

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

In re: )  
General Electric Co. ) RCRA Appeal No. 21-01  
Permit No. MAD002084093 )  
)

AMICUS BRIEF IN SUPPORT OF SELECTED REMEDY

Submitted by the Housatonic Rest of River Municipal Committee

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\* For clarity, all documents associated with the 2016 cleanup are referred to as “2016” documents, though some were issued earlier. Similarly, documents associated with the 2020 remedy are described as “2020” documents, regardless of their actual date.

## Glossary

<u>Short form</u>	<u>Full name</u>
2007 Permit	2007 Reissued RCRA Permit
2016 Permit	2016 Modification to Reissued RCRA Permit
2016 RTC	2016 Response to Comments
2016 SOB	2016 Statement of Basis
2016 Tr.	2016 Transcript of Oral Argument, <i>In re GE</i> , 17 E.A.D. 434 (2018)
2020 Permit	2020 Modification to Reissued RCRA Permit
2020 RTC	2020 Response to Comments
2020 SOB	2020 Statement of Basis
ACEC	Area of Critical Environmental Concern
CD	2000 Consent Decree, <i>United States v. GE</i> , No. 99-30225 (D. Mass.)
Citizens' Br.	Amicus Brief of Citizens for PCB Removal <i>et al.</i>
Committee	Housatonic Rest of River Municipal Committee
Committee Comment	Committee's Comment on 2020 Permit
Commonwealth	Commonwealth of Massachusetts
GE	Permittee General Electric Co.
GE Comment	GE's Comment on 2020 Permit
HRI	Petitioners Housatonic River Initiative and Housatonic Environmental Action League (collectively)
HRI Br.	Brief of Petitioners Housatonic River Initiative and Housatonic Environmental Action League
MA Comment	Commonwealth of Massachusetts' Comment on 2020 Permit
Mass Audubon	Massachusetts Audubon Society
RCMS	2010 Revised Corrective Measures Study
Region	EPA Region 1
Settlement Agreement	2020 Settlement Agreement between EPA, GE, and others

The Housatonic Rest of River Municipal Committee (“Committee”) supports the Region’s “Rest of River” revised remedy—including the on-site Upland Disposal Facility (“UDF”). Unlike the prior proposal for one or more UDFs in Berkshire County, which the Committee opposed, the new UDF: (1) will exclude the most contaminated PCB waste; and (2) is part of a settlement that includes new and major cleanup benefits, not the least of which is an expedited start to cleanup and an end to protracted litigation with GE over disposal at other (less suitable) sites in Berkshire County. The UDF will also have multiple safeguards, including a liner system expected to last for hundreds of years and other measures that EPA routinely uses at landfills (even over permeable soils) containing more concentrated and more mobile contamination. After intensive analysis of the issues, including GE’s unique litigation rights, the Committee is convinced the selected remedy is the best cleanup outcome for the River.

#### **INTEREST OF AMICUS**

The Committee’s members are appointed by the Select Boards of five towns in western Massachusetts: Great Barrington, Lee, Lenox, Sheffield, and Stockbridge. Each town is located along the “Rest of River” portion of the Housatonic River, and the proposed UDF is in Lee. Each town also signed a settlement agreement (“Settlement Agreement”) outlining a proposed cleanup and agreed not to appeal the cleanup decision if it conformed to the settlement.

#### **APPLICABLE STANDARDS**

The relevant remedy selection criteria appear in RCRA guidance and in a site-specific RCRA permit reissued in 2007 (“2007 Permit”). *In re GE*, 17 E.A.D. 434, 449-51, 576 (2018). The standard of review is deferential: Housatonic River Initiative and Housatonic Environmental Action League (collectively, “HRI”) must demonstrate a clear error or abuse of discretion, and also must show that their objections were raised in the public comment period. *Id.* at 446-47.

## ARGUMENT

Although the Committee supports the entire selected remedy, this amicus brief is addressed solely to the UDF, the issue where the Committee believes its views will have most value to the Board. The Committee explains (1) the reasons it supports “hybrid disposal,” *i.e.*, a mixture of on-site and off-site disposal, and (2) why it believes HRI’s objections to hybrid disposal are unfounded.

### **I. The Committee’s support for hybrid disposal.**

The Committee supports the revised remedy’s provisions for the Upland Disposal Facility, which differs from the landfills the Committee opposed in 2016 in important respects.

*First*, unlike the landfills proposed in 2016, which would have contained all the waste from the River, the UDF will accept only certain (less contaminated) waste. Highly contaminated materials will be sent off-site, so that the average concentration of banks and floodplain soils sent to the UDF from certain areas will be <50 ppm, and the average concentration of sediments sent to the UDF from a given reach of the River will be ≤25 ppm. *See* 2020 Permit at E-1 to E-4. As a result, the average concentration of all UDF materials will be 20 to 25 ppm. *See* 2020 RTC at 61. As described below, EPA routinely authorizes disposal of wastes with PCB concentrations <50 ppm for disposal in ordinary (often unlined) municipal landfills. Excluding high-level PCB waste from the UDF reduces risk significantly and advances the towns’ longstanding goal to protect public health and the environment.<sup>1</sup>

*Second*, the UDF is part of a package deal—one with important, additional environmental benefits. GE must now remove a significantly larger quantity of PCBs from

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<sup>1</sup> At the 2016 EAB oral argument, the presiding judge inquired whether the Committee would accept on-site disposal “[i]f GE were to take the PCBs that were 50 ppm and above and take them off site.” 2016 Tr. 145:13-16. The Board’s remand brought this question into sharp focus.

residential properties and the River—even though the Board already had sustained the more limited sediment removal provision in the 2016 remedy—and GE also must start design work immediately, without appealing and without waiting on other appeals. This means PCBs that have been uncontrolled in the environment for decades finally will begin to be remediated, without further litigation delays by GE. Other benefits include removal of two dams detrimental to fish habitat; less waste transport through residential communities; and, more community input on work activities, recreational enhancements, scheduling, and traffic routes. None of these improvements would have occurred but for the agreement on all terms, including the UDF.

*Third*, the 2020 UDF eliminates the risk that other, far less suitable landfill locations proposed by GE (at Forest Street in Lee and Rising Pond in Great Barrington) would be selected. These locations are totally undeveloped, heavily wooded parcels, far from the most contaminated areas of the River. In contrast, the UDF is “a low-value, disturbed gravel area” next to two other landfills—and the area will be substantially improved in the long run when the UDF is closed and covered with soil and vegetation. *See* 2020 RTC at 10, 40; 2016 RTC at 241 (most habitat at the site “would be improved”). The UDF site is also located near the most heavily contaminated areas of the River—which will cut down substantially on truck traffic on local roads (in part because GE now must consider pumping waste to the site hydraulically). 2020 RTC at 22. If there is to be a landfill, the best location is the UDF site, rather than the undeveloped, distant parcels at Rising Pond and Forest Street.

*Fourth*, full off-site disposal has become harder to defend, given the Board’s remand of the 2016 Permit. In 2016, the Region’s primary argument against on-site disposal was that the three possible on-site disposal locations failed to meet TSCA siting requirements, including requirements that soils beneath the landfill be impermeable. But as the Board pointed out, TSCA

siting requirements are sometimes waived, and the Region had not explained why a waiver was inappropriate here. *In re GE*, 17 E.A.D. at 566. As GE noted, on-site disposal of PCBs and other hazardous waste occurs at many other cleanup sites. *Id.* Although there were and are other arguments against on-site disposal, the Committee reasonably concluded there was a significant risk that these factors might not convince the Region to forbid on-site disposal; or even if the Region tried to select off-site disposal again, there was a significant risk that the Board and/or the First Circuit would view these factors as insufficient.<sup>2</sup>

*Finally*, the monetary component of the settlement avoided potential litigation between the municipalities and GE over compensation for cleanup impacts—litigation that would have taken many years to resolve. Without a tort lawsuit even being filed, GE has accepted responsibility for these impacts and provided substantial compensation for the disruptive effects of the remedy. But the Committee wants to be clear: the elected officials on the Select Boards know they will be judged based on how well this cleanup works out over decades, long after the money is spent. The Committee never would have accepted the settlement if its constituent Select Boards (each of which voted to approve the Settlement Agreement) did not believe that the 2020 remedy was, under the exceptional circumstances present here (including GE’s unique rights to appeal), the best outcome for human health and the environment.

## **II. The Region’s UDF decision was lawful.**

### **A. The UDF site is suitable.**

In HRI’s (incorrect) telling, the Region previously determined that the UDF site is “unsuitable.” HRI Br. at 13. This is supposedly because the site has permeable soil, and because

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<sup>2</sup> For example, in all similar cases cited by the Board in which courts have upheld more expensive cleanups over less expensive ones, the cost differentials have been <\$3 million, and the more expensive option was usually found to be better in some obvious way. *Id.* at 576. These cost differences are very different from the \$146M cost difference between full offsite disposal and the UDF. 2020 SOB at 36.

the landfill’s liners may “eventually” fail, *id.* at 15, which (HRI says) could lead to re-contamination of the River. The argument is apparently that the Region’s remedy decisions have been inconsistent, and/or that the remedy is simply unsafe. Either way, HRI misses the mark.

**1. The Region has consistently found that a landfill near Woods Pond is safe.**

HRI says the Region previously concluded that the UDF site was “unsuitable.” HRI Br. at 13. Not so. The Region has consistently taken the position that, although locating a landfill at the UDF site carries some small risk of a leak, such a landfill still would be highly protective because of multiple safeguards. The only thing the Region has ever said or done that even arguably contradicts this position was its 2016 refusal to waive TSCA siting requirements—a refusal the Board already rejected.

The Region’s statements about on-site disposal have been consistent over time:

- **Before issuing the final 2016 permit**, the Region “did not note any concern with the protectiveness of on-site disposal.” *In re GE*, 17 E.A.D. at 563. Instead, the Region concluded that both off-site and on-site disposal would “provide high levels of protection.” *Id.* (quoting 2016 SOB at 35). And this evaluation was of a landfill that would have contained *all* waste from Rest of River, rather than hybrid disposal.
- **When the 2016 permit was issued**, the Region defended off-site disposal by emphasizing some of the drawbacks of on-site disposal—but still never said on-site disposal was unsuitable or unsafe. For example, the Region said there was a “non-zero” chance the liner would fail, and that if there were such a failure the risk of a release to the River would be “increase[d]” because the UDF site has permeable soils. 2016 RTC at 239, 244-45.<sup>3</sup> These are all true statements, as HRI emphasizes in its brief. HRI Br. at 16 n.71. But they are very different from concluding that on-site disposal was not protective. And although the Region declined to waive TSCA siting requirements, the Region *never* said the UDF site presented an unreasonable risk—a silence that resulted in the Board’s remand of the 2016 Permit. *In re GE*, 17 E.A.D. at 568.
- **In 2020**, the Region candidly acknowledged the pros and cons of on-site disposal. Specifically, the Region took the following position: (a) off-site disposal was the “strongest” disposal option for preventing re-releases of contamination, because any leak from an on-site facility (though “extremely unlikely”) could affect the River, and (b) on-site disposal was nonetheless “strong” and effective, mainly because of various safeguards (discussed below).

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<sup>3</sup> HRI says the “Region found that an onsite disposal facility *would* eventually leak.” HRI Br. at 16 (citing 2016 RTC at 239). But the RTC merely refers to “risks” and “potential” leaks, not to any inevitability.

2020 SOB at 28; *accord* 2020 RTC at 18-19; SCA at 31. Ultimately, the Region embraced limited on-site disposal because it was part of a cleanup that includes other features that offset the small, long-term risk of a leak, including remedy enhancements and an “expedited start to implementation.” 2020 SOB at 29; *accord* 2020 RTC at 9-11; SCA at 31-40 & *id.* at B4-B7.

In short, the Region has never denied the small risk of a leak, just as it has also never said the UDF site is “unsuitable” or unsafe. HRI’s inconsistency charge is incorrect.

## 2. The Region’s favorable evaluation of on-site disposal is not clearly erroneous.

The Region’s protectiveness finding also was substantively correct. HRI emphasizes that “any liner system will eventually fail,” and that when it does, PCBs will migrate through permeable soils into the River. HRI Br. at 15. HRI goes on to suggest the Region’s remedy is erroneous because of this potential leakage. HRI is wrong: (1) leaks are manageable problems that would occur in the *very* distant future, if at all; (2) EPA has specifically approved lined PCB landfills, even over permeable soils, and lined landfills are routinely used in hazardous waste cleanups; and (3) the Region properly exercised its discretion to treat the leak potential as less important than other new benefits of the cleanup.<sup>4</sup>

*First*, leaks are not expected to occur for hundreds of years; if and when they do occur, there should be plenty of warning so GE and the Region can address the situation. Consider the following findings by the Region, all of them unchallenged by HRI:

- **“400-800 years.”** As the Region pointed out, UDF liners are expected to work for 400 to 800 years. *See* 2020 RTC at 18. HRI says liners “eventually fail,” but even if this is true, in this case “eventually” means *really* far into the future.
- **No water, no leak.** Leaks can occur only if there is water in the landfill—but existing water within the landfill will be removed by the leachate collection system, and new water will be prevented from entering by the low-permeability cap (to be maintained indefinitely by GE). 2020 RTC at 18. So even if the liners fail, the lack of water would prevent PCB migration.
- **PCBs are not mobile contaminants.** As the Region observed, the tendency of PCBs to sorb onto soil and organic matter is “so overwhelming” that PCBs move up to 3,000 times more

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<sup>4</sup> HRI relies heavily on a report from David J. De Simone, who discusses the UDF site’s permeable soils. Since the report is new and not part of the record, no response is required.

slowly than the groundwater itself moves. *See* 2020 RTC at 21. So even if the cap and both liners fail, PCBs will not reach the River for a very long time, if ever, as the PCBs preferentially sorb to the material in the UDF. It is no coincidence the revised remedy that emerged from settlement negotiations requires the landfill bottom to be at least fifteen feet above the water table. 2020 Permit at 55; Settlement Agreement at 10.

- **Monitoring systems.** The Region will receive ample warning of any leaks. If the first liner fails, the PCBs would show up in the leachate collection system located between the first and the second liner. If the second liner fails, the PCBs would eventually show up in shallow groundwater within a network of groundwater monitoring wells between the UDF and the River. 2020 Permit at 55-56.
- **GE on the hook indefinitely.** If PCBs are detected moving toward the River, GE would be required to prevent the River from being re-contaminated, *e.g.*, by repairing the liner, pumping out contaminated groundwater, or using other treatment technology. *See* 2020 RTC at 19, 21-22. As the Region has emphasized (at the Committee's request), "it is critical to note that ... GE's obligations regarding the UDF are not time limited," and GE has posted a \$150 million bond to ensure it performs the cleanup and maintains the UDF. 2020 RTC at 19, 50.

In short, any leaks are not expected for centuries, and when and if they do occur, they will move slowly, will be detected, and must be addressed by GE. The revised remedy goes to great lengths to minimize the risk of any potential leak.

*Second*, EPA routinely finds that disposal of PCBs and other hazardous waste is safe, even in places with permeable soils. For example:

- **TSCA: liners protect permeable soils.** TSCA regulations effectively authorize landfills above permeable soils if there is a double liner, even in cases where the landfill (unlike the UDF) is expected to contain highly concentrated PCB waste. *See* 40 C.F.R. § 761.75(b)(2); *cf. In re GE*, 17 E.A.D. at 566 (faulting the Region for not addressing this rule).
- **Low-level PCBs sent to unlined landfills.** EPA routinely authorizes disposal of low-level PCB waste at landfills that are totally *unlined*. For example, TSCA regulations authorize disposal of certain low-concentration PCBs (<50 ppm) at municipal landfills—even though these landfills "typically have lower levels of protection than the UDF," *e.g.*, by lacking a liner system. *See* 2020 RTC at 12; 40 C.F.R. § 761.61(a)(5)(i)(B)(2)(ii). EPA has also authorized electric power generators to dispose of low-level (<50 ppm) remediation waste at these same municipal landfills. *See* 2020 RTC at 12. And EPA has also said certain PCB remediation waste ≤25 ppm need not be cleaned up at all if it is in a low-occupancy area. *Id.* at 13; 40 C.F.R. § 761.61(a)(4). These rules are relevant here, because the UDF in the revised remedy excludes soils with an average concentration ≥50 ppm and sediments with an average concentration >25 ppm; the average concentration of all materials will be ~20-25 ppm. 2020 Permit Att. E; 2020 RTC at 61.

- **On-site landfills routine at New England cleanup sites.** EPA routinely uses on-site disposal at other cleanup sites. The Region has identified 24 cleanup sites where PCB soils and/or sediments have been disposed of in local/on-site landfills. 2020 RTC at T-3 (Table 3). These sites include a landfill in Pittsfield holding 245,000 cubic yards of sediment from the River. Also on the list is the New Bedford Harbor site, where the Region has authorized disposal of up to 550,000 cubic yards of PCB-contaminated sediments into a “confined aquatic disposal cell”—essentially a hole dug into the bottom of the harbor. *Id.* More broadly, of the 119 NPL sites in Region 1, almost 60 have capped areas, presumably including sites with contaminants that (unlike PCBs) are highly mobile. 2020 RTC at 12. On-site landfills are routinely implemented, including at sites with PCBs and with more mobile contaminants, and including in New England, where sites with impermeable soils are infrequent.

All this constitutes overwhelming authority supporting the Region’s decision on on-site disposal. The Region’s finding that the UDF was protective was not clearly erroneous.

*Third*, the Region clearly acted within its discretion when it found that other benefits of the selected remedy outweigh the leak risk. HRI ignores almost all of these benefits:

- **Cleanup now is far better than cleanup later.** GE has agreed to start design work immediately, without appealing and without waiting on other appeals. *See* 2020 Permit at 5. And this work has begun: some 20 years after the CD was entered, GE has at last submitted a [Statement of Work](#). Had the Region opted for off-site disposal, GE would not have submitted the SOW—instead, it would have filed well-financed appeals to the Board and the First Circuit, presenting a substantial risk that its challenge to off-site disposal would once again result in a remand. *Cf.* SCA at B-4 (describing the potential for “indefinite delay” and the value of “fewer, if any, appeals” and “faster implementation”). GE’s commitment to commence remedy design is a giant step forward in the long history of “Rest of River.”
- **More sediment removal.** GE must remove more PCB contamination from six different reaches of the River. The extra PCB removal means 96 additional acres of the River will meet cleanup standards, without having to rely on river-bottom caps to isolate residual contamination in these areas. 2020 SOB at 24. This additional sediment removal significantly reduces risks. River-bottom caps are vulnerable to damage from floods and storms (which will only intensify with climate change), which could cause resuspension of contaminated sediments. Committee Comment at 3-4 n.4; 2020 SOB at 23.
- **More residential soil removal.** GE must remove PCBs from up to 28 additional residential properties. This additional soil removal will reduce concentrations below cleanup standards, freeing these properties from potential land use restrictions. *See* 2020 SOB at 12.
- **Possibly more riverbank removal.** GE must evaluate certain bank soils that would have been left in place by the 2016 Permit, and, under EPA supervision, must propose “any further

action consistent with” this evaluation, *i.e.*, additional soil removal. *See* 2020 Permit at 22, 23. This enhancement may reduce erosion and future transport of PCBs in the River.

- **Restore aquatic connectivity.** GE must remove two dams downstream of Woods Pond and some associated contaminated sediments. This will “greatly increase long-term habitat quality” in these areas and reduce downstream transport of PCBs. *See* 2020 SOB at 10, 24.
- **Hydraulic pumping & fewer truck trips.** GE must evaluate, again under EPA supervision, whether material from Reach 5C, Woods Pond, and adjacent backwaters can be pumped directly to the UDF. This feature promises to eliminate nearly 50,000 truck trips from the roads of Lee and Lenox. *See* 2020 SOB at 16.
- **Fewer adverse impacts on community.** GE is now required to minimize waste transport through residential areas and to consult the community about work activities, scheduling, traffic routes, and recreational enhancements. *See* 2020 Permit at 73-75.
- **The most highly contaminated materials are going off-site.** Finally, it bears repeating that the most highly contaminated materials are being sent off-site. *See* 2020 Permit Att. E; 2020 RTC at 61.

HRI does not, and cannot, dispute that these enhancements to the remedy (which affect portions of the remedy the Board had already upheld) would not have occurred but for the settlement including the UDF. Instead, HRI’s only response to any of these enhancements is to say that the Region’s desire to expedite cleanup is “almost laughable,” because the Region has already taken “over twenty years” to develop a cleanup plan. HRI Br. at 16. But this view is not shared by the Committee. If anything, the fact that Berkshire County residents have waited decades for the cleanup *increases* the value of getting started sooner rather than later; past patience (if that is what it was) is no justification for more delay. 2020 RTC at 73 (“Multiple commenters recommend no more delays”). At present, PCBs remain uncontrolled in the River, in eroding banks, and in the floodplain. The Region stated the obvious when it said the “sooner the cleanup ... is implemented, the sooner the risks of exposure to the PCBs in the River will be addressed.” 2020 RTC at 9. Put another way, there *already* is a local PCBs disposal facility of sorts that *already* presents an unacceptable condition: the Housatonic River. Although the

Committee sympathizes with HRI's concerns, it is well past time to clean up the River and isolate the PCBs in properly-designed facilities where they belong.

**B. The remedy-selection process was lawful.**

HRI wrongly argues the Region's participation in the mediation and Settlement Agreement somehow precluded the Region from considering later comments by other members of the public, and from applying the remedy-selection standards. *See* HRI Br. at 17-19. The truth is different: the Region did not ignore the remedy selection criteria or public comments, and the inquiry HRI seeks is highly disfavored and unsupported by the facts.

As an initial matter, it is worth remembering that the process for writing a draft permit is not highly regulated. The administrative record does not typically contain initial versions of the draft permit or Statement of Basis or other records of the Region's informal deliberations. The Region can and does consult others during this period, including consultants and responsible parties. There is, for example, no rule against *ex parte* communications with decisionmakers issuing a permit. *Cf.* 5 U.S.C. § 554(d) (no *ex parte* communications in formal adjudications).

More generally, the sort of inquiry HRI wants the Board to undertake into the Region's "real" reasons is rarely appropriate. As the Supreme Court has recently stated, judges "may not reject an agency's stated reasons ... simply because the agency might also have had other unstated reasons." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). There is a "a narrow exception" to this rule, but it requires a "strong showing of bad faith or improper behavior." *Id.* at 2573-74. Here, there is no evidence of bad faith or impropriety.

HRI's assumption seems to be that there is only one possible remedy that can be chosen under the selection criteria, and that if outsiders have influenced the outcome from what it would have been in a vacuum, then that outcome must be illegal. But this premise is wrong: the very

nature of discretion implies the discretion to choose among any of several valid cleanups. In exercising this discretion, it was not improper for the Region’s personnel to discuss their “policy preferences and ideas ... with affected parties.” *Id.* at 2574. This discussion with affected parties is exactly what happened here. All parties to the mediation understood the cleanup had to conform to the remedy selection criteria, and the Region (by virtue of being the permit issuer) self-evidently had the most leverage to lead this analysis. Moreover, the Region had special justification to mediate in this case, given GE’s unique appeal rights—rights absent in a CERCLA remedy selection but that were granted here in the CD. *See In re GE*, 17 E.A.D. at 486 n.19. Mediation was the Region’s best hope to reduce litigation-related delays, which are relevant to remedy selection criteria such as protectiveness, implementability, and community support. Far from being improper, EPA’s decision to reduce delay through mediation was fully consistent with the applicable remedy-selection criteria.

Moreover, the evidence HRI uses to support its impropriety argument shows the opposite. HRI’s brief cites a statement in which the Region explained its reasons for entering into the Settlement Agreement. The Region expressed concern that selecting off-site disposal again would lead to another loss on appeal, which would “lead to indefinite delays,” as well as the possibility of on-site landfills at less suitable locations. HRI Br. at 18. But these were precisely the reasons the Region gave in its response to comments, as described above.

HRI is also wrong to suggest that the mediating parties forced the selected remedy on the Region or compelled the Region to ignore public comments. HRI Br. at 19. The Settlement Agreement did not represent a major about-face by the Region. Instead, the Region’s hybrid disposal plan was consistent with its 2016 acknowledgement that on-site disposal has “high” protectiveness. The Settlement Agreement did not cut off public comment: the parties

acknowledged the permit would “be subject to ... public comment,” and agreed the parties could appeal the Permit if it ended up being inconsistent with the settlement. Settlement Agreement at 2-3. In fact, when the draft permit was issued, GE objected (without success) to what it believed were departures from the settlement. *See, e.g.*, GE Comment Letter at 6-7; 2020 Permit at 23. And the Region changed the permit again based on public comments—for example, by adding an air monitoring requirement absent from the Settlement Agreement. *See* 2020 RTC at A-5.

Finally, it is worth pausing to consider the ramifications of the ruling HRI requests. The Region’s approach to the 2020 permit is consistent with any sane conception of administrative law.<sup>5</sup> After having its cleanup derailed for years by the 2016 appeal, the Region offered to mediate with all parties to this appeal to try to head off a second remand and commence a long overdue cleanup. HRI laments the public’s exclusion, but there is no known way to negotiate with the public at large, and mediations almost always occur in a confidential setting as standard operating procedure. Moreover, the public *did* have a seat at the table: the elected representatives of the affected municipalities, here acting through the Committee, were and are the best voices of the people in our democratic system. And *all* of the municipal Select Boards voted unanimously in favor of the settlement; none has wavered from that decision in the intervening year. Pittsfield and Mass Audubon also had a seat at the table, as did HRI—which gave up on mediation because it objected to the likely outcome, HRI Br. at 7 n. 36, and not based on any opposition to mediation per se. Yet HRI argues this multilateral effort was *less* inclusive than its preferred procedure, which would have been for the Region simply to announce a draft permit from on high, without consulting anyone. This makes no sense.

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<sup>5</sup> Notably, RCRA guidance explicitly authorizes Regions to negotiate settlements of permit appeals. EPA OSWER #9521.00-01, [RCRA Permit Appeals Guidance Manual](#) (Oct. 3, 1990), at 13-14.

The approach the Region took in 2020 was a sincere attempt to *engage* stakeholders and, if anything, was in the best tradition of public service. It was not erroneous.

**C. The Region appropriately considered the UDF site’s designation as an “Area of Critical Environmental Concern.”**

The UDF is within an “Area of Critical Environmental Concern” (“ACEC”), where solid waste landfills are not allowed under state law—except that EPA waived the landfill prohibition under CERCLA’s “ARARs” provisions. *See* 42 U.S.C. § 9621(d)(4)(B). HRI says this decision was “nonsensical” because of the site’s high ecological value, HRI Br. at 20-22, but this objection was not preserved, is not supported by the Commonwealth of Massachusetts, and would have failed on the merits in any event.

*First*, any objection to the waiver of state law is not properly before the Board, because the objection was not raised during the public comment period. HRI does not cite any timely comment or response by the Region, as the Board’s rules require. And HRI also does not try to excuse the failure to preserve the issue. *In re GE*, 17 E.A.D. at 582-83 (rejecting one of HRI’s objections in the first appeal because the issue was not raised in the public comment period).

*Second*, as the Region has consistently and correctly concluded, the UDF site does not have high ecological value. HRI refers to habitat and vernal pools at the UDF site, but the statements appear to refer to the entire 12,280-acre [Upper Housatonic ACEC](#), of which the UDF Site is only a very small part. HRI Br. at 20; RCMS at 5-2. The administrative record confirms what the satellite pictures plainly show: the UDF site is “in close proximity to two other landfills,” and “does not impact any priority habitat for state-listed species, ... [and] has only 0.6 acre of any type of woodlands, with the rest being a low-value, disturbed gravel area.” 2020 RTC at 10, 22, 38-39; *id.* Fig. 1. The Region’s view was similar in 2016, when the Region found that habitat at the site might be “improved” over the long run. 2016 RTC at 241.

*Third*, the Region’s ARARs waiver was not “clearly erroneous.” HRI has objected to an ARARs waiver even though the Commonwealth itself has not objected to this waiver of its own laws. *See* MA Comment at 1. The Region waived the no-landfill rule because UDF disposal avoided delay and litigation risks, and opened the door to the remedy enhancements described above—factors that made UDF disposal more protective. SCA at B-3 to B-7. As explained above, the UDF excludes the most contaminated waste, and it also drove a settlement that (a) reduces delay, (b) protects other, less suitable landfill sites, and (c) results in more PCB removal, among other benefits. As the Commonwealth seems to agree, these features (absent from the 2016 version of the UDF) made it reasonable to waive the ACEC rule.

**D. The Region appropriately considered community impacts.**

HRI emphasizes the UDF’s impacts on Berkshire County property values, tourism, and conservation areas, HRI Br. at 23, but these arguments miss the mark.

The Region reasonably concluded these impacts are unlikely to be significant. This is primarily because (1) the UDF area already has landfills and some industrial facilities; (2) almost everyone who lives nearby is screened by woods from the landfill; (3) the landfill area may actually be aesthetically enhanced once it is closed and covered with grass; and (4) the only data available to the Region suggested little or no impact on property values. 2020 RTC at 35-40. HRI criticizes these findings in new reports the Region has moved to strike, HRI Br. Att. 8, *cf.* Dkt. #12, but even if these reports were properly before the Board, they are anecdotal and suggest mostly a *lack* of certainty about impacts; they do not carry HRI’s burden of showing clear error. If relevant at all, the community impacts HRI cites would have to be enormous to overcome the selected remedy’s concrete advantages, including nearly 50,000 fewer truck trips. HRI has not documented impacts at this level.

**E. The Region appropriately considered the views of the community.**

HRI’s final UDF argument—that community sentiment supposedly runs strongly against the selected remedy—fares no better. HRI Br. at 25.

The Region has accurately acknowledged both “some community opposition,” as well as “some community support,” including from the six municipalities who joined the Settlement Agreement. 2020 RTC at 43. This mixed assessment of community sentiment was, if anything, generous to the opponents. While HRI says the “overwhelming public sentiment” about the selected remedy “is one of horror,” HRI Br. at 25, this is pure *ipse dixit*. The record tells a different story: the Select Boards of the five “Rest of River” towns voted unanimously to sign the Settlement Agreement, and these boards are the duly elected representatives of the public. The City of Pittsfield, Mass Audubon, and the Berkshire Environmental Action Team also embraced the settlement.<sup>6</sup> The Commonwealth submitted a letter withdrawing its objection to on-site disposal. The Committee is aware that Lee Town Meeting Representatives (a body that is separate from the Lee Select Board and cannot bind the Board in this matter) voted to explore hiring counsel to overturn the Settlement Agreement, *see* Citizens’ Br. at 4, but it should be noted that the Select Board, the executive body empowered to compromise claims, did not do so and no such efforts have occurred in the other four Rest of River communities or in Pittsfield. The public sentiment in Berkshire County on this issue is not “overwhelming,” it is mixed—which is precisely what the Region found.

On this record, the Region’s assessment of “state and community” views was reasonable.

**CONCLUSION**

The Region’s 2020 Permit should be sustained.

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<sup>6</sup> The main newspaper in Berkshire County also [endorsed](#) the cleanup plan.

April 19, 2021

Respectfully submitted,

Housatonic Rest of River Municipal Committee

s/ Matthew F. Pawa

Matthew F. Pawa

Benjamin A. Krass

Seeger Weiss LLP

1280 Centre Street

Newton, MA 02459

617 641-9550; 617 641-9551 (fax)

mpawa@seegerweiss.com

bkrass@seegerweiss.com

**STATEMENT REGARDING ORAL ARGUMENT**

To the extent oral argument is held in this matter, the Committee requests leave to participate.

**STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

Pursuant to 40 C.F.R. § 124.19(d)(iv), this amicus brief complies with the word limit set by the Board. According to the word count function in Microsoft Word, this brief contains 5,604 words.

/s/ Matthew F. Pawa

## CERTIFICATE OF SERVICE

I certify that on April 19, 2019, I have sent via email a copy of this amicus brief, together with all attachments, to the counsel listed below.

/s/ Matthew F. Pawa

For EPA Region 1

Timothy Conway  
John Kilborn  
Senior Enforcement Counsel  
U.S. EPA Region 1  
5 Post Office Square, Suite 100  
Boston, MA 02109-3912  
[conway.tim@epa.gov](mailto:conway.tim@epa.gov)  
[kilborn.john@epa.gov](mailto:kilborn.john@epa.gov)

For Petitioners Housatonic River Initiative & Housatonic Environmental Action League:

Stephanie R. Parker  
O'Connor, Carnathan & Mack, LLC  
1 Van de Graaff Drive, Suite 104  
Burlington, MA 01803  
[sparker@ocmlaw.net](mailto:sparker@ocmlaw.net)

Andrew Rainer  
Brody, Hardoon, Perkins & Kesten, LLP  
699 Boylston Street  
Boston, MA 02114  
[arainer2009@gmail.com](mailto:arainer2009@gmail.com)

Katy T. Garrison  
Murphy & Riley, PC  
125 High Street  
Boston, MA 02110  
[KGarrison@MurphyRiley.com](mailto:KGarrison@MurphyRiley.com)

For Citizens for PCB Removal et al.

Judith C. Knight  
342 Main Street  
Great Barrington, MA 01230  
[jknight@judithknight.com](mailto:jknight@judithknight.com)

For Permittee General Electric Co.:

Jeffrey R. Porter  
Mintz, Levin  
One Financial Center  
Boston, MA 02111  
[JRPorter@mintz.com](mailto:JRPorter@mintz.com)

James R. Bieke  
Sidley Austin, LLP  
1501 K Street, N.W.  
Washington, D.C. 20005  
[jbieke@sidley.com](mailto:jbieke@sidley.com)

Eric S. Merrifield  
Executive Counsel  
General Electric Company  
P.O. Box 2049  
Poulsbo, WA 98370  
[eric.merrifield@ge.com](mailto:eric.merrifield@ge.com)

Courtesy copies to:

Jeffrey Mickelson  
Deputy General Counsel  
Massachusetts DEP  
One Winter Street  
Boston, MA 02108  
[jeffrey.mickelson@state.ma.us](mailto:jeffrey.mickelson@state.ma.us)

Lori D. Dibella  
Assistant Attorney General  
55 Elm Street P.O. Box 120  
Hartford, CT 06141  
[lori.dibella@ct.gov](mailto:lori.dibella@ct.gov)