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

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

PETITION FOR REVIEW
SUBMITTED BY THE HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE

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Introduction

This petition for review is brought by five communities in Berkshire County, Massachusetts: Lenox, Lee, Stockbridge, Great Barrington, and Sheffield. The RCRA permit modification at issue requires General Electric to clean up massive PCB contamination in the Housatonic River, with large-scale dredging in these communities. The cleanup is so extensive, and in an area so highly dependent on tourism, that the cleanup itself has damaged and will continue to damage these communities for many years, over and the above the damage caused by the contamination. Although these communities support the remedy in most respects, they bring this petition to rectify two errors by EPA Region 1: (1) the Region committed a clear error of law when it refused to require GE to comply with the Massachusetts Hazardous Waste Facility Siting Act, Mass. G.L. ch. 21D ("Siting Act"), and (2) the Region abused its discretion by failing to require GE to maintain in perpetuity key remedial measures, such as caps on sites with waste that will remain highly toxic for hundreds of years.

On the first issue, Region 1 made a clear error of law when it determined that the Siting Act is a "permit" that is preempted by CERCLA § 121(e)(1) – thereby purporting to overrule a state policy designed to ensure that GE compensate communities for at least some portion of the disruption caused by a massive cleanup. The Region's position suffers from at least three clear legal errors. First, GE's compensation obligations under the Siting Act are not a "permit" under CERCLA § 121(e)(1). Second, the Region's reading of CERCLA § 121(e)(1) violated a fundamental rule of environmental law that is explicitly embedded in CERCLA: preemption is to be construed and applied narrowly, and state remedies are to be preserved. Third, the cleanup selection process here was highly unusual, indeed *sui generis*: instead of being selected under CERCLA, the Housatonic remedy was selected under RCRA, which has no permit preemption

provision, and under other rules established by agreement between GE and the Region, as part of an unprecedented legal maneuver that gave GE enormous benefits, most notably an immediate right of appeal under RCRA prior to commencing cleanup. The Region's position thus relies on a statute, CERCLA, that it did not use to issue or select the remedy.

On the second issue, EPA's refusal to require GE to maintain the remedy in perpetuity was also an error. This refusal was arbitrary and capricious because it is indisputable that permanent maintenance by GE is required to ensure long-term protectiveness given that PCBs remain highly toxic for hundreds of years. The RCRA permit should have explicitly acknowledged this obvious fact.

Threshold Procedural Requirements

The Petitioners are the Housatonic Rest of River Municipal Committee (the "Committee"), a formal committee formed under an intergovernmental agreement by the towns of Lenox, Lee, Stockbridge, Great Barrington, and Sheffield. The Committee satisfies the threshold requirements for filing a petition for review and has standing because it participated in the public comment period on the draft permit. 40 C.F.R. § 124.19(a)(2). The Committee expressly requested that the Region require GE to comply with state-law compensation rules with respect to the centralized temporary facility, and that GE be obligated to maintain the remedy in perpetuity. The Committee's comments are attached at Exhibit 8, and the Region's responses to these comments are attached as Exhibit 2; both are summarized below.

Background

I. GE's Contamination of the Housatonic River

The Housatonic River is one of the scenic gems of New England. It flows south through the Berkshire mountains in western Massachusetts, and passes through each of the five

municipalities of the Committee, before flowing on through western Connecticut to Long Island Sound. The state of Massachusetts has designated a 13-mile corridor of the river (from southern Pittsfield to northern Lee) as a protected habitat, *i.e.*, an "Area of Critical Environmental Concern" ("ACEC"), due to the exceptionally high numbers of rare species, exemplary plant communities, and vernal pools. *See* Exhibit 9 (Revised CMS), at 1-6.[1] The Appalachian Trail runs along a portion of the river, and there are four historic covered bridges crossing it. Despite the contamination, the river remains one of the premier fly-fishing destinations in the eastern United States, including in areas within the Committee's municipalities, even though GE's pollution make the fish too toxic to eat.[2] According to a socioeconomic report commissioned by the Region, the total economic impact of tourism in Berkshire County alone is over $500 million, and the area's "outstanding beauty" has made it a "famous" vacation destination. Exhibit 10, at 20. The Region's corrective measures study acknowledged that the proposed cleanup – which is expected to take 13 years – would preclude boating, fishing, hiking, and hunting in large construction areas in or near the river, particularly in the part of the river that is within the

[1] The state's website includes maps and details on the ACEC designation. *See* http://www.mass.gov/eea/docs/dcr/stewardship/acec/uhr-acec-topo-color-line.pdf, and http://www.mass.gov/eea/agencies/dcr/conservation/ecology-acec/upper-housatonic-river.html.

[2] The Region's human health risk assessment notes that "the Housatonic River flows through one of the most biologically diverse regions of Massachusetts and Connecticut. … Reach 5 [in Lenox] has a significant amount of forested, undeveloped land that supports a wide variety of recreational uses, including hunting, fishing, hiking, and canoeing." Exhibit 11, at 1-12. The same report describes how Woods Pond (an impoundment of the river in Lenox) "is a popular recreational area" and "well-known ice-fishing location, with many anglers observed on winter days, especially weekends. It is a warm water fishery with good fishing" for numerous fish species. *Id.* at 1-15; *see also id.* at 1-17 (program to replenish fish stocks downstream received "much attention" from national fly-fishing publications); *id.* at 1-33 (thousands of children fish in Berkshire County, most of them presumably in the river).

municipalities that form the Committee. *Id.* at 24. In short, the remedy promises a massive and lengthy disruption to daily life in these five municipalities.

GE began operating a factory on the river beginning in the early 1900s. This factory was located in Pittsfield, about two miles upstream of the area now designated as the "Rest of River." Between 1932 through 1977, GE made electrical transformers that contained polychlorinated biphenyls (PCBs), a persistent organic pollutant that is also a probable human carcinogen. GE's use of PCBs – and its improper disposal of them – led to massive contamination in downstream areas of the river, as well as in numerous areas near the river and the GE facility (including an elementary school that accepted PCB-contaminated fill from GE). *See* Exhibit 11 (Human Health Risk Assessment), at 1-3. The specific PCB compounds used by the company (predominantly Aroclor 1254 and 1260) are exceptionally persistent and resistant to degradation. *See id.* at 1-3 to 1-5; *see also* Exhibit 2 (Response to Comments), at 45 (PCB persistence in environment).

These PCBs can now be found in almost the entire river downstream of the GE plant, for over 125 miles; essentially all PCBs found within the Rest of River were generated and released from the GE plant. Since 1977, environmental agencies have advised residents and visitors not to eat fish from the river because of PCB contamination. Nonetheless, most Berkshire County residents are likely to have GE's PCBs in their bodies – permanent additions to their brains, their blood, and their other organs. *See* Exhibit 11 (Human Health Risk Assessment), Figures 1-6 and 1-7.

II. Enforcement history against GE; the consent decree.

Early responses, the CD is entered. Beginning in the 1980s, the Region and the environmental agencies for Massachusetts and Connecticut began to issue unilateral orders and

administrative consent orders requiring GE to undertake investigation and cleanup activities. These orders were issued under CERCLA § 106 and analogous state cleanup statutes. In 1991, the Region also issued a RCRA corrective action permit for the GE facility itself, which had wound down its active operations in the late 1980s.

After this RCRA permit was issued, the Region, GE, the states of Massachusetts and Connecticut, and the City of Pittsfield negotiated a consent decree ("the CD") that requires GE to clean up the river and nearby areas. Although Pittsfield was part of these negotiations (and obtained from GE a $10 million settlement, among other things), none of the members of the Committee or other impacted municipalities was allowed to join these negotiations, and none was consulted about any part of the CD. *See* Exhibit 3 (CD), ¶ 5, at 44. Pittsfield is the largest city in Berkshire County, located immediately upstream of the five municipalities that make up the Committee.

The CD was entered by the U.S. District Court for the District of Massachusetts in 2000. GE and the Region have carried out some separate cleanup actions under the CD, including three separate cleanups of the river itself. Most of these cleanups are either finished or underway, but by far the largest of these cleanups is the "Rest of River" cleanup. The "Rest of River" area begins approximately 2 miles downstream of the GE facility, below the confluence of the east and west branches of the river; it extends for more than 125 miles of river, traversing most of Massachusetts and Connecticut north to south. This Rest of River cleanup has not begun; this was the cleanup that was selected in the Permit Modification and that is being challenged by this petition.

The CD on "Rest of River": RCRA procedure, sui generis remedy-selection, CERCLA preemption. The portion of the CD addressing the Rest of River cleanup is highly unusual – and extremely beneficial to GE.

EPA traditionally uses CERCLA, not RCRA, to address cleanups of inactive facilities, because CERCLA gives the Region broader authority to select a remedy and force a responsible party to carry it out. Unlike RCRA, CERCLA also has an express provision alleviating the requirement to obtain any "federal, state or local permit" for the portion of any remedial action conducted entirely onsite, if such remedial action is selected and carried out in compliance with CERCLA. *See* CERCLA § 121(e)(1), 42 U.S.C. § 9621(e)(1). Where a remedy is selected in compliance with CERCLA, EPA issues a Record of Decision ("ROD") selecting the remedy, and then negotiates a consent decree with the responsible party (such as GE) for it to perform the remedy. If the party fails to agree to the CD, EPA is authorized to carry out the cleanup itself or to order the responsible party to do it, with all challenges by the responsible party statutorily barred by CERCLA § 113(h) until initiation of EPA's cost-recovery suit (at which point the Region would be entitled to treble damages). Faced with the prospect of a future suit for treble damages, almost all responsible parties accede to EPA's remedy selection; CERCLA remedy challenges are thus almost non-existent.[3]

[3] As GE once argued in an unsuccessful due process challenge to CERCLA's jurisdictional bar, CERCLA makes it practically impossible for responsible parties like GE to challenge a remedy or EPA's allocation of liability; the mere threat of EPA carrying out the remedy itself and then seeking treble damages is an overwhelming inducement to accept EPA's remedy selection. *GE v. EPA*, 360 F.3d 188 (D.C. Cir. 2004) (rejecting claim by GE that CERCLA jurisdictional bar violates due process). Notably, EPA successfully relied on CERCLA to force GE to undertake a similarly massive cleanup of the Hudson River, with no legal challenge by GE. *United States v. GE*, 460 F. Supp. 2d 395 (N.D.N.Y 2006) (entering consent decree for performance of Hudson cleanup by GE).

But with the Housatonic "Rest of River," the Region and GE agreed to the CD *before* the remedy was selected, and agreed further that: (a) the GE facility's RCRA permit would be reissued after entry of the CD, even though the GE facility long ago ceased operations, and (b) the remedy would be selected as a modification to this reissued RCRA permit, and not as a CERCLA ROD – which in turn means that GE is now allowed to make an *immediate* challenge to the remedy under RCRA, in the form of a petition to the Board objecting to the permit modification.[4]

These RCRA appeal procedures are not the only departure from CERCLA. The Region could have used the format and procedures of a RCRA permit, but retained the substantive remedy-selection criteria prescribed under CERCLA. Instead, the CD requires the Region to follow a *sui generis* set of remedy selection criteria – criteria that differ from the CERCLA criteria. Specifically, the CD says that the Region will propose the draft permit modification in which the remedy is to be selected "pursuant to the Reissued RCRA Permit." Exhibit 3 (CD), § 22.n, at 94. A draft of the Reissued RCRA Permit was attached as an exhibit to the CD and incorporated into the parties' agreement; the currently operative version of this document is Exhibit 7.[5] This Reissued RCRA Permit lists three "general standards" for evaluating a remedy plus six "selection decision factors." *See* Exhibit 7, ¶ II.G, at 20-23. Despite some facial similarity between these nine criteria and the remedy-selection criteria prescribed by the National Contingency Plan (CERCLA's implementing regulation), s*ee* 40 C.F.R. § 300.430(e)(9), there

[4] There appears to be no credible explanation in the administrative record of why EPA unilaterally disarmed itself of its most powerful statutory weapon (*i.e.*, the CERCLA § 113(h) jurisdictional bar) against a notoriously litigious RP at a major site; it is a decision that appears to be unprecedented. Indeed, GE and EPA explicitly agreed that "no aspect of this settlement should be considered precedent." Exhibit 3 (CD), ¶ 201, at 383.

[5] This Reissued RCRA Permit is not to be confused with the *Modification* to the Reissued RCRA Permit, called here the "Permit Modification," which is the decision challenged in this petition.

are significant differences. For example, the permit criteria do not include state and community acceptance as standalone criteria, even though the existence of these two criteria is a key justification for the CERCLA permit preemption that GE also relies on. This and other changes from the CERCLA criteria are described in detail in section I.B of the argument, below.

However, the CD embraces CERCLA when it comes to whether and how the remedy must comply with state law. The CD states that "[a]ll activities undertaken by [GE] pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations." Exhibit 3 (CD), ¶ 8(a), at 45. In addition, section 121(d) of CERCLA (also included in the CD) specifically requires cleanups to actually incorporate "applicable" or "relevant and appropriate" requirements (aka "ARARs") into the remedy itself. *See* Exhibit 3 (CD) ¶ 8(a), at 45. Under the statute, these ARARs expressly include "any … facility siting law." CERCLA § 121(d)(2), 42 U.S.C. § 9621(d)(2). The CD also mimics CERCLA in eliminating any requirement to obtain a permit for work performed on-site: "As provided in [CERCLA], no permit shall be required for any portion" of the remedy that is "conducted entirely on-site." Exhibit 3 (CD) ¶ 9.a, at 47; *see also* CERCLA § 121(e)(1), 42 U.S.C. § 9621(e)(1) (similar).

In sum, the CD (1) uses a RCRA permit with RCRA appeal provisions, (2) requires the Region to select the remedy using *sui generis* criteria that differ from the CERCLA remedy selection criteria, and (3) authorizes GE to implement the remedy pursuant to CERCLA, including its limited preemption of "permit" requirements, and its requirement to obey all other state and federal law.

III. The selected remedy; permanent and temporary storage facilities.

The remedy documents are issued by the Region. In June 2014, after years of evaluation, the Region proposed a remedy for the Rest of River. This was done in three documents: a "Statement of Basis," a "Comparative Analysis," and the Permit Modification (issued in draft form in June 2014 and then finalized in October 2016 after notice and comment and dispute resolution). The Comparative Analysis (Exhibit 4) and Statement of Basis (Exhibit 5) describe the various remedial alternatives and evaluate them according to the criteria from the Reissued RCRA Permit. *See, e.g.*, Exhibit 4 (Comparative Analysis), at 59-76; Exhibit 5 (Statement of Basis), at 25-39. The final Permit Modification does not evaluate remedial alternatives; instead it simply describes the "performance standards" GE must achieve and the "corrective measures" GE must undertake. It explicitly requires responses "in accordance with Sections 3004(u), 3004(v), and 3005(c) of RCRA." Exhibit 1 (Permit Modification), at 1.

Summary of selected remedy. The selected remedy is massive in scope. It will require excavation and capping of 298 acres of riverbed, impoundments and backwaters. Exhibit 5 (Statement of Basis), at 24. Another 45 acres of floodplain will also be excavated. *Id.* Nearly 1 million cubic yards of material will be removed. *Id.* The most contaminated areas are certain "reaches" of the river (Reaches 5-8) and adjacent "backwaters" located in Pittsfield and in Lenox, Lee and Great Barrington, three municipalities that are part of the Committee. Cleaning up just these portions of the river is expected to take approximately 13 years to implement. *Id.* at 12. Notwithstanding the scale of the cleanup, significant contamination will remain after GE is finished with active remediation. For example, the water in the river will not be remotely safe for human consumption, and the PCB concentrations in fish are expected to remain at more than 20 times the level the Region deems safe. *See* Exhibit 1 (Permit Modification), at 15; Exhibit 5

(Statement of Basis) at 29. The concentration of PCBs in some exposed sediments will be nearly 50 ppm – a number the Region admits is "a significantly elevated concentration that results in substantial risk to the environment." Exhibit 2 (Responsiveness Summary) at 106; *see also* Exhibit 1 (Permit Modification), at 22 (50 ppm cleanup standard). Concentrations in some floodplain soils at the end of cleanup may be even higher – up to 242 ppm. *See* Exhibit 1 (Permit Modification), at Table 1.

Disposal facilities, permanent and temporary. Under the Region's selected remedy, all of this waste removed from the river and surrounding areas is to be permanently stored at an "existing" licensed landfill facility – which is to say that all PCB contamination will be sent not just off-site, but outside Massachusetts and Connecticut, since as far as the Committee is aware there are no "existing" facilities in these states that accept PCB waste. *See* Exhibit 1 (Permit Modification), at 51.

The Region evaluated GE's proposal to construct a new, permanent (and purportedly "on-site") disposal facilities at three possible locations in Lee (one being immediately across the river from Lenox) and Great Barrington. *See* Exhibit 5 (Statement of Basis), at 26.[6] These locations are uncontaminated and between several hundred and more than 1,000 feet from the river; two of them are located in densely populated villages. After careful consideration, the Region appropriately rejected this proposal.[7] Its reasons for doing so included Massachusetts state law and state and community opposition. The Region noted that "the availability of on-site

[6] The Region's Comparative Analysis also states that all three proposed on-site disposal facilities "would be 'on-site' activities for purposes of the permit exemption set forth in CERCLA § 121(e)." Exhibit 4, at 74.

[7] If this portion of the Region's decision is overturned or remanded by the Board in response to a petition by GE and/or others, this outcome would represent a serious injury to the Committee members' interests, and the Committee would expect to seek to defend offsite disposal in further proceedings.

disposal facilities may be limited by opposition from state and local officials" and by "regulatory issues" – including "issues" arising out of the "Massachusetts Hazardous Waste Facility Site Safety Council Regulations."[8] Exhibit 5 (Statement of Basis), at 38. Notably, this is a reference to regulations issued under the Siting Act – *i.e.*, the very same statute that the Region contends is inapplicable with respect to the *temporary* storage facility it has required and that is at issue here.

That temporary facility is a dewatering and transfer facility GE must build and operate next to the river – *i.e.*, "centralized temporary location(s) for contaminated materials processing and transfer." Exhibit 1 (Permit Modification), at 65. The Permit Modification further requires GE to develop "construction plans" for such a centralized facility (or facilities), and to develop a "process to coordinate with affected communities" about its "operation." *Id.* at 66. Although the Permit Modification does not specify a location, the most likely location for these temporary facilities is somewhere in Lee or Lenox and in Great Barrington, since these are areas where significant dredging will occur. All three towns are members of the Committee.

IV. GE's impact on Berkshire County.

GE once employed some 13,000 people in Pittsfield, which at the time was more than a quarter of the city's entire population. Now GE has closed the facility and the economy has shifted its focus to tourism; despite this shift, Berkshire County remains one of the poorest

[8] The Region had several other reasons for rejecting GE's proposal for on-site permanent storage. For example, the Region found it preferable to consolidate contamination in existing landfills, rather than to create a new one. It also found that GE's preferred "on-site" landfills fail to meet certain TSCA criteria for PCB landfills, and/or would be located in certain important and sensitive habitats (known as ACECs, or areas of critical environmental concern) where state law prohibits new hazardous waste facilities. *See* Exhibit 5 (Statement of Basis), at 38; Exhibit 4 (Comparative Analysis), at 63, 70, 74; Exhibit 2 (Response to Comments) at 239. Massachusetts submitted a comment explicitly concurring in the Region's determination that state and community opposition made on-site permanent disposal infeasible. *See* Exhibit 2 (Response to Comments), at 265.

counties in Massachusetts.[9] GE left behind hundreds of thousands pounds of PCBs that are, to this day, still in the Housatonic River.[10] Concentrations of PCBs in the "Rest of River" are many times the level deemed safe by the Region, and have been for decades.[11] For almost 40 years, no one has been allowed to eat fish from the river, and sediment in the river and on the floodplain has been unsafe for recreational use; for almost 20 years active remediation has been occurring at literally dozens of locations on or near the river, including residential properties in several communities. Many adults in Berkshire County cannot remember a time when GE was not cleaning up the river.

A few of the impacts to date. As the Region acknowledges, Berkshire County "has already endured decades of impacts from GE's contamination." Exhibit 2 (Response to Comments), at 265. Moreover, the cleanups that have taken place so far – which are smaller in scope than the Rest of River cleanup – have already been massively disruptive. Well over 100 residential properties have been or will be cleaned up. More than 1 million gallons of "non-aqueous phase liquid" – a/k/a "contaminated slime" – have been removed from groundwater; additional NAPL continues to be pumped out and removed from multiple locations, a process

[9] *See* https://en.wikipedia.org/wiki/List_of_Massachusetts_locations_by_per_capita_income. The data aggregated in this Wikipedia entry are from the U.S. Census Bureau.

[10] The Region's website on the Housatonic states that, although estimates vary, there may be nearly 600,000 pounds of PCBs in the river. https://www.epa.gov/ge-housatonic/understanding-pcb-risks-ge-pittsfieldhousatonic-river-site. More concretely, one remedial alternative evaluated by the Region would have removed an estimated 100,000 pounds of PCBs from the river – and still would have left significant contamination behind. *See, e.g.*, Exhibit 5 (Statement of Basis), at 21.

[11] The site investigation showed spot concentrations of PCBs as high as 600 ppm in Woods Pond. *See* Exhibit 12 (Facility Investigation Report), at 4-20. In fact, the river is so contaminated that some interim goals have been set well above protective levels. For example, the interim goal for fish tissue is some 20 times the level deemed protective ($1x10^{-5}$) by the Region. *See* Exhibit 1 (Permit Modification), at 15. Similarly, the Region admits that the remedy will never come close to meeting the water quality criterion established by EPA for human consumption of water. *Id.* at C-1.

that will go on for decades. Well over 250,000 cubic yards of contaminated material have already been dug up and removed from the upper reaches of the river and nearby areas.[12]

The "Rest of River" impacts to come. The Committee supports most of the Rest of River remedy selected by the Region. However, it should be clear that this cleanup will have severe and long-lasting impacts. For example, the remedy is expected to involve more than 150,000 truck trips, and to create numerous unsightly construction areas in which recreational use would be forbidden. *See* Exhibit 2 (Response to Comments), at 20. As the Region has acknowledged, albeit with understatement, "[a]esthetically, the presence of heavy construction equipment and cleared or disturbed areas would detract from the visually undisturbed nature of the area." Exhibit 10 (Socioeconomic Report), at 24. Much of the river in Berkshire County will be dredged using barges and other heavy equipment. Some highly contaminated areas, including exceptional scenic places like Woods Pond (see photograph below, at 33) will be dredged, artificially deepened, and then entirely covered with an engineered cap. This active construction phase will take approximately 13 years, beginning only once GE exhausts its inevitable appeals, to the Board and the First Circuit – likely postponing the ending of active remediation beyond the lifetimes of thousands of ordinary people who cherish living in this beautiful area. *See* Exhibit 5 (Statement of Basis) at 24.

V. The Committee's comments on the Siting Act and on GE's permanent duties; the Region's responses.

The Siting Act. The Massachusetts Hazardous Waste Facilities Siting Act was enacted in 1980 to enable the development of hazardous waste facilities in Massachusetts – primarily by

[12] The cleanup statistics in this paragraph are from the Region's website. *See* https://www.epa.gov/ge-housatonic/cleaning-housatonic#WhatProgress, and https://www.epa.gov/ge-housatonic/floodplain-properties-ge-pittsfieldhousatonic-river-site.

requiring developers to negotiate a siting agreement with host communities and to pay compensation to these communities for the socioeconomic impacts of the facility. *Warren v. Hazardous Waste Facility Site Safety Council*, 466 N.E.2d 102, 105 (Mass. 1984); *see also* 990 Code Mass. Reg. 1.01.

As amended in 1990, 1998, and 2003, the legislation applies to practically any "site" where hazardous waste is located, even if the waste is merely stored, stabilized or dewatered there. *See* Mass. G.L. ch. 21D, § 1 (defining facility to include any "site … for the storage, treatment, dewatering, refining, … stabilization, solidification, disposal or other processes where hazardous wastes can be stored, treated or disposed of"). The statute has an exception for facilities that are storing, treating, processing or disposing of hazardous waste "produced exclusively on-site," but the exception does not apply to any generator who, as here, will be disposing hazardous waste "into or on the land." Mass. G.L. ch. 21D, § 18. The definition of "disposal" is broad, has no temporal limitation, and includes any "deposit" or "placing" of hazardous waste on any land "so that such hazardous waste . . . *may* enter the environment . . ." Mass. G.L. ch. 21D, § 2 (emphasis added). In any event, the exception defines "on-site" to mean a "geographically contiguous property," *id.* § 18, which by all indications would not be the case with the "centralized" temporary facilities at issue here. State regulations also contain exceptions for remedial action "conducted by the Department of Environmental Quality Engineering [now DEP] or a contractor authorized by the Department of Environmental Quality Engineering," 990 Code Mass. Reg. 1.02(2)(e) & (f), but this provision by its plain terms does

not apply to a remedial action like the present one, which will not be conducted by DEP or a DEP contractor.

The statutory process is centered on brokering a deal as quickly as possible. It begins when the developer submits to the state a notice of intent that contains a description of the waste, the site and the proposed facility. *Id.* § 7. The state has 15 days to decide whether the project is "feasible and deserving of state assistance." *Id.* This determination is based primarily on the need for the facility and the finances and qualifications of the developer. The developer then submits a preliminary impact report, describing the environmental and "social economic" impacts. *Id.* § 10.

At this point, the developer and the municipality have 60 days to reach a "siting agreement" – a binding contract by which the municipality agrees to accept the facility. This siting agreement "shall specify," among other things, the "compensation, services and special benefits" to be provided to the municipality by the developer, as well as "services and benefits" to be provided to the municipality by state agencies. *Id.* §§ 12, 15. In addition, the siting agreement "may" include "provisions for direct monetary payments from the developer to the host community," over and above those required for "demonstrable adverse impacts." *Id.* § 12. If after 60 days the parties are at impasse, the developer or the municipality can ask the state to require the municipality and the developer to submit to binding arbitration; arbitrators are to be appointed within 30 days, and to render a decision within 45 days after appointment. *Id.* § 15.

The Committee raises the Siting Act issue; the Region's response. In its comment letter, the Committee asked that the Region recognize that the Siting Act applies to the "centralized, temporary" hazardous waste facilities, and that federal law does not preempt the Siting Act. Specifically, the Committee argued that (1) the Siting Act is not a "permit"

requirement within the meaning of CERCLA 121(e) and thus falls within the CERCLA provisions that "expressly preserve [] other law," (2) the Siting Act may be applicable under CERCLA as an ARAR, and (3) the Region is not entitled to rely on CERCLA preemption because RCRA was the remedial scheme "actually … used to issue the remedy." *See* Exhibit 8 (comment letter), at Attachment A.

In its response, the Region argued that "the provisions of [the Siting Act] do not include substantive standards of control" – which apparently means that EPA considers the Siting Act to be a "permit" preempted by CERCLA Exhibit 2, at 297. The Region also rejected the Committee's argument that the Siting Act is an ARAR. The Region did not address the Committee's contention that CERCLA permit preemption does not apply at all because the remedy was not selected under CERCLA.

GE's monitoring and maintenance obligations. Another issue the Committee raised in its comment letter was a request that language be inserted into the Permit Modification making GE "responsible for maintaining the performance standards or remediating contamination in perpetuity." *See* Exhibit 8 (comment letter), at 9-10. This request was based on the likelihood that the river will change course and expose contaminated areas, the ever-increasing risk of more frequent and intense storms, the possibility of political changes affecting the Region's authority, and the amount of PCBs to be left behind after the end of active remediation. *Id.*

In its response to this comment, the Region conceded that "inspection, monitoring and maintenance of caps is … critical to ensure that the remedy remains protective of human health and the environment," and did not contend that there might be a point in the future where GE's cap maintenance obligations could reasonably be allowed to terminate. *See* Exhibit 2 (Response to Comments), at 200. Nonetheless, the Region declined to impose any perpetual requirements

on GE. Instead, it observed that "there is no termination date for these requirements in the Final Permit Modification," *id.*, yet it still retained discretion to terminate maintenance obligations.

VI. The dispute resolution process.

GE objected to the remedy selected in the Permit Modification, on the ground (among others) that the Region should have opted for permanent disposal at proposed new (and purportedly "on-site") facilities in Lenox and Great Barrington. GE's position is based almost entirely on cost: creating new on-site PCB dumps operated by GE and sheltered (in theory) from state regulation by CERCLA is cheaper than using existing facilities operated elsewhere in conformity with all applicable state and local laws. As authorized by the CD, GE sought formal dispute resolution before a neutral official from Region 1. Exhibit 3 (CD), ¶ 136(b), at 291; *see also id.* ¶ 22(o), at 94. The neutral official (Carl Dierker, the Region's general counsel) rejected all of GE's objections, and sustained the permit modification *in toto*. The Committee did not participate in dispute resolution, because it is not allowed to do so under the CD.

Standard of Review

The Board's power to grant review "should be only sparingly exercised" and "most permit conditions should be finally determined at the [permit issuer's] level." *In re Town of Newmarket*, 2013 EPA App. LEXIS 48, *3-7 (EAB Dec. 2, 2013). However, review is appropriately exercised where the Region has come to a "conclusion of law that is clearly erroneous." 40 C.F.R. 124.19(a)(4). An erroneous construction of a statute is a clear error warranting relief. *In re ArcelorMittal Cleveland Inc.*, 15 E.A.D. 611, 628-29 (EAB 2012). The Board also has authority to review matters committed to the Region's discretion. 40 C.F.R. 124.19(a)(4); *see also City of Pittsfield v. EPA*, 614 F.3d 7, 12 (1st Cir. 2010) (describing this standard as review for "abuse of discretion").

Argument

I. CERCLA does not preempt the Siting Act.

The Region and GE incorrectly contend that CERCLA § 121(e)(1) preempts the Siting Act. Section 121(e)(1) provides that no "permits" are required for the portion of any remedial action conducted entirely onsite if the remedy is selected and carried out in compliance with CERCLA. This legal determination was clearly erroneous.

A. The Siting Act is not preempted because it is not a "permit"

It is a cardinal principal of environmental law that state law is respected and preserved. RCRA – the statute the Region actually used to issue the remedy – expressly preserves state law.[13] CERCLA also contains three provisions expressly preserving state law. Section 114(a) of CERCLA states: "Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). And CERCLA § 302(d) provides in relevant part: "Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases

[13] 42 U.S.C. § 6929 ("Nothing in this title [RCRA] shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations."); *Blue Circle Cement v. Bd. of County Comm'rs*, 27 F.3d 1499, 1504 (10th Cir. 1994) ("Congress explicitly intended not to foreclose state and local oversight of hazardous waste management more strict than federal requirements."). EPA has previously acknowledged in its approvals of RCRA responses that it is appropriate to require compliance with state and municipal laws. *See, e.g.*, *North Haven Planning & Zoning Com. v. Upjohn Co.*, 921 F.2d 27, 27-28 (2d Cir. 1990) (per curiam) (sustaining municipal zoning board's jurisdiction over RCRA plan to remediate substantial hazardous sludge site: "Consistent with the view that the approval was thus not intended to preempt local zoning regulations, EPA and DEP responded to public comments and questions by stating that if the Connecticut courts upheld a ruling that Upjohn's current plan would violate zoning regulations, Upjohn would have to submit to EPA and DEP a new plan for review and approval."); *see also* 40 C.F.R. § 258.56 (in assessing corrective measures, facility operator must address "State or local permit requirements or other environmental or public health requirements that may substantially affect implementation of the remedy").

of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). Finally, section 310(h) provides in relevant part: "This Act does not affect or otherwise impair the rights of any person under Federal, State, or common law, except with respect to the timing of review as provided in section 113(h)." 42 U.S.C. § 9659(h).

This respect for state law is a key feature of federal environmental law. As Senator George Mitchell stated when section 121 was added to CERCLA in 1986, "None of our other environmental statutes, with a limited exception in the Clean Air Act, are preemptive. This is an issue of great importance to many of us, and we have stated repeatedly in this bill [to enact CERCLA § 121] that there is no preemption. Any other conclusion is wholly without foundation." 132 Cong. Rec. S17,212 (Oct. 17, 1986). The Supreme Court and lower courts have zealously enforced this cardinal principle of environmental law.[14]

Moreover, even without the express provisions preserving state law in RCRA, CERCLA and virtually all federal environmental statutes, it is a basic rule that federal preemption of more stringent state remedies is disfavored, and that preemption clauses must therefore be read narrowly. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001) ("the historic police powers of the States are not to be superseded by [federal law] unless that [is] the clear and manifest purpose of Congress.") (quotation marks omitted); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("we have long presumed that Congress does not cavalierly pre-empt state-law

[14] *See, e.g.*, *International Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987) ("courts should not lightly infer" that state or local law has been preempted by federal environmental law; Clean Water Act preserves state-law remedies against water pollution); *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 449 (2005) (applying presumption against preemption, FIFRA does not preempt state-law claims against pesticide manufacturers); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 195 (3d Cir. 2013) (Clean Air Act); *see also* William D. Ruckelshaus & William K Reilly, Why Obama Is Right on Clean Energy, *N.Y. Times* (Sept. 25, 2016), at A27 (former EPA Administrators: respect for state law "has defined virtually all … public health legislation that the E.P.A. administers.").

causes of action," an approach that is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety"). An additional consideration is that section 121 is a CERCLA amendment that, as interpreted by EPA, threatens to work an implied repeal of the savings clause in the original enactment – another outcome which is "disfavored." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quotation marks omitted).

Here, however, by construing CERLCA to preempt the Siting Act, the Region has stood the presumption against preemption on its head. Instead of reading section 121(e)(1) narrowly, the Region determined that any law that is not an ARAR under CERCLA § 121(d)(2)(a) is, *ipso facto,* a permit, and is therefore preempted by section 121(e)(1). *See* Exhibit 2 (Response to Comments), at 297. This conclusion of law was a clear error.

To begin with, this construction of the sections 121(d) and (e) has been specifically rejected by the courts. In *United States v. Colorado*, 990 F.2d 1565, 1582 (10th Cir. 1993), a leading case construing section 121(e)(1), the Tenth Circuit held that this provision did not preempt a state-law duty to submit a site cleanup plan to state authorities, even though the site was already subject to a CERCLA cleanup supervised by EPA. *Id.* at 1582. The state-law duty to submit a cleanup plan was not an ARAR, but the Tenth Circuit still found that it was not a permit preempted by section 121(e)(1) because, as the Court ruled, "nothing in CERCLA supports the contention that Congress intended the ARAR's provision to be the *exclusive* means of state involvement in hazardous waste cleanup." *Colorado*, 990 F.2d at 1581 (emphasis in

original). Thus, permits and ARARs are not the entire universe of state laws; some state laws are neither and thus are not preempted.

Moreover, when read with the presumption against preemption in mind – or even when just read literally – Section 121(e)(1) does not preempt the Siting Act. In plain terms, a "permit" is a document authorizing someone to do something. Merriam-Webster defines a "permit" as "a written warrant or license granted by one having authority," such as "a gun permit." *See* http://www.merriam-webster.com/dictionary/permit. There is nothing here to suggest that every law that is not an ARAR is a permit. Contrary to the Region's decision here, many laws that apply to a cleanup site are neither ARARs nor permits – rules like workers compensation laws, speed limits, building codes, and the minimum wage. The Region has never contended that those rules are preempted, regardless of whether they are ARARs, and regardless of whether they make cleanup more costly or difficult. Instead of bypassing "permits" in section 121(e)(1), Congress could easily have said that any law that is not an ARAR is preempted; that would have been a simple statement added to section 121(d). Congress did not do so. The Region's attempt to see every law as either an ARAR or a permit is plainly mistaken.

The Region may have been relying on its own guidance manual, which describes permits as "administrative requirements" or "mechanisms that facilitate substantive requirements of a statute or regulation." *CERCLA Compliance with Other Laws Manual: Interim Final*, at 1-11 (Aug. 8, 1988). These "administrative" requirements are contrasted in the *Manual* with "substantive" requirements, which "pertain directly to actions or conditions in the environment." *Id.* But the Siting Act is not a permit under this framework either. The *Manual* is clear that a permit is *not* the underlying substantive obligation – on the contrary, the *Manual* states that "Superfund cleanups will comply with all the substantive requirements that permits enforce." *Id.*

at 1-12; *see also* Exhibit 2, at 333 ("the Region will ensure compliance with the substance of state and local bylaws, regulations, and permit requirements for on-site remedial action"). An example provided in the *Manual* is that section 121(e)(1) preempts the obligation to obtain a NPDES permit, but not the underlying obligation under state and federal law to limit discharges of pollutants. *Id.* at 3-7.

The Siting Act is no different. It has a core substantive rule based on a clear social policy: hazardous waste facilities cause damage to their host communities and therefore the operator should have to pay these costs instead of imposing the externality on the towns. The statute's requirement of a structured negotiation backed up by an arbitration does not obscure this basic compensatory duty – and certainly does not, in any event, resemble what anyone would call a "permit."[15] A state-law substantive duty to negotiate and pay is not remotely "administrative."[16]

And even if the *Manual* did support the Region's ARAR/permit dichotomy, the Board should not follow it here. An "interim" compliance manual is not owed *Chevron* deference,[17] and neither is the *Manual* a persuasive reading of the law: it expands on the plain meaning of

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[15] Ironically, the only the Siting Act requirement that EPA *has* preserved in some form are the procedural ones, and not the Siting Act's substantive duty to pay. The Permit Modification requires GE to consult with municipalities on "the operation of temporary contaminated materials handling facilities." Exhibit 2 (Response to Comments), at 343; Exhibit 1, at 66.

[16] The duty to pay compensation to communities hosting a hazardous waste facility is conceptually similar to other remedies that are not preempted by CERCLA. *See, e.g.*, *New York v. Hickey's Carting, Inc.*, 380 F. Supp. 2d 108, 117 (E.D.N.Y. 2005) (attempt by state government to use state-law remedies to recover cleanup-related costs incurred by state was not preempted by CERCLA, even though these remedies were potentially broader than CERCLA cost-recovery remedies).

[17] The Supreme Court has made it clear that agency manuals are not entitled to *Chevron* deference. "Interpretations such as those … contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law … do not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); *see also In re ArcelorMittal Cleveland Inc.*, 15 E.A.D. 611, 628-629 (EAB 2012) (relying on *Christensen*).

"permit," it does not cite the presumption against preemption that was so important to the legislature that enacted section 121, and it also does not cite any of the provisions in CERCLA that expressly embrace this presumption and preserve state law. Moreover, the *Manual* also reads section 121(e) much more narrowly than *Colorado*: the state-law duty to submit a cleanup plan in *Colorado* was about as procedural or "administrative" as a rule can be possibly be, yet the court held that it was not a preempted "permit" all the same, and rejected the Region's argument to the contrary. To the extent the *Manual* defines a "permit" as "everything that is not an ARAR," the *Manual* contradicts both *Colorado* and common sense, and is plainly wrong.

Alternatively, even if the Region's broad interpretation of "permit" were correct, the Region still should have listed the Siting Act as an ARAR, which section 121(d) expressly preserves. An ARAR is "any promulgated standard, *requirement*, criteria or limitation under a State environmental *or facility siting law*." 42 U.S.C. 9621(d)(2)(A)(ii) (emphases added).[18] The Siting Act is a "facility siting law," and it imposes "requirements" – which means that these requirements are expressly preserved by section 121(d)(2)(A). EPA was also clearly aware of the Siting Act – in fact it relied on the Siting Act as one reason for rejecting permanent on-site disposal. Exhibit 5 (Statement of Basis), at 38. Yet it ignored the clear reference to "facility siting law" in the ARARs statute when it rejected applying the Siting Act to the temporary hazardous waste facility. [19]

[18] The Supreme Court has held that "'standards' and 'requirements' are separate categories" when they are conjoined by the words "or." *Hancock v. Train*, 426 U.S. 167, 186 n.47 (1976) (construing savings clause of Clean Air Act).

[19] Under the Siting Act, a notice of intent is submitted to the Massachusetts Department of Environmental Protection and to an entity called the "hazardous waste facility site safety council," Mass. G.L. ch. 21D, §§ 2, 7, which issues a declaration signing off on siting agreements, *id.* § 12. Although this council used to be active, as far as the Committee is aware there are no members currently appointed to it, apparently due to a lack of hazardous waste facility proposals. Presumably upon submission of a notice of intent to DEP, the state would act promptly to comply with its own statutory duties by appointing members.

In sum, the Siting Act imposes a substantive duty on GE to pay for the socioeconomic harms caused by its "centralized temporary location(s) for contaminated materials processing and transfer," and this substantive duty is not a "permit" under the plain meaning of the term, under the narrow reading of 121(e)(1) required by *Colorado* and other preemption case law, and even under the Region's guidance *Manual*. The Region's determination to the contrary was clear legal error.

B. The Region was not authorized to preempt any permits at this cleanup, because the cleanup was not selected in compliance with CERCLA.

Even if the Siting Act were somehow counted as a "permit" and not deemed an ARAR, it still should not be preempted by CERCLA because the remedy here was not selected using CERCLA. The Region and GE specifically bargained for a hybrid creature that is primarily a RCRA cleanup, and thus neither the Region nor GE may use CERCLA to preempt state law.

Specifically, the only authority the Region even arguably possesses to preempt the Siting Act ultimately derives from CERCLA § 121(e)(1). But section 121(e)(1) applies only "where such remedial action is selected and carried out in compliance with this section." In turn, section 121(a) requires that CERCLA cleanups be selected and carried out "in accordance with … , to the extent practicable, the national contingency plan." In other words, because section 121(e)(1) gives the Region preemptive powers not found in any other cleanup statute (most notably RCRA), Congress has required that this power be deployed only where the cleanup is selected

Alternatively, if EPA were somehow correct that the procedural aspects of the Siting Act are a permit, and assuming for the moment that CERCLA applies, then by EPA's own practice, under CERCLA section 121(e)(1) a mere piece of paper from the siting council would not be required, yet the substantive obligation to comply with the Siting Act requirements would remain. *See supra*, at 21.

and carried out in accordance with the NCP's many requirements or where the agency makes a finding of impracticability.[20]

That did not occur here. To begin with, the NCP requires a ROD, and none was issued here. *See* 40 C.F.R. § 300.430(f)(4)(i) (the Region "shall make the final remedy selection decision and document that decision in the ROD"). Instead, the Region issued a Permit Modification under RCRA and explicitly required responses "in accordance with" RCRA, not CERCLA;[21] it did so specifically to allow GE to take an immediate appeal that would have been impossible with a ROD. GE's right to challenge the remedy has already delayed the remedy by two years, with much more delay to come. This fundamental departure from CERCLA procedure is significant, because the main reason CERCLA defers remedy challenges is to expedite cleanup – and this also happens to be the rationale for CERCLA's permit preemption. *See Compliance with Other Laws Manual* at 1-11 ("This permit exemption allows the response action to proceed in an expeditious manner, free from potential lengthy delays of approval by administrative bodies."). When the Region deliberately opts into a slower, non-CERCLA remedy selection procedure, it cannot simultaneously lay claim to CERCLA's extraordinary powers to expedite cleanup by preempting permits.

Moreover, the Region and GE have deliberately modified the NCP remedy-selection criteria. The NCP requires the Region to use nine criteria to select CERCLA remedies; the

[20] Notably, the requirement to act "in accordance with" the NCP in "carrying out" and "selecting" the remedy appears to require a stricter adhere to CERCLA than other parts of CERCLA that similarly attach strings to various exercises of EPA's authority. *Compare* CERCLA § 107(a), 42 U.S.C. 9607(a) (authorizing recovery of costs where work in question was "not inconsistent with" the NCP); CERCLA § 121(d)(1), 42 U.S.C. § 9621(d)(1) (requiring EPA to protect human health in any cleanup "selected under this section *or otherwise required or agreed to* by [EPA] under this chapter") (emphasis added).

[21] The Permit Modification requires responses "in accordance with Sections 3004(u), 3004(v), and 3005(c) of RCRA." Exhibit 1 (Permit Modification), at 1.

permit similarly requires the Region to select the Housatonic remedy using nine criteria. But the permit criteria are different from the NCP criteria in two key respects:

- *State and community acceptance.* Under the NCP, "state acceptance" and "community acceptance" are two of the nine remedy selection criteria – but they do not appear as standalone criteria under the permit. GE and the Region disagree about whether the Region may properly consider state and community views notwithstanding this absence; the Region has correctly pointed out that other parts of the permit and the CD authorize it to take state and local views into account.[22] But that there is even a *possibility* that the Region is required to select a remedy without giving the usual weight to state and community views is a significant departure from CERCLA – and shows why permit preemption is inappropriate here. The Region has explicitly defended permit preemption by arguing that consideration of state and community views in remedy selection creates a process that is a rough substitute for the permit procedures preempted by section 121(e). *See, e.g.*, 55 Fed. Reg. 8,666, at 8,756 (March 8, 1990) (defending CERCLA preemption of and state and local processes because "CERCLA has its own comparable procedures for remedy selection *and state and community involvement*") (emphasis added). To the extent state and local views cannot be granted their formal, customary weight in a standard CERCLA remedy selection process, it is inappropriate to deploy CERCLA to preempt attempts by state and local officials to pursue these same policies through the ordinary channels granted by state law.

[22] In its response to comments, EPA cites to guidance on selecting a RCRA corrective action – not guidance on selecting a CERCLA remedy – to defend its decision to take state and local views into account in selecting the remedy. Exhibit 2, at 259, 263.

- *Time to protectiveness.* The NCP requires the Region to evaluate remedies in terms of time to protectiveness, but the permit does not. Specifically, both the NCP and the permit criteria require the Region to evaluate "short-term effectiveness." Exhibit 7 (Reissued RCRA Permit), ¶ G.2.d, at 22; *compare* 40 C.F.R. 300.430(e)(9)(iii)(E). But, critically, the NCP defines short-term effectiveness to require an evaluation of the "[t]ime until protection is achieved" – and this factor was deliberately omitted from the permit version of this criterion, and not actually considered in the Region's remedy selection documents. *See* Exhibit 4 (Comparative Analysis), at 66-73. Instead, the permit requires an evaluation of time to achieving "interim media protection goals," *see* Exhibit 7 (Reissued RCRA Permit), ¶ G.2.b, at 21 – but many of these "interim" goals fall well short of what would be considered protective under the NCP.[23] All this is significant, because a refusal to evaluate remedies in terms of time to true protectiveness tends to produce a bias in favor of passive (cheaper) options that reduce contamination more gradually, and a bias against more extensive removal of contaminated sediments. Unsurprisingly, the remedy the Region ultimately selected leaves high concentrations of PCBs in sediment, and as a result it will not achieve PCB concentrations representing true protectiveness for many years, if ever. Exhibit 2 (Responsiveness Summary) at 106. And once again, this

[23] More specifically, the NCP defines protectiveness in terms of "remediation goals," which require a reduction of cancer risks to below $1x10^{-4}$. *See* 40 C.F.R. § 430(e)(9)(iii)(A) (requiring EPA to evaluate remedial alternatives in terms of achieving remediation goals); § 300.430(e)(2)(i)(A)(2) (cancer risk standard for remediation goals). But IMPGs in theory and in fact set the target at a higher risk level than remediation goals, which is a term nowhere used in the permit. *See* Exhibit 9 (Revised Corrective Measures Study), at Table 2-2 (showing that $1x10^{-4.}$ threshold is passed at much lower fish tissue concentrations). To be fair to EPA, it should be emphasized that the remedy *is* protective, at least in theory: the Permit Modification requires GE to attain IMPGs *and* another benchmark called "Performance Standards." The Performance Standards are more ambitious than IMPGs and as protective as NCP remediation goals. But these Performance Standards will not be achieved by the selected remedy for many, many years, and were not used to evaluate remedial alternatives in any way.

> decision to de-emphasize CERCLA's speed requirement is directly related to the Region's CERCLA authority to preempt state permits, since permit preemption is a shortcut Congress granted to achieve the same goal of reducing the time to protectiveness. Put differently, where the Region has decided at the outset not to follow CERCLA's preference for speedy remedies, the Region should not be allowed to use preemption of state law to "expedite" this same (slow) remedy.

These, then, are some of the Region's most significant departures from the NCP process required under section 121 – departures that show that this cleanup was selected using procedures and criteria partially designed by GE to try to slow the process down, to make it less responsive to community concerns, and to make the remedy less extensive than a regular CERCLA cleanup. These go-slow/do-less departures are significant because the whole point of permit preemption is to *expedite* large cleanups, on the theory that CERCLA cleanups are exigent, and that community views have already been fully considered in the remedy selection process. In no way has the Region selected this remedy "in accordance with" either the letter or the spirit of CERCLA or the NCP; the Region has no call to use CERCLA's extraordinary powers to expedite this (deliberately slow) cleanup to preempt permit requirements like the Siting Act.

Nor does the language in section 121(a) that requires the Region to follow the NCP "to the extent practicable" authorize the Region's deliberate departures from the NCP. To begin with, the Region has not even made this argument – instead, its responsiveness summary simply ignored the Committee's comment that the remedy was not governed by CERCLA. Exhibit 2, at

297.[24] This silence from the Region is damning, because an "impracticability" escape hatch requires a contemporaneous finding that compliance with the relevant NCP provisions was impractical. *See, e.g.*, *Goldings v. Winn*, 383 F.3d 17, 23 (1st Cir. 2004) (where statute required that prisoners spend the last part of their sentences under transitional conditions "to the extent practicable," agency did not have discretion "to disregard that duty," unless it specifically found that doing so was impractical in a particular case: "a qualified obligation differs from a grant of discretion"). As far as the Committee is aware, no such findings were ever made – or likely could have been made, given the significance of the above departures from the NCP.

Finally, the incorporation of the "no permits required" language into the CD does not help the Region and GE either. As the CD itself recognized, the power of the district court that entered the CD to preempt state and local permits was based entirely on section 121(e)(1); the CD cannot by fiat have bestowed more power on the court, the Region, or GE. *See* Exhibit 3 (CD) ¶ 9.a (preemption authority is "[a]s provided" in CERCLA § 121(e)(1)); *see also Restatement 2d of Judgments* § 12 (parties are not bound by judgments entered without jurisdiction) & *id.* ch. 4 (non-parties generally not bound by a judgment).[25] And here again, the Region's neutral official has already recognized this basic point, as has GE: "In carrying out my role under the CD, I fully agree with GE's statement … that '[i]t is axiomatic that the Region must act within the limits of its statutory authority, and any decision the Region makes that conflicts with its governing statute … is unlawful and cannot stand.'" Exhibit 6, at 3.

[24] In fact, Carl Dierker's dispute resolution decision appears to hedge its bets on whether RCRA or CERCLA applies, referring to the remedy as a "RCRA or Superfund cleanup." Exhibit 6, at 4.

[25] *See also* Exhibit 3 (CD) ¶ 189, at 376-77 ("Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law.").

In short, CERCLA's preemptive powers are dependent on the Region's use of CERCLA's remedy-selection obligations, which did not occur here.

C. The Siting Act is not preempted because the record does not disclose whether the centralized, temporary locations are "entirely onsite"

A final point on the Siting Act is that the record does not disclose the location of the centralized, temporary locations – these locations are apparently still to be determined.[26] This means in turn that it is impossible for the Region to determine whether these locations are "entirely onsite," as section 121(e)(1) explicitly requires. On this basis alone, the Permit Modification should be remanded to the Region for clarification and possible further appellate review on this point. *See* 40 CFR § 300.400(e)(1) (defining on-site as " areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action"); *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 304 (5th Cir. 2010) (an area ¼ mile from site did not meet this standard).

II. The Region should have required GE to conduct responses in perpetuity.

The remedy depends for its protectiveness on performing tasks that, realistically, are never going to go away. For example, GE is required to maintain caps over highly contaminated sediment, and to ensure that these caps are not covered by soil carried from exposed sediments in upstream areas that are also highly contaminated. Exhibit 1 (Permit Modification), at 27. As the river inevitably changes course and experiences more frequent/intense flooding due to climate change, contaminated sediments that are now considered isolated may become exposed, and caps will come under greater stress. And because this contamination is concentrated PCB

[26] *See* Exhibit 2 (Response to Comments), at 332 (comment requesting that local permitting requirements be obeyed in all uncontaminated areas where remediation operations occur).

contamination, which is much less biodegradable than most organic contamination, it will be present for centuries.[27] Region 2 faced precisely this situation when it required GE to clean up PCBs in the Hudson River, and as here the remedy involved permanent caps and a dynamic river environment. In these circumstances, Region 2 explicitly required GE to maintain the Hudson remedy in perpetuity: "The OM&M program for engineered caps shall ... continue in perpetuity." Exhibit 8 (Comment Letter), Attachment B, at 3-2. Region 2 also required GE to conduct monitoring "in perpetuity for all caps areas at intervals of 10 years." *Id.* at 3-2, 3-3.

But the Permit Modification and the other site documents take a different approach at the Housatonic: they do not require GE to continue maintaining protectiveness on a permanent basis. On the contrary, the CD authorizes the Region to issue a "certification of completion" terminating GE's obligations as soon as all Performance Standards are met; the only Performance Standard related to monitoring and maintenance is to "implement a ... program" of no specified duration. Exhibit 1 (Permit Modification), at 50 (monitoring and maintenance plan); Exhibit 3 (CD) ¶ 88, at 214 (certification of completion). The upshot is that, on the very first day that the remedy's Performance Standards have been met, however fleetingly, GE can try to walk away from the Site forever, including its monitoring and maintenance obligations. If EPA granted this request at any point, it is not clear what remedy the Committee would have to contest this decision, notwithstanding the near-certainty that any significant cap failure would

[27] Although the Committee is not aware of any estimate as to how fast PCBs will biodegrade beneath the caps, EPA and GE estimated that certain remediation alternatives would not achieve "interim" cleanup goals for PCBs for more than 250 years – which gives a sense of how long PCB contamination is likely to last in the river. *See, e.g.*, Exhibit 9 (Revised CMS), at 3-31. The selected remedy is supposed to achieve these interim goals much sooner, but this is only because the models assume the continuing integrity of the caps that cover up many of the most highly contaminated areas. Contamination under caps will presumably decay much more slowly than PCBs exposed to the environment.

cause GE abruptly to fall out of compliance with Performance Standards that were attained when the caps where intact.

The Committee appreciates that the Region has significant discretion here,[28] but given the remedy that the Region has now selected – *i.e.*, a complicated, cap-centric remedy that leaves behind a very durable contaminant at a highly dynamic river – preserving an "out" this open-ended was inappropriate. Region 1's only attempt to defend this approach is *not* to deny the complexity of the remedy or the environment, or to argue that there really will be a time when GE can simply let the caps fail. Instead, the Region announced its current view that "GE should be responsible for conducting monitoring for a very long period of time, if not in perpetuity," and that there "is no termination date set" for GE's obligations. Exhibit 2 (Response to Comments), at 233. In these fine words there is simply no guarantee that, through all the personnel turnover and political vicissitudes that may befall the Region decision-makers over a "very long period of time," Region 1 will require GE to maintain Performance Standards. Unlike Region 2 at the Hudson, Region 1 has insisted upon retaining a discretion to pull the plug that could never be reasonably exercised. This decision thus did not deny – yet also failed entirely to consider – the permanent need for GE to maintain the remedy, and was quintessentially arbitrary and capricious.

[28] Because EPA's decision on this point was discretionary, the standard that would be applied by a federal court is whether Region 1's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *i.e.*, whether the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 20-21 (1st Cir. 2012) (quotation marks omitted).

Conclusion

The Committee respectfully requests that the Board grant review of this petition, and that it remand the Permit Modification to the Region to require GE to comply with the Siting Act and to maintain the protectiveness of the remedy in perpetuity.

November 23, 2016

Respectfully submitted,

Housatonic Rest of River Municipal Committee

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(d)(iv), this Petition for Review complies with the word limit set by the Board. According to the word count function in Microsoft Word, this Petition contains 11,500 words or fewer.

/s/ Benjamin A. Krass

CERTIFICATE OF SERVICE

I certify that on November 23, 2016 I have sent a copy of this petition for review, together with all attachments, to the counsel listed below.

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