



HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE

September 18, 2020

Via email

Dean Tagliaferro
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EPA Region 1
c/o r1housatonic@epa.gov

Re: Comments on July 2020 Proposed Cleanup Plan, Housatonic “Rest of River” Site

Dear Mr. Tagliaferro:

The Housatonic Rest of River Municipal Committee (“the Committee”) is pleased to submit the following comments on the July 2020 proposed [RCRA Corrective Action Permit](#) (“2020 Permit”) for the Housatonic “Rest of River” site, and on the accompanying remedy selection documents, in particular the Region’s July 2020 [Statement of Basis](#) and its July 2020 [Determination on Remand and Supplemental Comparative Analysis](#) (“Determination on Remand”). The Committee is made up of representatives of Great Barrington, Lee, Lenox, Sheffield, and Stockbridge (“Rest of River Towns”). In February of this year, the select boards of the Rest of River Towns signed a settlement agreement (“Settlement Agreement”) with EPA Region 1 (the “Region” or “EPA”), the General Electric Company (“GE”), and other parties.

This letter has four parts: (I) background information; (II) a summary reiterating the Committee’s reasons for supporting the selected remedy; (III) more specific comments on the Statement of Basis; and (IV) requests for specific changes to the draft of the 2020 Permit.

I. Background information.

In 2016, the Region issued a RCRA permit (“2016 Permit”) to GE, in which the Region decided on a cleanup of the “Rest of River” portion of the Housatonic River.¹ This cleanup

¹ “RCRA” stands for the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, a federal statute which requires permits for the disposal of certain kinds of waste, and which also has “corrective action” rules that apply to waste cleanups. Some 20 years ago, a federal court entered a consent decree (“Consent Decree”) under which GE, the Region, the City of Pittsfield and other parties agreed that the

required GE to excavate PCBs from the river and portions of the floodplain, to install a “cap” over the river-bottom in certain areas to contain contamination beneath the cap, and to dispose of all the excavated PCB-contaminated material outside Massachusetts. Many parties appealed aspects of the Region’s cleanup decision to EPA’s Environmental Appeals Board (“EAB”), but GE was the only party that persuaded the EAB to require the Region to reconsider the 2016 Permit.

Before the EAB, the key part of GE’s appeal was the company’s attack on the Region’s out-of-state disposal decision. GE argued that the Region should have accepted GE’s proposal to store *all* of the contaminated material at three potential locations in Berkshire County. GE’s proposed locations were: (1) a sand and gravel facility near Woods Pond on the Lee/Lenox line, (2) an undeveloped area on Forest Street in Lee, and (3) another undeveloped area near Rising Pond in Great Barrington. The Region and the Rest of River Municipal Committee made counterarguments in favor of out-of-state disposal, but the EAB agreed with GE that the Region’s reasons for requiring out-of-state disposal were not persuasive. The EAB sent this critical aspect of the 2016 cleanup decision back to the Region, so that the Region could reconsider its disposal decision. As the EAB noted, GE’s proposal would have cost \$187M less than the offsite disposal option selected by the Region. See *In re General Electric*, 17 E.A.D. 434, 479-80 (2018).

In the wake of the EAB decision, EPA invited GE, the Rest of River Towns and other parties to enter into a confidential mediation to discuss how the Region could modify the 2016 Permit in light of the EAB’s decision.² The proposed mediation was confidential, because candid, informal discussions were the only hope of settling the parties’ differences. Given the likelihood that open meetings would have a detrimental effect on their litigation position, representatives of the Rest of River Towns participated in the mediation through non-public executive sessions, as permitted under the Massachusetts Open Meeting Law. See Mass. G. L. c. 30A, § 21(a)(3). The select boards of the Rest of River Towns agreed to instruct their representatives to enter this confidential mediation to avoid the risks, delays, and costs of more litigation. More specifically, even assuming the Region would again require GE to ship all waste out of state, based on new reasons different from the ones that the EAB had already rejected, GE would file another appeal. This appeal would likely result in legal costs to the Rest of River Towns (assuming voters approved incurring these costs), and would delay the onset of the cleanup. GE might also have prevailed on

“Rest of River” cleanup decision would be embodied in a permit to be issued by the Region under RCRA, and which would impose specific “corrective actions” by GE to clean up “Rest of River.” The Rest of River Towns did not negotiate or approve this Consent Decree. The 2020 Permit is the Region’s proposed version of the RCRA permit envisioned by the Consent Decree. The Consent Decree specified a cleanup selection process governed by RCRA, because any RCRA cleanup decision (unlike most other federal cleanup decisions) would be immediately appealable by GE—first to EPA’s Environmental Appeals Board, and then to a federal court. It is this appeal right that GE has now finally surrendered; in the Settlement Agreement GE agreed not to appeal the 2020 Permit, provided the 2020 Permit requires a cleanup that is “substantially similar” to the cleanup agreed upon in the Settlement Agreement.

² The parties who participated in the mediation were the Region, GE, the State of Connecticut, the Rest of River Towns, the City of Pittsfield, the Berkshire Environmental Action Team, the Massachusetts Audubon Society, the Housatonic River Initiative, and C. Jeffrey Cook. These parties all appeared before the EAB in the litigation over the 2016 Permit.

this appeal, just as it prevailed in the 2016 appeal—at which point the Region would presumably have accepted GE’s proposal to store *all* waste in Berkshire County, including at the less suitable locations on Forest Street and at Rising Pond.³ The Committee decided to seek a negotiated settlement to avoid further litigation costs and delays, and to eliminate if possible the potential risk that 100% of the Rest of River waste would be stored in Berkshire County.

After months of contentious negotiations, the select boards of the Rest of River Towns agreed to the Settlement Agreement, along with the Region, GE, and all but one of the other parties to the mediation. This Settlement Agreement imposes three key requirements on GE. GE: (1) must begin certain design work on the cleanup immediately, and may not appeal the 2020 Permit so long as the 2020 Permit conforms to the Settlement Agreement; (2) must remove more PCBs from the river and from certain residential properties than the 2016 Permit; and (3) must use a “hybrid” of onsite and offsite disposal, in which at least 100,000 cubic yards of the most contaminated materials will be disposed of offsite, with the remainder disposed of at the sand and gravel operation near Woods Pond (“Upland Disposal Facility”). Although all of the material disposed of at the Upland Disposal Facility must have an average concentration of PCBs below 50 parts per million (and the majority will be below 25 ppm), the Region has said that the Upland Disposal Facility will be designed to standards “generally equivalent” to facilities accepting much more concentrated PCB waste. *See* Determination on Remand at p. 33.

II. The Committee’s reasons for supporting the 2020 Permit.

Apart from the changes requested below, *see* § IV, the Committee strongly supports the 2020 Permit. The Committee believes the cleanup described in the 2020 Permit is the best option for cleaning up the River—*i.e.*, the safest, least disruptive, and most implementable option available given the unique circumstances of this site and the constraints of the Consent Decree. Although the Committee already has described its reasons for supporting the Settlement Agreement [at length](#), it wishes to reiterate its similar views on the 2020 Permit, the Statement of Basis and the Determination on Remand. The Committee has three primary reasons for believing that the 2020 Permit is a good environmental outcome for the Housatonic River.

First, the 2020 Permit is the safest choice among the limited remaining options for dealing with PCBs over the long-term, particularly given the restraints imposed by the original Consent Decree. The 2020 Permit requires GE to remove an additional 143,000 cubic yards of contaminated soil and sediment, which amounts to 3,530 pounds of pure PCBs. *See* Statement of Basis at p. 26. Under the 2016 Permit, these PCBs would have remained in the river. While the 2016 Permit required GE to isolate many of these PCBs beneath engineered caps, this is a distinctly second-best solution, because river-bottom caps are at constant risk of being damaged over time by the forces constantly at play in the river (*e.g.*, floods, organisms living on the river bottom, erosion).⁴ This extra sediment removal in the 2020 Permit is part of a package deal: the

³ As described below, the Forest Street and Rising Pond sites are farther away from the main areas of contamination (making it difficult or impossible to use hydraulic pumping to transport materials there), and are undeveloped areas with greater aesthetic and habitat value.

⁴ *See* Statement of Basis at p. 23 (acknowledging risk of cap failure and the 2020 remedy’s “greater resilience to extreme flood events” because of reduced capping); *id.* at p. 24 (“the risks posed by the remaining PCBs, in the event of the cap not working as designed, would be less” under the selected

Region added it and GE agreed to it *only* because it was part of a settlement that included the Upland Disposal Facility.⁵ So the practical reality is that if there had been no inclusion of the Upland Disposal Facility in the Settlement Agreement, then there would have been no extra sediment removal either. The extra sediment removal significantly reduces risks to human health and the environment, which we believe outweighs any currently-known risk from storing lower-level PCB waste in Berkshire County. Waste that is to be permanently “isolated” beneath a cap that is subject to dynamic river forces is more dangerous than storing waste in a landfill—particularly since this landfill will exclude the most concentrated waste.⁶

Second, the 2020 Permit has fewer temporary, cleanup-related impacts on the local community than the 2016 Permit. The selected remedy is expected to have 48,800 fewer truck trips than the 2016 remedy—a 32% reduction. *See* Statement of Basis at p. 27. This reduction may be more dramatic than these figures suggest, because GE is now required to use hydraulic pumping (in lieu of truck transport) to the extent feasible, which could reduce traffic further. *See* 2020 Permit at p. 25; Statement of Basis at p. 27. GE is also required to consult with the community on reducing cleanup impacts on the community, including consultations about “work activities, scheduling and traffic routes” and about enhancing recreational activities on land where there has been cleanup activity or construction of a temporary access road. *See* 2020 Permit at p. 77. In addition, the 2020 Permit requires GE to minimize the transport of waste material through residential areas. *Id.* The Committee views these changes to the cleanup as

remedy); *id.* at p. 29 (onsite disposal will “serve to further protect human health and the environment and provide better short-term and long-term effectiveness”). EPA guidance also recognizes that caps fail: “The major limitation of in-situ capping is the contaminated sediment remains in the aquatic environment where contaminants could become exposed or be dispersed if the cap is significantly disturbed or if contaminants move through the cap in significant amounts.” EPA OSWER, [Contaminated Sediment Remediation Guidance for Hazardous Waste Sites](#) at p. 5-3 (2005) (EPA-540-R-05-012, OSWER 9355.0-85). *See also id.* at p. 5-14 (describing potential for “[e]rosion or other physical disturbance of cap” and “[c]ontaminant flux” through the cap).

⁵ The sediment portion of the Region’s 2016 Permit had been entirely sustained by the EAB; the only parts of the 2016 Permit that the EAB told the Region to reconsider were the parts related to the disposal issue and one other minor issue. *See In re General Electric*, 17 E.A.D. at 584-85. So the Region would presumably have declined to consider expanding GE’s obligations to remove sediment above and beyond what the 2016 Permit required, since the EAB had upheld that part of the 2016 Permit. *Cf. In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 7 (2000) (after a remand, petitioners may not seek review of those portions of a remedy sustained in the first EAB proceeding).

⁶ In addition to the extra sediment removal, the 2020 Permit has other important environmental benefits. For example, the 2020 Permit requires GE to excavate PCB-contaminated soil from up to 28 additional residential properties, including six in Lenox, so that the soil at these properties meets the Region’s cleanup standards for residential properties—contamination that would have been left in place by the 2016 Permit. Along the same lines, the 2020 Permit requires GE to consider removal of additional contaminated soil from the banks of Reaches 5A and 5B; to evaluate alternative PCB removal techniques in vernal pools; and to remove the Eagle Mill and Columbia Mill dams and their associated contaminated sediments, which will enhance fish habitat. The Settlement Agreement also obligates GE to provide valuable benefits to Berkshire County that are separately enforceable but not incorporated in the 2020 Permit, including restoration of roads damaged by the cleanup, donation of land near Rising Pond, and collaboration with EPA in efforts to develop new methods to treat PCB contamination.

major improvements—improvements that will diminish short-term, cleanup-related impacts and make the remedy more implementable.

Third, the 2020 Permit avoids more delay and uncertainty in the cleanup—which in turn makes the 2020 Permit safer than alternatives that would leave PCBs uncontrolled in the river while litigation plays out. GE’s appellate victory before the EAB has already delayed the cleanup by years. As noted above, the main potential alternative to the cleanup described in the Settlement Agreement and the 2020 Permit would have been for the Region to select again the full offsite disposal option that had been previously rejected by the EAB—thereby guaranteeing another appeal by GE to the EAB.⁷ In this second round of litigation, the Region might have marshalled additional arguments in favor of offsite disposal—*e.g.*, arguments about loss of forest cover at some of the possible disposal sites, about zoning and impacts on nearby businesses, and about whether a leak from an onsite disposal facility was really that much more likely or harmful than a leak from an offsite facility. *See in re GE*, 17 E.A.D. at 571-74 (describing but largely declining to evaluate the merit of other justifications for offsite disposal advanced by the Committee and others). But onsite disposal of even hazardous waste is routinely implemented by EPA at large cleanup sites, as the Settlement Agreement reflects and as the Region acknowledges. *See* Statement of Basis at pp. 30, 33 (landfills such as the Upland Disposal Facility are “effective,” “reliable,” “common,” and “routinely constructed”). Moreover, in all the similar cases cited by the EAB in which courts have upheld more expensive cleanups over less expensive ones, the cost differentials have been less than \$1 million, and the more expensive option was usually found to be better in some obvious way at protecting human health and the environment.⁸ These cost differences are very different from the \$187M cost difference between

⁷ The other major option open to the Region—and arguably the path of least resistance given the prior EAB ruling—would have been to accept GE’s proposal to store *all* waste locally, including at potential sites at Forest Street in Lee and at Rising Pond. The Committee would never have supported this option. The Committee views the Forest Street and Rising Pond sites as undeveloped locations that are far less suitable for waste storage than the Woods Pond site that EPA has proposed for the Upland Disposal Facility. *See* Determination on Remand at p. B-4 to B-5 (describing high habitat value of these locations). Unlike Forest Street and Rising Pond, the location selected for the Upland Disposal Facility has easy access to the most contaminated areas and has already been used for gravel mining, as described below. *See id.* at pp. 30, 34 & pp. B-3, B-5, B-6. Any decision to force Berkshire County to accept all the waste would almost certainly have led to protracted litigation in the EAB and the federal courts—not from GE, but from the Committee and many other stakeholders.

⁸ *See Franklin County. Convention Facilities Auth. v. Am. Premier Underwriters*, 240 F.3d 534, 546 (6th Cir. 2001) (“While CFA could have saved up to \$30,000 by opting for encapsulation rather than removal, we conclude this amount is insignificant when compared to the benefits CFA achieved in terms of permanence and reduction of mobility and volume by opting to remove as much of the contamination as possible”); *United States v. Sterling Centrecorp*, 208 F. Supp. 3d 1126, 1137-38 (E.D. Cal. 2016) (although EPA’s decision to pipe in public water to residents would cost \$943,000 more over 50 years compared to operating a pump and treat system, the cost was justified because the pipeline “provides a fail-free method for delivering safe water without the need for ongoing, and potentially problematic, monitoring”); *Pentair Thermal Management v. Rowe Indus.*, 2013 WL 1320422, at *14-15 (N.D. Cal. March 31, 2013) (excavation cost \$0.9M more than capping, but excavation was worth it, because it was more effective over the long-term and “reduces the toxicity of the environment”). *See also In re GE*, 17 E.A.D. at 576 (citing these cases).

full offsite disposal and full onsite disposal. *See In re GE*, 17 E.A.D. at 479. There was a real risk that GE would prevail in this second round of litigation.

Had GE prevailed in this second appeal before the EAB, the 2020 Permit would have been sent back to the Region to take a *third* try at the cleanup decision. And at that point, the Region (and possibly EPA leadership in Washington) would have had the unenviable choice between provoking another appeal by GE, or simply yielding to GE on the remedy that the company has preferred all along—*i.e.*, disposal of *all* waste in Berkshire County, including at the less suitable locations on Forest Street and Rising Pond. In short, insisting on 100 percent offsite disposal would have guaranteed *years* of continued litigation before the start of any cleanup, and increased the risk that all waste would be stored at any of several locations in Berkshire County. By contrast, the selected remedy eliminates the possibility of any GE appeal (as long as the 2020 Permit conforms to the Settlement Agreement), and requires GE to begin certain parts of the cleanup immediately—in fact, GE has already submitted cleanup deliverables to the Region. *See* 2020 Permit at pp. 74-78.

Reducing the potential for the delay that would be caused by another GE appeal is a major consideration. This is a site where an enormous volume of contamination has for decades been polluting a waterway that reaches to Long Island Sound. Compared to hypothetical cleanups that are likely to be endlessly litigated and might *never* occur (given the nearly limitless litigation options provided by the Consent Decree), a cleanup that starts now and actually occurs in our lifetimes is superior. It is also consistent with the applicable RCRA criteria—*e.g.*, compared to a *hypothetical* cleanup *later*, a more *certain* cleanup *now* is more protective of human health and the environment, because it removes PCBs from the environment sooner.⁹ For the same reason, beginning the cleanup now also does a better job of controlling PCB sources in river sediments that are currently uncontrolled. And finally, this “bird in the hand” cleanup is self-evidently more “implementable,” because it allows GE and the Region to start the cleanup immediately instead of spending their resources (and the Committee’s) on dispute resolution, EAB petitions, and potential litigation in the federal court system. After all the years of delay and litigation, with no end in sight, a negotiated and expedited cleanup was the right choice—for the Committee, for the Region, and for the river.¹⁰

⁹ *See* Determination on Remand at p. B-4 (“the alternative of off-site landfilling creates greater risk to human health and the environment through the potentially indefinite delay before PCB removal will occur,” which “translates directly into the risk of continued exposure to PCBs for a potentially indefinite number of years”); *id.* at p. B-6 (“Prompt implementation of the remedy translates directly into reduced risks to human health and the environment, by more quickly addressing the risks associated with PCB contamination. By contrast, delayed implementation of the remedy will result in fish, benthic invertebrates and other ecological receptors in the Housatonic River continuing to bioaccumulate PCBs, PCBs continuing to migrate downstream, and continued risks of exposure to PCBs by humans and wildlife.”).

¹⁰ The Committee also considered the likely cost of engaging in additional litigation over the cleanup with GE, and how these funds would be raised in a period of growing pressure on municipal budgets. These evaluations were made before COVID-19, which has made it even more problematic to raise additional funds for environmental litigation.

In summary, the 2020 Permit is the best cleanup the Region could have selected under the circumstances. The cleanup:

- Requires cleanup to begin immediately, which reduces risks better than hoping that additional litigation with GE would have somehow persuaded the EAB that offsite disposal was the right disposal option all along. Any attempt to persuade the EAB to embrace offsite disposal would have had to overcome the EAB’s explicit rejection of the offsite disposal decision in the 2016 Permit.
- Removes more PCBs from the river, which is better than leaving them “isolated” underneath an inherently unstable river-bottom cap.
- Significantly diminishes short-term, cleanup-related impacts on Berkshire County.
- Provides local communities unprecedented input into a cleanup that will affect them profoundly.

For these reasons, the Committee strongly supports the basic components of the cleanup described in 2020 Permit.

III. Specific comments on the Statement of Basis.

1. The Committee wishes to state its support for the Region’s ARARs approach, including the Region’s analysis of ARARs waivers.¹¹ These potential ARARs waivers may apply to, *inter alia*, Massachusetts solid waste siting rules, which speak to solid waste facilities in Areas of Critical Environmental Concern (“ACEC”) such as the site for the Upland Disposal Facility. For all the reasons given above (*e.g.*, extra sediment removal, avoiding delay, eliminating the possibility of landfills at Forest Street and Rising Pond), the Committee believes the selected remedy is the best option available to the Region in terms of reducing risk to human health and the environment, which would fully justify any waiver under CERCLA § 121(d)(4)(B). The Committee also agrees that the Upland Disposal Facility site is a better location for a local disposal facility than the other options proposed by GE, because the ecological value of the site has already been heavily compromised by the site’s open sand and gravel pits (the appearance of which may actually be improved once the Upland Disposal Facility is closed and vegetated).¹² The

¹¹ “ARARs” stands for “applicable or relevant and appropriate requirements.” ARARs are environmental laws (such as water quality standards and waste disposal rules) that the 2020 Permit should generally either comply with or waive. If the Region decides to waive an ARAR, it must justify this decision by making one of the findings required by CERCLA § 121(d)(4), which is codified at 42 U.S.C. § 9621(d)(4). In particular, section 121(d)(4)(B) authorizes the Region to excuse compliance with an ARAR where complying with the ARAR would result “in greater risk to human health and the environment than alternative options.” The Region has found that certain Massachusetts rules governing waste disposal may be ARARs, and that waiving these ARARs would be appropriate under section 121(d)(4)(B).

¹² *See* Determination on Remand at p. B-3 (“any agricultural or horticultural values for the area have been largely eliminated by long-term gravel mining activities”; describing the “already damaged and altered area surrounding the Upland Disposal Facility location including the two adjacent landfills” and the “existing contamination from current industrial uses at or near the Upland Disposal Facility”); *id.* at p. B-6 (“grassland will be replacing primarily disturbed sand and gravel surface material” at the Upland Disposal Facility).

other potential disposal sites in Berkshire County, at Forest Street and Rising Pond, are valuable natural habitats and are much farther from the main areas of contamination, making it impractical to send waste there (particularly via hydraulic pumping). *See* Determination on Remand at B-6. Any decision by the Region to store waste at these other sites would also have guaranteed opposition from the Committee and others—thereby increasing the potential for delay of the cleanup.

2. The best analysis by the Region of the benefits of the 2020 Permit is tucked away in Attachment B to the Determination on Remand, and has not been included in the Statement of Basis or the main text of the Determination on Remand. Specifically, the Statement of Basis and the front matter of the Determination on Remand say much less than Attachment B about the value to human health and the environment of avoiding litigation and delay, about why the extra soil and sediment removal is a package deal with partial on-site disposal, and about how both of these considerations bear on eliminating risks to human health and the environment.¹³ The Committee commends the Region on its analysis in Attachment B, and urges the Region to make this analysis more easily accessible on its website, and to draw attention to this analysis in its response to public comments.
3. The Statement of Basis and the Determination on Remand evaluate the cleanup in the 2020 Permit by comparing this cleanup to other options for cleaning up the river. These evaluations by the Region primarily use the nine criteria that GE and the Region agreed to in 1999-2000, when the Consent Decree was entered.¹⁴ But the Committee believes that the law requires the Region to evaluate the cleanup required under the 2020 Permit using slightly different criteria—namely, the criteria that EPA uses to select corrective actions at all other RCRA sites.¹⁵ The general criteria that EPA uses at other corrective action sites are similar to the GE-specific criteria from the Consent Decree, so using the general criteria should not change the analysis substantially. Nonetheless, the Committee urges the Region to clarify that the cleanup in the 2020 Permit is the appropriate choice

¹³ *Compare* Determination on Remand at pp. B-3 to B-7 *with* Statement of Basis at pp. 28-35. Relatedly, our understanding is that there is a substantial chance that carrying out the sediment portion of the 2020 Permit could end up costing GE much more than the cost estimate in the Statement of Basis, because GE may well have to do much more excavation than the cost estimate assumes, in order to comply with some of the new performance standards. The Committee suggests that the Region should discuss this point in the response to comments. It is relevant to whether it would have been realistic for the Region to require GE to undertake additional soil and sediment removal outside the context of a settlement that included the Upland Disposal Facility.

¹⁴ *See* Statement of Basis at pp. 5 & 17; Determination on Remand at p. 12 *et seq.* To be precise, the Consent Decree itself did not specify the nine criteria; instead it required the Region to issue a separate document called the “2000 Permit” that listed these criteria.

¹⁵ *See In re GE*, 17 E.A.D. at 449-451, 575 (evaluating the 2016 Permit under EPA’s general criteria for selecting corrective action at RCRA sites, and not under the GE-specific criteria from the Consent Decree); Subpart S Proposal, Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,824 (July 27, 1990) (listing the RCRA general criteria).

under the RCRA general criteria, and not just the GE-specific criteria from the Consent Decree.

IV. Specific comments on the 2020 Permit.

1. The requirement to dispose of 100,000 cubic yards of material at an offsite location is listed in the 2020 Permit as a corrective measure, rather than a performance standard. *See* 2020 Permit at p. 60. Our understanding is that performance standards differ from corrective measures primarily in that performance measures are more difficult to modify in the future. The Committee believes the 100,000 cubic-yard offsite disposal requirement is a critical aspect of the cleanup that was a key part of the Settlement Agreement and that must not be changed. The Region should re-categorize the 100,000 cubic-yard offsite disposal requirement as a performance standard.
2. It is not clear to the Committee why some cleanup requirements are listed as performance standards, while others are listed as corrective measures. For example, the hydraulic pumping requirement is listed as a performance standard *and* a corrective measure for backwaters adjacent to Reaches 5, 6, and 7, but it is listed solely as a corrective measure in Reach 5C. *See* 2020 Permit at pp. 26, 28. The Region should review the Permit to ensure that other requirements are categorized in a consistent manner.
3. The 2020 Permit requires GE to propose innovative treatment technologies, but does not address what EPA will do to facilitate these efforts. *See* 2020 Permit at p. 59; *cf.* Settlement Agreement at p. 12, ¶ B (requiring EPA to facilitate these efforts). The Committee believes the Region should use its response to comments to discuss what EPA's efforts will be in this area.
4. The 2020 Permit says that "in addition to the Reach 5A banks that otherwise require remediation," GE is required to "consider supplemental bank removal." *See* 2020 Permit at p. 23. There is similar language for Reach 5B. *Id.* at p. 25. The Committee requests that the Region be more explicit that any "supplemental bank removal" would occur in those portions of the Reach 5A and 5B banks that are not otherwise being remediated.
5. The Settlement Agreement requires "hydraulic dredging and/or pumping" if feasible. *See* Settlement Agreement at p. 6, ¶ K. Many similar statements are made in the Statement of Basis. *See* Statement of Basis at p. 13. But the 2020 Permit seems to refer to hydraulic pumping only, without an express requirement on hydraulic dredging. *See* 2020 Permit at pp. 26, 28, 29 ("conveyed hydraulically"); *cf. id.* at p. 26 (requiring GE to remove sediment via "dredging or wet excavation techniques to be approved by EPA," without reference to *hydraulic* dredging specifically). The Committee understands that the Region may not wish to commit itself yet to any particular dredging or excavation technique, but GE should be required at least to *evaluate* hydraulic dredging specifically, in order to conform the 2020 Permit to the Settlement Agreement.
6. The new language in the 2020 Permit limiting the amount of capping in certain areas is confusing. The 2020 Permit describes GE's obligations to excavate certain areas and to cap other areas, and then states that "all actions pursuant" to these requirements "shall not

exceed” a certain acreage. *See, e.g.,* 2020 Permit at pp. 30, 33. The Region should clarify that the “shall not exceed” language was intended solely to limit capping and not to limit sediment excavation.

7. The language requiring GE to remove sediment from additional residential properties in Lenox states that this removal shall be at the option of the property owner. *See* 2020 Permit at p. 48. However, the Settlement Agreement stated that the Town of Lenox would help determine whether the landowner has consented. *See* Settlement Agreement at p. 4, ¶ B. The Region should change the language to require GE to work through the Town of Lenox to ensure that property owners are consulted about their options for additional cleanup, in conformity with the Settlement Agreement. The Town is partially funding this cleanup work and must be involved in trying to obtain access to the properties.
8. The 2020 Permit does not specify how GE will treat and dispose of leachate, whether from the Upland Disposal Facility or from any sediment and/or soil dewatering taking place elsewhere. *See* 2020 Permit at p. 72. The Committee noted in its recent comments on the Statement of Work that the Region must require GE to submit specific plans on leachate treatment and disposal in future deliverables. The Committee requests that the Region clarify in the response to comments that (a) stakeholders, including local officials, will be included in developing and evaluating the details of these leachate plans, (b) these plans will comprehensively evaluate local impacts (including but not limited to noise, traffic, potential airborne transmission of PCBs, potential roadside spills) and will propose steps to mitigate these impacts.
9. GE should be required to consult with the Town of Lee about the Environmental Restriction and Easement (“ERE”) to be placed on the Upland Disposal Facility site. *See* 2020 Permit at p. 71. The Town of Lee has a clear interest in the content of this ERE, and is likely to provide GE and the Region with useful input.
10. GE is required to state in the Quality of Life Compliance Plan how it will coordinate with “local governments, affected residents *or* landowners.” *See* 2020 Permit at p. 77; *cf.* Settlement Agreement at pp. 6-7, ¶ L. The “or” should be changed to “and.” More broadly, the Region should make a commitment in the response to comments that residents and local officials will be given adequate time and opportunity to comment on all key deliverables, so that stakeholder input can have an actual effect on designs, plans etc.
11. The 2020 Permit states that the sediments removed in Reaches 7B and 7C “shall include sufficient sediment in any areas with ≥ 50 mg/kg total PCBs, to achieve a spatially weighted average concentration of 1 mg/kg total PCBs...” *See* 2020 Permit at p. 31. The Committee requests that this language be changed as follows: the sediments removed in Reaches 7B and 7C “shall include sufficient sediment, *including* in any areas with ≥ 50 mg/kg total PCBs, to achieve a spatially weighted average concentration of 1 mg/kg total PCBs...” This is consistent with similar language applicable to Reach 5C. *See* 2020 Permit at p. 25. These revisions should be included in the 2020 Permit.

12. The 2020 Permit treats the coves/ponds located near the Columbia Mill dam and the Eagle Mill dam as “impoundments” included in Reaches 7B and 7C. *See* 2020 Permit at p. 30 (“Permittee shall remove sediment and remove the dams in these impoundments (which include the coves/ponds adjacent to Columbia Street in Lee)” to reach 1 mg/kg spatial average). The Region should specifically identify the three coves/ponds that are covered by this part of the 2020 Permit and clarify how any contamination in these areas will be addressed.

In conclusion, the Rest of River Municipal Committee wishes to thank the Region in advance for considering these comments. The Committee also wishes to thank the Region’s staff for their efforts to achieve the best possible cleanup of Rest of River. These efforts have demonstrated exceptional dedication, patience, expertise, and thoughtfulness. Should you wish to contact us about these comments, please feel free to contact our attorney Matt Pawa at mattp@hbsslaw.com.

Respectfully submitted,

HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE

cc: Hon. Edward Markey, U.S. Senator
Hon. Elizabeth Warren, U.S. Senator
Hon. Richard Neal, U.S. House of Representatives
Hon. Charlie Baker, Governor
Hon. Adam G. Hinds, State Senator
Hon. Tricia Farley-Bouvier, State Representative, 3rd Berkshire District
Hon. Smitty Pignatelli, State Representative, 4th Berkshire District
Ms. Kathleen A. Theoharides, Secretary, EOEEA
Mr. Martin Suuberg, Commissioner, Department of Environmental Protection
Mr. Ronald Amidon, Commissioner, Department of Fish & Game