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

In re:	)	
GENERAL ELECTRIC COMPANY	)	**RCRA Appeal No. 16-04**
Modification of RCRA Corrective Action Permit No. MAD002084093	)	

RESPONSE OF GENERAL ELECTRIC COMPANY TO PETITION OF THE HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE

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Dated: February 14, 2017

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* These attachments contain only documents or excerpts from documents that were not included in the Attachments to General Electric Company's ("GE's) Petition for Review. Where applicable, cross-references are provided to the document numbers in EPA's Administrative Record (A.R.) for the October 2016 Final Modification of the Reissued RCRA Permit (October 2016).

GLOSSARY OF TERMS

A.R.	Administrative Record
ARAR	Applicable or Relevant and Appropriate Requirement
CD	Consent Decree in *United States et al. v. General Electric Company*, Civil Action No. 99-30225-MAP *et seq.* (Oct. 27, 2000)
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	U.S. Environmental Protection Agency
GE	General Electric Company
HI	Hazard Index
IMPGs	Interim Media Protection Goals
mg/kg	milligrams per kilogram (equivalent to parts per million)
NCP	National Contingency Plan
NRD	Natural resource damages
O&M	Operation and maintenance
PCBs	Polychlorinated biphenyls
RCMS	Revised Corrective Measures Study (submitted by GE)
RCRA	Resource Conservation and Recovery Act
RTC	EPA's Response to Comments
Stmt. Basis	EPA's Statement of Basis for Proposed Rest of River Remedial Action

INTRODUCTION

The General Electric Company ("GE") submits this response to the petition for review filed by the Housatonic Rest of River Municipal Committee (the "Committee") of the final permit modification issued to GE by EPA Region 1 under the Resource Conservation and Recovery Act ("RCRA") on October 24, 2016 (the "Modified Permit").

The Committee's petition is based on a false impression of the governing Consent Decree ("CD").[1] The Committee asserts that the CD reflects a "legal maneuver that gave GE enormous benefits," Municipal Committee Petition ("M.C.Pet.") at 2, and was "extremely beneficial to GE," *id.* at 6. This is not at all correct. The CD was no "maneuver," but a comprehensive settlement negotiated among GE, EPA, and the States of Massachusetts and Connecticut. All parties were represented by competent counsel and other informed and sophisticated representatives. The resulting contract embodied in the CD binds all of the parties to it.

Regardless of the Committee's opinion, the terms of the CD are not slanted in GE's favor. In fact, as the United States District Court found when it entered the judgment of the Court, the CD was "fair, reasonable, consistent with the Comprehensive Environmental Response, Compensation, and Liability Act ('CERCLA') *and in the public's interest.*" *United States v. General Electric Company*, Civil Action No. 99-30225-MAP *et seq.*, Memorandum and Order Re Entry of Consent Decree and Final Judgment (Oct. 31, 2000) (Attachment 2), at 2 (emphasis added). The CD obligates GE to perform very expensive cleanup actions, reimburse EPA's past and future oversight and response costs, make payments and conduct projects to

[1] Relevant provisions of key documents referenced herein were either provided in attachments to GE's Petition or are in attachments to this Response. The former includes all references herein to the CD except where noted. The additional CD provisions cited herein and not previously provided are included in Attachment 1 hereto.

settle the governments' claims for natural resource damages ("NRD"), implement an expensive Brownfields program under a collateral agreement triggered by CD entry, and, following review by this Board and the federal appeals court, perform the Rest-of-River Remedial Action. GE has already conducted the investigation and cleanup of more than 20 areas, comprising well over 300 acres, at and near its former Pittsfield plant and downstream along the River, has reimbursed EPA over $100 million for its oversight and response costs, and has paid over $15 million in NRD to the United States and the States. Additionally, under the collateral agreement, GE has paid over $26 million to the City of Pittsfield and the Pittsfield Economic Development Authority ("PEDA") and donated 52 acres of land to PEDA.

The Committee's depiction of the CD as one-sided is not just incorrect, but ironic. It ignores the fact that the CD itself gave the *Committee* rights that it would not otherwise have under CERCLA – namely, the right to pre-implementation review of the Rest-of-River Remedial Action, a right which the Committee has now exercised.

The Committee's legal arguments are no more valid than its mischaracterization of the CD:

1. The Committee's primary argument is that EPA erred when it declined to apply the Massachusetts Hazardous Waste Facility Siting Act, M.G.L. ch. 21D ("Siting Act") to the temporary sediment and soil staging/handling areas necessary for the Rest-of-River Remedial Action. The Committee asserts that the Siting Act should apply and therefore the communities "hosting" such temporary staging and handling areas are entitled to compensation as part of the "siting agreement" that the Act would require with a host community if it was applicable.

There is no merit to this. Paragraph 9.a of the CD expressly exempts the Rest-of River Remedial Action from the need to obtain any state or local permits. The Siting Act approval

process, and, in particular, a "siting agreement," undeniably constitute a "permit" for the purposes of that exemption. This conclusion is consistent with the position of the Commonwealth of Massachusetts, which has determined that the Siting Act is not applicable to CERCLA cleanup actions.

2. Moreover, as both EPA and the Commonwealth of Massachusetts have also determined, the Siting Act is not an "applicable or relevant and appropriate requirement" ("ARAR") for the Rest-of-River Remedial Action because it does not include substantive standards of control. In any case, that Act has never been applied to any similar remedial activities in Massachusetts, as is required of an ARAR.

3. The Committee also attacks the CD as an unlawful hybrid of RCRA and CERCLA, exceeding EPA's and the District Court's authority. This attack on the CD, a final judgment by a federal court 16 years ago, is untimely and misplaced, since the Committee never raised the issue in submissions to the court prior to entry. In any event, because the District Court retained jurisdiction over the matter, it is an argument that can be made only in that forum.

4. Finally, the Committee challenges the Modified Permit on the ground that it does not require GE to maintain the remedy "in perpetuity." This argument also misapprehends the CD, which requires GE to continue operation and maintenance ("O&M") of the remedy for as long as necessary until such O&M obligations have been fully performed.[2]

[2] In addition to these points, the Committee's petition contains a number of factual errors, as illustrated in Section III of this Response.

ARGUMENT

I. The Siting Act Does Not Apply to the Rest-of-River Remedial Action.

The Committee's primary argument is that the Siting Act is not preempted and thus should be applied to the temporary sediment and soil handling facilities that will be necessary to implement the Remedial Action, thus entitling the "host communities" to compensation. M.C.Pet. at 18-30. That argument fails because, as both EPA and the Commonwealth have correctly determined, the Siting Act does not apply to the Rest-of-River Remedial Action.

A. The Siting Act Is Preempted by the On-Site Permit Exemption in the CD and CERCLA.

Paragraph 9.a of the CD contains a provision that references and is comparable to the on-site permit exemption in Section 121(e)(1) of CERCLA. It states that, "[a]s provided in Section 121(e) of CERCLA..., no permit shall be required for any portion of the Work conducted entirely on-site (*i.e.*, within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work)." That provision indisputably preempts any state or local permit requirement for on-site work.

The Committee makes three arguments – all fruitless – against the application of the permit exemption to the Siting Act. First, the Committee contends that the Siting Act is not a "permit." M.C.Pet. at 21-23. This claim does not bear up under even superficial scrutiny. As noted, the contractual permit exemption in the CD both references and resembles the statutory exemption in CERCLA. *Compare* CD ¶ 9.a *and* CERCLA § 121(e)(1). Although neither the CD nor CERCLA defines "permit," EPA long ago explained that, for purposes of the statutory exemption incorporated in the CD, "required approval or consultation by regulatory bodies is analogous to permit requirements and is encompassed within the CERCLA section 121(e)

exemption." 53 Fed. Reg. 51394, 51406 (Dec. 21, 1988). Moreover, EPA elsewhere defines "permit" to mean "an authorization, license, or equivalent control document." *See, e.g.*, 40 C.F.R. §§ 122.2, 124.2, 146.3, 270.2, 501.2.

According to these standards, the Siting Act is quite clearly covered by the permit exemption. First, the process established by the Massachusetts statute requires the consultation and approval of not one, but two, regulatory bodies. The first regulatory body, a state "Hazardous Waste Site Facility Council" (the "Council"), must issue at least three approvals before a hazardous waste facility project can go forward: (1) the Council must determine that the project is "feasible and deserving of state assistance," M.G.L. c. 21D, § 7; (2) the Council must determine that the "social and economic appendix" prepared by the developer "is in [the Council's] judgment in compliance with the rules, regulations, procedures and standards which it has prescribed for said appendix," *id.* at § 10; and (3) the Council must declare that the "siting agreement" between the developer and the host community is "operative and in full force and effect." *Id.* at § 12. These approvals required from the Council are at least "analogous to permit requirements" and thus they bring the Siting Act within the permit exemption. *See also Rhode Island Resource Recovery Corp. v. Rhode Island Dep't of Environmental Management*, No. CA 05-4151 ML, 2006 WL 2128904 (D.R.I. 2006), rejecting a state's attempt to require a party operating under a CERCLA consent decree to comply with a state law requiring a state agency's "written approval" as barred by the on-site permit exemption in the consent decree (which was identical to Paragraph 9.a of the current CD) and in Section 121(e)(1) of CERCLA. The court noted that the state could not "attempt[] to bypass the prohibition on permit requirements by asserting that it is merely requesting that [the party] seek 'written approval,' and not a formal permit." *Id.* at *5.

The second regulatory body, the Local Assessment Committee, is appointed by the chief executive officer of the host community and is responsible for negotiating the terms of the "siting agreement" with the developer. *Id.* at § 5. The project cannot go forward unless the Local Assessment Committee executes a siting agreement. *Id.* at § 12 ("No facility shall be constructed, maintained or operated unless a siting agreement shall have been established by the developer and the local assessment committee....").

The siting agreement that the Siting Act would require isn't just *analogous* to a permit – it *is* a permit, under both the regulatory definition of an "authorization, license, or equivalent control document" and the Committee's own definition in its petition of a "document authorizing someone to do something." M.C.Pet. at 21. The siting agreement is unquestionably a document, and it just as indisputably authorizes someone (the developer) to do something (construct, operate, and maintain a hazardous waste facility in the host community).

The conclusion that the permit exemption applies to the Siting Act is therefore completely consistent with both the scope of the exemption and the terms of the Act. It is also consistent with the positions taken by state regulators. The Applicability Committee of the Hazardous Waste Site Facility Council concluded more than 20 years ago that "[c]areful legal review of CERCLA and EPA's regulatory interpretations indicate that the 21D [Siting Act] siting process is a permit process preempted by CERCLA." May 9, 1994 Memorandum to the Council (Attachment 3) at 1. The Massachusetts Department of Environmental Protection ("MassDEP") likewise decided that the Siting Act did not apply to on-site remedial actions. *See* January 28, 1994 Memorandum from MassDEP to the Council's Applicability's Committee (Attachment 4 hereto) at 3.

Second, the Committee argues that the CD's on-site permit exemption doesn't apply to the Siting Act because that exemption comes from Section 121(e)(1) of CERCLA and the Rest-of-River Remedial Action was selected under RCRA, not CERCLA. M.C.Pet. at 24-29. This argument is wrong because its premise is false. Although the Rest-of-River remedy was selected in accordance with the RCRA Permit incorporated in the CD, Paragraph 22.z of the CD provides that, "[f]or purposes of the Rest of River Remedial Action and O&M, EPA's modification of the Reissued RCRA Permit to select such Remedial Action and O&M that is effective at the time of initiation of the Rest of River Remedial Design/Remedial Action *shall be considered to be the final remedy selection decision pursuant to Paragraph 121 of CERCLA*" (emphasis added). Moreover, the CD unambiguously specifies that the remedy is to be *implemented* under CERCLA, CD ¶¶ 22.p, 22.s, 22.z, and there is no doubt that CERCLA's on-site permit exemption applies to such implementation. Indeed, the National Contingency Plan ("NCP") provides that "[n]o federal, state, or local permits are required for on-site response actions *conducted* pursuant to CERCLA ...." 40 C.F.R. § 300.400(e)(1) (emphasis added).[3]

The Committee's second argument also ignores the fact that the governing instrument here, the CD, specifically creates a permit exemption for on-site work conducted in the Rest of River. CD ¶ 9.a. The District Court has retained jurisdiction over the subject matter of the CD

[3] The Committee's reliance on *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993) (M.C.Pet. at 20-21), is entirely misplaced. The court in that case held that Colorado was not barred by CERCLA from implementing its federally delegated hazardous waste management program under RCRA at a federal (U.S. Army) site that was also subject to CERCLA. That has nothing to do with whether a separate state law that was not authorized by federal law is preempted by CERCLA. Further, regarding the on-site permit exemption, the court held that that exemption had no application to the case because the state order in question did "not require the Army to obtain a permit," but only to update a prior permit application as required by RCRA, and thus the order "would not violate [§ 121(e)(1)]." *Id.* at 1582. Finally, that case did not involve a consent decree with an explicit on-site permit exemption.

for purposes of any motion to modify the CD, CD ¶ 211 (in Attachment 1); *see also* Fed. R. Civ. P. 60(b); and thus any argument that Paragraph 9.a should not be applied to the Siting Act would need to be addressed to that court and, as discussed in Section I.D below, any such argument now would be untimely.

Finally, the Committee contends that the on-site permit exemption may not apply to the temporary staging/handling facilities because they may not be "entirely onsite." M.C.Pet. at 30. Paragraph 9.a of the CD defines "on-site" as meaning "the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work." The NCP definition is similar. 40 C.F.R. § 300.400(e)(1). In order for the temporary sediment and soil staging and handling facilities to serve their purpose (including the staging and/or dewatering of removed sediments and soils before they can be moved to a loading or disposal site), they will necessarily have to be in sufficiently "close proximity" to the excavated areas to be considered "on-site." *See also, e.g., Town of Fort Edward v. United States*, No. 06-5535-cv, Summary Order (2d Cir. 2008), slip op. (Attachment 5) at 4, 5 (noting that "it is plain from examples cited at the time of the regulation's promulgation that the 'very close proximity' limitation within the definition of 'on-site' was intended to afford EPA some flexibility in identifying proximate sites necessary to achieve CERCLA objectives," and thus a processing facility located within 1.4 miles from the contaminated area met that definition); *Ohio v. EPA*, 997 F.2d 1520, 1549-50 (D.C. Cir. 1993) (noting that the NCP definition of "on-site" "reflects the practical aspects of responding to hazardous waste releases under various conditions," that "in many situations, it may be prohibitively burdensome or, in fact, impossible to conduct the necessary response measures within a narrowly 'contaminated' area," and that "[n]onetheless, the necessary response measures may so closely relate to the concerned site as to be effectively managed under the aegis of

CERCLA"). That would clearly be the case for temporary staging/handling areas for the sediments and soils removed from the river and floodplain.

B. The Siting Act Is Not an ARAR.

The Siting Act is not an ARAR for the Rest-of-River Remedial Action. As EPA said in its Response to Comments ("RTC"), the Commonwealth did not propose the Siting Act as an ARAR and "EPA concurs that it is not an ARAR," as its provisions "do not include substantive standards of control." RTC at 297 (included in Attachment 6). The CD contains a specific provision for the Commonwealth to appeal EPA's determination not to designate a state ARAR (¶ 22.bb), but the Commonwealth has not done so here.

That should be the end of the matter. At any rate, there is no substantive merit to the Committee's position. It argues that EPA and the Commonwealth should have identified the Siting Act as an ARAR because CERCLA's provision on ARARs refers to a "standard, *requirement*, criteria or limitation under a State environmental *or facility siting law*" that is more stringent than any federal standard or requirement, and the Siting Act is a "facility siting law." M.C.Pet. at 23, citing CERCLA §121(d)(2)(A)(ii) (emphases by Committee). But the very same ARARs provision of CERCLA makes clear that the impact of an ARAR is that a remedial action must require "*a level or standard of control* for [a] hazardous substance or pollutant or contaminant which at least attains" the ARARs. CERCLA § 121(d)(2)(A) (emphasis added). As EPA has recognized, the Siting Act, regardless of its name, does not establish any "level or standard of control" for a contaminant and therefore is not an ARAR.

The Committee also claims that EPA recognized the Siting Act regulations as an ARAR, since it relied on them as one reason for rejecting the on-site disposal option. M.C.Pet. at 11, 23, citing EPA's 2014 Statement of Basis. In fact, however, in response to GE's comments that the

Siting Act regulations should not be an ARAR, EPA deleted the reference to these regulations as an ARAR. RTC at 250, 314 (in Attachment 6).

Even if the Siting Act might otherwise meet the definition of an ARAR, it would not be an appropriate ARAR here because it has never been applied to temporary waste staging/handling areas at any other cleanup sites in Massachusetts.[4] CERCLA and the NCP provide that a state ARAR should be waived where the State "has not consistently applied (or demonstrated the intention to consistently apply)" that requirement in similar circumstances at other sites. CERCLA § 121(d)(4)(E); 40 C.F.R. § 300.430(f)(1)(ii)(C*)(5)*.[5]

C. The Committee's Argument That the Siting Act Applies Even if It Is Not an ARAR Is Erroneous.

The Committee goes on to argue that the Siting Act applies to the Rest-of-River Remedial Action t even if it is not an ARAR. This argument is based on the false premise that EPA has wrongly concluded that any law that is not an ARAR is necessarily a permit preempted by CERCLA section 121(e)(1). M.C.Pet. at 20-21, 23. But neither EPA nor the Commonwealth has concluded that. Rather, as shown above, and as EPA and the Commonwealth have rightly

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[4] Indeed, the Committee misstates the purpose of the Siting Act as embodying "a state policy designed to ensure that GE compensate communities for at least some portion of the disruption caused by a massive cleanup." M.C.Pet. at 1. In fact, as the Committee itself recognizes later, the Siting Act "was enacted in 1980 to enable the development of hazardous waste facilities in Massachusetts – primarily by requiring developers to negotiate a siting agreement with host communities and to pay compensation to these communities for the socioeconomic impacts of the facility." *Id.* at 13-14. It was not enacted to address cleanups; and as discussed above and the state regulators have recognized, it does not even apply to on-site cleanups. *See* Section I.A above and Attachments 3 and 4.

[5] Nor could the Siting Act feasibly be applied here. As noted, the Siting Act cannot be implemented without the participation of the Hazardous Waste Facility Site Safety Council, but the Council has long been defunct. Its budget was reduced to zero in the mid-1990s and it has since ceased to exist. *See* Attachment 7.

concluded. the Siting Act approvals *are* the functional equivalent of a permit, and the siting agreement *is* a permit, and Paragraph 9.a of the CD therefore applies.[6]

D. The Committee's Challenge to the CD Is Untimely and in the Wrong Forum.

As a last resort, the Committee argues that the CD's incorporation of the on-site permit exemption derived from CERCLA was unauthorized by law, thus depriving the District Court of jurisdiction to enter the CD. M.C.Pet. at 29. This argument constitutes a challenge to the legality of the CD itself, which should have been made over sixteen years ago.

After the CD was lodged with the court, the United States published a notice of the proposed settlement, 64 Fed. Reg. 57654 (Oct. 26, 1999), and established a public comment period that ultimately extended for 120 days. 65 Fed. Reg. 4439 (Jan. 27, 2000). Further, EPA specifically notified the Towns of Lenox, Lee, Stockbridge, and Great Barrington (four of the five members of the Committee) of the proposed settlement. If any of the members of the Committee had believed that any portion of the CD was illegal or beyond the court's jurisdiction, they should have commented to that effect. They did not.[7] In addition, a number of parties moved to intervene to oppose entry of the CD. The members of the Committee did not. The court then rejected the arguments of the opponents and entered the CD, including a

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[6] Moreover, contrary to the Committee's suggestion, the ARARs process is the exclusive mechanism by which state *environmental laws* not subject to the on-site permit exemption are, or are not, applied to a remedy to be implemented under CERCLA. *Rhode Island Resource Recovery Corp.* at *3-4; *see also United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1454-58 (6th Cir. 1991). The Committee asserts that "many laws that apply to a cleanup site are neither ARARs nor permits – rules like workers compensation laws, speed limits, building codes, and the minimum wage." M.C.Pet. at 21. GE agrees. Those laws are not *environmental laws* and thus not covered by the ARARs process or preemption.

[7] The Committee complains that none of its members was allowed to participate in the negotiation of the CD. M.C.Pet. at 5. That is irrelevant. What the Committee doesn't say is that when its members were notified of the lodging of the CD and given a chance to comment on it, they did not.

determination that the court had jurisdiction to do so (CD ¶ 1 [in Attachment 1]) and that the CD was "fair, reasonable, consistent with [CERCLA], and in the public's interest." *United States v. General Electric Company* (Attachment 2) at 2.

Since then, GE, EPA, and the other CD parties have implemented the CD. For GE, as discussed above in the Introduction, that has included extensive cleanup and restoration activities throughout numerous portions of the Site (as required in summary by CD ¶ 6 [in Attachment 1]), as well as reimbursement of EPA's costs and payments and donations of land to the City and PEDA.

For these reasons, the Committee's claim that the CD was unlawful and beyond the court's jurisdiction must be rejected as untimely.

In addition, the Committee's claim that the CD was illegal and that the District Court did not have jurisdiction to enter it is not properly addressed to this Board, which has no authority to overturn a final judgment of a federal district court, which is what the CD is (CD ¶ 225). Any such claim for relief from the court's final judgment must be addressed to that court. *See* CD ¶ 211 (in Attachment 1); Fed. R. Civ. P. 60(b).

II. The Committee's Claim That EPA Should Have Required GE to Maintain the Remedy in Perpetuity Misrepresents the CD.

The Committee argues that EPA should have required GE to maintain the Rest-of-River remedy, especially the sediment caps, "in perpetuity." M.C.Pet. at 30-31. It claims that the current CD allows EPA to issue to GE a Certification of Completion as soon as the Remedial Action is completed and all Performance Standards are met (*id.* at 31, citing CD ¶ 88), and that thus "on the very first day that the remedy's Performance Standards have been met, however

fleetingly, GE can try to walk away from the Site forever, including its monitoring and maintenance obligations." *Id.*

This argument is plainly wrong and ignores Paragraph 89 of the CD.[8] While Paragraph 88 authorizes EPA to issue a Certification of Completion *of the Remedial Action* once that Remedial Action is completed and the Performance Standards are met, the Remedial Action for these purposes explicitly *excludes* Operation and Maintenance ("O&M"). CD ¶ 88.a. Thus, even after that Certification is issued, GE must continue its O&M obligations, including the monitoring and maintenance of caps, indefinitely. Under Paragraph 89, which provides for Certification of Completion *of the Work* (which includes O&M), EPA may not issue such a Certification until all phases of the Work, including all O&M, have been "fully performed" in accordance with the CD. Thus, if there are any remaining O&M obligations, for the caps or otherwise, this Certification cannot be issued.

III. The Committee's Petition Contains Other Factual Errors.

In addition to the fundamental defects discussed above, the Committee's petition contains a number of other factual errors. These include the following examples:

The Committee states that "most Berkshire Count residents are likely to have GE's PCBs in their bodies – permanent additions to their brains, their blood, and their other organs," citing Figures 1-6 and 1-7 of EPA's Human Health Risk Assessment of the Rest of River. M.C.Pet. at 4. This alarmist claim is highly misleading. The two figures cited come from the Massachusetts Department of Public Health's 1997 Final Report entitled *Housatonic River Area PCB Exposure Assessment Study* (A.R.42500). That report included the results of a survey on PCB levels measured in the blood of individuals in the Housatonic River Valley having a high potential for

[8] Paragraphs 88 and 89 of the CD are included in Attachment 1.

PCB exposure, as well as volunteers. The two figures cited by the Committee include the results for individuals who had occupational exposure to PCBs in their jobs. The study itself concluded that the PCB levels measured in the blood of non-occupationally exposed individuals in the Housatonic River area were *within the normal background range* for non-occupationally exposed individuals nationwide. See Abstract from report in Attachment 8.

The Committee claims that, under EPA's remedy, "PCB concentrations in fish are expected to remain at more than 20 times the level the Region deems safe." M.C.Pet. at 9; also *id.* at 12 n.11. For this, the Committee cites the Modified Permit at 15, which indicates that EPA's Short-Term Biota Standard of 1.5 milligrams per kilogram (mg/kg) in fish is approximately 20 times EPA's long-term *goal* of 0.064 mg/kg in fish in Massachusetts. However, EPA has made clear that the Short-Term Biota Standard was set at a level that EPA considers safe. *See* EPA's Statement of Basis ("Stmt. Basis") at 34 (Attachment 9); EPA's RTC at 77.

In a similar vein, the Committee claims that the EPA-approved Interim Media Protection Goals ("IMPGs") used in the evaluation of remedial alternatives "fall well short of what would be considered protective under the NCP." M.C.Pet. at 27. That is flatly wrong. The health-based IMPGs were based on levels within EPA's acceptable cancer risk range specified in the NCP (*i.e.*, 10^{-6} to 10^{-4}), as well as non-cancer-based values using a target non-cancer Hazard Index ("HI") of 1, which EPA considers protective. *See* Revised Corrective Measures Study ("RCMS"; A.R.472605) at 2-13; Stmt. Basis at 34.

The Committee claims that, of the three on-site disposal sites identified by GE, two "are located in densely populated villages" (M.C.Pet. at 10), and all "fail to meet certain TSCA criteria for PCB landfills, and/or would be located in certain important and sensitive habitats

(known as ACECs, or areas of critical environmental concern)" (*id.* at 11 n.8). The Committee has presented no information regarding the population density around the two on-site disposal sites it references or comparison to the population density around other sites where EPA has approved on-site disposal facilities or around the off-site commercial disposal facilities which EPA would require GE to use.[9] Moreover, as shown in GE's Petition, two of the three identified sites are located in unimproved areas outside the Upper Housatonic ACEC with no "important and sensitive" habitats, and the third, while located within the boundary of the ACEC, would occupy a sand and gravel quarry. The Committee's claim regarding TSCA criteria is incorrect for the reasons given in GE's Petition at 14-16.[10]

CONCLUSION

For the foregoing reasons, the Board should deny the Committee's petition.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R § 124.19(d)(1)(iv), undersigned counsel certifies that the foregoing Petition for Review contains 4,762 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, but not including the cover, Table of Contents, Table of Authorities, Table of Attachments, Glossary of Terms, Statement of Compliance with Word Limitation, signatories, or Attachments; and thus this Petition is well below the 14,000-word limitation approved by this Board's order dated December 15, 2016.

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[9] For example, a simple review of areal maps shows that the number of residences within ¼ mile of one of the two on-site disposal sites referenced by the Committee (the Woods Pond Site) is considerably less than the number around the Wayne Disposal, Inc. commercial landfill in Michigan, which is one of the candidates for off-site disposal.

[10] The Committee also asserts that EPA relied on the Siting Act regulations as one reason for rejecting on-site disposal. M.C.Pet. at 11. As shown above, EPA has now deleted any reference to that Act and its regulations.

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ATTACHMENTS

Attachment 1

Additional Excerpts from Consent Decree in *United States et al. v. General Electric Company* (October 27, 2000)

and avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, 42 U.S.C. §§ 9606, 9607, and 9613(b), 42 U.S.C. §§ 6928 and 6973, 33 U.S.C. § 1319, and 15 U.S.C. § 2606. This Court has pendent jurisdiction over the state law claims. This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaints, Settling Defendant, the City, and PEDA waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendant, the City and PEDA shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States, on behalf of EPA, DOI, NOAA, the Army Corps of Engineers ("ACOE"), the Department of Defense ("DOD"), the Agency for Toxic Substances Disease Registry ("ATSDR"), and any other agency which may have authority to administer the statutes cited in Paragraph 161 (United States' Covenant), upon Massachusetts, upon Connecticut and upon the City, PEDA, Settling Defendant and their successors and assigns. Except as provided in Paragraph 12, any change in ownership or corporate status of Settling Defendant, the City or PEDA, including, but not limited to, any transfer of assets or real

Site by the design and implementation of response actions at the Site by the Settling Defendant and EPA, to reimburse response costs of the Plaintiffs as provided herein, to provide for recovery of damages and the performance of restoration projects for injury to natural resources, and to resolve the claims of Plaintiffs against Settling Defendant as provided in this Consent Decree. In addition to this Consent Decree, Settling Defendant, the City, and PEDA have entered into a Definitive Economic Development Agreement which provides, inter alia, for redevelopment of a portion of the GE Plant Area and economic aid to the City. The United States and the State reserve the right to consult with and/or assist the City and PEDA and to move to intervene or participate as amicus curiae in connection with any dispute or proceeding relating to enforcement or implementation of the Definitive Economic Development Agreement.

6. Commitments by Settling Defendant. Except as otherwise expressly provided in this Consent Decree, Settling Defendant shall finance and perform the Work in accordance with this Consent Decree, the SOW, the Rest of the River SOW, and Work Plans attached to this Consent Decree, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendant and approved by EPA pursuant to this Consent Decree. Settling Defendant shall also reimburse Plaintiffs for response costs as provided in this Consent Decree, and shall reimburse the United States for costs related to the 1 ½ Mile Reach Removal Action as provided in this Consent Decree. Settling Defendant shall also pay Natural Resource Damages to the Trustees, perform Restoration Work and other natural

resource protection and restoration actions as specified herein, and reimburse the Trustees for costs Incurred and to be Incurred, all as provided in this Consent Decree.

7. Commitments by EPA. EPA intends to implement a Removal Action in the 1 ½ Mile Reach. Performance of such Removal Action shall be in accordance with the 1 ½ Mile Reach Removal Action Memorandum. Funding of such Removal Action shall be in accordance with Paragraphs 103-111 of this Consent Decree.

8. Compliance With Applicable Law And Protectiveness

a. All activities undertaken by Settling Defendant pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Except for the Rest of the River Remedial Action, for all activities undertaken pursuant to CERCLA in this Consent Decree, Settling Defendant must also comply with any ARARs of all federal and state environmental laws, as described in Attachment B to the SOW and in ARARs tables in the Removal Action Work Plan for the Upper ½ Mile Reach (Appendix F hereto), EPA's Action Memorandum for the Allendale School Removal Action (Appendix C hereto), and a Supplemental Addendum to the Work Plan for On-Plant Consolidation Areas (included in Annex 1 to the SOW), unless otherwise determined by EPA pursuant to CERCLA and the NCP. For the Rest of the River Remedial Action, for all activities undertaken pursuant to CERCLA in this Consent Decree, Settling Defendant must also comply with any ARARs of federal and state environmental laws set forth in the documents selecting the Rest of the River Remedial Action and/or in the Rest of the River SOW, unless waived by EPA pursuant to CERCLA and the NCP. For purposes

XVIII. CERTIFICATION OF COMPLETION

88. Completion of Each Response Action

a. Within 90 days after Settling Defendant concludes that a particular Removal Action required by this Consent Decree (excluding Post-Removal Site Control) or the Rest of River Remedial Action (excluding Operation and Maintenance) has been fully performed and that the Performance Standards for such Removal or Remedial Action have been attained, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, the Trustees (as appropriate), and the State. The City shall be invited to participate in inspections relating to the GE Plant Area Removal Actions and the Allendale School Removal Action. PEDA shall be invited to participate in inspections relating to property that will be transferred to PEDA by Settling Defendant. If, after the pre-certification inspection, Settling Defendant still believes that such Removal or Remedial Action (excluding Post-Removal Site Control or Operation and Maintenance) has been fully performed and that the Performance Standards for such Removal or Remedial Action have been attained, it shall submit a written report requesting certification to EPA for approval, with a copy to the Trustees, the State, and the City and PEDA (as applicable), pursuant to Section XV (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and Settling Defendant's Project Coordinator shall state that the particular Removal or Remedial Action (excluding Post-Removal Site Control or Operation and Maintenance) has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and

stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or Settling Defendant's Project Coordinator:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the particular Removal Action or Remedial Action (excluding Post-Removal Site Control or Operation and Maintenance) referenced above, or any portion thereof, has not been completed in accordance with this Consent Decree or that the Performance Standards for such Removal or Remedial Action have not been achieved, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Decree to complete the Removal Action or Remedial Action (excluding Post-Removal Site Control or Operation and Maintenance) and achieve the Performance Standards therefor; provided, however, that EPA may only

require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the response action and do not modify the Performance Standards (except as provided in Paragraph 217 (Modification) of this Consent Decree). EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XV (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XXIV (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the particular Removal Action (excluding Post-Removal Site Control) or the Rest of River Remedial Action (excluding Operation and Maintenance) has been performed in accordance with this Consent Decree and that the Performance Standards for such Removal or Remedial Action have been achieved, EPA will so certify in writing to Settling Defendant. Settling Defendant may contest EPA's failure to respond to Settling Defendant's request for certification pursuant to Section XXIV (Dispute Resolution), Paragraph 136 (record review) of this Consent Decree. This certification shall constitute the Certification of Completion of the response action for purposes of this Consent Decree, including, but not limited to, Section XXVI (Covenants Not to Sue by

Plaintiffs). Certification of Completion of the response action shall not affect Settling Defendant's remaining obligations under this Consent Decree.

c. For each Removal Action Outside the River for which one or more Conditional Solutions are a component, Settling Defendant may seek a Certification of Completion of such Removal Action, including the Conditional Solution(s). EPA will evaluate such request pursuant to the provisions in this Paragraph, and if it determines that the Removal Action has been performed in accordance with this Consent Decree and that the Performance Standards for such Removal Action have been achieved (excluding Post-Removal Site Control), EPA will issue a Certification of Completion of such Removal Action, including the Conditional Solution(s); provided, however, that insofar as such Certification relates to the Conditional Solution(s), it will be contingent on Settling Defendant's compliance with the obligations relating to Conditional Solutions, as set forth in Paragraphs 34.d and 35-37 of this Consent Decree. Such Certification relating to a property with a Conditional Solution shall terminate if and when EPA determines and notifies Settling Defendant that Settling Defendant has not complied with the conditions of Paragraphs 34.d and 35-37 with respect to such property. Settling Defendant shall have the right to seek dispute resolution of such determination by EPA in accordance with Section XXIV of the Consent Decree.

d. For any Removal or Remedial Action for an area that contains a Non-Settling Defendant Property to or at which the owner of such property has refused to allow access for implementation of the required response actions after Settling Defendant has used "best efforts" to obtain such access and to implement the response actions in

accordance with Section XIII of this Consent Decree, and after any efforts by EPA or the State to obtain access for the implementation of the response actions, Settling Defendant may seek a Certification of Completion of such Removal or Remedial Action except for the portion relating to such property. EPA will evaluate such a request pursuant to the provisions in this Paragraph, and if it determines that the Removal or Remedial Action has otherwise been performed in accordance with this Consent Decree and that the Performance Standards for such Removal or Remedial Action have otherwise been achieved (excluding Post-Removal Site Control or Operation and Maintenance), EPA will issue a Certification of Completion of such Removal or Remedial Action, subject to any contingencies set forth above in Paragraph 88.c, except for the portion relating to the property where the owner refused access. Settling Defendant shall continue to make best efforts to obtain access to such property to perform the required response actions in accordance with the same procedures set forth in Paragraph 34.a(ii) of this Consent Decree, and shall implement the required response action whenever such access is granted.

e. The Trustees shall determine that the Restoration Work that is part of a particular Removal Action has been fully performed in accordance with Paragraphs 120 and 121 of Section XXI (Natural Resource Damages).

89. Completion of the Work for the Site

a. Within 90 days after Settling Defendant concludes that all phases of the Work (including Post-Removal Site Control and Operation and Maintenance) have been fully performed for all Removal and Remedial Actions and Restoration Work required by

this Consent Decree, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, EPA, the Trustees and the State. If, after the pre-certification inspection, Settling Defendant still believes that the Work has been fully performed, Settling Defendant shall submit to EPA, the Trustees and the State a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. A copy of the Report shall be sent at the same time to the City and PEDA. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or Settling Defendant's Project Coordinator:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity for review and comment by the State and the Trustees, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant

pursuant to this Consent Decree to complete the Work; provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the scope of the response action and do not modify the Performance Standards (except as provided in Paragraph 217 (Modification) of this Consent Decree). EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendant to submit a schedule to EPA for approval pursuant to Section XV (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to its right to invoke the dispute resolution procedures set forth in Section XXIV (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendant and after a reasonable opportunity for review and comment by the State and the Trustees, that the Work has been performed in accordance with this Consent Decree, EPA will so notify Settling Defendant in writing. Settling Defendant may contest EPA's failure to respond to Settling Defendant's request for certification pursuant to Section XXIV (Dispute Resolution), Paragraph 136 (record review) of this Consent Decree.

c. To the extent that one or more Conditional Solutions are a component of the Work at the Site, Settling Defendant may seek a Certification of Completion of Work, including the Conditional Solution(s). EPA will evaluate such request pursuant to the provisions in this Paragraph, and if it determines that the Work

has been performed in accordance with this Consent Decree, EPA will issue a Certification of Completion of the Work at the Site, including the Conditional Solution(s); provided, however, that insofar as such Certification relates to the Conditional Solution(s), it will be contingent on Settling Defendant's compliance with the obligations relating to Conditional Solutions, as set forth in Paragraphs 34.d and 35-37 of this Consent Decree. Such Certification relating to a property with a Conditional Solution shall terminate if and when EPA determines and notifies Settling Defendant that Settling Defendant has not complied with the conditions of Paragraphs 34.d and 35-37 with respect to such property. Settling Defendant shall have the right to seek dispute resolution of such determination by EPA in accordance with Section XXIV of this Consent Decree.

d. If the owner of a Non-Settling Defendant Property at the Site has refused to allow access for implementation of the required response actions after Settling Defendant has used "best efforts" to obtain such access and to implement the response actions in accordance with Section XIII of this Consent Decree, and after any efforts by EPA or the State to obtain access for the implementation of the response actions, Settling Defendant may seek a Certification of Completion of Work at the Site except for the portion relating to such property. EPA will evaluate such a request pursuant to the provisions in this Paragraph, and if it determines that the Work has otherwise been performed in accordance with this Consent Decree, EPA will issue a Certification of Completion of the Work, subject to any contingencies set forth above in Paragraph 89.c, except for the portion relating to the property where the owner has refused access.

Settling Defendant shall continue to make best efforts to obtain access to such property to perform the required response actions in accordance with the same procedures set forth in Paragraph 34.a(ii) of this Consent Decree, and shall implement the required response actions whenever such access is granted.

e. The Trustees shall determine that the Restoration Work that is part of a particular Removal Action has been fully performed in accordance with Paragraphs 120 and 121 of Section XXI (Natural Resource Damages).

XIX. EMERGENCY RESPONSE

90. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall immediately notify EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, Settling Defendant shall notify the EPA Emergency Response Unit, Region I. Settling Defendant shall also immediately notify the State Project Coordinator, and CTDEP if appropriate. For purposes of this Section XIX, the phrase "constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment" shall mean an unforeseen combination of circumstances, or the conditions resulting from such circumstances, not normally anticipated to occur as part of the Work, that require immediate action to avoid harm or an immediate threat of harm to human health, welfare or the environment.

As to the Settling Defendant:

Andrew T. Silfer, P.E.
Project Coordinator
Corporate Environmental Programs
General Electric Company
100 Woodlawn Avenue
Pittsfield, Massachusetts 01201

and

Andrew J. Thomas, Jr.
Counsel, Environmental Matters
Corporate Environmental Programs
General Electric Company
3135 Easton Turnpike
Fairfield, Connecticut 06431

As to PEDA:

Director, Pittsfield Economic
Development Authority
100 Woodlawn Ave
Building 42-100
Pittsfield, MA 01201

XXXIII. EFFECTIVE DATE

210. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XXXIV. RETENTION OF JURISDICTION

211. This Court retains jurisdiction over both the subject matter of this Consent Decree and Settling Defendant for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XXIV (Dispute Resolution) hereof.

Attachment 2

Memorandum and Order Re Entry of Consent Decree and Final Judgment in *United States v. General Electric Company*, Civil Action No. 99-30225-MAP *et seq.* (October 31, 2000)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff v. GENERAL ELECTRIC COMPANY, Defendant	)	CIVIL ACTION NO. 99-30225-MAP ✓
COMMONWEALTH OF MASSACHUSETTS, Plaintiff v. GENERAL ELECTRIC COMPANY, Defendant	)	CIVIL ACTION NO. 99-30226-MAP
STATE OF CONNECTICUT, Plaintiff v. GENERAL ELECTRIC COMPANY, Defendant	)	CIVIL ACTION NO. 99-30227-MAP

MEMORANDUM AND ORDER RE ENTRY OF CONSENT DECREE AND FINAL JUDGMENT

October 31, 2000

PONSOR, D.J.

Counsel for all parties, including intervenors, appeared before this court on October 27, 2000 for argument regarding entry of the Consent Decree in this case. Following hearing, and

10 5-1477

for the reasons set forth in open court, the court ordered entry of the Consent Decree ("Decree"). The court's reasons, in summary, are that the Decree is fair, reasonable, consistent with the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and in the public's interest. United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990) (trial court's review of settlements under CERCLA limited to whether reasonable, fair, and loyal to the statute); United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275, 280 (1st Cir. 2000) (same).

"Fairness" in the "CERCLA settlement context" includes both procedural and substantive elements. Cannons Engineering Corp., 899 F.2d at 86. Procedural fairness tests the negotiation process for its candor, openness and bargaining balance. Here, the Decree was procedurally fair because the parties engaged in lengthy, good-faith, arms-length discussions with sophisticated counsel and neutral third parties. Moreover, they made significant efforts to solicit and respond to public input.

Substantive fairness assesses whether the party legally responsible will bear the cost of the cleanup. See id. at 87. Here, the Decree is substantively fair because General Electric Company ("GE") will undertake a comprehensive cleanup program,

and will reimburse the Government for most of the cost, which is estimated between $300-700 million. GE will also spend approximately $25 million as part of a natural resource damages component of the settlement.

The "reasonableness" of a settlement involves at least the following three factors. See id. at 89-90. First, the Decree is likely to be effective in cleaning the environment. Second, it satisfactorily compensates the public for actual and anticipated remedial and response measures. And third, it properly reflects the relative strengths and weakness of the Government's litigation position.

Here, the Decree is reasonable because it satisfies these factors. First, giving proper deference to the Environmental Protection Agency's technical judgments, the Decree will provide an adequate and effective cleanup. It includes twenty eight separate cleanup actions, twenty five outside the Housatonic River, covering over 300 acres, and three River cleanup actions. Second, the Decree provides adequate compensation because the Government will recover from GE ninety to ninety-seven percent of the expected cleanup costs, and the Decree includes a natural resource damages package worth approximately $25 million. In addition, the Government will continue to investigate and where

appropriate order cleanups for newly discovered contamination. Third, the Decree appropriately reflects the inherent risks involved in this type of complex environmental action.

Finally, the Decree is consistent with goals of CERCLA and in the public's interest. The Decree promptly and effectively protects human health and the environment by providing a comprehensive and expeditious cleanup of the contamination at issue. See id. at 90. Moreover, it requires the responsible party to pay for the cleanup, and provides finality to a complex environmental action. See id. at 90-91.

For the foregoing reasons, the clerk is hereby ordered to enter judgment in accordance with the terms of the Consent Decree.

It is So Ordered.

Michael A. Ponsor

MICHAEL A. PONSOR
U. S. District Judge

Attachment 3

Memorandum from Applicability Committee to Hazardous Waste Facility Site Safety Council Re: Report of the Applicability Committee Regarding CERCLA/21E Remediation and Clean-up Activities (Including the Proposed New Bedford PCB Incinerator), and Clean Harbors of Natick, Inc.'s License Renewal (May 9, 1994)

TO: HWFSSC

FROM: Applicability Committee

DATE: May 9, 1994

RE: REPORT OF THE APPLICABILITY COMMITTEE REGARDING CERCLA/21E REMEDIATION AND CLEAN-UP ACTIVITIES (INCLUDING THE PROPOSED NEW BEDFORD PCB INCINERATOR), AND CLEAN HARBORS OF NATICK, INC.'S LICENSE RENEWAL

CERCLA/21E REMEDIATION AND CLEAN-UP ACTIVITIES:

After additional discussion with DEP and the EPA regarding the New Bedford Harbor proposed incinerator and the relationship between 21D and 21E/CERCLA, the Committee has clarified a prior decision, passed at the April 13th Applicability Committee meeting, to recommend that:

- The Council determine that under 990 CMR 1.02 (2) (e) and (f), Chapter 21D is not applicable to CERCLA and 21E remediation and clean-up activities that are excused from obtaining a Chapter 21C license (ie activities that are on-site for the purposes of CERCLA or 21E), and that the Council refer to the Legislation/Regulation Committee the matter of recommending specific regulatory changes to clarify 990 CMR 1.02 (2)(e) and (f).

- The Council inform those individuals who sought a Council determination on the applicability of 21D to the New Bedford incinerator, that 21D is not applicable to the New Bedford Harbor remediation and clean-up activities proposed to date, including the incinerator, for the following reasons:
  - CERCLA preempts any on-site clean-up activity (as defined by CERCLA) from the need to apply for or obtain state permits. Careful legal review of CERCLA and the EPA's regulatory interpretations indicate that the 21D siting process is a permit process preempted by CERCLA.
  - The Council has (by approving the Applicability Committee's recommendation detailed above in the first bullet) interpreted that 990 CMR 1.02 (2)(e) and (f) as exempting CERCLA and 21E remediation and clean-up activities from the jurisdiction of 21D and the Council intends to revise its regulations to clarify these exemptions.

- The Council inform DEP and EPA of the above determinations as well as the following:
  - The Council believes that the location criteria in 990 CMR 5.04 (2) through (8) are substantive standards which CERCLA remediation activities are required to follow if identified by the DEP and determined by the EPA to be "Relevant and Appropriate" to a particular CERCLA cleanup. In all future remediation and clean-up activities exempt from state permitting under CERCLA, the Council asks that these location

criteria be considered by the DEP as potentially "Relevant and Appropriate" and a careful determination be made as to whether or not they are relevant and appropriate to particular remediation activities (in particular, proposed on-site treatment or disposal facilities).

- In the case of future 21E remediation and clean-up activities exempt from 21C licensing, the Council urges DEP to take into consideration and adhere to the location criteria in 990 CMR 5.04 (2) through (8) wherever possible. Although there is no requirement in 21E similar to the CERCLA requirement that all clean-up activities meet "Relevant and Appropriate" state standards in addition to "Applicable" state standards, for the sake of consistency and in recognition of the fact that these criteria are designed to protect against unnecessary environmental risks from the construction and operation of commercial hazardous waste treatment, storage and disposal facilities in unsuitable locations, DEP should, where possible, apply these criteria to the proposed construction and operation of facilities to be utilized to store, treat or dispose of on-site remediation or clean-up wastes.

- In regards to the proposed New Bedford Harbor incinerator, the Council believes that this clean-up remedy involves an on-site treatment/disposal facility similar in technology to a proposed off-site commercial facility previously in the 21D siting process for which site suitability proved to be the most crucial factor leading to the failure of the proposal. Given that the location criteria are substantive standards, these criteria should have been considered in the New Bedford incinerator case to be "Relevant and Appropriate" state standards and the Council asks that these criteria be identified by the DEP and considered by the EPA as "Relevant and Appropriate" state standards if and when the Record of Decision is reopened.

CLEAN HARBORS OF NATICK, INC. N/A

The Applicability Committee discussed with Clean Harbors of Natick, Inc.(CHNI), the modifications proposed as part of the upgrade of the Natick facility planned in their Part B renewal application currently under consideration by DEP. Based on the Committee's April 13 discussion, CHNI proposed a change in their renewal application resulting in all wastes at the Natick site being counted towards the facility's licensed storage capacity, including wastes held in in-transit vehicles. Given this change, the major applicability issue raised by the proposed facility upgrades appears to have been addressed and the Committee will be considering at a meeting to be held just prior to the Council meeting on May 20, the following recommendation from Gina McCarthy:

- That the Council determines that 21D is not applicable to the modifications proposed in the letter sent to the Council by CHNI dated March 25, 1994 and revised per correspondence dated April 15, 1994, with the understanding that CHNI must receive the appropriate permit modifications from DEP and any

necessary local permits or approvals.

Please refer to the attached memo from Dan Hassenfeld dated 4/29/94 discussing the CHNI modifications. This memo outlines the modifications proposed and the facts considered by the Applicability Committee relative to the CHNI renewal, including most importantly:

- the new waste codes requested for storage and handling have the same characteristics as those already stored at the facility;

- although the physical capacity of the facility is increased with the reconfiguration of the interior, the construction of the loading dock, and the addition of a rolloff container, the increased physical capacity as proposed is part of an effort to upgrade the facility to facilitate the safe receiving, storage, handling, and shipping of wastes at the site; and the modifications as proposed will not result in an increase in the overall licensed hazardous waste storage capacity for the facility; and

- the total amount of waste on the site (including waste in in-transit vehicles, waste in outgoing or incoming vehicles, waste being held temporarily on the loading dock, waste in the rolloff container, and waste in staging and storage areas in the interior of the facility) cannot exceed the current licensed storage capacity of 92,400 gallons.

Attachment 4

Memorandum from Richard Lehan, Deputy General Counsel, Massachusetts Department of Environmental Protection, to Applicability Committee, Hazardous Waste Facility Site Safety Council (January 28, 1994)

Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Protection

William F. Weld
Governor
Daniel S. Greenbaum
Commissioner

Memorandum

To: Applicability Committee
Hazardous Waste Facility Site Safety Council

From: Richard Lehan
Deputy General Counsel, DEP

Re: DEP comments on legal evaluation by Daniel Hassenfeld dated December 29, 1993 on the jurisdiction of M.G.L.c. 21D over the New Bedford Harbor Remedial Action

Date: January 28, 1994

Per the meeting of the Applicability Committee on January 6, 1994, the Department of Environmental Protection (the "Department") is submitting the following comments on the above referenced legal memorandum by Daniel Hassenfeld, Esq., dated December 29, 1993 (the "Hassenfeld memorandum"):

1. The Department supports the analysis and conclusion in the Hassenfeld memorandum that the New Bedford Harbor remedial action is clearly "on-site" within the meaning of s.121(e) of CERCLA and the NCP and is, therefore, exempt from any federal, state or local permit (or similar "administrative" requirement). See p.p. 10-13.

2. The Department also supports the conclusion in the Hassenfeld memorandum that even if the 990 CMR locational criteria had been identified as an ARAR, EPA would have had grounds for waiving it under s.121(d)(4)(E) based on the Commonwealth's record to date of not applying such state standard to any other Superfund site. See p.p. 29-32.

3. In evaluating the remedial action exemptions under 990 CMR 1.02(e) and (f), the Hassenfeld memorandum concludes that arguments can be made for and against applying either the remedial action or cleanup exemption to this case. See p.8. The Hassenfeld memorandum states, however, that the "best" argument against their application is that if the Siting Council considered them to apply to all cleanups, it would presumably not have spent the time it did between 1984 and 1989 devising [but never adopting] a policy

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specifying the circumstances under which it would take jurisdiction over cleanups. See p.8. In the Department's view, the best argument for their application is the same argument used in the Hassenfeld memorandum in favor of the waiver of the 990 CMR locational criteria as an ARAR - although the Siting Council has been considering the question of whether to take jurisdiction over cleanups for over nine years, it has yet to take jurisdiction over any such cleanup. See p.32. The Hassenfeld memorandum uses the same argument in support of its conclusion that M.G.L.c. 21D is not a legally applicable ARAR. See p.26. The Siting Council's own practice for the last decade on this threshold issue of its jurisdiction is the best argument for interpreting the scope of its existing regulatory exemptions to apply to cleanups.

4. The Hassenfeld memorandum concludes, based on the ARAR evaluation factors in 40 CFR s.300.400(g)(2) and EPA guidance on the application of such factors, that it can be reasonably argued that the 990 CMR locational criteria constitutes a relevant and appropriate ARAR for the New Bedford Harbor remedial action. See p.p.27-28. The Department disagrees with this conclusion. As the Hassenfeld memorandum states, EPA's general criterion of whether a particular state requirement is "appropriate" is whether it is "well suited to the particular site." See p.27. In contrast to an "applicable" state requirement, EPA has emphasized that flexibility exists to identify "appropriate" portions of a state regulation in a manner that "makes good environmental sense for the site." See p.19. More specific to the instant case, EPA has further stated that "[c]onsideration must also be given to whether locational restrictions are prospective only (e.g., siting requirements) or whether they are intended for existing situations." See p.28. The Hassenfeld memorandum acknowledges that this guidance is a reason for thinking that siting act locational requirements may not always be appropriate, "in view of the significant differences between the decision whether to site a commercial facility, and the need to cleanup a site already contaminated." See p.28. The Hassenfeld memorandum did not, however, determine whether the siting of the "Hot Spot" incinerator complies with the 990 CMR locational criteria in reaching its conclusion that such criteria is an "appropriate" state requirement. See p.29. As explained below, the 990 CMR locational criteria would, by its express terms, prohibit the siting of the "Hot Spot" incinerator. For this reason, it is clear that such state criteria can not be "well suited" to, or make "good environmental sense" for, this Site if its application would preclude the remedial action as proposed from going forward.

990 CMR 5.04 provides, in pertinent part, that any proposed project which names a specific site shall be determined to be feasible and deserving with respect to that site only if the Siting Council finds, based on available information, that it can be reasonably expected that no portion of the proposed site is located

in bordering vegetated wetlands or within the 100 year floodplain or the boundary of the inland or coastal flood of record, whichever is greater. See 990 CMR 5.04(2) and 5.04(8)(d) respectively. [Compare with 310 CMR 30.705 of the Department's Hazardous Waste Regulations which requires the Department to "evaluate" certain location factors in making a licensing decision.] Portions of the site of the proposed "Hot Spot" Incinerator are located in bordering vegetated wetlands and within the 100 year floodplain, which means that the locational criteria under 990 CMR 5.04 would prohibit the use of the "Hot Spot" Incinerator and related disposal facilities at that site and thereby preclude the implementation of core components of the "Hot Spot" remedy in a timely and feasible manner. Because of its proximity to the "Hot Spot" contamination and its availability to EPA for its intended use, at this juncture the City owned site represents the only practicable location for the proposed "Hot Spot" Incinerator, and for implementing the "Hot Spot" remedy "on-site" within the meaning of s.121(e) of CERCLA and the NCP.

A recognition of the confines of the site of the proposed "Hot Spot" Incinerator and its necessity to implementing the overall "Hot Spot" remedy underscores the relevance of EPA's distinction between prospective siting criteria (which, in the Department's view, is clearly the purpose of 990 CMR 5.04) and location restrictions intended for existing situations (e.g., an existing Superfund site such as New Bedford Harbor whose limitations are dictated by the nature and scope of the release). The application of the locational criteria in 990 CMR 5.04 to the site of the proposed "Hot Spot" Incinerator clearly demonstrates, consistent with EPA guidance, the inappropriateness of such criteria as an ARAR for the "Hot Spot" remedy. For the above stated reasons, the Department requests that the Applicability Committee's final evaluation of this issue for the Siting Council affirm that the locational criteria in 990 CMR 5.04 is not an "appropriate" ARAR.

5. Finally, the Department urges the Siting Council to use this opportunity to decide the applicability of M.G.L.c. 21D to cleanups under M.G.L.c. 21E. See p.p.33-34. In the Department's view, the existing language in 990 CMR 1.02(e) and (f) of the Siting Council regulations - when read in light of the non-remediation purpose of M.G.L.c. 21D - would support an interpretation exempting both the on-site treatment and disposal components of a "remedial action" or "cleanup" under M.G.L.c. 21E from jurisdiction under M.G.L.c. 21D. See the Department's memorandum to the Siting Council dated November 22, 1993. For the purposes of conducting such actions pursuant to 990 CMR 1.02(e) and (f), the Department believes that the proper scope of the existing exemptions should reflect the Department's actual practice at these sites over the last decade - i.e., the exemptions would apply as long as the treatment and disposal facilities are used for on-site remediation (which includes other areas in close proximity to the contamination

necessary for the implementation of the remedial action).

Alternatively, the Department urges the Siting Council to revise its regulations in a timely manner to specify the exact parameters of the remedial action exemptions, including their relationship to other pertinent definitions and requirements thereunder (e.g., the definition of "on-site"). Using the framework identified in the Hassenfeld memorandum for deciding issues of jurisdiction under M.G.L.c. 21D, the Department believes that the fundamental difference between the Siting Council's mission of developing new hazardous waste treatment facilities and the use of these facilities to remediate existing sites justifies an exemption from jurisdiction because it acts to coordinate and further the separate missions of the Siting Council and the Department under their respective statutes and regulations. See p.p.33-34.

Thank you for your consideration of the Department's comments.

cc: James Colman, Assistant Commissioner, BWSC, DEP
Madeleine Snow, BWSC, DEP
Helen Waldorf, BWSC, DEP
Paul Craffey, BWSC, DEP
Steve Dreeszen, BWP, DEP

Attachment 5

Summary Order in *Town of Fort Edward v. United States*, No. 06-5535-cv, Summary Order (2d Cir. 2008)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

_____At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 3rd day of January, two thousand eight.

PRESENT: HONORABLE GUIDO CALABRESI,
HONORABLE ROBERT A. KATZMANN,
HONORABLE REENA RAGGI,
Circuit Judges.

TOWN OF FORT EDWARD,
Intervenor-Appellant,

v. No. 06-5535-cv

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

GENERAL ELECTRIC CO.,
Defendant.

APPEARING FOR APPELLANT: MARK SCHACHNER, Miller, Mannix, Schachner & Hafner, Glen Falls, N.Y. (Jeffrey Bernstein, Barbara Landau, BCK LAW, PC, Boston, MA, on the brief).

APPEARING FOR APPELLEE: JENNIFER L. SCHELLER, U.S. Dep't of Justice

Env't & Natural Res. Div., Washington, DC (Douglas Fischer, Paul Simon, U.S. Envt'l Protection Agency, New York, N.Y., of counsel; Charles Openchowski, U.S. Envt'l Protection Agency, Washington, DC, of counsel).

Appeal from the United States District Court for the Northern District of New York (David N. Hurd, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment approving the consent decree, entered on November 2, 2006, is AFFIRMED.

Intervenor Town of Fort Edward ("Fort Edward") appeals from the entry of a consent decree between Plaintiff-Appellee United States of America, acting through the Environmental Protection Agency ("EPA"), and Defendant General Electric Company. Fort Edward contends that paragraph 8(a) of the consent decree, which exempts the Sediment Processing Transfer Facility ("Facility") from local permit requirements, violates Section 121 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and 40 C.F.R. § 300.400(3). We assume the parties' familiarity with the facts and the record of somewhat complex prior proceedings, which we reference only as necessary to explain our decision.

We review a district court's entry of a consent decree for abuse of discretion. See United States v. Hooker Chem. & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985). Where, as in this case, the consent decree is the result of settlement negotiations between a federal administrative agency and a private entity, it is entitled to "twofold deference," i.e., we defer

first to "the agency's expertise and the voluntary agreement of the parties in proposing the settlement," and second to "the informed discretion of the trial court in approving the settlement." In re Cuyahoga Equip. Corp., 980 F.2d 110, 118 (2d Cir. 1992). The district court's entry of a consent decree will not be overturned unless the parties can "point to an error of judgment or law." Id.; see also 42 U.S.C. § 9613(j)(2) (requiring courts to uphold executive's decisions concerning CERCLA response actions "unless objecting party can demonstrate . . . that the decision was arbitrary and capricious or otherwise not in accordance with law").

Here, Fort Edward submits the district court erred as a matter of law in concluding that the Facility qualifies as "on-site" for purposes of 40 C.F.R. § 300.400(e)(1). Our review of the court's resolution of this issue, as with all conclusions of law, is undertaken de novo. See Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 114-15 (2d Cir. 2007) (reviewing questions of law de novo); Phong Thanh Nguyen v. Chertoff, 501 F.3d 107, 111 (2d Cir. 2007) (applying de novo review to questions of law raised in petition for review of agency decision). As an application of law to fact, EPA's conclusion that the Facility is "on-site" pursuant to CERCLA is similarly reviewed de novo. See United States v. Haggar Apparel Co., 526 U.S. 380, 391 (1999) (noting deference given to agency regulations does not impair "the authority of the court to make factual determinations, and to apply those determinations to the law, de novo"); London v. Polishook, 189 F.3d 196, 200 (2d Cir. 1999); see generally Beverly Enters. v. NLRB, 139 F.3d 135, 140 (2d Cir. 1998) (reviewing agency's application

of law to facts de novo).

The main issue in contention between the parties is whether the Facility meets the Section 300.400(e)(1) permit exemption's precondition of being in "in very close proximity" to the area of contamination. See 40 C.F.R. § 300.400(e)(1) ("The term 'on-site' means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."); 42 U.S.C. § 9621(e)(1) ("No Federal, State or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite . . . ."). While EPA has indicated that "very close proximity" will generally mean adjacent to the contamination site, see 55 Fed. Reg. 8666, 8690 (March 8, 1990), it is plain from examples cited at the time of the regulation's promulgation that the "very close proximity" limitation within the definition of "on-site" was intended to afford EPA some flexibility in identifying proximate sites necessary to achieve CERCLA objectives. See, e.g., 53 Fed. Reg. 51394, 51406-407 (Dec. 21, 1988) (providing examples of instances where "[f]lexibility in defining a site is necessary in order to provide expeditious response to site hazards"). While there are spatial limits to what the agency may label "in very close proximity" to a contaminated site, see In the Matter of U.S. Dep't of Energy Hanford Nuclear Reservation, No. RCRA-10-99-0106, 2000 WL 341006 (EPA Feb. 9, 2000) (holding that facility located four miles from contaminated area was not "on-site"), we need not identify any bright-line rule in this case. The 1.4 miles separating the Facility from the contaminated area, viewed within the totality of

circumstances, including the adjacent canal that affords easy access to the contaminated river, is a sufficiently minimal distance to preclude us from identifying legal error in EPA's or the district court's challenged assessments of the Facility's compliance with the regulatory requirement.

We note that EPA is required to comply with the substance of state and local permit laws, and is merely exempted from "the administrative processes" of obtaining the necessary permits that "could otherwise delay implementation of a response action." See 53 Fed. Reg. 51394, 51406.

Accordingly, the judgment approving the consent decree is AFFIRMED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

BY:_____

Attachment 6

Additional Excerpts from EPA's Response to Comments on Draft Permit Modification and Statement of Basis (October 2016)

Response to Comments

on

Draft Permit Modification and Statement of Basis
for EPA's Proposed Remedial Action for the Housatonic River "Rest of River"
GE-Pittsfield/Housatonic River Site

SDMS: 593922

U.S. Environmental Protection Agency
Region 1 (EPA New England)

5 Post Office Square, Suite 100
Boston, MA 02109-3912

October 2016

EPA Response 558: Based on this comment, EPA has deleted reference to 990 CMR 5.04 as a basis for an ARAR. Also, see EPA Response 727 *et al.*, Section IV of this Response to Comments.

iv. "Possible" Wetlands ARARs

Comment 559: GE asserts the following: EPA asserts that TD 3 has ARARs "possibly" associated with wetland impacts, but provides no further details as to what such ARARs might be. The operational footprints of the upland disposal facilities at the Woods Pond and Rising Pond Sites would not impact any wetlands, and thus would not be subject to ARARs associated with wetlands impacts.

At the Forest Street Site, shown on Figure 3, the operational footprint of the disposal facility would require construction of an access road that would involve the crossing of a small stream in the southern portion of the site; and the facility would be located, in part, within the 100-foot buffer zone and the 200-foot Riverfront Area of that stream, which are subject to the Massachusetts Wetlands Protection Act regulations. However, given the limited nature of this work, the Region could readily find, as it did in the discussion of these regulations in the ARARs tables relating to the proposed sediment/floodplain remedy (Draft Permit, Attachment C), that the work would be conducted in accordance with the substantive requirements of these regulations.

EPA Response 559: EPA concurs there are no currently identified wetland ARAR issues for the Woods Pond Site. For the Rising Pond Site, see Response 547 *et al.* above in this Section. For the Forest Street Site, the proposed landfill location is within a regulated wetland area and a waiver may also be required of regulations or requirements designed to protect such areas including: EPA's and the Corps of Engineers' regulations under Section 404 of the Clean Water Act (40 C.F.R. Part 230, 33 C.F.R. Parts 320-323); the federal Executive Order for Wetlands Protection (E.O. 11990); the Massachusetts water quality certification regulations for discharges of dredged or fill material into waters of the U.S. (314 CMR 9.06); and the Massachusetts Wetlands Protection Act regulations (310 CMR 10.53(3)(q)). EPA can only waive ARARs under specific circumstances, including where compliance is technically impracticable. Since there is a technically practicable alternative to constructing a landfill at the Forest Street Site, namely off-site disposal, there is no justification to granting a waiver to these ARARs. For the Rising Pond Site, and for further information on the Forest Street Site, see Response 547 *et al.* above in this Section.

III.F.2.d Long-Term Reliability and Effectiveness

Comments 560, 561: GE asserts the following: EPA states that both an off-site disposal facility and an on-site disposal facility would isolate the PCB-containing materials from direct contact with human and ecological receptors but claims, without providing any support or basis, that TD 3 would have "a greater potential" for exposure to such material and thus pose a greater "residual risk" than TD 1 and TD 1 RR. TD 3 involves no greater potential for exposure to the PCB-containing material than TD 1 and TD 1 RR.

The Region also claims that off-site disposal is more reliable than on-site disposal because "it does not rely on operation, monitoring, and maintenance requirements (except at the receiving

Permit Modification does require that the temporary storage facilities used by GE are restored in accordance with Performance Standards and Corrective Measures governing Restoration of Areas Disturbed by Remediation.

The State did not propose MGL c. 21D as an ARAR. EPA concurs that it is not an ARAR; the provisions of 21D do not include substantive standards of control. The State proposed, and EPA included, in the Final Permit Modification as an ARAR, the Massachusetts regulations governing hazardous waste management, including the location standards for hazardous waste management facilities.

Comment 297: To ensure that the ARARs listed in the Permit are protective of human health, commenters request that the EPA consult with the Massachusetts and Connecticut Departments of Health to ensure that all relevant statutes and regulations have been included in the final Permit.

EPA Response 297: EPA consulted with the Commonwealth of Massachusetts and the State of Connecticut, and Massachusetts and Connecticut each responded with their proposed State ARARs. Massachusetts Department of Public Health provided comments on the Draft Permit Modification and did not identify any ARAR issues. EPA did not seek separately to obtain proposed ARARs from the State Departments of Health, as each state's environmental agency has been designated as the lead agency for identification of ARARs through the Superfund program.

IV.B Comments on Specific ARARs

IV.B.1 Clean Water Act, National Recommended Water Quality Criteria for PCBs, Numeric Massachusetts Water Quality Criteria for PCBs, Numeric Connecticut Water Quality Criteria for PCBs

Comment 710: GE asserts the following: EPA proposed to waive the human health criterion of 0.000064 ug/L based on consumption of water and organisms. EPA says the remedy will instead be required to meet the biota Performance Standard and the Downstream Sediment Transport Performance Standard. GE requested EPA to clarify that the Biota and Downstream Transport Performance Standards would not constitute ARARs, because they are not promulgated standards of general applicability.

EPA Response 710: Based on this comment, EPA has revised its description of this ARAR waiver. The Final Permit Modification, Summary of ARARs table makes specifically clear that these alternative criteria are not ARARs.

Comments 711, 712: In the draft Permit, EPA proposed that the remedy is intended to meet the human health criterion of 0.000064 ug/L based on consumption of water and organisms. EPA pointed out that current modeling shows that the remedy will achieve attainment in at least 3 of the 4 Connecticut impoundments. Recognizing that the results from the Connecticut model are very uncertain, EPA stated that it is not possible to predict with certainty attainment or lack of attainment. In addition, EPA acknowledged that the concentration cannot be reliably measured using available analytical techniques. In its Statement of Basis, EPA stated that the criterion is not being waived in Connecticut because it can potentially be met in the future, but that such a waiver may be considered in the future should it become apparent that this criterion cannot be met based on technical impracticability.

4. Summary of ARARs table, Massachusetts Facility Location Standards - In the Synopsis of Requirements column, the words "in floodplains" should be deleted since the potential impacts are not limited to floodplains.

5. Statement of Basis, Page 38, Implementability, 3rd paragraph - The second sentence of this paragraph should be revised to include the Massachusetts Hazardous Waste regulations, and should read, "As discussed in the Compliance with Federal and State ARARs section above, TD2 and TD3 would have significant issues with the Massachusetts Hazardous Waste regulations, the ACEC regulations..."

EPA Response 727, 728, 474, 475, 476, 497, 498, 499:

1. EPA has revised the language in the Summary of ARARs table to make explicit that 310 CMR 30.708 is considered a potential ARAR. However, EPA has modified Attachment C in the Final Permit Modification and now considers the regulation as potentially waived.

2. In the Summary of ARARs table, EPA has deleted reference to 990 CMR 5.04 as a basis for an ARAR.

3. In response to this comment, EPA notes that it has modified the "Action(s) to be Taken to Achieve ARAR" column to demonstrate that EPA is referencing 310 CMR 30 as a whole. In addition, EPA has included other provisions of the Massachusetts Hazardous Waste Management regulations, 310 CMR 30, in separate citations in the Summary of ARARs table, such as the Massachusetts Hazardous Waste Regulations on Identification and Listing of Hazardous Waste, regulations for generators, general requirements, and technical requirements for storage, listed on pages 18-20. Finally, EPA in the final Permit is modifying the Citation to refer to 310 CMR 30, which includes 30.501.

4. Based on this comment, EPA has revised the Summary of ARARs table in the final Permit to delete the phrase "in floodplains" from the Synopsis of Requirements.

5. EPA agrees that the Massachusetts Facility Location Standards at 310 CMR 30 would present significant issues for TD 2 and TD3, particularly with respect to 30.708's prohibition on a permanent hazardous waste facility in an ACEC. Beyond that, there is no requirement for a revised Statement of Basis when issuing the final Permit, so EPA will not be inserting additional language in it.

IV.B.15 Massachusetts Solid Waste Site Suitability Criteria

Comments 729, 730, 731, 500: Commenters, including GE, assert the following:

a. The 310 CMR 16 site assignment regulations would not apply to storage of excavated material with PCB concentrations at or above 50 mg/kg. (Commenter referred to it as 310 CMR 19.40(3), and (4) but the context indicates Commenter was referring to 310 CMR 16.40(3), and (4)).
b. That the site assignment regulations would not apply to a remedial action in which Mass DEP concurs, because of a provision exempting remedial actions conducted under the Massachusetts Contingency Plan.

Attachment 7

Excerpt from Commonwealth of Massachusetts State Archives: Agency history record for Massachusetts Hazardous Waste Facility Site Safety Council

ARCHIVEGRID

Agency history record.

Massachusetts Hazardous Waste Facility Site Safety Council.

Commonwealth of Massachusetts State Archives

Contact an Archivist or Librarian to learn more about access.

Contact Information (/archivegrid/collection/organization/33) | Save (#)

Details

St 1980, c 508, s 8 (Hazardous Waste Facility Siting Act, codified as MGLA c 21D), established the Hazardous Waste Facility Site Safety Council (known also as the Massachusetts Hazardous Waste Facility Site Safety Council) as an independent Massachusetts state agency consisting of twenty-one members, including the secretary of environmental affairs and other state agency heads/designees and gubernatorial appointees representing municipal and industrial groups, relevant professions, and the public (s 4).

The council was responsible in conjunction with the Dept. of Environmental Management and the Dept. of Environmental Protection for overseeing siting of hazardous waste treatment facilities as provided by the Siting Act, including receiving notice of intent from the potential developer to construct or expand a treatment facility; establishing a list of acceptable facility sites; facilitating negotiations among developer, host community, and abutting communities; determining compensation paid by developer to abutting community; and declaring operative the siting agreement reached between developer and host community. The council was also responsible for management of a technical assistance grant program for local assessment committees commissioned by their communities to pursue such an agreement.

Facilities affected included those designed to store, recycle, treat, incinerate, or otherwise dispose of hazardous waste. Exempted from the siting process were manufacturers and other waste generators treating, recycling, or storing waste onsite without land treatment or waste disposal.

The council ceased to meet as a body after Mar. 1995; for FY 1995/1996 its functions were budgeted directly under the office of the secretary of environmental affairs (St 1995, c 38, s 2, item 2000-0100). Enabling legislation providing for the council's role in facility siting was repealed per St 1996, c 58, s 16.

NAME AUTHORITY NOTE. Series relating to the agency described above can be found by searching the following access point for the time period stated: 1980-1996--Massachusetts Hazardous Waste Facility Site Safety Council.

Attachment 8

Excerpt from Massachusetts Department of Public Health, *Housatonic River Area PCB Exposure Assessment Study – Final Report* (September 1997)

Final Report

of

The Housatonic River Area

PCB Exposure Assessment Study

Massachusetts Department of Public Health

Bureau of Environmental Health Assessment

Environmental Toxicology Unit

250 Washington Street

Boston, Massachusetts

September, 1997

This report was supported in part by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) trust fund provided to the Massachusetts Department of Public Health from the Agency for Toxic Substances and Disease Registry, Public Health Service, U.S. Department of Health and Human Services. Additional support was provided by the Massachusetts Department of Environmental Protection through an Interagency Service Agreement.

ABSTRACT

The Housatonic River and nearby localized areas are known to be contaminated with polychlorinated biphenyls (PCBs) from a former electrical manufacturing facility in Pittsfield, Massachusetts. Extensive environmental sampling has documented widespread contamination of sediments, floodplain soil, fish and other biota. However, the extent and nature of PCB exposure opportunities among residents of the Housatonic River Area (HRA) had not been completely characterized. This exposure assessment study was undertaken by the Massachusetts Department of Public Health (MDPH), Bureau of Environmental Health Assessment (BEHA) to address these concerns. The area on which the study focused comprises eight communities in Berkshire County, Massachusetts: Lanesborough, Dalton, Pittsfield, Lee, Lenox, Stockbridge, Great Barrington, and Sheffield.

The overall goal of the HRA PCB Exposure Assessment Study was to identify possible patterns of PCB exposure and to measure serum PCB levels among HRA residents. The specific objectives of this study were: 1) to identify patterns of different activities offering a potential for exposure to PCBs - this was done by means of a household screening questionnaire administered to residents of 800 randomly selected households located within a half mile of the Housatonic River between Pittsfield and the Connecticut border; 2) to assess the relationship between reported potential exposure pathways and serum PCB levels among residents determined to be at the greatest risk of exposure. This is referred to as the Exposure Prevalence Study. As a public service, the same household screening questionnaire and serum tests were also offered to a volunteer group of residents of South Berkshire County communities, regardless of their household location relative to the river. The responses of this group were also analyzed for reported potential exposure pathways and serum PCB levels.

A total of 658 households (response rate: 84%, representing 1529 individuals) participated in the Exposure Prevalence Study. Out of these 1529 individuals, 120 were selected based on an exposure risk scoring system and invited to take part in blood testing for PCBs, and 69 (57.5%) agreed to submit to a blood test. A total of 65 households (representing 158 individuals) participated in the Volunteer Study. All individuals 18 years old or over (126) were invited to take part in blood testing for PCBs, and 79 (62.7%) participated.

In the Exposure Prevalence Study, over one-third of the participants had eaten freshwater fish for an average of 25 years. About three percent had eaten fish from the Housatonic River for an

average of 20 years. A considerable number of local residents participated in a variety of recreational activities on or adjacent to the Housatonic River and its floodplain. Similar results were found in the Volunteer Study.

Of the 69 participants in the Exposure Prevalence Study, one (1.4%) had a serum PCB level over 20 ppb. The mean and median levels of this group were 5.44 ppb and 3.93 ppb respectively. Five out of the 79 participants (6.3%) in the Volunteer Study had serum PCB levels over 20 ppb. The mean and median of this group were 9.07 ppb and 6.60 ppb. The serum PCB levels found among participants of both studies were generally within typical background estimates for a non-occupationally exposed U.S. population. ATSDR reports that, for U.S. populations without occupational exposure, mean serum PCB levels were usually between 4 and 8 ppb, with 95% of the individuals having concentrations less than 20 ppb. Since the results of this study represented individuals with the highest risk of exposure, it is reasonable to assume that serum PCB levels of most non-occupationally exposed residents in the HRA communities are within the US background range, though individual differences may likely occur.

As observed in a number of studies previously conducted by MDPH and others, age was found to be the prominent predictor of serum PCB level in general. Considering all the potential exposure pathways examined, serum PCB levels tend to be higher in older people who are frequent and/or long-term fish-eaters. In addition there is some indication that other activities (e.g. fiddlehead fern consumption, gardening) may contribute slightly to serum PCB levels. People who reported opportunities for occupational exposure had higher serum PCB levels than those who did not report these opportunities.

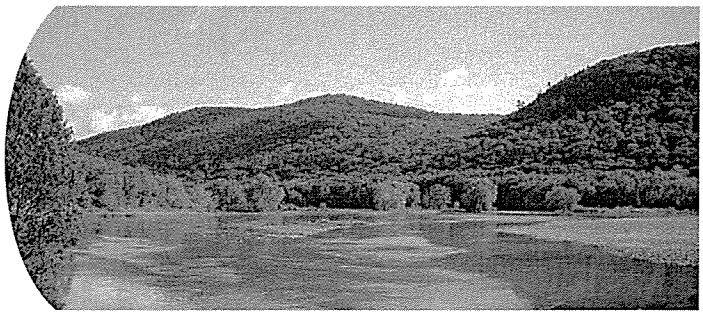
Attachment 9

Additional Excerpt from EPA's Statement of Basis for Proposed Remedial Action for the Housatonic River "Rest of River" (June 2014)

LEARN MORE AT: www.epa.gov/region1/ge

Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River "Rest of River"

THE RIVER *The Housatonic River is contaminated with polychlorinated biphenyls (PCBs) released from the General Electric Company (GE) facility in Pittsfield, MA. The entire site consists of the 254-acre GE facility; the Housatonic River and its banks and floodplains from Pittsfield, MA, to Long Island Sound; and other contaminated areas. Under a federal Consent Decree, GE is required to address contamination throughout the site, including in the River.*



YOUR OPINION COUNTS: OPPORTUNITIES TO COMMENT

EPA is accepting public comment on this proposal from June 25, 2014 through August 8, 2014. EPA's Proposed Remedial Action is based on current information and the cleanup plan could change in response to public comment or new information. The following two public informational meetings will include a presentation describing the Proposed Remedial Action, followed by a question and answer session. EPA will begin a formal public comment period on June 25, 2014. Near the end of the public comment period, EPA will schedule a Public Hearing where the public will have an opportunity to make oral comments during this Hearing for EPA to consider. You may also submit written comments – see page 43 to find out how.

For further information about these meetings, call Kelsey O'Neil of EPA's Community Affairs office at 617-918-1003, or toll-free at 1-888-372-7341.

Public Informational Meeting
Wednesday, June 18, 2014 at 6:00 pm at Lenox Memorial Middle/High School, Lenox, MA

Public Informational Meeting
Tuesday, June 24, 2014 at 6:00 pm at Kent Town Hall, Kent, CT

Public Hearing
date/time/location to be determined

SUMMARY:

After careful study of the impacts of PCBs released to the Housatonic River from the GE-Pittsfield/Housatonic River site in Pittsfield, MA, and in consideration of the contaminant reduction accomplished by cleanup activities at other parts of the site, EPA proposes the following cleanup actions, known as corrective measures, or remedial action, for the "Rest of River" component of the GE-Pittsfield/Housatonic River site. EPA's Proposed Remedial Action was developed after consultation with Massachusetts Departments of Environmental Protection (MassDEP) and Fish and Game (MassDFG) and the Connecticut Department of Energy and Environmental Protection (CT DEEP).This Statement of Basis, in conjunction with the Draft Modification to the Reissued RCRA Permit, constitute EPA's "Proposed Plan" or "Proposed Cleanup Plan," setting forth EPA's Proposed Remedial Action for the Rest of River and Operation and Maintenance (O&M) as prescribed by Paragraph 22.n. of the Consent Decree (termed the "Proposed Remedial Action" or "Proposed Cleanup Plan" throughout this document) to address polychlorinated biphenyl (PCB) contamination in river sediment, banks and floodplain soil, and biota which poses an unacceptable risk to human health and the environment.

In addition to addressing risks in the areas slated for cleanup, the Proposed Remedial Action also includes provisions to reduce downstream transport of PCBs, relax or remove fish consumption advisories, and to avoid, minimize and/or mitigate adverse impacts to state-listed species and their habitats regulated under the Massachusetts Endangered Species Act (MESA), and

continued >

WHAT'S THE DIFFERENCE BETWEEN IMPGS AND PERFORMANCE STANDARDS?

This Statement of Basis and the Draft Modification of the RCRA Permit include discussion of two related measures for the Rest of River remedy – the Interim Media Protection Goals (IMPGs), and the Performance Standards.

In the investigation of Rest of River, EPA completed a Human Health Risk Assessment (HHRA) and an Ecological Risk Assessment. Taking into account the conclusions of the risk assessments, GE was required to propose IMPGs, which consist of preliminary goals that are shown to be protective of human health and the environment, and which served as points of departure in evaluating potential corrective measures in the Corrective Measures Study. Most of these IMPGs were identified as residual PCB concentrations in sediment, soil, or environmental media (like fish fillet tissue) across numerous risk-based benchmarks, including cancer risk (at 10^{-6}, 10^{-5}, and 10^{-4} risk levels) across a number of exposure scenarios (residential, recreational, etc.), non-cancer risks, and ecological risks calculated at an "upper bound" (less stringent) and "lower bound" (more stringent) risk level. The discussion in the "Comparative Analysis of Combined Sediment/Floodplain Alternatives" in this document includes a discussion of how each alternative performs in attaining these various IMPGs.

In the Draft Permit, EPA adopts certain of these IMPGs as Performance Standards. GE will be required to meet these and other Performance Standards as part of the remedy, as outlined in more detail in the Draft Permit. See Section II as well as Tables 1 through 4 of the Draft Permit for specific details.

One example of the relationship of the IMPGs and the Performance Standards is the following. In the HHRA, EPA evaluated risks to humans from consuming PCB-contaminated fish tissue. GE used the information from the HHRA to develop the IMPGs for fish consumption, which are presented as a range of concentrations associated with different risk levels that correspond to different consumers and to different points on the EPA risk range. IMPGs were developed for both deterministic and probabilistic risk analyses. The range of concentrations for probabilistic IMPGs is shown on Figure 9. EPA selected one point in this range of concentrations to serve as the Performance Standard for fish consumption, the PCB concentration of 1.5 mg/kg in fish fillet tissue which is associated with the non-cancer probabilistic risk for the average adult fish consumer who is assumed to consume 14 fish meals per year, half of those from the Housatonic River. This Performance Standard is met when fish fillet concentrations are less than 1.5 mg/kg in all Reaches. Other fish tissue IMPGs were retained as benchmarks in the Draft Permit, whereas other IMPGs for fish tissue were not carried over into the Permit.

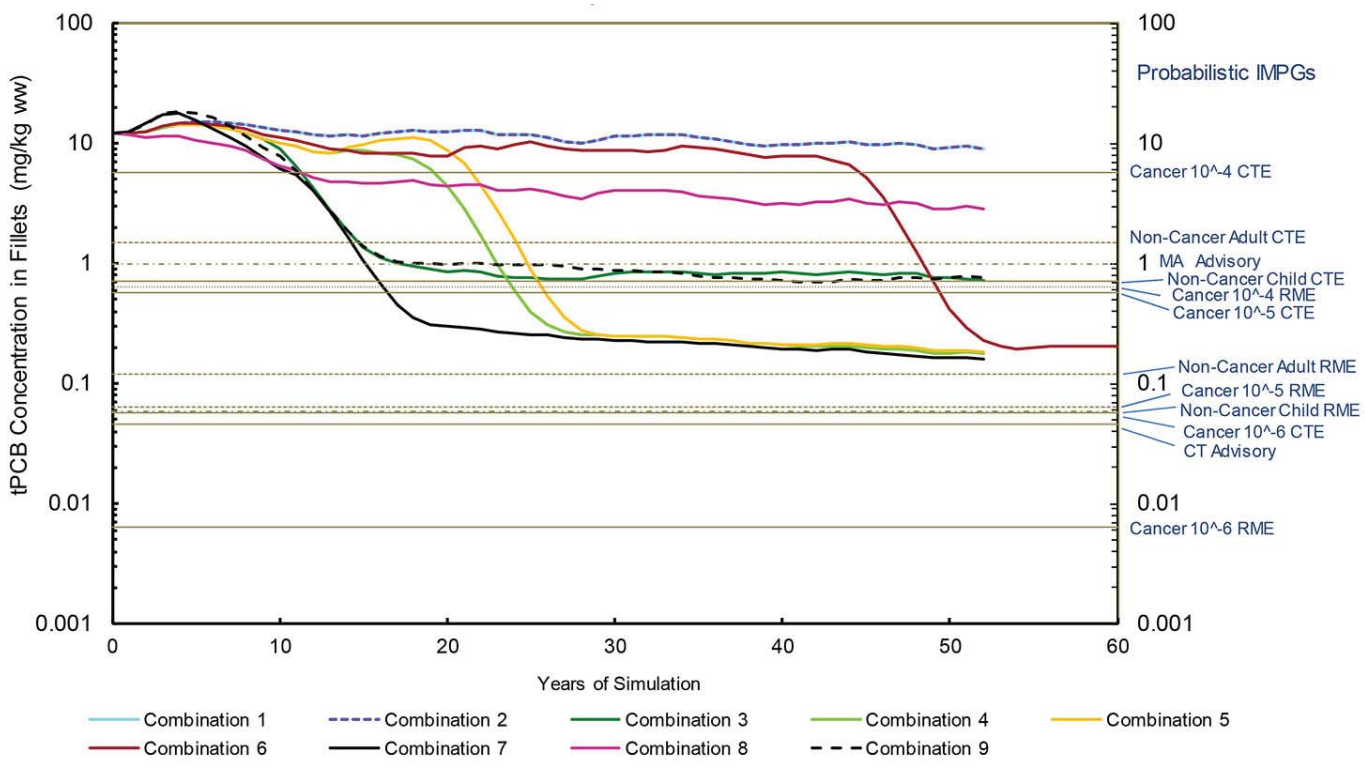


Figure 9
Average Fillet PCB Concentrations in Largemouth Bass (Average for Fish Ages 5 to 9) Compared to Probabilistic IMPGs

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2017, I served one copy of the foregoing Response of General Electric Company to Petition of the Housatonic Rest of River Municipal Committee, with the Attachments, on each of the following:

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/s/ James R. Bieke

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