

Attachment 8

Excerpts from GE's Petition for Review (November 23, 2016)

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

In re:

GENERAL ELECTRIC COMPANY

Modification of RCRA Corrective Action
Permit No. MAD002084093

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) RCRA Appeal No. 16-01M
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PETITION OF GENERAL ELECTRIC COMPANY FOR
REVIEW OF FINAL MODIFICATION OF RCRA
CORRECTIVE PERMIT ISSUED BY EPA REGION 1

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comments, EPA must notify GE of its "intended final decision," and GE may invoke administrative dispute resolution. CD ¶¶22.o, 141.b(i). Thereafter, EPA must issue its final modification of the CD-Permit specifying the Rest-of-River Remedial Action. CD ¶22.p. The final decision is appealable to this Board under 40 C.F.R §124.19, and then to the First Circuit under RCRA §7006(b). CD ¶¶22.q, 141.b(ii)&(iii). Ultimately, GE will implement the Rest-of-River Remedial Action under CERCLA. CD ¶22.w.

With one potential – and specifically defined – exception, implementation of the specified Rest-of-River Remedial Action is the final step in the process. The United States has given GE a covenant not to sue, under which EPA may not seek to compel GE to conduct additional response actions unless: (1) there are new conditions or information; (2) EPA determines, based on those new conditions or information, that the Rest-of-River Remedial Action "is not protective of human health or the environment"; and (3) the additional response actions sought are related to that determination. CD ¶¶161, 162, 163.⁴

II. History of Rest-of-River Activities

2005: EPA completed human health and ecological risk assessments of the Rest of River (A.R.219190, 225585, 215498, 222490).

2006: EPA produced a model of the fate, transport, and bioaccumulation of PCBs for use in predicting future PCB concentrations in water, sediments, and fish under various remedial alternatives (A.R.258097). Additionally, at EPA's direction, GE submitted and EPA approved a revised IMPG Proposal (A.R.248201).

⁴ Massachusetts and Connecticut agreed to similar covenants, subject to the same kinds of reopeners. CD ¶¶166-173.

2007: GE submitted a Corrective Measures Study ("CMS") Proposal outlining its plans for the identification and evaluation of remedial alternatives (A.R.260320).

2008: GE submitted a CMS Report (A.R.283374, 580283-85) which evaluated – against the nine selection criteria specified in the CD-Permit – several remedial alternatives for the sediment and the floodplain, and for disposition or treatment of removed sediments/soils. After the Commonwealth and others criticized the ecological impacts of the alternatives, EPA directed GE to prepare a revised CMS (A.R.293437).

2009: While GE worked on the revised CMS, the Commonwealth designated a 13-mile stretch of the Upper Housatonic River, extending from the Confluence to slightly downstream of Woods Pond, as an Area of Critical Environmental Concern ("ACEC") under state law (A.R.558607).

2010: GE submitted a revised CMS Report ("RCMS") (A.R.472605, 580275, 580283). The RCMS contained a detailed evaluation of the original sediment/floodplain remedial alternatives plus two additional alternatives identified in 2009. GE's evaluation was again based on the nine selection criteria specified in the CD-Permit; and it used the assumptions, IMPGs, and other inputs that EPA had directed GE to use (even though GE disagreed with many of them). GE also evaluated alternatives for disposition of removed sediment/soil and recommended use of an engineered on-site disposal facility.

2011: The Commonwealth submitted comments on the RCMS ("MA 2011 Comments"; Attachment 4), which expressed "vigorous" opposition to on-site disposal, and advocated disposal at a facility outside of Massachusetts. *Id.* at 18-19. It also maintained that all of the active remedial alternatives under consideration were too intrusive, and proposed its own

remedial alternative avoiding dredging other than in certain impoundments of the River. *Id.* at 1-2.

2014: EPA issued a draft modification of the CD-Permit, which identified its proposed Rest-of-River Remedial Action (A.R.558619). Ignoring the Commonwealth's plea for a less intrusive remedy, the draft included the removal and disposal of approximately one million cubic yards of sediment and soil, impacting over 400 acres of habitat. EPA also proposed that all removed sediment and soil be transported to, and disposed of at, an out-of-state facility. At the same time, EPA issued a Statement of Basis for its proposed Rest-of-River Remedial Action ("Stmt. Basis"; Attachment 5), and a Comparative Analysis of Remedial Alternatives for the Rest of River ("Comp. Analysis"; Attachment 6). In October 2014, GE submitted detailed comments. ("GE Comments"; Attachment 7).

2015: EPA notified GE of its intended final decision (A.R.582991). GE invoked its rights under the CD to administrative dispute resolution in October 2015 (A.R.583778).

2016: The parties proceeded with formal dispute resolution pursuant to CD ¶135, submitting Statements of Position (and a Reply by GE) ("GE SOP"; Attachment 8; "Region SOP"; Attachment 9; "GE Reply"; Attachment 10). The Regional Administrator designated the Regional Counsel to issue a final administrative decision on the dispute; and the Regional Counsel issued his decision on October 13, 2016 ("Region Decision"; Attachment 11). On October 24, 2016, the EPA Region issued and served on GE the final Permit Modification to select a Rest-of-River Remedial Action (the "Modified Permit"; Attachment 1), accompanied by a Response to Comments ("RTC"; Attachment 12).

because much less invasive and disruptive remedies would protect human health (Conditions II.B.2.a-II.B.2.g and II.B.3);

- (6) The Downstream Transport and Biota Performance Standards, which exceed EPA's authority by deferring the specification of remedial actions contrary to the CD (Conditions II.B.1.a and II.B.1.b);
- (7) The requirements for GE to conduct unspecified response actions if a third party undertakes projects on or along the river or in the floodplain, which also exceed EPA's authority by deferring the specification of remedial actions contrary to the CD (Conditions II.B.2.j.(1)(c) and (2)(e), II.B.2.k, II.B.6.b.(1) and (2)(b) and (c), and II.B.6.c);
- (8) The requirement to "ensure" proper inspection and maintenance of certain dams owned by third parties, which EPA has failed to evaluate under the remedy-selection criteria, and which would interfere with federal and state dam regulatory schemes (Conditions II.B.2.j.(1)(a) and (2)(b)); and
- (9) The "MESA/Conservation Net Benefit Plan" requirement, which constitutes an impermissible effort to extract additional NRD (Modified Permit, Attachment C at C-16).

ARGUMENT

I. The Out-of-State Disposal Requirement Conflicts with the Consent Decree and Is Clearly Erroneous.

In the Modified Permit, EPA insists that all disposal – of about a million cubic yards of sediments and soil – take place at out-of-state facilities. Modified Permit Condition

EPA has failed to account for this disparity in its decision-making. This was error. “Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate” because consideration of cost reflects both (1) “the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* disadvantages of agency decisions,” and (2) the “reality that ‘too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.’” *Michigan v. Environmental Protection Agency*, 135 S.Ct. 2699, 2707 (2015). According to EPA’s own RCRA guidance, where multiple remedies will otherwise satisfy the selection criteria, “cost becomes an important consideration in choosing the remedy which most appropriately addresses the circumstances at the facility and provides the most efficient use of Agency and facility owner/operator resources.” 61 Fed. Reg. at 19449.

In light of the enormous cost discrepancy here, it is not enough for EPA to determine that out-of-state disposal might be as effective as on-site disposal. Because the difference in cost is so large, EPA’s selection is not cost-effective, within the meaning of the case law and administrative guidance, absent a defensible conclusion that the difference in effectiveness (as measured by the non-cost Permit criteria) is very large too. Although EPA has belatedly *asserted* that out-of-state disposal will be more effective, there is no basis for this claim in the administrative record.

2. On-site disposal is at least as protective and effective as out-of-state disposal.

EPA has admitted that disposal of PCB-containing sediment and soil in a properly designed and maintained on-site upland disposal facility “would provide high levels of protection to human health and the environment....” Stmt. Basis at 35. The Agency has long recognized

that on-site disposal facilities are protective, particularly for waste containing PCBs. That is why EPA has selected on-site (or other local) disposal at numerous PCB sites throughout the country, including in Massachusetts. See GE Comments at Table 1, EPA RTC at Table 1; see also GE Reply at 11-12.⁷ Indeed, it is why EPA approved the use of on-site disposal facilities for sediment and soil from generally more contaminated portions of *this Site*. CD Appendix D at 38, 41 (noting that “PCBs are relatively immobile due to their low solubility in water,” and determining that on-site disposal “will not pose an unreasonable risk of injury to health or the environment”). Since “patently inconsistent applications of agency standards to similar situations are by definition arbitrary,” *South Shore Hospital, Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002), EPA’s insistence on out-of-state disposal for the Rest of River is presumptively arbitrary.⁸

EPA cannot escape the implications of this inconsistency. Contradicting its own prior statements and past practices, the Agency has now conjured a number of make-weight justifications for its selection of out-of-state disposal, culminating in the categorical – and categorically incorrect – claim that analyses of the Permit criteria “demonstrate clear distinctions

⁷ For example, at the New Bedford Harbor Site, EPA elected to dispose of a large portion of PCB-containing sediments in an on-site, confined aquatic disposal cell within the harbor itself, after determining that such disposal would “not result in an unreasonable risk of injury to health or the environment.” EPA, *Fourth Explanation of Significant Differences for use of a Lower Harbor CAD Cell (LHCC), New Bedford Harbor Superfund Site, Operable Unit #1* (March 2011) at Att. B.

⁸ EPA’s preference for out-of-state disposal also flies in the face of the rationale behind Section 104(c)(9) of CERCLA. That provision requires a state in which a remedial action will occur to assure that it has “adequate capacity” for the treatment and disposal of hazardous wastes that are generated. The Senate Report underlying Section 104(c)(9) states: “While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them. This is the NIMBY syndrome (not in my backyard). Yet if the RCRA and Superfund programs are to work – if public health and the environment are to be protected – the necessary sites must be made available.” S. Rep. No. 11, 99th Cong., 1st Sess. (1985) at 23.

between GE's favored approach and the selected remedy with respect to each of the Permit's threshold General Standards." RTC at 269.

For example, with respect to Overall Protection of Human Health and the Environment (one of the CD-Permit's three overriding "General Standards"), EPA relies on the assertion that "on-site disposal facilities may be less effective than an off-site disposal facility because the locations identified in the [RCMS] do not meet TSCA's siting requirements for PCB landfills." RTC at 239. Here EPA is referring to the default siting criteria in EPA's Toxic Substances Control Act ("TSCA") regulations, 40 C.F.R. §761.75(b), relating to soil permeability and hydrologic conditions. In the very next sentence, EPA acknowledges that it has the power to waive these criteria upon a demonstration of equivalent effectiveness, but insists – without any justification whatsoever – that it "believes that it is not appropriate to do so here." RTC at 239.

The Agency's position on the TSCA regulations is arbitrary and capricious because it relies on a false comparison. In the RCMS, GE identified three potential on-site disposal locations: the Woods Pond, Rising Pond, and Forest Street Sites.⁹ EPA's assessment of on-site disposal versus out-of-state disposal is premised on a comparison between (1) the real-world characteristics of these three specific locations, and (2) the hypothetical characteristics of as-yet-unidentified off-site disposal location(s). Thus, when EPA claims that the "on-site disposal facilities [identified by GE] may be less effective at containing waste than an [unidentified] off-site disposal facility," *id.*, it is comparing real apples to a conjectural orange: EPA's preferred side of the putative balance reflects assumptions that this Board cannot test or review.

⁹ The Woods Pond and Rising Pond Sites are potential on-site disposal facility locations which are different from the Woods Pond and Rising Pond impoundments discussed in Sections II and III below.

This is a consequential incongruence. It means that when EPA claims it would be “inappropriate” to waive the TSCA regulations for an on-site disposal facility, there is no way to determine whether this refusal constitutes anything more than a patently inconsistent application of agency standards to similar situations. Since no off-site disposal facility has been identified, there is no administrative record of the “effectiveness” of “off-site” locations.

Moreover, EPA cannot deny that there are only a few existing candidates for off-site disposal, and that at some of them EPA has already waived some of the very same TSCA criteria it refuses to waive here. For example, GE has identified at least three licensed commercial disposal facilities where EPA has waived at least one of the TSCA siting criteria – namely, the specification of 40 C.F.R. §761.75(b)(3) that the bottom of the landfill liner system be at least 50 feet above the historical high groundwater table. See Attachment 13. The Agency has failed to explain why those waivers were called for when even considering corresponding waivers for an on-site facility at the Rest of River is inappropriate.

At the same time, it is clear that EPA has overstated the supposed inability of the on-site locations identified by GE to meet the default TSCA siting criteria. With respect to soil permeability, the claim that a waiver would be “inappropriate” is a *non sequitur* because no waiver would even be needed. The regulations explicitly allow for alternatives to locating disposal sites in “thick, relatively impermeable formations” (namely, the use of soil with a high clay content in a “compacted soil liner” or the use of a synthetic membrane liner), §761.75(b)(1)&(2); and GE could use these alternatives in an on-site disposal facility. As for hydrological conditions, EPA may either: (1) give risk-based approval to an alternate disposal method if such method will not pose an unreasonable risk of injury to health or the environment, §761.61(c); or (2) waive any criteria that are not necessary to protect against such an

unreasonable risk, §761.75(c)(4); and it frequently makes such determinations when engineered safeguards are incorporated into the facility to ensure comparable protection, as would be the case here. See GE Reply at Table 1. Indeed, as noted, EPA has waived hydrological default criteria at some of the out-of-state facilities that would be candidates for off-site disposal.

Apart from the TSCA siting criteria, EPA offers nothing but conjecture in its calculation of the on-site half of the effectiveness equation. For example, EPA insists “that there is the *potential* for spills of leachate” during the potential transport of such leachate to GE’s water treatment plant in Pittsfield, and that if GE were to build a water treatment facility at the disposal site, “there is the *possibility*, despite best efforts to properly operate the treatment facility, to have releases of PCBs to the River.” RTC at 243 (emphasis added). Likewise, in its discussion of Control of Sources of Releases (the second General Standard enumerated in the Permit), EPA supports its decision with the statement that “[e]ven with close EPA oversight of GE’s design, construction and operation of a landfill, there remains a *non-zero potential* for issues in the ability long-term for a landfill next to the River to control the sources of PCBs.” RTC at 244-45 (emphasis added).

Once again, EPA’s speculation about the possible consequences of on-site disposal is entirely one-sided. If the risk of releases from an on-site facility is “non-zero” even with close Agency oversight, so is the risk of releases occurring during rail transportation of over a million yards of contaminated soil and sediment to an out-of-state facility, or once that sediment and soil are deposited at that out-of-state facility. It is arbitrary and capricious for EPA to take into

account highly improbable “non-zero” risks associated with on-site disposal while ignoring the corresponding risks of off-site disposal.¹⁰

Nor is it appropriate for EPA to wave aside the potential adverse consequences of out-of-state disposal by reasoning, as it repeatedly does, that those consequences will not be felt on the Housatonic. See RTC at 239 (“an off-site disposal facility would pose no risk of release to the Housatonic watershed”); 244 (“fair to distinguish ... the disposal of PCBs at a landfill in close proximity to the Housatonic River and its watershed from the disposal off-site far from the Housatonic River watershed”); 251 (“if such issues arise with off-site disposal, the Housatonic River watershed is unaffected”). If the *risk* of adverse consequences is no greater (and, for the reasons stated, EPA has no basis for concluding that it is), then the *location* of those consequences is not a legitimate reason to distinguish between on-site and out-of-state disposal.¹¹

3. Compliance with ARARs does not justify rejecting on-site disposal.

Compliance with ARARs is one of the Rest-of-River remedy-selection criteria. CD-Permit Condition II.G.1.c. EPA does not contend that the TSCA siting criteria discussed above are ARARs; however, it argues that certain other regulatory requirements constitute ARARs that

¹⁰ EPA has also claimed that PCB releases to the Housatonic watershed might occur if an on-site facility is not operated or maintained properly over its life, ostensibly making on-site disposal less protective, less effective at preventing future releases, and less reliable over the long term because it would have to rely on proper long-term operation, maintenance, and monitoring (“OM&M”) activities. Region SOP at 51. But any disposal facility, wherever it is located, will have a similar potential for releases, and thus will require long-term OM&M. Given that the design, construction, operation, and OM&M of an on-site disposal facility would be subject to EPA approval and under close EPA oversight, such a facility would provide the same protection, control of releases, and long-term reliability as an out-of-state facility.

¹¹ EPA also argues that on-site disposal would affect an area “with no known contamination,” adversely affecting the habitat in that area. RTC at 261, 241. This ignores that a disposal facility at the Woods Pond Site would occupy an industrial area used as a sand and gravel quarry, and that the other two sites identified do not include any sensitive or otherwise significant floodplain, wetland, or rare species habitats. See GE Comments at 12.

would not be met for an on-site disposal facility. RTC at 246-250. This position, too, is clearly erroneous as a matter of both fact and law. The putative ARARs are at best a pretext for rejecting an equally effective (and much less expensive) disposal option.

First, EPA claims that on-site disposal would require a waiver of the provisions in the Massachusetts solid and hazardous waste regulations that prohibit a disposal facility in an ACEC. RTC at 247, 249. However, as EPA recognizes, *id.* at 247, the Massachusetts solid waste regulations do not cover wastes that contain PCB concentrations at or above 50 mg/kg or are commingled with such wastes because (1) they are considered hazardous waste, 310 CMR 30.131, and (2) the solid waste regulations do not apply to facilities that manage hazardous waste. 310 CMR 16.01(4)(a). Since those are the kinds of wastes that would be subject to on-site disposal here, the solid waste regulations do not constitute an ARAR.

To be sure, the Massachusetts hazardous waste regulations also prohibit a disposal facility in an ACEC, 310 CMR 30.708, and that prohibition is theoretically applicable to the waste at issue here.¹² But that prohibition clearly would not apply to the Forest Street or Rising Pond disposal sites, or other on-site locations that may be identified, that are outside the ACEC, as EPA admits, RTC at 249. The prohibition could potentially apply to the Woods Pond Site, which is located within the boundaries of the ACEC, but its application there would be pretextual because the Woods Pond Site would occupy the grounds of a sand/gravel quarry where on-site disposal would not affect any of the resources of the ACEC. Even if a waiver were needed, it

¹² Apart from this single prohibition, the Massachusetts hazardous waste regulations are not applicable here. As EPA has recognized, *see* Attachment C to Modified Permit at C-12, although wastes containing more than 50 mg/kg of PCBs are listed as hazardous waste in state regulations, those regulations exempt facilities that manage waste with such PCB concentrations in compliance with TSCA regulations. 310 CMR 30.501(3)(a). That exemption, however, does not apply to the ACEC prohibition.

would be appropriate to grant one (and arbitrary not to grant one) since EPA has already decided to waive other ACEC prohibitions that would interfere with its selected remedy – e.g., a prohibition on dredging in an ACEC and on temporary waste management in an ACEC. *See* Attachment C to Modified Permit at C-8, C-13, C-15.

Second, although EPA cites “‘possible’ wetlands ARARs, RTC at 250, the federal and state wetlands regulations are not applicable to the Woods Pond and Rising Pond Sites (as EPA appears to recognize, *id.*) because the operational footprints of the disposal facilities at those sites would not be located in, and would not affect, any regulated wetlands. *See* GE Comments, Figures 2 and 4. Even at the Forest Street Site, the impact on wetlands would be negligible: the footprint of the disposal facility would merely require construction of an access road across a small stream in the southern portion of the site, and a part of the facility would be located within the areas adjoining that stream. *Id.*, Figure 3. Given the extremely limited extent of these impacts, EPA could readily find – as it did in discussing the Massachusetts Wetlands Protection Act regulations, *see* Modified Permit, Attachment C at C-11 – that the work would be conducted in accordance with the substantive regulatory requirements, avoiding the need to waive these putative ARARs.

Finally, EPA contends that the Rising Pond Site abuts an area of Priority Habitat for the state-listed wood turtle, and claims that “further confirmation would be needed to conclude if there are any effects on priority habitat of rare species in the operational area of the landfill.” RTC at 242. This rationale is patently speculative. The Rising Pond facility was designed to ensure that its operational area will be located outside of, and will avoid any impacts on, the Priority Habitat of the wood turtle. *See* GE Comments, Figure 4. This is in stark contrast to EPA’s own sediment and floodplain remedy, which would impact over 200 acres of state-listed

Although local opposition could, in some cases, have an indirect impact on “coordination with other agencies,” the risk here is ephemeral because both the CD and CERCLA exempt on-site remedial actions from the need to obtain state and local permits and approvals. CD, ¶9.a; CERCLA §121(e)(1). As to zoning restrictions, the courts have similarly made clear that, with respect to on-site remedies, local zoning ordinances are preempted by CERCLA.¹³ Thus, EPA’s position is not just wrong but an inversion of the contractual status quo: When the parties included regulatory and zoning restrictions as aspects of “implementability,” they expected such restrictions to be taken into account in the evaluation of potential *off-site* elements of a remedy, even though under the CD, the statute, and the case law they will have no bearing on the implementability of an *on-site* remedial alternative.¹⁴

EPA also argues that, even though state and community opposition are not among the enumerated remedy-selection criteria, it is free to consider such opposition because the CD-Permit authorizes it to select a remedy based on both GE’s submissions and “any other relevant information in the Administrative Record,” CD-Permit Condition II.J., and the Administrative Record here includes public and governmental comments about the disposal remedy. RTC at 263. But Condition II.J. of the CD-Permit explicitly limits EPA to “any other *relevant*

¹³ See *United States v. City & County of Denver*, 100 F.3d 1509 (10th Cir. 1996) (municipal zoning ordinance that prohibited maintenance of hazardous waste in areas zoned for industrial use was preempted by CERCLA and could not bar remedy involving on-site solidification of contaminated soils); *Town of Acton v. W.R. Grace & Co.-Comm.*, Civil Action No. 13-12376-DPW, D. Mass., September 22, 2014 (Town Bylaw that conflicted with an EPA on-site remedy was preempted by CERCLA).

¹⁴ EPA cites RCRA guidance stating, with respect to implementability, that “[s]ome technologies may require state or local approvals,” and that “[i]n some cases, state or local restrictions or concerns may necessitate eliminating or deferring certain technologies or remedial approaches from consideration in remedy selection.” RTC at 259 (citing a 1994 RCRA guidance document). That guidance relates to regular RCRA remedies, which are not subject to an on-site permit exemption or CERCLA preemption law. Since the remedy here will be implemented under CERCLA, see CD ¶22.w, this aspect of the RCRA guidance is inapposite.

information in the Administrative Record” (emphasis added). What defines the universe of “relevant” information? The CD-Permit criteria, which could have included, but do not include, state or community acceptance. Even if the CD were ambiguous in this regard, EPA’s position would be refuted by the fact that it has never interpreted the CD to give it free rein in its evaluation of potential remedies. Rather, as noted, EPA has consistently agreed that it evaluated and selected the remedy under the nine enumerated CD-Permit criteria. See Section I.A, *supra*.

Finally, even if the Board were free to disregard the explicitly-limited text of the CD-Permit, there is no factual merit to the notion that the document *implicitly* incorporates public opinion as an element of implementability because state and community opponents might thwart or undermine implementation by appealing the remedy or enacting legislation or regulations to hinder on-site disposal. RTC at 262, 265-266. The CD allows for appeals by Massachusetts and others and thus contemplates the possibility that opponents of the selected remedy may “delay or block” its performance through judicial action. In fact, the “delay” rationale proves too much because GE *also* has a right to appeal. CD ¶141.b. Thus, the schedule will be the same whether EPA properly selects on-site disposal under the CD-Permit criteria (possibly generating an appeal by Massachusetts or other opponents), or bows to public pressure and selects out-of-state disposal (provoking an appeal by GE). EPA’s purported concern over the prospect of adverse legislative or regulatory action is spurious because any such action would be preempted by CERCLA’s on-site permit exemption. *See, e.g., Rhode Island Resource Recovery Corp. v. Rhode Island Dep’t of Env’tl. Mgmt.*, 2006 WL 2128904 at *5 (D.R.I., July 26, 2005) (application of state law requiring state approval for use of out-of-state waste as fill in on-site CERCLA capping remedy violated §121(e)(1) of CERCLA).

described above would require about 75% fewer truck trips, and reduce GHG emissions by almost 90%. GE Comments at 43 and Tables 13-14.

EPA cannot deny that these impacts will occur. Instead, it argues that any negative impacts of its selected remedy will be outweighed by its benefits. RTC at 162-163. These asserted benefits, however, are either irrelevant under the CD or inherently speculative or both.

In large part, EPA rationalizes its decision by assuming that bigger is better, *i.e.*, that deeper dredging should take place simply because the remediation of Woods Pond “represents the opportunity to remove a significant mass of PCBs from the river system. . . .” RTC at 162. EPA has repeatedly given “mass removal” as the reason for its selection. *See id.* (“At issue here is the opportunity to permanently remove the risks posed by approximately 285,000-340,000 CY . . . of PCB-contaminated sediment”); *id.* at 163 (remedy “will remove a significant mass of PCBs”); Region SOP at 28 (“There is no other point on the River where it is possible to remove over 285,000 CY of PCB contaminated material from a single location”).

In other words, EPA asserts that a remedy which requires more removal is necessary *because* it will require more removal. That isn’t an application of the mandated remedy-selection criteria. The Rest-of-River remedy-selection criteria do not include “mass removal.” As far as the CD is concerned, size does not matter (except insofar as a bigger remedy may be more costly). The selected remedy, requiring the expenditure of tens of millions of extra dollars and the emission of thousands of tonnes of extra GHGs, would be contractually permissible only if the additional impacts could be justified on the basis on one or more of the remedy-selection criteria – *e.g.*, in terms of additional protectiveness, long-term effectiveness, etc.

This aspect of EPA’s rationale, however, depends on both the inconsistent application of Agency standards and a speculative conclusion derived from dubious assumptions, and is

including those that EPA has instructed GE to install as part of the selected remedy for Reaches 5A and 5C. EPA has no reason to be more concerned about an engineered cap in Woods Pond than in those locations, which actually have a higher velocity than Woods Pond.¹⁸

EPA's rationale here, moreover, is so speculative as to be self-defeating. If the time horizon is expanded to "perpetuity," then the list of "unknowns or uncertainties" isn't limited to maintenance lapses or climate change. If EPA can compel GE to provide a "guarantee" against any unknowns and uncertainties that could arise in perpetuity, then there is no practical limit to what it could require of GE despite the very specific limits on its discretion imposed by the CD.

Indeed, EPA's claim of vulnerability to unstated effects "associated with potential climate change" is completely conjectural, and its claimed risk of cap or dam failure due to poor maintenance is contradicted by the record, which establishes there is a negligible risk of dam failure in any non-speculative time frame because GE itself owns the Woods Pond Dam and conducts the necessary monitoring, maintenance, and repair of the dam to prevent failure.¹⁹ Doing so is critically important to GE because, in the CD, the federal and state governments have promised not to sue for additional NRD, but these covenants do not apply in the case of a failure of Woods Pond Dam (CD ¶176), and thus such a failure would open GE to additional claims for NRD.

¹⁸ At numerous other sites as well, EPA has selected engineered capping, either by itself or following just enough sediment removal to place the cap, as an appropriate remedy for contaminated sediments, including at river and impoundment sites, as EPA concedes. RTC at 198-199.

¹⁹ EPA cites an example of a 1992 release at Rising Pond Dam, RTC at 162, which occurred before GE became the owner of that dam, when the then-owner drew down the water in the Pond to perform repairs. GE would ensure that this type of release does not occur at Woods Pond Dam (or at Rising Pond Dam either, which GE now owns).

Finally, EPA argues that its deep dredging remedy will increase the trapping efficiency of Woods Pond and thereby reduce downstream transport of PCBs. RTC at 162-163. However, while the selected remedy may increase solids trapping efficiency in Woods Pond compared to smaller alternatives, *solids* trapping efficiency does not equate to *PCB* trapping efficiency. EPA's own model indicates very little difference between that remedy and the smaller removal alternative in terms of the annual average PCB loads passing Woods Pond and Rising Pond Dams. *See* GE Comments at 42. While EPA claims that these small differences (0.1 to 0.2 kg/year) "are significant relative to the Downstream Transport Performance Standards," *id.* at 29, current model projections indicate that they would not make a difference in whether the standard is attained, and thus do not justify the selection of a more expensive and intrusive remedy. *See* GE Reply at 21. Moreover, as EPA has admitted, these differences would not translate to *any* reduction in risks due to fish consumption, direct contact, or ecological impacts compared to the smaller alternative, and thus would not increase the protectiveness of the remedy.

III. The Remedy Selected for Rising Pond Conflicts with the CD and the Rest-of-River Remedy-Selection Criteria.

For Rising Pond, the Modified Permit requires removal and capping of sediments to achieve a spatially-weighted average PCB concentration of 1 mg/kg in various averaging areas. Modified Permit Condition II.B.2.g. As with the remedy for Woods Pond, this requirement conflicts with the Rest-of-River remedy-selection criteria and is arbitrary, capricious, and clearly erroneous because it would not have greater risk-based benefits than smaller, less disruptive, and less costly alternatives.²⁰

²⁰ GE commented on this requirement (GE Comments at 50-52); and the issue was briefed in the administrative dispute resolution process (GE SOP at 20-21, Region SOP at 35-36, GE Reply at 21-23). EPA addressed the issue in its RTC at 182-188.

IX. The MESA Conservation/Net Benefit Plan Requirement Is Overbroad and Violates the CD.

The table of ARARs attached to the Modified Permit says that, where the selected remedy would cause a “take” of any species listed as threatened, endangered, or of special concern under the Massachusetts Endangered Species Act (“MESA”), “EPA would follow the [Massachusetts] regulatory requirements” and require GE to submit and implement a Conservation and Management Plan providing for a “long-term net benefit” to the affected species. Modified Permit Attachment C at C-16. *See also id.* at C-9, C-10, C-11 and RTC at 312. This requirement is clearly erroneous in two respects: (1) it would *not* “follow the regulatory requirements,” and (2) it would violate the CD.³⁶

First, the specified process would not follow the Commonwealth’s regulatory requirements because the regulations promulgated under MESA allow the Director of the Massachusetts Division of Fisheries and Wildlife to permit a take only if, among other things: (1) “[a]n insignificant portion of the local population would be impacted by the Project or Activity,” and (2) the applicant “agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species...” 321 CMR 10.23(2). Thus, requiring GE to carry out a Conservation and Management Plan would “follow the regulatory requirements” only when the take would impact an insignificant portion of the local population; if the take would impact a significant portion, it is prohibited altogether and there is no statutory or regulatory authority to require a Conservation and Management Plan.

³⁶ GE commented on this requirement (GE Comments at 67); and the issue was briefed in the administrative dispute resolution process (GE SOP at 33-34, Region SOP at 80-83, GE Reply at 31-32). EPA addressed the issue in its RTC at 141-143.

The record shows that, for at least nine state-listed species, the takes resulting from the selected remedy would impact a significant portion of the local populations. GE Comments at 37, Table 12, and Attachment E. EPA has neither refuted that showing nor limited its Conservation and Management Plan requirement to exclude such takes. Instead, EPA argues that the Commonwealth "has affirmed for EPA" an interpretation of the MESA regulations that would require GE to submit a Conservation and Management Plan even when the take would impact a significant portion of the local population. RTC at 142. If so, then that interpretation is itself arbitrary and capricious, because it cannot be squared with the plain language of the regulation.

Second, this aspect of the selected remedy violates the CD because, by requiring GE to conduct unspecified conservation measures in order to provide a "Net Benefit" to the conservation of the affected species, it effectively extracts compensation for a take and thus constitutes a form of NRD. The CD, however, resolved GE's NRD liability through a combination of monetary payments and specified restoration work. CD Section XXI. In return, the United States and the Commonwealth agreed not to seek additional NRD, except in the case of a failure or breach of Woods Pond or Rising Pond Dam. CD ¶¶161, 166, 176. Any attempt to recover additional NRD in the guise of conservation measures would violate those covenants.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, GE requests the Board to review and set aside the Modified Permit conditions identified above and remand them to EPA for reconsideration and revision consistent with the positions set forth in this Petition.