

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

**In re:**

**GENERAL ELECTRIC COMPANY**

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

**RCRA Appeal No. 16-01**

**COMMONWEALTH OF MASSACHUSETTS  
RESPONSE TO GE PETITION FOR REVIEW  
OF MODIFICATION OF RCRA CORRECTIVE ACTION PERMIT  
ISSUED BY EPA REGION 1**

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- Attachment 1: Commonwealth of Massachusetts' October 27, 2014 comment letter on the Draft Modified Permit
- Attachment 2: EPA's May, 2012 Status Report to the public entitled: *Potential Remediation Approaches to the GE Pittsfield/Housatonic River Site "Rest of River" PCB Contamination.*
- Attachment 3: Commonwealth of Massachusetts' October 19, 2016 letter to EPA concurring with the Final Modified Permit
- Attachment 4: Excerpts from Reissued RCRA Permit (reissued in October 2001 and again effective December 7, 2007) ("CD-Permit")
- Attachment 5: Excerpts from Designation of the Upper Housatonic River Area of Critical Environmental Concern
- Attachment 6: Excerpts from Final Modification of RCRA Corrective Action Permit issued October 2016 ("Modified Permit"), including Attachments B and C
- Attachment 7: Excerpts from EPA's Comparative Analysis of Remedial Alternatives (May 2014) ("Comp. Analysis")
- Attachment 8: Excerpts from GE's Petition for Review (November 23, 2016)
- Attachment 9: Excerpts from EPA's Statement of Position in Support of Intended Final Decision on the Modification to the Reissued RCRA Permit and Selection of CERCLA Response Action (February 29, 2016) ("EPA SOP")
- Attachment 10: Excerpts from EPA's Response to Comments on Draft Permit Modification and Statement of Basis (October 2016) ("RTC")
- Attachment 11: Excerpts from EPA's Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River "Rest of River" (June 2014) ("Statement of Basis")
- Attachment 12: Excerpts from Consent Decree in United States et al. v. General Electric Company (October 27, 2000) ("CD")

## GLOSSARY OF TERMS

ACEC	Area of Critical Environmental Concern
ACEC Designation	Designation of the Upper Housatonic River Area ACEC (March 30, 2009)
Administrative Record	EPA's Administrative Record for the Modified Permit
ARAR	Applicable or Relevant and Appropriate Requirement
CD	Consent Decree in <i>United States et al. v. General Electric Company</i> , Civil Action No. 99-30225-MAP <i>et seq.</i> (October 27, 2000)
CD-Permit	Reissued RCRA Permit (reissued by EPA in October 2001 and again effective December 7, 2007), incorporated into CD
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CMS	Corrective Measures Study
CMP	Conservation and Management Permit
Commonwealth	Commonwealth of Massachusetts
Comp. Analysis	EPA's Comparative Analysis of Remedial Alternatives for the Rest of River (May 2014)
CY	Cubic yards
Draft Permit	Draft Modification of RCRA Corrective Action Permit for the GE-Pittsfield/Housatonic Site, Rest of River (June 2014)
EPA	U.S. Environmental Protection Agency, Region 1
GE	General Electric Company
MassDEP	Massachusetts Department of Environmental Protection
MassDFG	Massachusetts Department of Fish and Game
MassDFW	Massachusetts Division of Fisheries and Wildlife in MassDFG
MESA	Massachusetts Endangered Species Act

mg/kg	milligrams per kilogram (equivalent to parts per million)
Modified Permit	Final Modification of RCRA Corrective Action Permit for the GE-Pittsfield/Housatonic Site, Rest of River (October 2016)
NHESP	Natural Heritage and Endangered Species Program in MassDFW
NCP	National Contingency Plan
NRD	Natural Resource Damages
PCBs	Polychlorinated biphenyls
PSA	Primary Study Area
RCMS	Revised Corrective Measures Study (submitted by GE)
RCRA	Resource Conservation and Recovery Act
RTC	EPA's Response to Comments
SOP	Statement of Position
Statement of Basis	EPA's Statement of Basis for Proposed Remedial Action for the Rest of River (June 2014)
TSCA	Toxic Substances Control Act

## **INTRODUCTION**

Pursuant to 40 C.F.R. § 124.19(b)(4), the Massachusetts Department of Environmental Protection (“MassDEP”) and the Massachusetts Department of Fish and Game and its Division of Fisheries and Wildlife (“MassDFG”), on behalf of the Commonwealth of Massachusetts (“Commonwealth” or “Massachusetts”), hereby file this response to the General Electric Company’s (“GE”) petition for review of the Modification of RCRA Corrective Action Permit for the GE-Pittsfield/Housatonic Site, Rest of River (“Modified Permit”) issued to GE on October 24, 2016 by EPA Region 1.

## **THRESHOLD PROCEDURAL REQUIREMENTS**

The Commonwealth satisfies the threshold requirements for filing a response to a petition for review under 40 C.F.R. part 124 for the following reasons:

The Commonwealth has standing to participate in this appeal and to file a response to GE’s petition for review of the Modified Permit because it is the State where the permitted facility or site is located and the Commonwealth submitted public comments on the draft permit. *See* 40 C.F.R. § 124.19(b)(4) and § 124.19(a)(2) respectively, and Attachment 1.

## **BACKGROUND**

As summarized in more detail in the Commonwealth’s October 27, 2014 comment letter (Attachment 1) on the Draft Modification of RCRA Corrective Action Permit for the GE-Pittsfield/Housatonic Site (“Draft Permit”), the Commonwealth has actively provided input to EPA on the remediation of the Rest of River since at least 2008. It is critically important to the Commonwealth that EPA’s selected remedy for the Rest of River protects human health and the environment, including the unique ecological character of the Housatonic River watershed.



EPA's selected remedy best satisfies the remedy selection criteria in the CD-Permit, as supported by EPA's careful weighing of the relevant remedy decision standards and factors and the evidence in the Administrative Record as a whole, and appropriately requires the off-site disposal of all contaminated soil and sediment.

The CD-Permit sets forth the remedy selection criteria, specifying three General Standards (Overall Protection of Human Health and the Environment, Control of Sources of Releases, and Compliance with Applicable or Relevant and Appropriate Federal and State Requirements) and six Selection Decision Factors (Long-Term Reliability and Effectiveness, Attainment of Interim Media Protection Goals, Reduction of Toxicity, Mobility, or Volume of Wastes, Short-Term Effectiveness, Implementability, and Cost). CD-Permit at 20-23. The three General Standards are considered threshold criteria, and EPA must select the remedy alternative that best meets the General Standards in consideration of the Selection Decision Factors, including a balancing of those Factors against one another.

The Housatonic River watershed is home to a dynamic river ecosystem that has, in turn, generated a rich diversity of natural resources and habitats, including one of the densest concentrations of species protected under the Massachusetts Endangered Species Act ("MESA") in Massachusetts. Moreover, on March 30, 2009, the Secretary of the Massachusetts Office of Energy and Environmental Affairs designated the Upper Housatonic River Area of Critical Environmental Concern ("ACEC") in accordance with M.G.L. c. 21A, § 2(7) and 301 CMR 12.00. "ACECs are those areas within the Commonwealth where unique clusters of natural and human resource values exist and which are worthy of a high level of concern and protection." 301 CMR 12.02. The ACEC consists of approximately 12,276 acres along the 13-mile corridor of the Upper Housatonic River from southern Pittsfield to northern Lee and consists of all nine

inland resource features identified as areas eligible for nomination as an ACEC (Fishery Habitat, Inland Wetlands, Inland Surface Waters, Water Supply Areas, Natural Hazard Areas, Agricultural Areas, Historical/Archaeological Resources, Habitat Resources, and Special Use Areas) of which only four are required for nomination review. ACEC Designation at 3. “The regionally significant biodiversity and wildlife habitat in the [ACEC] is indicated by the exceptional number of rare species (32), Certified and Potential Vernal Pools (46), and the combined total of 11,405 acres or 93% of the area delineated as viable habitat by the DFW’s Natural Heritage & Endangered Species Program (NHESP).” *Id.* Consequently, the highest standards of environmental review and protection must be applied to actions that may affect the resources of the Upper Housatonic River ACEC. *Id.* at 30.

The Commonwealth also has a direct and substantial interest in EPA’s selected remedy because MassDFG and its Division of Fisheries and Wildlife (“MassDFW”) own approximately 85% of the land along the river banks in the Primary Study Area (“PSA”) for the Rest of River remediation, including the 818 acre George Darey Housatonic Valley Wildlife Management Area. Thus, in addition to being the state where core components of the Rest of River remedy will be implemented, the Commonwealth is the owner of major conservation land holdings that will be impacted directly by the remedy.

In its 2011 comments to EPA on the Revised Corrective Measures Study (“RCMS”), the Commonwealth showcased the ecological uniqueness and significance of the Housatonic River watershed, including the PSA, and outlined a high level, conceptual remediation approach that underscored the need to carefully consider the potential impacts of the remediation on the Rest of River ecosystem. In response, EPA invited the Commonwealth and the State of Connecticut to actively participate in a series of technical discussions with EPA that focused on educating each

other on the parties' respective interests and concerns, as well as identifying shared remediation goals and approaches. The result of this extended consultative process was EPA's May 2012 Status Report to the public entitled "*Potential Remediation Approaches to the GE Pittsfield/Housatonic River Site 'Rest of River' PCB Contamination,*" which the Commonwealth publicly supported. Attachment 2. The Status Report outlined a conceptual remedy for the Rest of River predicated on protecting human health within a remediation framework that seeks to preserve the fundamental character of the river ecosystem and avoid, minimize and mitigate the impacts of the remedy on affected wildlife species and habitats. As an example of the latter objective, the Status Report remedy incorporated the Core Habitat Area mapping approach developed by NHESP, which identifies state-listed species and habitats that may be particularly sensitive to such impacts. Attachment B to the Modified Permit (NHESP's July 31, 2012 letter to EPA explaining the Core Habitat Area mapping approach). Critical to the Commonwealth, the conceptual remedy in the Status Report also provided for the off-site disposal of contaminated soil and sediment.

GE's summary of the history of the Rest of River Activities in its petition for review ("Petition" or "GE Petition") makes no mention of EPA's 2012 Status Report and thus ignores an important milestone in the development of the remedy for the Rest of River. Petition at 5-7. MassDEP and MassDFG actively participated with EPA and Connecticut in the development of the Status Report conceptual remedy and publicly supported it because the remedy both reasonably and responsibly addressed public health risks while being responsive to the need for a more ecologically balanced approach to designing and implementing the Rest of River remedy, and included off-site disposal.

EPA continued to actively consult with the Commonwealth and Connecticut while converting the Status Report, with some refinements and clarifications, into the Draft Permit. In doing so, EPA did not, as GE claims “[i]gnore the Commonwealth’s plea for a less intrusive remedy”<sup>1</sup> (Petition at 7), but instead followed through on proposing a remedy for the public’s review that reasonably addressed the Commonwealth’s interests and concerns consistent with the remedy selection criteria in the CD-Permit. Accordingly, the Commonwealth strongly supported the Draft Permit in its October 27, 2014 public comment letter, which explains how the key components of EPA’s proposed remedy reflect the extent to which EPA incorporated the Status Report remedial approach. Attachment 1. On October 19, 2016 MassDEP, on behalf of the Commonwealth, concurred in writing with the Modified Permit, which set forth essentially the same remedy as in the Draft Permit. Attachment 3. In concurring with the Modified Permit, MassDEP highlighted the Commonwealth’s support for several of the key provisions of the Modified Permit (off-site disposal; restoration in accordance with MESA and other ARARs; the remedial approach to Woods Pond).

In summary, consistent with EPA’s 2012 Status Report, EPA has proposed a remedy for the Rest of River that meets the Commonwealth’s objectives by protecting human health; requiring the off-site disposal of contaminated soil and sediment; effectively addressing the risk of downstream transport of a large amount of PCBs through the upfront and periodic dredging of Woods Pond; and employing a remediation framework developed in consultation with the States that is directed at preserving the dynamic character of the river ecosystem and avoiding,

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<sup>1</sup> GE’s characterization presumably refers to the Commonwealth’s 2011 comment letter to EPA on GE’s RCMS, which set forth an array of remedy alternatives. The Commonwealth’s comments at that time reflected a concern that some of the identified remedy alternatives, if ultimately selected by EPA, had the potential to fundamentally alter the dynamic character of the river system that generates the unique ecological features of the Rest of River. EPA responded to the Commonwealth’s concerns by engaging directly with both of the affected States in an active and extended consultation process that resulted in the more balanced Status Report conceptual remedy supported by the Commonwealth and thereafter incorporated by EPA into the Draft and Modified Permits.

minimizing, and mitigating impacts of the remediation on the affected wildlife and their habitats, with a particular focus on protecting state-listed species.

## STANDARD OF REVIEW

Under 40 C.F.R. § 124.19(a)(4), GE must demonstrate that its challenges to EPA's Modified Permit are based on "(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 should, in its discretion, review."

## ARGUMENT

### **I. EPA's Selection of Off-site Disposal at Existing Licensed Facilities is Consistent with and Supported by the CD and the CD-Permit for the Rest of River Remedy Selection.**

EPA's selection of off-site disposal as the preferred disposal alternative is consistent with and supported by the CD and the Reissued RCRA Permit (reissued by EPA in October 2001 and again effective December 7, 2007, and incorporated into the CD) ("CD-Permit"). As compared to on-site disposal, off-site disposal: 1) is more protective of human health and the environment; 2) provides greater long-term reliability and effectiveness; 3) complies with applicable or relevant and appropriate federal and state requirements ("ARARs"); 4) affords the best control of sources of releases; and 5) is easier to implement and more promptly addresses the risks associated with the PCB contamination.<sup>2</sup> Although GE argues that there is no benefit justifying the cost difference between onsite and off-site disposal, the benefits of off-site disposal outlined in 1) through 5) immediately above support the selection of off-site disposal as the preferred disposal alternative. Moreover, while GE places great weight on the cost of off-site disposal,

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<sup>2</sup> In its October 27, 2014 comment letter on the Draft Permit, the Commonwealth strongly supported the requirement to dispose of all contaminated soil and sediment at existing off-site licensed facilities as a core component of the remedy, and vigorously opposed the creation of any new landfills. In doing so, the Commonwealth highlighted many of the issues discussed herein.

Cost is not one of the three threshold General Standards that must be met in selecting the disposal alternative; rather, it is one of the five Selection Decision Factors (or balancing criteria) applicable to the selection of the disposal alternative.<sup>3</sup>

**A. Off-site disposal at existing licensed facilities provides more Overall Protection of Human Health and the Environment than on-site disposal.**

Off-site disposal is more protective of human health and the environment than on-site disposal because: 1) the locations proposed by GE for its on-site disposal facilities fail to meet the Toxic Substances Control Act's ("TSCA's") landfill siting requirements; 2) on-site disposal relies upon proper long-term operation, maintenance and monitoring; 3) on-site disposal will cause long-term adverse environmental impacts; 4) GE's proposed on-site disposal facilities will be located in areas with no known contamination; and 5) on-site disposal is less readily implementable.

Overall Protection of Human Health and the Environment is one of the CD-Permit's three threshold General Standards to be met in a remedy decision.<sup>4</sup> CD-Permit at 20. In evaluating which disposal alternative would best provide Overall Protection of Human Health and the Environment EPA considered, in part, the Long-Term Reliability and Effectiveness of each disposal alternative. Comp. Analysis at 60. Long-Term Reliability and Effectiveness is one of the CD-Permit's Selection Decision Factors, and includes the following sub-criteria: 1) the magnitude of the residual risk; 2) the adequacy and reliability of the alternatives; and 3) the potential long-term adverse impacts on human health or the environment. CD-Permit at 21.

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<sup>3</sup> The other four Selection Decision Factors applicable to selection of the disposal alternative are Long-Term Reliability and Effectiveness, Reduction of Toxicity, Mobility or Volume of Wastes, Short-Term Effectiveness, and Implementability. CD-Permit at 21-23. The Attainment of IMPGs Selection Decision Factor is not directly applicable to the analysis of disposal alternatives. Statement of Basis at 37.

<sup>4</sup> The other two General Standards are Control of Sources of Releases and Compliance with ARARs. CD-Permit at 20-21.

GE argues that it has identified three potential on-site disposal locations that are at least as protective as out-of-state disposal.<sup>5</sup> Petition at 12-17. The disposal locations identified by GE are the Woods Pond, Rising Pond and Forest Street locations. Without conceding that these locations are on-site, these locations are not at least as protective as existing off-site licensed facilities. None of the disposal locations identified by GE meet TSCA's PCB landfill siting requirements, which are meant to be protective of human health and the environment in the event of leaks or failure in the landfill technology. EPA SOP at 51. For example, none of the three locations meet TSCA's requirements for soil or hydrological characteristics. RTC at 239; EPA SOP at 51. Also, the Woods Pond location is near a drinking water source and above a medium yield aquifer, and the Forest Street location fails to meet the TSCA requirement that a landfill be located in a relatively flat area to minimize erosion or landslides. *Id.* Compared to GE's proposed disposal facility locations, existing off-site licensed disposal locations already have been deemed suitable for the siting of a TSCA PCB landfill, either by meeting TSCA's PCB landfill siting requirements or having certain requirements waived based upon a determination by EPA that it was appropriate to do so.<sup>6</sup>

In addition to failing to meet TSCA's siting requirements for a PCB landfill, all of GE's proposed disposal facilities will rely heavily on the proper construction, operation, and long-term monitoring and maintenance of the facility after closure. The volume of contaminated material requiring disposal and the length of remedy implementation will require that any on-site disposal facility constructed by GE operates for an extended period of time, and long-term monitoring

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<sup>5</sup> Although GE states that the Modified Permit requires out-of-state disposal and uses this phrase throughout its Petition, EPA's Modified Permit requires that all contaminated sediment, soil and other waste material be disposed of "off-site at existing licensed facilities." Modified Permit at 51. The Commonwealth acknowledges that there are currently no off-site hazardous waste or PCB disposal facilities in Massachusetts.

<sup>6</sup> While EPA has the authority to waive TSCA siting requirements when it determines that it is appropriate to do so, EPA stated that it is not appropriate to do so here. RTC at 239.

and maintenance will be necessary to ensure that the PCB contaminated material remains adequately contained within the landfill. Statement of Basis at 36-37; RTC at 239; EPA SOP at 51. As stated by EPA, “the potential extended duration of the operation of the proposed on-site landfills, given the range of sediment and soil volumes ... and the length of remedy implementation, likely necessitates that the proposed on-site facilities operate for an extended period of time. These factors increase the risk of potential future releases to the Housatonic watershed, compounded by the poor suitability of the proposed locations given such factors as soil permeability, proximity to the Housatonic watershed, and/or drinking water sources.” EPA SOP at 51; see also Statement of Basis at 36, RTC at 239, 251.

In addition to the environmental and public health risk related to potential releases during the operation and long term monitoring and maintenance of the disposal facility itself, the proposed facility near Woods Pond could generate as much as 600,000 gallons of leachate per month for 10 to 20 years, requiring more than 1,000 truck trips per year between the disposal facility and GE’s water treatment facility located in Pittsfield, a 10 to 20 mile drive along public roads. Comp. Analysis at 64. The potential for a release to the Housatonic River watershed exists during transfer of leachate from the treatment facility to the trucks and during the transport of the leachate from the disposal facility to GE’s treatment facility located in Pittsfield. Alternatively, GE could construct a treatment facility at its proposed disposal facility; however, if not operated properly, PCBs could potentially be released to the area where the facility is located or to the Housatonic River watershed. Comp. Analysis at 64-65; RTC at 243.

The construction, monitoring and maintenance of an on-site disposal facility would also have a greater long-term adverse impact on the environment compared to off-site disposal at an existing licensed facility. While off-site disposal would not cause adverse long-term



environmental impacts in the Housatonic River watershed, the construction of an on-site disposal facility would result in the permanent alteration of the existing habitat within the landfill area itself and any access roads that would remain after closure of the facility. Comp. Analysis at 65-66. The extent of such permanent adverse impacts on the environment by construction of an on-site disposal facility depends upon the location of the facility. For example, the Forest Street and Rising Pond locations are primarily forested and contain prime forest land, and a small portion of the Woods Pond location is prime forest habitat, in addition to being located within an ACEC. RTC at 241-42. Moreover, the Forest Street location would require construction of an access road over Goose Pond Brook that would be located within the 100-foot buffer zone and 200-foot riverfront area of the brook, and the Rising Pond location directly abuts 25 acres of priority habitat for the state-listed Wood Turtle.<sup>7</sup> RTC at 242. MassDFW has delineated geographic areas in the Commonwealth that serve as "priority habitat" for state-listed species protected under MESA. 321 CMR 10.02 and 10.12. Work proposed to occur in priority habitat must first be reviewed by MassDFW to determine whether it will result in a "take" of a state-listed species. 321 CMR 10.18. Finally, while an existing off-site disposal facility will already contain hazardous substances, none of the disposal facilities proposed by GE are known to be contaminated. RTC at 239; EPA SOP at 52.

As discussed in detail in Section I.D. below, off-site disposal will also allow the remedy to be implemented with a minimum of delay. Prompt implementation of the remedy is more protective of human health and the environment since it more quickly addresses the risks associated with the PCB contamination as compared to delayed implementation of the remedy.

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<sup>7</sup> The 100-foot buffer zone and the 200-foot riverfront area of the brook are subject to jurisdiction under the Massachusetts Wetlands Protection Act and/or MassDEP's Wetlands Protection Act regulations, both of which are included as ARARs in the Modified Permit. Both MESA and its implementing regulations are also included as ARARs in the Modified Permit. Modified Permit, Attachment C at 11, 16.

For example, as a result of delayed implementation of the remedy, fish in the Housatonic River will continue to bioaccumulate PCBs, and PCBs will continue to migrate downstream into Connecticut and wash up on floodplains during storm events. EPA SOP at 54.

As discussed above, on-site disposal of excavated PCB-contaminated material in a permanent disposal facility that: 1) requires many decades of operation, and long-term monitoring and maintenance; 2) fails to meet TSCA's landfill siting requirements; 3) will cause long-term environmental impacts; 4) will be located in a currently uncontaminated area; and 5) is less readily implementable than off-site disposal, is less protective of human health and the environment and less reliable and effective than off-site disposal of the same contaminated material. Accordingly, off-site disposal of the contaminated material best meets the Overall Protection of Human Health and the Environment General Standard and the Long-Term Reliability and Effectiveness Selection Decision Factor, including the Factor's following sub-criteria: the magnitude of the residual risk, the adequacy and reliability of the alternatives, and the potential long-term adverse impacts on human health or the environment.

**B. Any on-site disposal facility must comply with ARARs and GE's proposed on-site disposal facility locations fail to do so.**

GE's proposed on-site disposal facilities are required to comply with ARARs but fail to do so, and there is no basis for EPA to waive ARARs because off-site disposal is a technically practicable alternative.<sup>8</sup>

Compliance with ARARs is the second of the CD-Permit's three threshold General Standards that must be met in a remedy decision. CD-Permit at 21. Compliance with ARARs is

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<sup>8</sup> Under CERCLA, "[t]he President may select a remedial action ... that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation ... if the President finds that ... compliance with such requirements is technically impracticable from an engineering perspective." 42 U.S.C. § 9621(d)(4)(C).

also a separate requirement of the CD, which states, “[f]or the Rest of the River Remedial Action ... [GE] must also comply with any ARARs of federal and state environmental laws set forth in the documents selecting the Rest of the River Remedial Action ... unless waived by EPA pursuant to CERCLA and the NCP.” CD at 45. Accordingly, both the CD-Permit remedy selection criteria and the CD clearly require that the remedy comply with ARARs (unless waived by EPA).

MassDEP’s Facility Location Standards, 310 CMR 30.700 (applicable to hazardous waste facilities) and Site Suitability Criteria, 310 CMR 16.40(3), (4) (applicable to solid waste facilities) are included as ARARs in the Modified Permit. Modified Permit, Attachment C at 12-15. Both of these ARARs prohibit locating a disposal facility within an ACEC. GE objects to 310 CMR 16.40(3), (4) being identified as an ARAR, claiming that this solid waste ARAR does not apply to material that qualifies as hazardous waste under state law. Petition at 18. GE’s argument is misplaced, however, because the applicability of these two ARARs depends upon the concentration of PCBs in the material, and GE will not know whether particular material constitutes solid or hazardous waste until it is excavated and tested. Thus, EPA correctly concluded that “[t]he PCB-contaminated sediment and soil to be excavated as part of the remedy may be regulated under ... the Massachusetts Hazardous Waste regulations ..., or, if the remedy involves sediments and soils with PCB concentrations below 50 mg/kg, and such sediments and soils are not commingled with sediments and soils with PCB concentrations at or above 50 mg/kg or other hazardous wastes, the standards at 310 CMR 16 are potentially applicable ....” RTC at 247.

GE is also wrong to argue that the prohibition against locating a facility within an ACEC should not be applied or should be waived by EPA with respect to GE’s proposed Woods Pond

location, even though it is located within the ACEC, because it would, in part, occupy the grounds of a sand/gravel quarry. Petition at 18. First, prior or current property use is simply irrelevant to the applicability of MassDEP's regulations prohibiting a solid or hazardous waste disposal facility within an ACEC.<sup>9</sup> Second, GE asserts that a disposal facility at the Woods Pond location would result in a habitat improvement since the closed landfill could be planted with native grasses to create grassland/open field habitats. RTC at 241. Even if true, the Commonwealth does not believe that the benefit of any such habitat improvement would outweigh the concerns and risks associated with on-site disposal, as discussed throughout this Response. Finally, there is no basis under CERCLA or the NCP for EPA to waive either of these ARARs as they pertain to construction of a permanent disposal facility, since off-site disposal is a technically practicable alternative. RTC at 250; EPA SOP at 53, 92, 94; 42 U.S.C. § 9621(d)(4).

Finally, with respect to MassDEP's regulations that prohibit locating a solid or hazardous waste disposal facility within an ACEC, GE argues that it would be arbitrary for EPA not to waive these two ARARs since EPA waived other ACEC prohibitions that would interfere with the remedy. However, GE fails to mention that EPA's waiver of these other ACEC prohibitions applies only to the requirements that prohibit or restrict the *temporary management* of materials excavated *during implementation of the remedy prior to off-site disposal*, such as the temporary stockpiling or storage of materials, and that the remedy includes provisions for restoration of what is disturbed by the temporary management of materials and for final disposition of materials through off-site disposal. Modified Permit, Attachment C at 12-15. Moreover, waiver

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<sup>9</sup> The regulations are straightforward and state as follow, "[n]otwithstanding any other provision of 310 CMR 30.000, no facility shall be located where such location or any portion thereof: (1) Would be within an Area of Critical Environmental Concern ...." 310 CMR 30.708 and "[n]o site shall be determined to be suitable or be assigned as a solid waste management facility where such siting: 1. would be located within an Area of Critical Environmental Concern...." 310 CMR 16.40(4)(d).

of these ARARs to allow for the temporary management of excavated material prior to final off-site disposal is appropriate because it is technically impracticable to implement the remedy without allowing for temporary on-site management of such materials. EPA SOP at 52. There is an obvious difference between waiving ARARs in order to allow the temporary management of hazardous or solid waste necessary for the cleanup to occur (with subsequent restoration and off-site disposal) and waiving ARARs to allow the construction of a permanent disposal facility. *Id.*

With respect to the proposed Forest Street and Rising Pond disposal locations, GE argues that EPA could find that these disposal facilities could be located without the need to waive ARARs. Petition at 19. EPA, however, reasonably rejected this argument because “the proposed [Forest Street] landfill location is within a regulated wetland area and a waiver may also be required of regulations or requirements designed to protect such areas ....” RTC at 250. Regarding the proposed Rising Pond disposal location, EPA correctly stated that the proposed operational area of the landfill directly abuts 25 acres of Priority Habitat for the state-listed Wood Turtle and further confirmation is necessary to determine if locating a landfill in this area could be done in compliance with MESA or if a waiver of this ARAR would be required. RTC at 242; EPA SOP at 52.

As is clear from the above discussion, compliance with ARARs is not only one of the CD-Permit’s three threshold General Standards to be met in a remedy decision, but compliance with ARARs is also required by the CD, unless properly waived by EPA. Since off-site disposal is a practicable alternative to on-site disposal, technical impracticability does not provide a basis for waiving ARARs related to on-site disposal, and there is no other valid basis for a waiver. RTC at 250; EPA SOP at 53, 92, 94. As such, of all the disposal alternatives, off-site disposal

most clearly complies with all disposal-related ARARs, and EPA was correct in requiring the disposal of all contaminated material off-site at existing licensed facilities.

**C. Off-site disposal at existing licensed facilities provides the best Control of Sources of Releases.**

Off-site disposal best controls sources of releases since the potential for future releases to the Housatonic River watershed exists with on-site disposal but not with off-site disposal.

Control of Sources of Releases is the third of the CD-Permit's three threshold General Standards to be met in a remedy decision. CD-Permit at 20. Much of the analysis of this criterion overlaps with the analysis of the Overall Protection of Human Health and the Environment criterion discussed in Section I.A above. Accordingly, the Commonwealth incorporates by reference the discussion in Section I.A above relating to the failure of any of GE's proposed disposal facility locations to meet TSCA's landfill siting requirements, the need to rely upon long-term maintenance and monitoring of any on-site disposal facility, and the need to properly manage the large volume of leachate generated at such a facility. Based upon the discussion in Section I.A above, it is clear that off-site disposal best controls sources of releases since on-site disposal presents a risk of potential future releases to the Housatonic River Watershed, whereas off-site disposal presents no such risk. Statement of Basis at 35-36; Comp. Analysis at 62; EPA SOP at 51.

GE takes issue with the fact that EPA's analysis of the CD-Permit criteria takes into account the location of the disposal facility and distinguishes the potential adverse impacts resulting from a disposal facility located in close proximity to the Housatonic River watershed from a disposal facility not located in close proximity to the Housatonic River watershed. Petition at 17. However, it only makes sense that EPA's evaluation of the CD-Permit criteria be done within the context of the cleanup for which they were designed (i.e., cleanup of the Rest of

River portion of the GE-Pittsfield/Housatonic River site). In evaluating “Long-Term Reliability and Effectiveness” and “Control of Sources of Releases,” it is appropriate for EPA to “draw a distinction between on-site landfilling along the Housatonic River, under the potential landfill facility conditions present, as opposed to disposal in an off-site disposal facility designed and sited for disposal of PCBs.” RTC at 251. After all, if issues arise with off-site disposal, the Housatonic River watershed is unaffected, whereas the Housatonic River watershed will bear the negative impacts if issues arise with on-site disposal. Id.

**D. EPA properly evaluated Implementability, including state and community opposition to on-site disposal, in selecting the off-site disposal alternative.**

Off-site disposal is more readily implementable than on-site disposal since: 1) there is no state or community opposition to off-site disposal; 2) off-site disposal complies with all regulatory and zoning restrictions; and 3) suitable off-site disposal facilities currently exist. Implementability is one of the CD-Permit’s five Selection Decision Factors applicable to selection of the disposal alternative. CD-Permit at 22. Most relevant to EPA’s selection of the off-site disposal alternative are the following Implementability sub-criteria: “coordination with other agencies,” “regulatory and zoning restrictions,” and “availability of suitable on-site or off-site ... disposal facilities....” Id.

There is a long history of persistent and vigorous state and community opposition to an on-site disposal facility, including opposition by Berkshire County residents, community groups, every municipality along the Housatonic River, elected officials, and many Commonwealth government agencies and offices. RTC at 264-266; EPA SOP at 47-49; Attachment 1 at 2, 13-14. In its discussion of the likely delay in remedy implementation resulting from such opposition if EPA was to select the on-site disposal alternative, EPA draws upon its real-world experiences at other sites where strong state and community opposition resulted in an inability to complete or

timely complete a remedy. RTC at 266; EPA SOP at 49-50. Notwithstanding GE's argument to the contrary, it was eminently reasonable for EPA to consider state and community opposition in evaluating the "coordination with other agencies" sub-criterion since opposition to an on-site disposal facility by state and local agencies, which are necessarily influenced and informed by community opposition, will jeopardize the ability to implement or timely implement a remedy with on-site disposal.<sup>10</sup>

Not only does the "coordination with other agencies" sub-criterion allow EPA to consider state and local opposition to an on-site disposal facility when evaluating the Implementability criterion, the CD-Permit includes specific language, separate from and in addition to the remedy selection criteria, that also allows EPA to consider state and local opposition. The CD-Permit explicitly authorizes EPA to select a remedy based upon both GE's submissions and "*any other relevant information in the Administrative Record....*" CD-Permit Condition II.J. at 25 (emphasis added). GE asserts that the universe of *relevant* information is limited to the CD-Permit remedy selection criteria. Petition at 23. However, such a limitation is not set forth in the CD-Permit, which could have, but did not, include the limitation claimed by GE.

Moreover, the CD provides for active state and public participation in the remedy selection process, which further supports EPA's authority to consider state and community opposition when evaluating the Implementability criterion.<sup>11</sup> For example, the CD requires public notice and opportunity for public comment, and opportunities for review and comment by the Commonwealth, of EPA documents. E.g., CD ¶ 22.j at 93 (Corrective Measures Study

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<sup>10</sup> In its Petition for Review, the Housatonic Rest of River Municipal Committee ("Committee") affirmed its strong support for the off-site disposal component of the remedy, stating that if the Board were to overturn or remand this issue, such an 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." Committee Petition at 10, footnote 7.

<sup>11</sup> Public and governmental comments, minutes of the Citizens Coordinating Council, and other information relating to the many public engagement sessions sponsored by EPA are within the Administrative Record. RTC at 263; EPA SOP at 45.



Proposal), ¶ 22.k at 93 (CMS Report), and ¶ 22.n at 94 (Statement of Basis and draft modification to the Reissued RCRA Permit). Comments provided by the public and the states pursuant to these Paragraphs are a significant part of the Administrative Record. EPA SOP at 13, 44. The Commonwealth agrees that “[c]omment periods and opportunities for coordination with the states would be meaningless if public and state opinions were irrelevant to remedy selection.” RTC at 263; EPA SOP at 46.<sup>12</sup>

In evaluating the Implementability criterion, EPA also considered the “regulatory and zoning restrictions” sub-criterion, noting: 1) that multiple TSCA landfill siting requirements will not be met at GE’s proposed disposal facility locations; 2) MassDEP’s prohibition against a solid or hazardous waste disposal facility within an ACEC; 3) the proposed Forest Street disposal location is zoned primarily as Conservation – Residential; 4) the proposed Rising Pond disposal location is zoned as residential property with land size of at least 1 acre; and 5) a significant portion of the operational area of the proposed Woods Pond disposal location is zoned as Conservation – Residential. RTC at 261. EPA reasonably concluded that the zoning restrictions “reinforce[] the difficulty in implementing on-site disposal, which results in greater favorability of off-site disposal for implementability purposes.” *Id.*

GE asserts that EPA was wrong to consider the “coordination with other agencies” and “regulatory and zoning restrictions” sub-criteria because the CD and CERCLA exempt on-site remedial actions from the need to obtain state and local permits and approvals or comply with local zoning ordinances. Petition at 22. However, GE’s assertion assumes that all three of GE’s proposed disposal facilities are on-site. The CD defines on-site to be “within the areal extent of

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<sup>12</sup> EPA’s consideration of state and community input is also consistent with CERCLA’s and RCRA’s statutory provisions contemplating consideration of community input through the comment process, as well as regulations and guidance documents recognizing community acceptance as a factor in the remedy selection process. RTC 263; EPA SOP at 13, 45-46.

contamination or in very close proximity to the contamination and necessary for implementation of the Work.” CD ¶ 9.a at 47. Thus, unless the location is within the areal extent of the contamination, the determination of whether a location is on-site involves a site specific, fact intensive analysis. Such a determination may ultimately need to be decided by a court if the on-site status is disputed. The Commonwealth does not concede that GE’s proposed disposal locations are on-site, and compliance with state and federal siting requirements and regulations will be necessary for any in-state off-site disposal facility. RTC at 236.

Finally, in evaluating the implementability of the remedy, EPA also considered the “availability of suitable on-site or off-site ... disposal facilities” sub-criterion, noting that GE’s proposed disposal facility locations: 1) do not meet TSCA’s landfill siting requirements or local zoning restrictions; 2) would require the waiver of ARARs; and 3) would result in locating a TSCA disposal facility in an area with no known contamination. RTC at 239, 261-62; EPA SOP at 43-44. On the other hand, existing off-site disposal facilities are located in areas that already contain contaminated material, would be fully licensed and regulated under TSCA and/or other applicable state and federal requirements, and would pose no risk of release to the Housatonic watershed. RTC at 239; EPA SOP at 51-52. It was certainly reasonable for EPA to conclude that GE’s proposed disposal facilities were unsuitable compared to existing licensed off-site disposal facilities. RTC at 261-62.

As is evident from the foregoing, off-site disposal is more readily implementable than on-site disposal. Off-site disposal will: 1) avoid delays associated with state and community opposition; 2) comply with regulatory and zoning restrictions; and 3) utilize a suitable, established disposal facility in an appropriate location.

**E. EPA properly evaluated Cost in selecting the off-site disposal alternative.**

While GE places great weight on the cost of off-site disposal, Cost is not one of the CD-Permit's three threshold General Standards that must be met in selecting the disposal alternative. Rather, it is one of the five Selection Decision Factors (or balancing criteria) applicable to the selection of the disposal alternative. CD-Permit at 23. GE claims that off-site disposal is more expensive than on-site disposal and that EPA failed to account for this disparity in its decision-making. However, the record demonstrates that EPA took the difference in disposal cost into account when selecting off-site disposal, estimating that the difference in cost for off-site and on-site disposal ranges from \$160 to \$245 million. RTC at 267. The record further demonstrates that EPA rejected more costly disposal alternatives requiring treatment. EPA SOP at 2, 43. "While these [treatment] alternatives included positive aspects such as controlling sources of releases and reduction of toxicity of the contamination ... these treatment alternatives are more costly than off-site disposal, and were rejected." *Id.* at 53. The fact that a less costly disposal alternative was not selected by EPA does not mean that EPA failed to appropriately evaluate this criterion.

**F. Conclusion.**

As discussed above, EPA properly selected the off-site disposal alternative as the disposal alternative best suited to meet all three of the CD-Permit's threshold General Standards - Overall Protection of Human Health and the Environment, Control of Sources of Releases, and Compliance with ARARs. RTC at 269. In doing so, EPA considered the CD-Permit's Selection Decision Factors, including a balancing of those Factors against one another. "Overall, EPA determined that off-site disposal is the best alternative under the relevant criteria because it will provide improved implementability, increased long-term reliability and effectiveness, compliance with ARARs, and be more protective of human health and the environment.

Collectively these benefits outweigh off-site disposal's higher cost and the increased short-term impacts from the remedy." EPA SOP at 44.

## **II. The Administrative Record Supports EPA's Proposed Remediation Approach to Woods Pond for Achieving Substantial Reductions in Risks and the Downstream Transport of PCBs.**

The Commonwealth has strongly supported EPA's proposed remediation approach to Woods Pond as first outlined in the 2012 Status Report. The parties recognized that most of the PCB contamination in the Rest of River is located in Massachusetts between the confluence of the East and West branches of the river (Reach 5) and Woods Pond Dam (Reach 6), and that high concentrations of PCBs are contained in Woods Pond. Indeed, GE found that Woods Pond sediment contains approximately 25% of the mass of PCBs present in the river. RTC at 162. This large mass of PCB-contamination has accumulated behind the Woods Pond Dam, and thereby presents an additional risk of a major downstream release of PCBs in the event of a dam breach or failure. At the same time, Woods Pond itself does not have any MESA-regulated priority habitat for state-listed species, which means that it can be remediated without causing harm to state-listed species. Attachment 1 at 6; RTC at 162; EPA SOP at 27.

To address this major source of PCBs and related risks, EPA's proposed remedy for Woods Pond requires the permanent removal of approximately 285,000 – 340,000 cubic yards (depending on EPA's or GE's respective calculations) of PCB-contaminated sediment that will result in a minimum water depth of six feet in the pond (with shallower water depths in the near shore areas), followed by the placement of an engineered cap. RTC at 162; EPA SOP at 27; Modified Permit at 26. In addition, the Modified Permit requires GE to thereafter periodically remove PCB-sediment that has accumulated in Woods Pond. Modified Permit at 27. The Commonwealth regards this latter remedy component as a necessary and effective means of

ensuring that the remedial objectives for Woods Pond are achieved and maintained. The remedy for Woods Pond will permanently remove a large amount of PCBs from the river system and thereby reduce the potential for downstream transport of PCBs, and significantly reduce the bioavailability and exposure of PCBs to human and ecological receptors with minimal short or long-term impacts to the environment from the remediation itself. RTC at 162; EPA SOP at 27.

The Commonwealth shares EPA's view that GE discounts the many benefits of the proposed removal of PCB-contaminated sediments from Woods Pond, and that such benefits are neither "irrelevant" or "speculative." Petition at 27. EPA explains that there is no other point on the Housatonic River where it is possible to remove over 285,000 CY of PCB contaminated material from a single location using relatively straightforward open water dredging technologies and without impacting state-listed species habitat. EPA SOP at 28. By arguing that capping the existing Woods Pond would provide almost the same level of protection to human health and the environment, GE discounts the demonstrable benefits associated with EPA's proposed scope of removal in terms of more effective source control through the permanent reduction of the amount and bioavailability of PCBs in the Rest of River to human and ecological receptors. RTC at 162. GE's claim of equivalent protection relies, in part, on its view that "there is a negligible risk of dam failure in any non-speculative time frame because GE itself owns the Woods Pond Dam and conducts the necessary monitoring, maintenance, and repair of the dam to prevent failure." GE Petition at 29. Notwithstanding GE's statement of confidence, EPA reasonably concluded that even if GE remains the dam owner in perpetuity there is no guarantee that the dam will never breach or fail, including when factoring in unknowns or uncertainties associated with climate change. EPA RTC at 162; SOP at 28. In contrast, as EPA stated, removing the PCB contaminated sediment from behind the dam and disposing of it in a secure landfill guarantees

that such sediment cannot be reintroduced into the River and transported downstream in the event of a dam breach or failure. *Id.* EPA's assessment of the comparative benefits and risks on this aspect of the remedy is reasonable and prudent, particularly when considering the large mass of PCBs contained behind the Woods Pond Dam and the potential catastrophic effects downstream of a dam breach or failure.

Similarly, GE discounts the benefits of the increased PCB trapping efficiencies and reduced downstream transport of PCBs provided by a dredged Woods Pond. GE Petition at 30. GE generally acknowledges that EPA's selected remedy would increase solids trapping efficiency in Woods Pond compared to GE's preferred smaller remedy alternatives. *Id.* GE's own modeling shows that as a result of the selected remedy's increase in trapping efficiency, the incremental reduction in the downstream transport of PCBs (or "flux") over Woods Pond is 0.1 kg/year and 0.2 kg/year over Rising Pond. RTC at 162; EPA SOP at 29. While GE dismisses the above reductions as "small differences" (GE Petition at 30), EPA appropriately connects the failure to achieve these "far more than 'modest'" reductions to a decreased likelihood of GE meeting the PCB Downstream Transport Standards in the Modified Permit. RTC at 162-163. EPA explained further that increased trapping combined with future periodic removal of PCB-contaminated sediment from Woods Pond will logically reduce downstream flux of PCBs by (1) eliminating the opportunity for those PCBs to dissolve off the solids and into the water column; and (2) preventing the PCBs attached to the solids from migrating downstream due to erosional forces and/or dam breaches or failure. *Id.* at 163.

Predictably, GE regards cost as determinative of the best suited remedy for Woods Pond. While EPA believes that the basis for GE's cost difference is inflated by as much as \$50 million, EPA properly concluded that even if GE's cost figures and assumptions are accurate, EPA's

proposal for Woods Pond would remain the preferred alternative based on its full evaluation of all nine CD-Permit criteria, including but not limited to, weighing criteria such as the threshold General Standard of Control of Sources of Releases, and the Selection Decision Factor of Long-Term Reliability and Effectiveness, both of which favor a remedy that eliminates risks related to source control and downstream transport and significantly increases the trapping efficiency of Woods Pond. RTC at 163 and footnote 12.

For the above reasons, the Board should find that the proposed remedy for Woods Pond is based on EPA's proper application and reasonable weighing of the remedy selection criteria in the CD-Permit as supported by the Administrative Record.

**III. Net Benefit Mitigation is a Separate and Distinct Substantive Requirement of MESA that must be met whenever the Implementation of a Remedial Action results in a Take of a State-listed Species.**

As the Commonwealth emphasized in its October 27, 2014 comment letter on the Draft Permit (Attachment 1), an important objective of EPA's proposed remediation of the Rest of River is to avoid, minimize and mitigate the impacts on the diverse and dense array of MESA species and habitats in the PSA. Thus, it is of paramount importance to the Commonwealth that any unavoidable "take"<sup>13</sup> of these rare species resulting from the implementation of the remedy must be mitigated in accordance with MESA. MESA does not authorize the take of a state-listed species unless the party causing the take provides "Net Benefit"<sup>14</sup> mitigation to the affected state-listed species. This Net Benefit performance standard takes into account the vulnerability of state-listed species as compared to other wildlife species, as well as MassDFW's responsibility

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<sup>13</sup> "Take" is broadly defined in 321 CMR 10.02 of the MESA regulations to include the killing or harming of animals as well as the disruption of their nesting, breeding, feeding or migratory activity, and the killing, collection and picking of plants.

<sup>14</sup> "Net Benefit" is defined in 321 CMR 10.02 of the MESA regulations to mean (1) an action(s) that contribute significantly to the long-term conservation of a state-listed species, and (2) that the conservation contribution exceeds the harm caused by the proposed project or activity.

under MESA to require actions that contribute to the conservation of the affected state-listed species as a whole to help these rare species recover from their endangered, threatened or special concern status. For these reasons, the Commonwealth strongly supports EPA's identification of MESA, M.G.L. c. 131A, and the MESA regulations, 321 CMR 10.00, as an applicable state ARAR in Appendix C of the Modified Permit. Modified Permit, Attachment C at 16.

GE's argument at pages 53-54 of its Petition is essentially that, under the plain language of 321 CMR 10.23(2), MassDFW has no authority to permit a take if a significant portion of the local population of affected state-listed species is impacted. Thus, GE argues, EPA cannot require as an ARAR any of the performance standards at 321 CMR 10.23(2)(a) – (c) for permitting a take, including the Net Benefit mitigation requirement at 321 CMR 10.23(2)(c). GE further argues that any interpretation of 321 CMR 10.23(2) requiring it to meet the Net Benefit mitigation standard when a significant portion of the local population is impacted is arbitrary and capricious. Consistent with MassDFW's interpretation of its MESA regulations, EPA properly rejected GE's arguments for the reasons summarized below. RTC at 141-43.

If MassDFW determines that a take will occur under the MESA regulations, the project or activity must either be modified to eliminate the take or the proponent must obtain a conservation and management permit ("CMP") from MassDFW pursuant to 321 CMR 10.23. More specifically, in addition to showing that the impacts from the remedial action have been avoided, minimized and mitigated, the MESA regulations at 321 CMR 10.23(2)(a)-(c) set forth three separate, distinct and substantive performance standards that must be met in order to obtain a CMP authorizing a take under MESA:

- (a) there has been an adequate assessment of alternatives to both temporary and permanent impacts;



- (b) only an insignificant portion of the local population of the affected state-listed species will be impacted, and
- (c) a DFW-approved conservation and management plan provides for the long-term Net Benefit for the conservation of the state-listed species.

In order for MassDFW to authorize a take, 321 CMR 10.23(2)(b) requires that only an insignificant portion of the *local population* of the affected state-listed species be impacted. In comparison, 321 CMR 10.23(2)(c) requires the implementation of a conservation and management plan that provides a long-term Net Benefit for the conservation of the state-listed species (which MassDFW interprets to mean as benefitting the affected state-listed species *as a whole*, i.e., beyond the geographic location of the local population of that species).

In order to move forward, an activity impacting a significant portion of the local population of the affected state-listed species would need to be redesigned or coupled with a form of mitigation that would result in an insignificant impact on the local population. In MassDFW's experience there are certain forms of mitigation designed to enhance the local population, thereby lessening the overall impact of a project. For this reason, MassDFW typically requires an applicant to evaluate whether a Net Benefit can be provided, even in cases where there is a preliminary assessment that the activity will impact a significant portion of the local population. MassDFW may then determine that the proponent's proposed habitat management and habitat restoration would off-set remediation impacts in certain cases, which should be considered in evaluating the level of impact on the local population resulting from a particular remedial alternative in site-specific locations.

If, despite the above evaluation and potential mitigation, a significant impact on the local population remains, EPA, in consultation with MassDFW, will evaluate whether it is appropriate to waive the requirement of an insignificant impact on the local population, such as if it is

technically impracticable to comply with that requirement. In the context of this remedy for the Rest of River – where EPA may under CERCLA waive the otherwise applicable insignificant impact on local population standard and allow the resulting take to occur - GE cannot thereby avoid its responsibility under the MESA regulations to provide Net Benefit mitigation for such take. Any waiver by EPA of the performance standard in 321 CMR 10.23(2)(b) requiring that only an insignificant portion of the local population be impacted does not thereby waive the separate and distinct requirement of 321 CMR 10.23(2)(c) that GE mitigate the resulting take with a CMP providing a Net Benefit to the state-listed species as a whole. RTC at 142-43.

Massachusetts courts accord a state agency's interpretation of its own regulations considerable deference, and any party challenging an agency's regulatory interpretation has a formidable burden of showing that the interpretation is not rational. *Ten Local Citizens Group v. New England Wind, LLC*, 457 Mass. 222, 228, 928 N.E. 2d. 939 (2010). Consistent with this well settled standard of review, the Board should defer to MassDFW's interpretation of its MESA regulations regarding the application of the separate and distinct performance standards governing a take of state-listed species. Adopting GE's interpretation would be clearly contrary to a core purpose of the MESA regulations - to ensure that whenever a take of a state-listed species is allowed to occur, it has been properly off-set by providing a long-term benefit to conservation of the affected species that exceeds the harm caused by the take.

GE's Petition at page 54 also argues that requiring GE to meet the MESA Net Benefit requirement violates the CD because it effectively extracts compensation for a take and thus constitutes a form of Natural Resources Damages ("NRD"), and that GE has resolved its NRD liability under the CD through a combination of monetary payments and specified restoration work. For the reasons discussed below, GE's settlement of the NRD claims under the CD is

subject to GE's separate obligation under the CD to first implement the Rest of River remedy in compliance with ARARs, including the MESA Net Benefit standard. RTC at 137-38.

CERCLA itself prohibits the Natural Resource Trustees ("Trustees") from providing a covenant for NRD until the responsible party "agrees to undertake appropriate actions necessary to protect and restore natural resources damaged by releases of hazardous substances." 42 U.S.C. § 9622(j)(2). The CD, in turn, addresses this issue in several provisions. Paragraph 112 of the CD sets out the actions that together constitute GE's satisfaction of the NRD claims of the U.S., the Commonwealth and Connecticut ("Governments"). The first required action identified in paragraph 112 is GE's "[p]erformance of the response actions required under this [CD]." CD at 257. Thus, the plain language of paragraph 112 states that until GE performs the Rest of River response actions required under the CD, it has not fully satisfied the Governments' NRD claims. Paragraph 8 of the CD further provides that "[f]or the Rest of River Remedial Action, for all activities undertaken pursuant to CERCLA in this Consent Decree, [GE] must also comply with any ARARs of federal and state environmental laws set forth in the documents selecting the ROR Remedial Action and/or in the ROR SOW, unless waived by EPA pursuant to CERCLA and the NCP." CD at 45.

The covenant not to sue from the U.S. in paragraph 161 of the CD is contingent upon GE's compliance with the response actions required under the CD, including all of the Work required in the Rest of River SOW. The same is true for the Commonwealth's covenant not to sue in paragraph 166 of the CD. CD at 327-40. Indeed, regarding compliance with ARARs, paragraph 166.a(iv)(A) expressly provides that "[n]othing in this Paragraph 166 or paragraph 22 ["Rest of River"] shall be interpreted as modifying or otherwise affecting...[GE's] obligations to comply with all ARARs for the Rest of River Remedial Action that have not been waived by

EPA....” CD at 329. In short, the CD makes clear that the Governments’ covenants not to sue for NRD do not apply until all the work is completed in Rest of River, including restoration of resources disturbed by remediation and compliance with MESA and other ARARs.

### **CONCLUSION**

In summary, the Administrative Record amply supports the conclusion that EPA’s selection of the remedy in the Modified Permit complies with the requirements of the CD, CD-Permit, RCRA and CERCLA and sets forth a protective, balanced remedial approach for the Rest of River. The Commonwealth concurs with EPA’s remedy decision and urges the Board to affirm the Modified Permit so that the long awaited remediation of the Rest of River can finally get underway.

### **STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

In accordance with 40 C.F.R. § 124.19(d)(1)(iv), the undersigned counsel certify that the foregoing Response to GE’s Petition for Review complies with the word limitation set by the Board.

Respectfully submitted,

Commonwealth of Massachusetts

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Dated: February 13, 2017

## CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of February, 2017, I served one copy of the foregoing Response to GE's Petition for Review, with the Attachments, on each of the following:

Via the EPA's E-Filing System and U.S. Mail to:

Eurika Durr  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
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Washington, D.C. 20460-0001

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