports EPA's selection of off-site disposal as the preferred disposal alternative for contaminated soil and sediment. This is a summary of Mass Audubon's position which is discussed in greater detail in the amicus curiae brief of the Rest of River Municipal Committee, which Mass Audubon joins. This provision is consistent with the Consent Decree (CD) and with the federal regulations. Specifically, Final Permit Section II.B.5 states that GE "shall dispose of all contaminated sediment and soils, as well as other waste material, off-site at existing licensed facilities that are approved to receive such waste material and are in compliance with EPA's off-site rule (40 C.F.R. 300.440)." The federal regulations contain specific monitoring requirements for off-site facilities as well as regular checks for potential releases or violations. Although GE argues that there is no benefit of using off-site disposal, its main argument for on-site disposal is the cost of off-site disposal. In fact, off-site disposal provides greater protection of human health and the environment, greater long-term reliability and effectiveness, is compliant with all applicable or relevant and appropriate federal and state requirements ("ARARS"), provides the best control and containment of sources of releases, and provides for more efficient implementation and quick response to risks associated with PCB contamination. Moreover, cost is not one of the General Standards required to be met in selecting the disposal alternative but, rather, is just one of several Permit criteria. The five balancing criteria under the Toxic Substances Control Act ("TSCA") are substantively related to effectiveness (See Selection Design Factors, CD-Final Permit at 21-23: Long-Term Reliability and Effectiveness; Reduction of Toxicity; Mobility or Volume of Waste; Short-term Effectiveness, and Implementability).

Off-site disposal meets the TSCA General Standard of Long-Term Reliability and Effectiveness. As the CD Final Permit provides, this Standard considers the magnitude of the residual risk, the adequacy and reliability of alternatives, and the potential long-term adverse impacts on human health and the environment. CD-Final Permit at 21. Utilizing a disposal site specifically made for PCBs assures a higher likelihood of controlling sources of releases.

Contrary to GE's assertions that on-site disposal is preferable at one of three locations GE identified - Woods Pond, Rising Pond, and Forest Street - none of its proposed landfill sites meets the TSCA requirements for soil characteristics, including permeability, and GE readily admits this (See Region I's Response to GE's Petition, page 16, line 9). Also, none of GE's proposed sites (which Mass Audubon does not concede are actually on-site) meets all of TSCA's requirements for hydrology, such as the bottom liner being at least 50 feet from the historical high water table, avoidance of groundwater recharge areas, and avoiding hydraulic connections between the site and a surface waterbody. *See* 40 C.F.R. §761.75(b)(3). The Woods Pond site is near a drinking water source and above a medium-yield aquifer. Also, the Forest Street site would not meet the TSCA requirement of §761.75(b)(5) that a landfill be located in a relatively flat area to minimize erosion and landslides or slumping. By contrast, off-site facilities would be fully licensed and regulated under federal law, and are generally constructed in areas best suited for that use considering soil and hydrology, thus meeting the Standards of Reduction of Toxicity and Mobility or Volume of Waste. Off-site disposal is clearly more protective of human health and the environment.

Although EPA has some discretion under the regulations to consider a disposal option that does not meet all TSCA siting requirements, in balancing the criteria, given the large volumes of PCB-contaminated soil and sediment and the expected length of remedy implementation, it is

reasonable for EPA to have selected an off-site disposal alternative that has been sited based on its suitability to accept PCB wastes. GE also erroneously argues that the use and protectiveness of off-site disposal facilities is unknown. (GE's Pet. at 12.) However, as EPA states in its Response to GE, EPA analyzed the risks of off-site disposal, CA 59-77, and noted that "only minor on-site short-term impacts would occur" (See Region I's Response to GE, p. 17, l. 5) Off-site disposal thus meets the Standards of Short-term Effectiveness and Implementability.)

Thus, EPA correctly determined that off-site disposal is more protective than on-site disposal. It is the best choice to assure protection of human health and the environment and allow for prompt cleanup with the least potential for adverse impacts and the best potential for beneficial long-term effects and will allow the cleanup to commence with a minimum of delay, further protecting human health and the environment. GE's burden of proof requires it to show that EPA's selection of off-site disposal is clearly erroneous, which it has not and cannot prove.

2. The Dredging of Woods Pond Remedy is Not Clearly Erroneous

Mass Audubon supports EPA's selection of the remedy of dredging of Woods Pond. Contrary to GE's argument that EPA's Woods Pond remedy conflicts with the Decree's CD-Final Permit remedy-selection criteria because it is allegedly too expensive and environmentally disruptive to remove the selected amount of PCB contaminated material from the Pond, GE misinterprets the selection criteria and EPA's discretion to interpret it. GE Pet. at 25-26. EPA followed the CD-Final Permit's decision-making criteria in its consideration of costs and short-term impacts, weighing the criteria according to its scientific expertise and knowledge of the nature and extent of the PCB contamination and selected the Woods Pond's remedy because it is the best alternative given *all* the relevant criteria, including source control, a threshold criterion. GE fails to explain how EPA's exercise of its expertise and discretion "clearly erroneous." By

raising this point again (this argument was contained in GE's 2014 comments which EPA already addressed. (See Region 1's response to GE, RCRA 16-01, p. 26) GE is not presenting anything reviewable by the EAB. In Re City of Pittsfield, NPDES Appeal No. 08-19, at 11-13 (EAB Mar. 4, 2009) (Order Denying Review).

As noted above with respect to on-site disposal, the fact that one remedy is more expensive than another does not by itself render it unreasonable. EPA fully and explicitly accounted for cost, but weighed cost, within its discretionary authority, against other countervailing criteria in accordance with the CD-Final Permit criteria. While GE may hold a different opinion as to the specific weight afforded cost, it has not identified any objective reason why EPA's assessment was incorrect. EAB can only set aside EPA's decisions regarding review criteria if they are clearly erroneous and as noted, GE doesn't even allege that Region 1's conclusions about costs are wrong, just that it would have decided differently.

GE also argues that EPA's reliance on the benefits of "mass removal" is unjustified because the "remedy-selection criteria do not include 'mass removal.'" (GE's Pet. at 27). Again, EPA has broad discretion to interpret the criteria, which are guidance rather than a menu of the only available cleanup alternatives. EPA's reliance on the benefits of PCB removal is based upon the threshold selection criterion for Control of Sources of Releases, including "how each alternative ... would reduce or minimize possible further releases." Att. 1, CD-Final Permit II.G.1.b. EPA properly and within its discretion determined that removal will provide both reduced risk of release, including downstream transport, and increased long-term effectiveness. As EPA pointed out, given potential flood events or the potential failure of the Woods Pond Dam, the benefits of eliminating the risks posed by PCB contamination behind Woods Pond dam through removal are significant. See Region 1's Response to GE, RCRA 16-01, p. 27. This

remedy is superior to any of the smaller, less effective remedies proposed by GE as it will permanently remove dangerous contaminants from the environment by removing the contaminated soil and sediments that pose a human health risk.

GE illogically argues that leaving contaminants in the river rather than removing them as EPA has selected is somehow more protective of the environment. Contaminants left in the river can be released. GE's remedy of leaving the PCBs could only speculatively be equal in protection to EPA's if adverse eventualities such as floods, dam breach, cap breach, etc., do not occur and no one can guarantee that such events won't happen. Based on EPA modeling, the PCB breakdown rate in the Housatonic River ecosystem is insignificantly small, so it's a virtual certainty (especially with increasing frequency of intense storm events due to climate change) that the river will experience a major flood while a substantial PCB mass remains in the area. (Att. 3, Region 1 SOP, page 31, Woods Pond Reach 7 Impoundments). Scott Ferson et al., Final Model Documentation Report: Modeling Study of PCB Contamination in the Housatonic River ES-15 (2006). EPA's decision to prepare for such possible occurrences through pollutant removal was reasonable interpretation of the Final Permit criteria and within its discretionary authority. A difference of opinion between GE and EPA, the agency with the particularized scientific and engineering knowledge and expertise to make cleanup decisions, is not a basis for EAB review. GE also objects to EPA's conclusion that future risks will continue in "perpetuity" thus requiring GE to have never-ending obligations. GE Pet. at 29. As history of CERCLA and RCRA cleanups has proven, widespread contamination at these sites can go on for decades or far longer. Scientific studies of PCB contamination have shown they could remain in the Housatonic River system for 250 years or more (Municipal Committee's Pet. at p. 31, footnote 27; See also, Housatonic River: Rest of River Revised Corrective Measures Study Report, 3-31 (Oct. 2010).

GE claims that EPA's long-term plans for risk evaluation would effectively provide "no practical limits" to GE's obligations, contrary to the selection criteria. *Id.* The selection criteria, however, do not establish specific time frames, so EPA's decision to adopt a long-term view, which is consistent with PCBs' tendency to persist in the environment, cannot be inconsistent with the CD-Final Permit Criteria or the CD. In fact, as discussed further below, Mass Audubon would like to see a requirement in the Final Permit itself that cleanup requirements and operation and maintenance requirements continue in perpetuity.

Finally, with respect to dredging Woods Pond, even if the approach chosen by EPA is only marginally more effective, which EPA doubts and Mass Audubon agrees with EPA, there is nothing in the selection criteria that precludes EPA from selecting a remedy with incremental benefits to the environment and the public. EPA's selection of dredging Woods Pond will provide for significant source removal in Woods Pond as well as reduced risk of downstream contamination, and is a solid part of an overall solution. The Final Permit and supporting documents acknowledge that extensive PCB contamination will remain across a wide geographic area following the remediation and will continue to pose risks to human and ecological health. Housatonic River: Rest of River Revised Corrective Measures Study Report, 3-31 (Oct. 2010). In order to maintain the level of risk at or below the levels required in the Final Permit, ongoing monitoring and maintenance of containment measures will need to be conducted indefinitely into the future. The Final Permit and supporting documents acknowledge that extensive PCB contamination will remain across a wide geographic area following the remediation and will continue to pose risks to human and ecological health. In order to maintain the level of risk at or below the levels required in the Final Permit, ongoing monitoring and maintenance of containment measures will need to be conducted indefinitely into the future.

The riverine environment will remain inherently dynamic regardless of any engineered stabilization. Therefore, the final plan should provide for potential further remediation over the long term, including application of adaptive management as restoration techniques continue to be refined. It also needs to explicitly hold General Electric (GE) responsible, in perpetuity, for any PCBs that remain in the environment, particularly if contaminated material is remobilized by floods or other natural disturbances. See Comment Letter dated October 27, 2014.

3. MESA Requirements Are Not Clearly Erroneous

PCB contamination caused by GE has been deposited widely throughout the Rest of River, including in areas designated by the Massachusetts Division of Fisheries and Wildlife (“DFW”) of the Massachusetts Department of Fish and Game (“DFG”) as habitat for endangered, threatened and species of special concern (or “State-listed species” collectively pursuant to the Massachusetts Endangered Species Act (“MESA”) and its regulations. G.L. c. 131A and 321 CMR 10.00. The Final Permit requires compliance with the MESA and its requirement that a project may not result in a “take” of a species unless it has been authorized for conservation and management purposes that provide a long-term net benefit to the conservation of the affected. GE makes two unsubstantiated challenges to EPA’s commitment to follow the MESA requirements during remedy design and implementation; first that EPA would not follow regulatory requirements; and second that EPA would violate the Decree in its implementation. GE’s Pet. at 53. Mass Audubon agrees with EPA that GE’s arguments are unfounded both procedurally and substantively. First, it is premature to determine if the specific actions undertaken in remediation of Rest of River will result in a “take” of a state-listed species, and if so, whether the take would result in a significant impact on the State-listed species. Also, it is premature to determine whether any potential mitigation projects constitute a violation of the

covenant for Natural Resource Damages (“NRD”). Att. 4, RTC 141. EPA has not made any determinations as to which, if any, species are so affected. Because EPA has made no MESA determinations, GE’s claim is premature. If a dispute arises as to EPA’s required MESA mitigation, GE can at that time seek administrative and judicial dispute resolution under the Consent Decree.

Substantively, GE’s argument also fails. The Final Permit explicitly states that to the extent that unavoidable impacts result in a take of state-listed species, EPA would follow the regulatory requirements with respect to implementing a conservation and management plan providing for a long-term net benefit to the affected state-listed species. GE argues that future MESA-required activities would be precluded by the Decree’s Natural Resource Damage covenants. GE Pet. at 54. However, GE provides no new information since its 2014 comments, and does not dispute EPA’s explanation in the RTC, at 137-39. Therefore, Mass Audubon agrees with EPA that this issue is also not ripe for review. Finally, the Decree requires compliance with any Applicable or Relevant and Appropriate Requirement (“ARAR”) set forth in the documents selecting the Rest of River Remedial Action, including any ARAR requiring that natural resources disturbed by the remedy be restored or mitigated. As EPA correctly concludes, there is no basis to treat MESA differently than any other ARAR. See Region I’s Response to GE’s Petition, p. 57. The MESA regulations contain a “Net Benefit” provision which means “an action, or set of actions, that contributes, on its own or in the context of other actions, significantly to the long-term conservation of a State-listed Species and that the conservation contribution to the impacted State-listed Species exceeds the harm caused by a proposed Project or Activity.” By including MESA mitigation in the Final Permit, EPA properly provided for site

restoration in accordance with the Net Benefit provisions of the MESA regulations. See 321 CMR 10.23 and CD-Final Permit.

4. The Region Should Require GE's PCB Remediation to be in Perpetuity.

The proposed cleanup approach will leave large amounts of PCBs within the environment, and this contamination will persist for many decades into the future. The Final Permit should ensure that the targeted risk reduction goals are met continuously for as long as these persistent contaminants remain. Leaving such large amounts of PCBs within a riverine environment that will remain a dynamic system subject to shifting of soils over time does not adequately address several of the nine criteria for selecting a cleanup plan. The Final Permit should explicitly require GE to conduct responses "in perpetuity" because the remediation of the PCBs in the Housatonic River will outlast the existing regulations governing the cleanup.

The remediation planning process to clean up the Housatonic River has taken decades. In fact, from the outset GE has delayed remediation at every step in the planning process, including its present appeal of the Final Permit, to further delay or avoid remediating the damage it caused. GE Pet. at 8-9. Moreover, once the parties agree upon a cleanup plan, the remediation of the river will take more than another decade to complete. Additionally, during the remediation process there is a high probability that new or more intensive areas of contamination will be discovered. Simply put, GE's duty to clean up the river will be everlasting and an immeasurable amount of time will pass before the Housatonic River and surrounding areas contain PCB levels that do not present risks to human health or the environment is fit for all human uses, including swimming. Over time, the river will inevitably change course and experience more frequent flooding or flooding of greater intensity, exposing contaminants that are now considered isolated. As the Municipal Committee properly noted in its Petition, because

this contamination is concentrated PCB contamination, which is more resistant to biological degradation than most organic contamination, it will be present for centuries. (Muni. Committee's Pet., p. 31, footnote 27) Ongoing monitoring and additional action will be needed to detect and address any failures of containment features or mobilization of PCBs from residual contamination even after initial targeted cleanup goals are met.

The Region notes that the Final Permit does not need to contain a direct reference to GE's obligations as "in perpetuity" because this language is contained in 40 C.F.R. §761.61(8). However, the Region's argument fails to take into account the fact that the regulations governing the cleanup change on a frequent basis. For example, 40 C.F.R. §761.61 has been amended in 1999, 2007 and 2009. *See* 64 FR 33755, 33761 (June 24, 1999); 72 FR 57235, 57239 (Oct. 9, 2007); 74 FR 30228, 30232 (June 25, 2009). There is no guarantee that the "in perpetuity" language will remain in a statute that has been subject to so many amendments since its promulgation. If this language is amended out of the statute, then all of the aggrieved parties will be at a loss. GE has explicitly fought against the time horizon being expanded to "perpetuity," and without this language in the Final Permit there will be nothing to stop GE from halting the remediation process before the river is clean. (GE Pet. at 29).

Region 2 faced similar circumstances, with a PCB cleanup in the Hudson River, and their decision regarding the "in perpetuity" should be considered. Region 2 explicitly stated "[s]ubsequent bathymetric surveys shall be performed five and ten years after construction of the cap and continued thereafter at 10-year intervals in perpetuity." Attachment E, Statement of Work Hudson River PCBs Site, Operation, Maintenance and Monitoring Scope of Phase 2 of the Remedial Action, Dec. 2010; Sec. 3. Cap Monitoring and Maintenance. In the Hudson River

PCB cleanup, EPA requires GE to remain responsible in perpetuity for PCBs remaining in the environment, such as under caps. While that requirement is in the Statement of Work for the Hudson River project, Mass Audubon asks that EPA be required to include a provision in the Final Permit for the Housatonic cleanup so as to ensure that this will be carried through to the subsequent more detailed plans. Mass Audubon requests that language be inserted in the Final Permit holding GE and its successors permanently responsible for PCBs even after the Long-Term Biota Benchmarks have been achieved, taking into account the potential for remobilization of material remaining in the environment post-remediation. Additionally, Region 2 required the program for engineered caps to continue in perpetuity. (Municipal Committee's Pet., p. 31). Region 2's inclusion of the "in perpetuity" language was not happenstance. Region 2 recognized the importance of having a detailed requirement that specifically identified GE's remediation duties and Region 1's Final Permit should do the same.

Amending the Final Permit to include the "in perpetuity" language is a simple change that the Region should implement. The Region has already acknowledged that there is no end date to GE's obligations to maintain all elements of the cleanup. (Region 1 Response to Muni at 34). Therefore, there is no rational reason as to why this language should not be included in the Final Permit. Inclusion of such a provision would not prejudice EPA in anyway and, in fact, would benefit the Region's ultimate goal of having a successful clean up.

5. The Region Should Allow for Public Comment Throughout the Remediation Process and More Specifically for Mass Audubon's Review and Comment of Submittals.

The Region should allow for public comment throughout the remediation process because the cleanup of the river will be ongoing for decades. “The EPA benefits from active participation of the public in the cleanup of contaminated sites.” *See* EPA Office of Site Remediation Enforcement, *The Revitalization Handbook, Revitalizing Contaminated Lands: Addressing Liability Concerns* (June 2014). Moreover, two of EPA’s guiding principles governing public participation in the cleanup process are: 1) proactively include community stakeholders in the decision-making process; and 2) include input from a diversity of stakeholders throughout the cleanup process. *Id.* The remediation of this contamination will take decades and the public’s interest in the cleanup is not stagnant. Many landowners and communities have been greatly affected by GE’s contamination of the river and their interests will continue and may change as the remediation progresses. Therefore, the Region should follow the EPA’s guiding principles concerning public input and allow for public comment throughout the entire cleanup until its completion. Furthermore, the Final Permit should include a process for formal public comment on the ongoing remediation.

The communities and affected landowners also need to have input into details of the actual cleanup operations including staging and temporary stockpiling, long term monitoring, and plans for responses to any failures to achieve performance standards or failures of caps or armoring. GE is required to submit all of these documents to EPA for review and approval, but there is no formal opportunity for affected landowners or the public to review and comment on these vitally important details before they are finalized and implemented. Mass Audubon calls on GE and EPA to provide for further opportunity for input, particularly from affected landowners,

the surrounding and downstream communities, and other stakeholders such as people who have an interest in recreational uses of the river. The Final Permit should include formal landowner and public involvement processes for all of the remaining detailed plans and on an ongoing basis during and after remediation work is conducted.

In addition, Mass Audubon should be able to comment on the ongoing cleanup because it is an aggrieved party. Massachusetts' zoning law is instructive on this point. Under G. L. c. 40A §17, only persons aggrieved have standing to appeal a decision of a zoning board or other special Final Permit granting authority. *See Marashlian v. Zoning Bd. Of Appeals of Newburyport*, 421 Mass. 719, 721 (1996). A person is "aggrieved" if [they] "suffer" some infringement of [their] legal rights." *Id.* The rationale behind this law is simple: only persons with affected interests are allowed to influence zoning and Final Permit decisions.

The Region should apply this rationale to the current case and allow Mass Audubon to continuously provide input on the remediation process. Here, Mass Audubon is an aggrieved party because it owns land abutting the river that is contaminated. Moreover, during the cleanup process GE will require access to Mass Audubon's property. Like an aggrieved party under G. L. c. 40A §17, Mass Audubon should be granted the ability to comment on the remediation process throughout the entire cleanup because the contamination directly affects its property. Mass Audubon also needs to provide input into the provisions for GE's responsibility for monitoring and additional remediation in relation to reasonable land use activities it will conduct in the future, e.g. trails, boardwalks, ecological management, or other work consistent with our conservation, education, and land stewardship mission. Therefore we request that Region 1 include an express provision in the Final Permit allowing for review and comment on plans

submitted by GE for remediation including: a work plan, schedule and sequencing of work; access points, material and equipment stockpiling locations and haul roads; community health and safety plans; restoration plan; adaptive management plan; dam operation and maintenance plan; invasive species control plan; institutional control plan; and plan for further response actions.

CONCLUSION

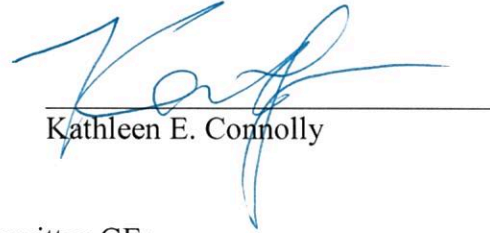
Mass Audubon generally supports USEPA Region 1's selected cleanup remedy and accepts its discretionary authority to select the Final Remedy, with specific regard to the three initial arguments above. Because it so supports Region 1 in this Final Permit issuance, it respectfully requests that the requirement of cleanup activities in perpetuity be added to the Final Permit and that a formal provision for public comment on future submittals cited above also be added to this solid Final Permit.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40C.F.R. § 124.19(d)(1)(IV), undersigned counsel certifies that the foregoing Amicus Curiae Brief contains 5585 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, but not including the cover, Table of Contents, Table of Authorities, Table of Attachments, Glossary of Terms, Statement of Compliance with Word Limitation, signatories, or Attachments; and thus this petition is well below the 7,000 word limitation approved by this Board's order dated February 17, 2017.

CERTIFICATE OF SERVICE

I, Kathleen E. Connolly, certify that on March 27, 2017, I have sent a copy of this petition for review, together with all attachments, to the counsel listed below.


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