

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

In re: General Electric Company)	
)	
)	
2020 REVISED PERMIT MODIFICATION)	
TO 2016 REISSUED PERMIT ISSUED TO)	
GENERAL ELECTRIC COMPANY,)	
UNDER THE RESOURCE RECOVERY)	RCRA Appeal No. 21-01
AND CONSERVATION ACT, FOR)	
THE HOUSATONIC RIVER "REST OF)	
THE RIVER,")	
)	
Permit No. MAD002084093)	

**BRIEF OF AMICI CURIAE CITIZENS FOR PCB REMOVAL,
CITIZENS AGAINST THE PCB DUMP,
BERKSHIRE-LITCHFIELD ENVIRONMENTAL COUNCIL, and
SCHAGHTICOKE INDIAN TRIBE OF KENT**

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INTRODUCTION

Citizens for PCB Removal, Citizens Against the PCB Dump, the Berkshire-Litchfield Environmental Council, and the Schaghticoke Indian Tribe of Kent (“Amici”) submit this amicus curiae brief in opposition to the permit issued by EPA Region 1 in December 2020 for remediation of the PCBs in the “Rest” of the Housatonic River. Amici Citizens for PCB Removal, Citizens Against the PCB Dump, and the Berkshire-Litchfield Environmental Council strongly oppose the onsite disposal of PCBs in the proposed “Upland Disposal Facility” (“UDF”) because the proposed site is geologically unsuitable for disposal of PCBs, because the hydraulic pumping of PCBs up hundreds of feet to the UDF will not only destroy Woods Pond but result in perilous volatilization of PCBs, because it is inconsistent with the remedy chosen at other contaminated sediment sites and will re-victimize the citizens of Berkshire County with the unfair burden of PCB contamination, and because it is the product of an improper, unauthorized settlement negotiation from which the citizens of Berkshire County were excluded. Amici Schaghticoke Indian Tribe of Kent and Citizens for PCB Removal oppose the permit because it utterly fails to remove the PCBs from the Connecticut portions of the Housatonic River, including the stretches of the River where the Schaghticoke fish for food.

AMICI

Citizens for PCB Removal

Citizens for PCB Removal (CPR) was formed in 1997 as a grassroots organization of residential property owners when it was learned that General Electric had distributed PCB contaminated fill from its industrial facility to residential properties in Pittsfield, Massachusetts. As part of the Consent Decree for the GE-Pittsfield/Housatonic River Site of 2000, CPR was given a seat on the Citizens Coordinating Council (CCC) and that seat was held by the group’s Executive

Director, Barbara Cianfarini, from its creation until her death in November of 2019. As Mrs. Cianfarini described CPR:

“We are Community members whose initial involvement was generated out of concern, frustration, anger and alarm over the General Electric-generated PCB and other toxic chemical contamination in our own yards, gardens and homes, neighborhoods, school yards, and [state,] city, county and local parks. . . . We are the actual human beings who have lived with the problems of contamination for decades; some since birth, others for varying portions of our lives. We are the people who have worked with PCB’s or worked in PCB contaminated buildings or lived with PCB contaminated workers. We are the people who have lived in PCB contaminated homes, lived in PCB saturated neighborhoods, played as children in PCB contaminated parks, schoolyards, and the River, itself. We attended or had our children attend PCB contaminated schools. We have lived near PCB contaminated dumps and landfills, eaten fruits and vegetables out of PCB contaminated soils and fish from contaminated ponds and rivers. We did all this innocently, victims; unaware of the dangers around us, and have suffered the consequences of this pervasive, inescapable saturation of toxic chemical contamination.”

As CPR’s name implies, the group has always advocated for the **REMOVAL** of PCBs and other contaminants, not the covering up nor landfilling of large concentrated amounts in industrial sites, neighborhoods or riverbanks. By contrast, GE’s attitude from the beginning has been, “yes, the contamination is there, but it won’t hurt you, and will go away by itself, therefore we really don’t need to do anything about it.” The so-called “science” of what GE has presented for “the Rest of the River” represents a similar approach for the Housatonic River all the way to the ocean, and should be and must be completely rejected and discarded.

Citizens Against the PCB Dump

Citizens Against the PCB Dump is a grassroots organization comprised of citizens of the Town of Lee, including a number of Town Representatives. The group came together in response to the improper and unauthorized decision by the Lee Board of Selectmen to agree to a PCB dump in Lee, in exchange for a payment of \$25 million.

Prior to the settlement, hundreds of residents and numerous Town Representatives (Lee has a Town Representative form of government) expressed to the Board of Selectmen that they did not want a PCB dump in Lee for any amount of money. At the May 9, 2013 Town Meeting, the Selectmen assured the Town Representatives that no decision would be made without their input. In the late summer of 2018, the Lee Selectboard entered into numerous executive sessions and began conferring amongst themselves and with a committee which included four other towns called the Rest of River Committee. Those closed-door meetings expanded to include negotiations with GE and various other private and public entities.

On February 5, 2020, without the authority or knowledge of Town Meeting, the three Lee Selectboard voted in a closed meeting to authorize the Chair of the Lee Selectboard to sign on to an agreement with GE to place the dump in a residential area of Lee filled with homeowners, children, seniors and farmland, in exchange for \$25 million. Three laypersons made this decision against the will and without the knowledge of their 6,000 constituents. Among other things, this has left citizens fearful for the health of their families, and their long-term financial wellbeing. In this rural area, for many Lee constituents, the value of their home is main asset and their retirement plan. Studies have shown constituents, their home is their main asset and their retirement plan. If the PCB Dump is realized, property values in Lee will drop dramatically.

In October 2020, Lee's Town Representatives voted 37-8 to rescind the agreement with GE and go back to the negotiating table, but the Lee Board of Selectmen have refused to do so. In March of 2021, several of the members of the group filed suit seeking to have the Town's assent to the settlement agreement invalidated for violation of Massachusetts Open Meeting law and of the Town By-Laws. *See Jones, et al. v. Town of Lee*, Berkshire Superior Court Docket No. 21-49.

Berkshire-Litchfield Environmental Council

The Berkshire-Litchfield Environmental Council ("BLEC") is a 501(c)(3) non-profit organization that focuses on environmental issues affecting the Northwest Corner of Connecticut and the Berkshires region of Massachusetts. Founded in 1970, BLEC holds regular educational forums on emerging environmental issues with speakers from federal agencies and researchers from around the world. BLEC addresses diverse environmental subjects, such as a proposed/failed hydroelectric pumped storage power plant, water and air contamination, land preservation, zoning controls, protection of vernal pools, the environmental effects of radio frequency radiation associated with telecommunications infrastructure, and industrial-scale wind turbines. BLEC has previously spoken out on proposals for remediation of the Housatonic River, and is strongly opposed to the proposal to site a PCB dump along the banks of the Housatonic and to pump PCBs under pressure from the River into the dump, substantially increasing the risk of releasing PCBs into the air.

The Schaghticoke Indian Tribe of Kent

The Schaghticoke Indian Tribe is a Native American Tribe located in Kent, CT. The Schaghticoke Tribe has been a state recognized tribe for over 300 years. The Tribe's reservation, granted in 1736 by the General Assembly of the Colony of Connecticut, is one of the oldest in the United States. It encompasses roughly 400 acres between the western bank of the

Housatonic River and New York state. A national trail system, the Appalachian Trail, passes through their reservation. The Schaghticoke Tribe has previously spoken out to oppose the 2000 Consent Decree for cleanup of the Housatonic River, and opposes the current permit for the Rest of the River because it proposes to do virtually nothing to clean up the stretches of the River that runs near to Tribal land. Because members of the Tribe regularly fish for food in the River, the failure to clean up the PCBs quite literally jeopardizes the health and safety of Tribal members.

STANDARD OF REVIEW

Under the Administrative Procedure Act, an administrative agency's action must be set aside if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The permit proposed by EPA Region 1 for the Rest of the River is all of these things--- arbitrary, capricious, an abuse of discretion, and not in accordance with law.

ARGUMENT

I. The Region's Decision to Require Onsite Disposal of PCBs is Arbitrary, Capricious, an Abuse of Discretion, and Contrary to Law.

A. The Proposed UDF Site is Not a Suitable Site for Disposal of PCBs

The Berkshire-Litchfield Environmental Council strongly opposes the Region's proposed remedy not only because of the proposal to create another PCB dump in Berkshire County, but because the proposed dump site is completely unsuitable. According to the expert geological analysis of Dr. David J. DeSimone (Attachment 1), the proposed "UDF" Site is a "textbook example of where not to locate a landfill." The UDF Site is an old sand and gravel mining pit. The subsurface geology is in mapped "ice contact stratified drift," which typically consists of a variable mixture of highly permeable sand and gravel and which usually lacks thick impermeable till above the bedrock. Such high permeability sediments are "the worst natural sediments to use for a PCB landfill because they allow easy migration of contaminants in the subsurface."

In addition, as Dr. DeSimone has found, the type of bedrock beneath the sand and gravel is particularly unsuitable for a landfill. The bedrock at the UDF Site consists of carbonate rock containing fractures or joint planes that are pathways for contaminants to migrate. This structure would enable any leachate to enter the bedrock and move rapidly toward the River. Because any liner that is put under the proposed dump will eventually fail, the PCBs being removed from the

River will ultimately flow back into the River. To select such a remedy is plainly arbitrary and capricious when there are so obviously available alternatives, such as the offsite disposal in existing licensed sites that is proposed for the rest of the PCBs being removed from the River, the use of transportation by rail to these sites, the destruction of the PCBs through alternative technologies; and a cleanup process overseen by public health officials, rather than GE monitoring and assessing its own work.

The Berkshire-Litchfield Environmental Council also opposes the Region's proposed remedy because it risks massive volatilization of PCBs into the air of Berkshire and Litchfield Counties. The proposal would create an enormous hydraulic pumping system in Woods Pond that will not only destroy the natural physical environment of the Pond, but result in volatilization of PCBs into the air and inhalation by surrounding residents. As Dr. David Carpenter has written, "inhalation of PCBs is not only an important route of exposure, but that it can also result in serious disease. PCB exposure is well documented to increase the risk of . . . cancer, cardiovascular disease, hypertension and diabetes." D. Carpenter, "Exposure to and Health Effects of Volatile PCBs," 20 Rev. Environ. Health (2005)(Attachment 2). Here, the pumping of PCB contaminated sediments under high pressure poses a risk of volatilization and inhalation that is completely avoidable, and must be avoided. The failure to do so is arbitrary, capricious, and a plain abuse of discretion.

Citizens for PCB Removal also oppose the creation of the UDF as arbitrary and capricious because it will re-victimize the citizens of Berkshire County, who have already suffered for decades the burdens of widespread PCB contamination. As the former Executive Director of Citizens for PCB Removal expressed it:

We are the actual human beings who have lived with the problems of contamination for decades; some since birth, others for varying portions of our lives. We are the people who

have worked with PCBs or worked in PCB contaminated buildings or lived with PCB contaminated workers. We are the people who have lived in PCB contaminated homes, lived in PCB saturated neighborhoods, played as children in PCB contaminated parks, schoolyards, and the River, itself. We attended or had our children attend PCB contaminated schools. We have lived near PCB contaminated dumps and landfills, eaten fruits and vegetables out of PCB contaminated soils and fish from contaminated ponds and rivers. We did all this innocently, victims; unaware of the dangers around us, and have suffered the consequences of this pervasive, inescapable saturation of toxic chemical contamination.

Given this history, removal of the PCBs from Berkshire and Litchfield Counties is the *only* fair thing for the government to do. Indeed, in the clean-up of PCBs from the Hudson River, that is what EPA required. See [U.S. v. General Elec. Co., 460 F. Supp. 2d 395 \(N.D. N.Y. 2006\)](#), *judgment aff'd*, [2008 WL 45416 \(2d Cir. 2008\)](#).

B. The Decision to Dispose of PCBs On-Site Was the Result of Improper Closed-Door Settlement Negotiations.

Citizens for PCB Removal and Citizens Against the PCB Dump also oppose the proposed remedy as arbitrary and capricious because it was not the result of applying established statutory remedy-selection standards to facts; instead, it was the result of secret negotiations carried out and finalized in the form of a settlement agreement without any opportunity for public input. If the Region wanted to select the remedy for the Rest of the River through a settlement negotiation, it should have given notice and sought public comments BEFORE it finalized the settlement, not the other way around. That is the law under CERCLA, which applies to the cleanup at issue here. See 42 U.S.C. § 9622(d)(2)(B). Even more importantly, transparency and the opportunity for the public to be heard are fundamental principles of a free and open democratic government that cannot be ignored. See Notice of Lodging Consent Decree, *Wildearth Guardianbs v. EPA*, 2010 WL 3940354 (D. Colo. 2010)(Under comparable provision of Clean Air Act, advanced notice of a settlement must “be given to the public through

publication in the *Federal Register*, and the public shall have a reasonable opportunity to make any comments . . . the Parties *cannot* proceed further with the settlement until after completion of the notice-and-comment process.”)(emphasis added).

CPR was invited to be included in the private and secret negotiations but would not agree to the secrecy clause that was presented as a condition of admission. The group has always supported open and transparent negotiations and discussions of any cleanup process, whether of the GE facility, residential properties, the first mile and a half of the Housatonic River, or the Rest of River. From what little the group could observe of the settlement process that was utilized, however, the process was fraught with problems, including improper pressure tactics. Among other things, participants were threatened that, if they did not agree to the UDF, GE would successfully demand *three* dumps in the area. Thus, key decisions in the settlement process were based not on science, legal requirements or health concerns, but on threats and on promises of multi-million dollar payments to some communities.

Citizens Against the PCB Dump also oppose the proposed remedy because the Town of Lee’s consent to the settlement was secured illegally. Lee’s citizens and Town Representatives were told specifically that no agreement would be made without their participation, but the then instead Town officials entered into a secret agreement to support the UDF entirely without their participation. As set forth in the Complaint in *Jones, et al. v. Town of Lee*, Berkshire Superior Court Docket No. 21-49 (Attachment 3), the Town’s assent to the settlement agreement violated Massachusetts’ Open Meeting Law, G.L. c. 30A, §21 *et seq.*, and the Town of Lee’s own By-Laws.

II. The Proposed Cleanup in the Connecticut Portions of the River is Not Protective of Human Health and the Environment

The Schaghticoke Indian Tribe of Kent and Citizens for PCB removal also oppose the proposed remedy as contrary to law because it will do virtually nothing to clean up the PCB-contaminated stretches of the Housatonic River in Connecticut. GE's attitude from the beginning has been, "yes, the contamination is there, but it won't hurt you, and will go away by itself, therefore we really don't need to do anything about it." The so-called "science" of the remedy proposed for "the Rest of the River" represents a similar approach, and must be completely rejected and discarded.

Just as GE envisioned, the proposed remedy leaves large volumes of PCBs in the River and emphasizes what is referred to euphemistically as "monitored natural recovery." The estimated mass of PCBs to be removed is only 50,500 pounds out of some 600,000 pounds of PCBs remaining in the River and floodplains. For most of the River, the proposed remedy does not require GE to do anything except occasionally monitor and report results.

For the Schaghticoke Tribe, this is a life threatening proposal. Members of the Tribe continue to fish for their food in the Housatonic. Thus, they are daily being exposed to a threat of PCB ingestion that is, under the proposed remedy, going to continue forever. For the Schaghticoke, this is not a remedy that is "protective of human health and the environment" in any way.

PCBs can pose serious health risks to the Schaghticoke and others who frequently eat PCB-contaminated fish. The PCBs can be transferred from a mother to her unborn baby, increasing the risk of preterm delivery and low birth weight. They may also be transferred from mother to baby through breast milk, and exposure has been associated with learning defects. J.

Nelson, "What Are PCBs and What Risks Do They Pose?," Mayo Clinic Health Letter (2020).

Once ingested, PCBs pose these risks:

Exposure to PCBs suppresses the immune system, thereby increasing the risk of acquiring several human diseases. Both ortho-substituted and coplanar (dioxin-like) congeners are tumor promoters that enhance the effects of other carcinogenic substances. PCB exposure, especially during fetal and early life, reduces IQ and alters behavior. The PCBs alter thyroid and reproductive function in both males and females and increase the risk of developing cardiovascular and liver disease and diabetes. Women are at high risk of giving birth to infants of low birth weight, who are at high lifetime risk for several diseases.

D. Carpenter, "Polychlorinated Biphenyls (PCBs): Routes of Exposure and Effects on Human Health," 21 Rev. Environ. Health 1 (2006).

While it is true that signs have, from time to time, been posted near the river warning of the threat of eating fish from the River in Connecticut, the posting of signs is not a long term environmental solution. A long-term solution is a remedy that requires the company that contaminated the River to actually clean it up, and render it safe to eat the fish again.

PRAYER FOR RELIEF

For the foregoing reasons, the proposed remedy is arbitrary, capricious, and not in accordance with law. Amici respectfully request that the remedy be remanded to the Region and that the following relief be provided:

1. That the Region be directed to select an offsite disposal option for all untreated PCB waste; and
2. That the Region be directed to select an a remedy for the Connecticut stretches of the river that will actually protect human health and the environment.

STATEMENT OF COMPLIANCE WITH PAGE LIMITATION

The undersigned certifies that the foregoing Amicus Brief is less than 15 pages long, not including the cover, Table of Contents, Table of Authorities, Table of Attachments, Statement of Compliance with Page Limitation, or Attachments, and, thus meets the limitation contained in 40 C.F.R. § 124.19.

Respectfully submitted,

**CITIZENS FOR PCB REMOVAL,
CITIZENS AGAINST THE PCB DUMP,
BERKSHIRE-LITCHFIELD ENVIRONMENTAL
COUNCIL, and
SCHAGHTICOKE INDIAN TRIBE OF KENT**

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2021, I served the foregoing Petition for Review, with the Attachments, by electronic mail to:

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