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

In re:	)	
GENERAL ELECTRIC COMPANY	)	**RCRA Appeal No. 21-01**
Modification of RCRA Corrective Action Permit No. MAD002084093	)	

GENERAL ELECTRIC COMPANY'S RESPONSE TO PETITIONERS' BRIEF

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GLOSSARY OF TERMS

2014 Comp. Analysis	EPA's Comparative Analysis of Remedial Alternatives for the Rest of River (May 2014)
2016 Permit	Final Modified RCRA Permit issued by EPA on October 24, 2016
ACEC	Area of Critical Environmental Concern
A.R.	Administrative Record
ARAR	Applicable or Relevant and Appropriate Requirement
Br. of *Amici* Supporting HRI/HEAL	Brief of Amici Curiae Citizens for PCB Removal et al.
CD	Consent Decree in *United States et al. v. General Electric Company*, Civil Action No. 99-30225-MAP *et seq*. (Oct. 27, 2000)
CD-Permit	Reissued RCRA Permit (reissued by EPA in October 2001 and again effective Dec. 7, 2007), incorporated into Consent Decree
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	U.S. Environmental Protection Agency
GE	General Electric Company
HEAL	Housatonic Environmental Action League
HRI	Housatonic River Initiative
HRI/HEAL Br.	Brief of Petitioners HRI and HEAL
mg/kg	milligrams per kilogram (equivalent to parts per million)
MNR	Monitored natural recovery
Mun. Com. Br.	Brief of Rest of River Municipal Committee as *Amicus Curiae*
PCBs	Polychlorinated biphenyls
ppm	parts per million
RCRA	Resource Conservation and Recovery Act

Revised Permit	Final Revised Modified Permit issued by EPA on Dec. 16, 2020
RTC	EPA's Response to Comments (December 2020)
Stmt. Basis	EPA's Statement of Basis for Proposed Rest of River Remedial Action (July 2020)
Supp. Comp. Analysis	EPA's Determination on Remand and Supplemental Comparative Analyses of Remedial Alternatives for the Rest of River (July 2020)
TSCA	Toxic Substances Control Act
UDF	Upland Disposal Facility

INTRODUCTION

In December 2020, EPA Region 1 ("EPA" or "the Region") issued a final revised permit modification to the General Electric Company ("GE") under the Resource Conservation and Recovery Act ("RCRA") (the "Revised Permit"; A.R. 650440).[1] In accordance with a judicially approved Consent Decree ("CD") entered in 2000, the Revised Permit specifies a remedial action for the area of the Housatonic River and its floodplain identified in the CD as the "Rest of River," to be implemented under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[2]

The six Massachusetts municipalities through which the Rest of River runs support EPA's issuance of the Revised Permit to GE. The Housatonic Rest of River Municipal Committee, which represents five of these municipalities, including the municipality where an on-site disposal facility will be located, has filed a brief as *amicus curiae* in support of the Revised Permit ("Mun. Com. Br."); and the other municipality, the City of Pittsfield, has indicated its support for the remedy embodied in the Revised Permit, as discussed below.

The Housatonic River Initiative ("HRI") and the Housatonic Environmental Action League ("HEAL"), as petitioners, have filed a brief challenging that Revised Permit

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[1] Documents referenced herein are cited to the Administrative Record ("A.R.") for the 2020 Final Revised Permit, the index to which EPA is scheduled to file on May 5, 2021. In addition, key documents from the Administrative Record that are discussed herein are either referenced as Attachments to the Amicus Brief of the Housatonic Rest of River Municipal Committee, filed on April 19, 2021 ("Mun. Com. Br.") or are provided as Attachments to this Response (see List of Attachments above). The Revised Permit is Attachment 1 to the Rest of River Municipal Committee's brief.

[2] As discussed further below, the CD established a process whereby, after investigation and evaluation, EPA would select a remedial action for the Rest of River and specify that remedial action in a modification of GE's RCRA permit. In accordance with that process, the Revised Permit at issue here specifies EPA's selected remedial action for the Rest of River.

("HRI/HEAL Br."). In addition, four entities have filed a brief as *amici curiae* in support of HRI and HEAL – Citizens for PCB Removal, Citizens Against the PCB Dump, the Berkshire-Litchfield Environmental Council, and the Schaghticoke Indian Tribe of Kent ("Br. of *Amici* Supporting HRI/HEAL").

GE submits this brief in support of the Revised Permit and in opposition to the briefs challenging its issuance by EPA.

In January 2018, this Board reviewed an earlier version of the Revised Permit, issued in 2016 ("2016 Permit"), upheld many of its provisions, and remanded two provisions for reconsideration by EPA – specifically, a permit condition requiring GE to dispose of all excavated sediments and soils off-site rather than on-site, and permit provisions requiring GE to perform additional work if third parties undertake certain future projects or work in the Rest of River. *In re General Electric Company*, 17 E.A.D. 434 (EAB 2018). Upon remand, and after a detailed review and evaluation, EPA issued the Revised Permit, which included the following key new elements:[3]

- The Revised Permit replaced the prior out-of-state disposal requirement with a "hybrid" disposal approach which requires GE to transport certain specified sediments and soils to a disposal facility outside of Massachusetts and to construct, for disposal of the remaining sediments and soils, a local state-of-the-art facility at a previously disturbed pit associated with a sand and gravel processing plant outside the floodplain of the River.

[3] The Revised Permit incorporates elements of a Settlement Agreement that was executed in February 2020 by EPA, GE, the six municipalities in Massachusetts through which the Rest of River runs, the State of Connecticut, and other stakeholders (A.R. 643538).

- The Revised Permit requires GE to remove more sediment and soil from the Housatonic River and floodplain than would have been required under the 2016 Permit.
- The Revised Permit requires GE to remove two current or former dams from the River.
- The Revised Permit provides that, to expedite the implementation of the Rest of River Remedial Action, GE has agreed not to contest that permit and to initiate investigation and design work on the remedy even prior to issuance of the permit and continue such work during the pendency of any appeals by others.

The remedy specified in the Revised Permit is otherwise basically the same as that specified in the 2016 Permit previously upheld by this Board.

GE – like the affected municipalities – supports the remedy in the Revised Permit and opposes HRI and HEAL's challenges to it in their brief, which are unsupported by the facts or the law. Those petitioners' primary argument – that EPA's decision to require on-site disposal of certain sediments/soils was an arbitrary, capricious, and unlawful reversal of course – disregards several key facts: (1) the hybrid disposal approach required by the Revised Permit is not the same as the alternative that EPA rejected before, which was on-site disposal of *all* removed sediments/soils; (2) to the extent there was a change, EPA has provided a full evaluation and explanation justifying the Revised Permit's disposal approach under the applicable remedy evaluation criteria; and (3) in its Response to Comments, EPA has provided detailed responses to HRI and HEAL's concerns about the on-site disposal component of the revised remedy, and HRI and HEAL have not shown that those responses are clearly erroneous.

HRI and HEAL also raise issues that have previously been adjudicated and rejected by this Board, challenging (1) EPA's decision not to incorporate specific treatment technologies (thermal desorption and bioremediation) into the remedy and (2) the remedy's inclusion of

monitored natural recovery ("MNR") for portions of the Rest of River. HRI presented the same arguments to the Board in its prior appeal, and the Board rejected both in its 2018 decision. EPA has not revised these aspects of the 2016 Permit and, in any case, has fully explained and justified those aspects of the Revised Permit. It is inappropriate for HRI and HEAL to reargue issues that have already been adjudicated and rejected.

STATEMENT OF FACTS

A. Background

The CD embodied a comprehensive settlement for the cleanup of the GE-Pittsfield/Housatonic River Site, including the Rest of River (A.R. 9420; Attachment 1 hereto).[4] For most areas of that site, the CD specified the remediation to be undertaken. For the Rest of River, however, the CD instead established a *process* for selection of a Rest of River Remedial Action (as defined in the CD) in accordance with an earlier version of the RCRA permit that was incorporated in the CD ("CD-Permit"; A.R. 280170; Attachment 14 to Mun. Com. Br.).

The CD-Permit specified that GE would evaluate remedial alternatives based on nine enumerated criteria, and that EPA would evaluate and address those criteria in selecting the Rest of River Remedial Action. CD-Permit Conditions II.G, II.J.[5] The CD also required EPA to

[4] That site includes GE's former industrial facility in Pittsfield, Massachusetts, and various adjacent and nearby areas, as well as the Housatonic River. The Rest of River consists of the portion of the Housatonic River and its floodplain beginning approximately two miles downstream of GE's former Pittsfield facility and extending through western Massachusetts and Connecticut.

[5] The enumerated criteria consist of three General Standards – (1) Overall Protection of Human Health and the Environment, (2) Control of Sources of Releases, and (3) Compliance with Applicable or Relevant and Appropriate Requirements ("ARARs") – and six Selection Decision Factors – (4) Long-Term Reliability and Effectiveness, (5) Attainment of Interim Media Protection Goals, (6) Reduction of Toxicity, Mobility, or Volume of Waste, (7) Short-Term Effectiveness, (8) Implementability, and (9) Cost. CD-Permit Condition II.G.

propose a Rest of River Remedial Action, including both "Performance Standards and the appropriate corrective measures necessary to meet the Performance Standards," in the form of a draft modification of the CD-Permit. CD ¶ 22.n; CD-Permit Condition II.J. After taking public comments, EPA would issue its final modification of the CD-Permit specifying the Rest of River Remedial Action. CD ¶ 22.p; CD-Permit Condition II.J. The final modification of the CD-Permit is appealable to this Board under 40 C.F.R § 124.19, and then to the First Circuit under Section 7006(b) of RCRA (42 U.S.C. § 6976(b)). CD ¶¶ 22.q, 141.b(ii)&(iii). Ultimately, GE will implement the Rest of River Remedial Action specified in the final modification of the CD-Permit under CERCLA. CD ¶ 22.w.

In cooperation with EPA, GE has invested hundreds of millions of dollars to clean up the first two miles of the River, beginning at the former GE Pittsfield facility, and to remediate numerous areas at the GE facility, nearby commercial areas adjacent to the River, an adjacent lake, and both residential and non-residential properties in the floodplain adjacent to the first two miles of the River. Those cleanup activities are now complete.

In October 2016, EPA issued the 2016 Permit selecting a remedy for the Rest of River (A.R. 593921; Attachment 10 to Mun. Com. Br.). The 2016 Permit was challenged in this Board by GE and several other parties, including HRI, five Massachusetts municipalities south of Pittsfield through which the Rest of River flows, and others. In its January 2018 decision, the Board upheld the 2016 Permit against the challenges brought by HRI, the municipalities, and other environmental groups. It also upheld the Permit against GE's arguments except in two respects. Most notably, after reviewing GE's challenge to EPA's requirement of out-of-state disposal of sediments and soil from the Rest of River, the Board remanded that requirement to EPA for reconsideration. *In re General Electric*, 17 E.A.D. at 568-69.

Following the Board's decision, and with notice to the public, EPA engaged in mediated negotiations with GE, the six municipalities in the Rest of River, the State of Connecticut, and several other stakeholders. These parties executed a Settlement Agreement, effective in February 2020, which included agreement on a Rest of River remedy that would be protective of human health and the environment (A.R. 643538; Attachment 8 to Mun. Com. Br.). In July 2020, following the process set forth in the CD and CD-Permit, EPA issued a draft of a Revised Permit and requested public comment on it (A.R. 647214; text in Attachment 2 hereto).

The draft Revised Permit was supported by a *Statement of Basis for EPA's Proposed 2020 Revisions to the Remedial Action for the Housatonic River "Rest of River"* ("Stmt. Basis"; A.R. 647211; Attachment 6 to Mun. Com. Br.) and a *Determination on Remand and Supplemental Comparative Analyses of Remedial Alternatives for the General Electric (GE)-Pittsfield/Housatonic River Site Rest of River* ("Supp. Comp. Analysis"; A.R. 6472101; Attachment 7 to Mun. Com. Br.). Both documents described in detail the changes from the 2016 Permit; and the latter document contained a detailed analysis of the proposed Rest of River Remedial Action under the nine remedy evaluation criteria in the CD-Permit. That analysis included a comparison with prior alternatives, including: (1) the Rest of River Remedial Action specified in the 2016 Permit, which itself had been evaluated against numerous other alternatives under the CD-Permit criteria in the 2014 *Comparative Analysis of Remedial Alternatives for the Rest of River* ("2014 Comp. Analysis"; A.R. 557091; text in Attachment 3 hereto); and (2) the alternatives of all off-site disposal and all on-site disposal, which themselves had been evaluated against other disposal and treatment alternatives in the 2014 Comparative Analysis.

B. Final Revised Permit

On December 16, 2020, EPA issued the final Revised Permit (A.R. 650440; Attachment 1 to Mun. Com. Br.), along with a lengthy Response to Comments ("RTC") (A.R. 650441; Attachment 2 to Mun. Com. Br.).[6]

As noted above, the Revised Permit specifies a hybrid disposal approach for sediments and soils removed from the Rest of River. Under the hybrid approach, GE is required to construct an Upland Disposal Facility ("UDF") in a previously disturbed industrial area associated with a sand and gravel operation, located near the River but outside the 500-year floodplain. The UDF will be used for the disposal of excavated sediments and soils that meet certain Acceptance Criteria – in particular, that they contain a volume-weighted average concentration of polychlorinated biphenyls ("PCBs") of less than 50 parts per million ("ppm") or, for sediments, less than 25 ppm on a reach or sub-reach basis. Revised Permit Section II.B.5 and Attachment E.

The Revised Permit also contains numerous other requirements for the UDF: (1) it must have a maximum design capacity of 1.3 million cubic yards and adhere to certain areal and height limitations; (2) it must be constructed with a double liner that has low permeability (less than 1 x 10^{-7} centimeters per second) and a minimum thickness of 30 mils and that is chemically compatible with PCBs; (3) the bottom liner of the landfill must be installed a minimum of 15 feet above a conservative estimate of the seasonally high groundwater elevation; (4) the UDF must include primary and secondary leachate collection systems; (5) the UDF must be capped with a low-permeability cap and vegetation; (6) GE must offer to connect all non-community and private

[6] The Rest of River reaches subject to the Revised Permit are shown on Figures 1 and 2 of the Revised Permit.

wells within 500 feet to public water; and (7) the UDF will be subject to long-term groundwater monitoring. *Id*. Section II.B.

The Revised Permit further specifies that all excavated sediments and soils that do not meet the Acceptance Criteria for placement in the UDF – in particular, those that contain a volume-weighted average PCB concentration of more than 50 ppm or, for sediments, greater than a reach or sub-reach average of 25 ppm – must be transported to a licensed out-of-state landfill. *Id*. Section II.B.6. At least 100,000 cubic yards of sediments and soil must be sent to such an out-of-state landfill. *Id*.

The Revised Permit also requires the removal of more PCB-containing sediments and soils from the Housatonic River and floodplain than the 2016 Permit. This will be accomplished by reducing the extent of capping in several reaches of the River and requiring sediment removal instead (see Supp. Comp. Analysis at 9-10), and by increasing the amount of soil to be removed from certain properties in the floodplain (see *id*. at 8). In addition, the Revised Permit requires that the sediments removed from portions of the River near the UDF (Reach 5C, Woods Pond, and associated backwaters) be pumped hydraulically to the UDF, if feasible, significantly reducing local truck traffic. Revised Permit Sections II.B.2.c.(2)(b), II.B.2.d.(2)(c), and II.B.2.e.(2). Further, the Revised Permit requires GE to remove two current or former dams downstream of Woods Pond and remediate the associated impoundments, improving the river habitat and eliminating the risk of dam failure. *Id*. Section II.B.2.f.(1)(d). Finally, the Revised Permit embodies GE's agreement to commence investigation and design work on the Rest of River Remedial Action in February of last year and to continue that work during the pendency of any appeals by others, thus resulting in expediting the Rest of River Remedial Action. *Id*. Section I.A.2.

The Revised Permit is otherwise generally the same in substance as the 2016 Permit. In particular, the two components of the Revised Permit challenged by HRI and HEAL other than hybrid disposal are identical to those contained in the 2016 Permit – EPA's decision not to require treatment of removed materials, and the Revised Permit's specification of MNR for the flowing portions of Reach 7 and all of Reaches 9 through 16 (*id*. at Section II.B.2.h). HRI challenged these identical provisions in the previous appeal, and this Board rejected those challenges in its 2018 decision. 17 EAD at 437, 537-40, 577-83.

Most of the parties that participated in the prior appeal – including the five municipalities that comprise the Rest of River Municipal Committee, the City of Pittsfield, the State of Connecticut, the Berkshire Environmental Action Team, the Massachusetts Audubon Society, C. Jeffrey Cook, and GE – support the remedy specified in the Revised Permit;[7] and the Commonwealth of Massachusetts stated in comments to EPA that it has no objection to that remedy.

STANDARD OF REVIEW

Under this Board's standard of review, which HRI and HEAL do not mention, the petitioners "must demonstrate that each challenge to the permit decision is based on a finding of fact or conclusion of law that is clearly erroneous." 40 C.F.R. §124.19(a)(4)(i). The regulations also require that each issue raised in the petition must have been raised during the applicable

[7] That support was either stated directly in comments on the draft Revised Permit or through execution of the Settlement Agreement, or both. While GE supports the Revised Permit, it notes that, in the event that, in response to this appeal and any further remand from this Board or any subsequent court challenge, EPA changes the Revised Permit so that it is materially inconsistent with the current Revised Permit, GE will likely challenge that permit in this Board and in a reviewing court on grounds presented in GE's challenge to the 2016 Permit in this Board, as well as on grounds relating to new provisions of that permit that were not in the 2016 Permit.

public comment period (or the petition must explain why that issue was not required to be raised). *Id*. § 124.19(a)(4)(ii).

HRI and HEAL's discussion of the standard of review for what they claim is a change in EPA's position (HRI/HEAL Br. at 11) ignores this Board's and Supreme Court precedent. In *In re Veolia ES Technical Solutions, L.L.C.*, 18 E.A.D. 194, 208 (EAB 2020), the Board concluded that, in reviewing an asserted change in position by EPA, application of its "clearly erroneous" standard of review "would not differ in any material respect" from the general standard of review for an agency's reversal of position, as set forth in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). In that case, the Supreme Court held that a change in agency policy complies with the Administrative Procedure Act when the agency provides a "reasoned explanation" for its revised position, including showing that "the new policy is permissible under the statute" and that there are "good reasons" for it. More recently, in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), the Supreme Court again stated that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[8] As the Board explained in *Veolia*, the "reasoned explanation" required by these Supreme Court decisions does not "differ[] materially from the examination of the record called for by the Board's clear error standard of review," in which the Board examines the administrative record to determine whether the permit issuer "exercised considered judgment" and "provided a cogent explanation" for its decision. 18 E.A.D. at 208.

In this case, even if the hybrid disposal approach represents a change in policy or position, EPA has satisfied the above requirements by providing, in response to this Board's

[8] The decisions cited by HRI and HEAL all turn on the agency's failure to provide good reasons or an adequate explanation for its new determination.

remand order, a reasoned explanation for the hybrid disposal approach, as discussed further below. See also *Emhart Industries v. Rhode Island*, No. 19-1563, slip op. at 21-30 (1st Cir. Feb. 17, 2021), upholding a CERCLA settlement agreement specifying a remedy for the Centredale Superfund Site in Rhode Island even though it incorporated response actions previously found to be arbitrary, where EPA had adequately explained its reasons for including those response actions.

HRI and HEAL also fail to mention another relevant standard of review– that where an issue was previously raised to and upheld by the Board and was not remanded, that issue is not properly before the Board in a new appeal. See, e.g., *In re Upper Blackstone Water Pollution Abatement District*, 15 E.A.D. 297, 302 (EAB 2011): "Where the decision at issue is a final decision issued after remand, . . . the scope of the appeal is further limited to the remanded permit condition(s) and to any changes to the permit required by intervening changes in the law governing the permit."

Finally, HRI and HEAL's brief, as well as the brief of their supporting *amici*, rely, as purported support for some of their arguments, on several attached documents which are not properly before this Board because they were not submitted to EPA in comments, are not in the Administrative Record, and are not subject to official notice by the Board. On April 7, 2021, EPA filed a motion to strike HRI and HEAL's Attachments 5, 6, 8, 9, 10, 11, 13, 14, 15, and 17. That motion also applies to Attachments 1 and 2 of the brief of the *amici* supporting HRI and HEAL. On April 8, 2021, GE filed a memorandum in support of EPA's motion. On April 30 and May 3, 2021, respectively, GE and EPA filed replies to HRI and HEAL's opposition to EPA's motion.

EPA's permit appeal regulations provide that a final permit decision must be based on the administrative record, which "shall be complete on the date the final permit is issued," 40 C.F.R. § 124.18(a) & (c), and that attachments to a brief are to consist of "[p]arts of the record," *id*. § 124.19(d)(2). These regulations indicate that such attachments are not to include extra-record documents submitted to the Board after the permit has been issued. Indeed, in its decision on the 2016 Permit, the Board stated that it "will not consider" studies that are not in the administrative record and are "presented for the first time on appeal." 17 E.A.D. at 582 n.62. Further, as shown in GE's Reply to Petitioners' Opposition to EPA Region I's Motion to Strike, the attachments in question here, with the potential exception of certain EPA guidance documents, do not qualify for any of the limited exceptions that the Board has previously recognized for consideration of materials outside the administrative record.[9] Thus, those extra-record documents should not be considered by the Board.

ARGUMENT

I. HRI and HEAL's Challenge to the On-Site Disposal Component of the Revised Permit Remedy Is Unsupportable.

A. EPA Has Provided a Reasoned Explanation for Its Selection of a Hybrid Disposal Approach.

Petitioners' first challenge to the Revised Permit is that EPA acted in an arbitrary, capricious, and unlawful manner by requiring the on-site disposal of certain soils and sediments,

[9] In particular, GE's Reply showed that, apart from EPA guidance documents, those attachments are plainly not subject to official notice by the Board as "incontrovertible" public documents, *In re City of Ruidoso Downs & Village of Ruidoso Wastewater Treatment Plant,* 17 E.A.D. 697, 716 n.22 (EAB 2019), or as "sources whose accuracy cannot reasonably be questioned." Fed R. Evid. 201(b) (relevant via 40 C.F.R. § 22.22(f)). Nor can their consideration be justified as responding to significant new information that the petitioners could not have addressed in comments. While the attached EPA guidance documents may be subject to official notice, they do not support HRI and HEAL's arguments, as discussed in the sections below.

when it previously had rejected an all-on-site disposal option. HRI/HEAL Br. at 12-14. This argument is unsupportable under this Board's *Veolia* decision and the Supreme Court's *Fox* and *Encino* decisions.

As described above, the Revised Permit prescribes a hybrid disposal approach, which (1) requires off-site transport and disposal of a portion of the removed sediments and soils (i.e., at least 100,000 cubic yards, including materials with average PCB concentrations at or above 50 ppm or, for sediments, 25 ppm), and (2) provides for on-site disposal of the remainder in a secure and lined UDF, to be constructed in a previously disturbed industrial area outside the floodplain of the River, subject to strict criteria for the types of materials that may be placed in it and rigorous requirements for its design, construction, operation, and monitoring. Insofar as this approach reflects a change in EPA's position regarding on-site disposal, it was a response to the Board's decision directing EPA to reevaluate disposal alternatives, 17 E.A.D. at 569; and EPA has provided an extensive justification and explanation of the reasons for the current approach in its Statement of Basis (at 8, 13-14, and 28-35), Supplemental Comparative Analysis (at 24-40), and Response to Comments (at 11-22). That is sufficient to uphold the new determination under the applicable standard specified in the Board's decision in *Veolia* and the Supreme Court decisions in *Fox* and *Encino*, as well as under the First Circuit's *Emhart* decision.

B. HRI and HEAL's Claim that the UDF Site Is Unsuitable for a Landfill Is Untenable and Does Not Show Clear Error.

HRI and HEAL claim that EPA has strayed from a prior position that "the UDF site is unsuitable for disposal of PCBs," having previously concluded that, in their words, "the site is located on permeable soil, is above a medium yield aquifer, is close to drinking water sources, and could release contaminants to the River." HRI/HEAL Br. at 14. That claim is untenable and

does not in any way show that EPA's selection of the UDF site for the on-site disposal component of the remedy was clearly erroneous.

To begin with, EPA did not say, in issuing the 2016 Permit, that the UDF site is unsuitable for a landfill. To the contrary, even though it selected off-site disposal for all excavated sediments and soils, it stated that on-site disposal of all such removed material at any of the identified sites (including the UDF site) would provide "high levels of protection to human health and the environment." 2016 Statement of Basis (A.R. 558621; Attachment 12 to Mun. Com. Br.) at 35. EPA made the statements cited by HRI and HEAL to support a determination that the UDF site would not meet the technical criteria for PCB landfills under its Toxic Substances Control Act ("TSCA") regulations, 40 C.F.R. § 761.75(b) ("TSCA landfill regulations"). See EPA's 2016 Response to Comments (A.R. 593922; Attachment 11 to Mun. Com. Br.) at 239. In the proceeding challenging that 2016 Permit, this Board held that it could not "conclude from the record that the Region exercised considered judgment in relying on the TSCA Landfill regulation to select off-site disposal," explaining that EPA had not adequately considered whether the use of synthetic liners could compensate for soil permeability concerns, that EPA had "asserted that on-site and off-site disposal both provide high levels of protection," and that EPA had not explained why a waiver for on-site disposal should not be granted, even though such waivers had been granted at other sites. 17 EAD at 561, 566-67. HRI and HEAL's assertions ignore this adjudicatory history and the Board's earlier holdings.

In accordance with the Board's 2018 decision, EPA has now properly recognized that the TSCA landfill regulations allow for the disposal of PCBs in landfills where the permeability criteria are not met, as long as the landfill has a synthetic liner with equivalent permeability to protect against seepage. 40 C.F.R § 761.75(b)(2). The TSCA regulations also authorize EPA to

provide "risk-based approval" of a disposal method upon a finding that the proposed disposal method will not pose "an unreasonable risk of injury to health or the environment." *Id*. § 761.61(c).

Here, whether or not the underlying soil meets the permeability criteria, the UDF will satisfy the TSCA permeability requirement through its double bottom liner, which is equivalent to the soil criterion. See 2020 RTC at 13; see also *id*. at 18 (explaining the established 99.9% effectiveness of such a double liner). Further, to address the hydrological concerns and requirements of the TSCA technical criteria, the UDF will incorporate substantial safeguards, including, as EPA has noted, "a double bottom liner (at least 15 feet above the seasonal high groundwater elevation), leachate collection and management, a groundwater monitoring network, and a multi-layer low-permeability engineered cap/cover." Revised Permit, Attachment D at D-1. The presence of these safeguards enabled EPA to determine that the UDF will satisfy the TSCA regulations by making a risk-based determination under 40 C.F.R. § 761.61(c) that the revised remedy, including the UDF, "will not result in an unreasonable risk of injury to human health or the environment." Revised Permit, Attachment D at D-1. EPA explained how it reached this conclusion, *id*.; and it directly addressed in its 2020 RTC the concerns raised by the petitioners, including not only the concerns about permeability, but also the concerns about impacts on groundwater (RTC at 16-17), potential leaks (*id*. at 18-19), and potential impacts on water supplies and the River (*id*. at 20-22).[10]

[10] EPA's 2020 Response to Comments also includes a table listing 24 sites where on-site or local disposal of PCB-containing sediments and/or soils was part of the remedy selected by EPA. RTC at Table 3.

HRI and HEAL also rely on a new report by a geologist (their Attachment 6), to support their claim that the site is geologically unsuitable for a landfill. HRI/HEAL Br. at 14-16. The *amicus* Berkshire-Litchfield Environmental Council similarly asserts that the site is geologically unsuitable for a landfill, relying on the same report. Br. of *Amici* Supporting HRI/HEAL at 6-7 and Attachment 1. That report, however, was never submitted to EPA in comments, is not part of the administrative record, is not subject to official notice by the Board, and should be stricken from the briefs to which it is attached, as requested in EPA's April 7, 2021 motion to strike and shown in GE's Reply to Petitioners' Opposition to EPA Region I's Motion to Strike. In any case, EPA's own regulations directly address the geologist's assertion that the site is unsuitable for a landfill because the subsurface is permeable and (in his view) the UDF will eventually leak. As noted above, the TSCA landfill regulations provide that, when the soil permeability criteria are not met, a landfill is still appropriate so long as it has a liner with equivalent impermeability, as will be the case with the UDF. 40 C.F.R. § 761.75(b)(2).[11]

C. EPA Fully Evaluated and Justified the Revised Permit Remedy Under the Applicable Remedy Evaluation Criteria.

HRI, HEAL, and certain of their supporting *amici* claim that EPA's selection of on-site disposal was not the result of a careful consideration of alternatives or the application of objective remedy selection factors, but rather the outcome of private settlement discussions in

[11] The Berkshire-Litchfield Environmental Council asserts further that pumping sediments to the UDF would risk "massive volatilization of PCBs into the air," relying on an extra-record literature article that is attached to both its brief and HRI and HEAL's brief. Br. of *Amici* Supporting HRI/HEAL at 7 and Attachment 2. Again, that article is not properly before the Board and should be stricken. Moreover, EPA has provided a substantive response to the concerns about PCB volatilization, RTC at 13-14, and the *amicus* has not addressed that response.

which there was no public input. HRI/HEAL Br. at 17-19; Br. of *Amici* Supporting HRI/HEAL at 8-9.

The administrative record, however, shows that EPA carefully considered and evaluated the hybrid disposal approach under the nine remedy evaluation criteria set out in the CD-Permit, both on its own and in comparison with other disposal alternatives. EPA described its evaluation in detail in both its Supplemental Comparative Analysis (at 27-39) and its Statement of Basis (at 28-35). Further, in accordance with the CD and the established procedures for modifying a RCRA permit, EPA issued its proposed hybrid disposal approach, including its evaluation under the applicable criteria, for public comment as part of the draft Revised Permit, took public comment on it, and issued a response to the comments.

Prior to that time, the selected hybrid disposal approach was discussed in mediated settlement negotiations and specified in the February 2020 Settlement Agreement.[12] Those events, however, do not vitiate the controlling facts – namely, that: (1) EPA evaluated and justified the hybrid approach under the CD remedy evaluation criteria and concluded that it "is best suited to meet the General Standards [in the CD-Permit] in consideration of the Selection Decision Factors," Supp. Comp. Analysis at 39; see also Stmt. Basis at 18; and (2) EPA explained its approach and evaluation, solicited public comment on it, and, after receiving and considering those comments, reached the same conclusion. RTC at 11.[13] That was an entirely

[12] EPA provided notice to the public in late 2018 that those mediated settlement negotiations were going to occur (see A.R. 6331183, 631454; Attachments 4 and 5 hereto).

[13] GE does not concede EPA's conclusion that that new hybrid disposal approach better meets the CD-Permit's remedy evaluation criteria than the alternative of all on-site disposal; and it reserves the right to take the position that the latter better meets those criteria in the event that the Revised Permit is changed to be inconsistent with the current version of the Revised Permit.

appropriate process.[14] The claims of HRI, HEAL, and the *amici* groups against the UDF do not undermine those critical facts.[15]

D. EPA Properly Waived the State Regulatory Provisions Relating to Location of a Landfill in an Area of Critical Environmental Concern.

The site selected for the UDF is a previously disturbed area associated with a sand and gravel processing operation. That site lies within the overall boundaries of an Area of Critical Environmental Concern ("ACEC"), designated as such by the Massachusetts Secretary of Energy and Environmental Affairs in 2009, which encompasses 13 miles of the Housatonic watershed. See HRI/HEAL Br. at Attachment 3. The Commonwealth designated that area as an ACEC because much of it contains valuable ecological resources that the Commonwealth believed were entitled to special protection. However, because the UDF will be in an already disturbed industrial area, its use for disposal will not adversely affect any of the resources of the ACEC; and EPA has waived the state regulatory prohibitions against locating a landfill in an ACEC, as authorized by CERCLA and discussed further below.

HRI and HEAL now contend that EPA has located a landfill in an ACEC despite prior concerns about doing so and without adequate explanation or support. HRI/HEAL Br. at 19-20. They also challenge EPA's waiver of the state regulatory prohibitions. *Id*. at 20-22.

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[14] Indeed, that process was very similar to that involved in the recent *Veolia* case, cited above, in which the revised permit that was upheld resulted from a private settlement agreement, after which EPA issued a draft permit for public comment and then decided to finalize the permit in accordance with the agreement. See 18 E.A.D. at 203-04.

[15] Citizens Against the PCB Dump also allege that the Town of Lee's consent to the proposed remedy was secured illegally in violation of the Massachusetts Open Meeting Law and the Town of Lee's own by-laws, as it has reportedly alleged in a separate suit in state court. Br. of *Amici* Supporting HRI/HEAL at 9. Those state-law claims have no bearing on the validity of the Revised Permit, which, as described in the text, was adopted under the established CD and RCRA procedures.

These challenges, however, were not preserved for appeal because they were not raised in HRI's or HEAL's comments on the draft Revised Permit (see their Attachment 1) (or any other comments). See 40 C.F.R. § 124.19(a)(4)(ii). But even if these arguments were properly before this Board, they are mistaken.

HRI and HEAL first challenge EPA's conclusion that the Massachusetts solid waste regulations prohibiting location of a landfill in an ACEC (310 CMR 16.40(d)(4)) are not applicable because the UDF will be a PCB Remediation Landfill under TSCA, rather than a solid waste landfill under state regulations. HRI/HEAL Br. at 20-21. However, that assertion is wrong. The UDF will not be a solid waste landfill because: (1) the Massachusetts solid waste site assignment regulations in 310 CMR 16.00 exclude facilities that manage state-listed hazardous waste (310 CMR 16.01(4)(a)); (2) state-listed hazardous waste includes waste that contains PCBs at concentrations at or above 50 ppm (310 CMR 30.131 (MA02)); and (3) the UDF will manage state-listed hazardous waste because some of the sediment and soil to be disposed of there will have a PCB concentration equal to or greater than 50 ppm (even though the average will be less than 50 ppm). Moreover, the Massachusetts hazardous waste regulations also do not apply to the UDF because: (1) they generally exempt PCB Remediation Landfills regulated under TSCA, including by virtue of a risk-based determination pursuant to 40 C.F.R. § 761.61(c) (such as EPA has made here) (310 CMR 30.501(3)(a)); and (2) while that exemption would not apply to the siting of a facility in an ACEC (*id*. at 30.501(3)(a)4), EPA has waived the prohibitions relating to locating a facility in an ACEC, as discussed below.

In any case, regardless of whether the state regulatory prohibitions on locating a landfill in an ACEC might be technically applicable, EPA has exercised its authority and discretion here to waive those prohibitions as applicable or relevant and appropriate requirements ("ARARs")

under CERCLA, as authorized by Section 121(d)(4) of CERCLA (42 U.S.C. § 9621(d)(4)). Specifically, EPA has waived those prohibitions on the ground that compliance with them would require the disposal of all removed materials elsewhere, which would result in greater risk to human health and the environment than the hybrid disposal approach. Revised Permit Attachment C at C-10 – C-11, C-13.

EPA has provided a detailed explanation for this waiver. See *id*. and Supp. Comp. Analysis, Attachment B at B-3 – B-7. It noted first that the area of the UDF and the surrounding area (even though technically within the ACEC boundaries) have already been altered by industrial activities and include two existing landfills, and that that the UDF will be designed and built with multiple protective safeguards. *Id*. at B-3. Further, EPA explained that off-site disposal would have inherent risks, including increased truck traffic (with its attendant increase of injuries and fatalities to transport workers), increased greenhouse gas and other air emissions, and a likely delay in remediation due to appeals. *Id*. at B-4.[16] Finally, EPA noted that the Revised Permit remedy will have numerous other benefits, including an increase in the amount of PCB-containing sediments and soils removed, the removal of two existing dams, the hydraulic pumping of some removed sediments, and a more expedited cleanup. *Id*. at B-5 – B-6.

Neither HRI nor HEAL (nor any other party) submitted comments to challenge EPA's waiver or its rationale for that waiver. Moreover, contrary to HRI and HEAL's current assertion that EPA's claims of risks and benefits are "unidentified" (HRI/HEAL Br. at 22), EPA has clearly identified the risks associated with other alternatives and the benefits of the Revised

[16] EPA also identified adverse impacts associated with the siting of a disposal facility at the other on-site locations that have been identified, including the disturbance of forested lands. Supp. Comp. Analysis, Attachment B at B-4 – B-5.

Permit, as described above, and has shown that they fully justify the waiver of the regulatory ACEC prohibitions.

E. EPA Has Explained Why the UDF Does Not Pose a Risk to the Housatonic River.

HRI and HEAL complain that EPA previously expressed concern that an on-site landfill would pose a risk of releases to the River over the long term and that it has not justified its departure from that prior concern. HRI/HEAL Br. at 22-23.

HRI and HEAL's claims regarding EPA's prior concerns are overstated. In 2016, EPA said only that, with an on-site landfill, "there remains a non-zero potential for issues in the ability long-term for a landfill next to the River to control the sources of PCBs." 2016 Response to Comments at 244-45. EPA has now explained that "non-zero" does not mean substantial, noting that, given the very high effectiveness of a double bottom liner coupled with the chemical tendency of PCBs to bind to soil and thus to migrate much more slowly (3,000 times slower) than groundwater, any release from the UDF to groundwater is unlikely and that, even if it did occur, it can and will be managed before affecting the River. RTC at 18, 21. In particular, EPA has explained that, "[i]n the unlikely event of a release to groundwater, to prevent any potential release to the River, GE will be required to establish a system of groundwater monitoring wells immediately adjacent to and surrounding the UDF," which "will detect any elevated contaminant levels many years before a release to the River would occur," so that GE can "propose and perform corrective action" if necessary. *Id*. at 21-22.

HRI and HEAL claim further that their concern is "reinforced by recent groundwater results," as described in their attached geologist's report. HRI/HEAL Br. at 22. As shown

above, however, that report (which does not identify the groundwater monitoring results it mentions) is not properly before the Board.

HRI and HEAL also assert that the UDF will cause a reduction in local property values and affect tourism and the "natural beauty" of the area. HRI/HEAL Br. at 23-24. Property value impacts and tourism impacts are not relevant to EPA's application of the CD-Permit's remedy evaluation criteria, and the UDF's location in an already disturbed industrial area associated with a sand and gravel processing operation will not affect the region's "natural beauty." Even if HRI/HEAL's concerns about impacts on property values and tourism had merit, which they do not, they were fully addressed by EPA. RTC at 34-40.[17]

F. The Hybrid Disposal Approach Is Supported by the Local Communities, and EPA Has Addressed the Objections of the Opponents.

Finally, HRI and HEAL complain that EPA has disregarded strong community opposition to the UDF. HRI/HEAL Br. at 24-25. While community acceptance is not one of the remedy evaluation criteria in the CD-Permit (see note 5 on page 4 above), the Board previously suggested that it could be considered – e.g., as part of the "implementability" criterion or otherwise. 17 E.A.D. at 574-76. EPA has done so. In contrast to the situation in 2016, when EPA noted that on-site disposal would require "coordinat[ion] with state and local entities" and that the Commonwealth of Massachusetts and "every Berkshire County city or town government along the Housatonic" were opposed to all on-site disposal (2016 Response to Comments at 260, 265), all of the Berkshire County municipalities along the Rest of River support the hybrid

[17] In a similar vein, Citizens for PCB Removal assert that the UDF "will re-victimize the citizens of Berkshire County." Br. of *Amici* Supporting HRI/HEAL at 7. This conclusory assertion has no bearing on EPA's application of the remedy evaluation criteria and, as discussed further in the next section, is belied by the fact that the Revised Permit has the support of all the municipalities in Berkshire County through which the Rest of River flows.

disposal approach, and the Commonwealth has no objection to it.[18] Thus, as EPA noted in its 2020 Supplemental Comparative Analysis, while "[c]oordination with state and local agencies will be important for the [UDF]," it is now the case that "agreement by the local governments [to the UDF] . . . is evidence of this coordination and their anticipated continued cooperation." Supp. Comp. Analysis at 30. Furthermore, EPA has acknowledged that there remains some opposition in the community to the UDF, RTC at 43, but it has provided detailed responses to the various substantive objections of the opponents. *Id*. at 11-43.

* * *

In summary, EPA has provided a detailed evaluation and justification of the selected hybrid disposal approach under the applicable remedy evaluation criteria, and the arguments made by HRI and HEAL, as well as those of their supporting *amici*, should be rejected by the Board.

II. HRI and HEAL's Arguments that the Revised Permit Needed to Incorporate Treatment Technologies for Removed Materials Are Not Properly Before the Board and, in any Case, Are Unfounded.

HRI and HEAL's second challenge to the Revised Permit is that EPA's failure to incorporate thermal desorption or bioremediation into the remedy violated CERCLA's preference for treatment (in CERCLA § 121(b)(1), 42 U.S.C. § 9621(b)(1)) and was arbitrary and capricious. HRI/HEAL Br. at 26-32. These claims are not properly before the Board in this appeal and, in any case, do not show in any way that EPA's decision was clearly erroneous.

[18] Additionally, the Massachusetts Audubon Society and the Berkshire Environmental Action Team, which also opposed the all-on-site disposal remedy in the previous appeal (see 17 E.A.D. at 558 n.49), support the Revised Permit as well.

A. HRI and HEAL's Claims Regarding Treatment Are Not Properly Before the Board.

HRI presented all of its "treatment" claims to the Board in its prior appeal. The Board rejected them for the following reasons: (1) the claim regarding thermal desorption was not raised during the 2014 comment period and, in any event, EPA provided a detailed rationale for rejecting that alternative; (2) HRI did not show that bioremediation is appropriate for this site; and (3) HRI's claim that the permit violated CERCLA's preference for treatment was also not raised during the 2014 comment period and, in any event, was unsupported. 17 E.A.D. at 577-83. Thus, these issues were not remanded by the Board. In this situation, as noted under the Standard of Review discussion above, this issue is not properly before the Board in this appeal. See, *e.g., Upper Blackstone*, 15 E.A.D. at 302.

HRI and HEAL attempt to avoid this result by arguing that the Board's remand of the on-site/off-site disposal issue necessarily raised the question of how the removed sediments should be handled, including via treatment. HRI/HEAL Br. at 29. That argument has no supportable basis. Neither the Board's remand nor EPA's actions on remand affected the grounds on which the Board previously rejected HRI's contentions on these issues.[19]

B. HRI and HEAL's Claims Regarding Treatment Have No Substantive Basis.

In any case, HRI and HEAL's "treatment" claims have no substantive merit and fail to show clear error. Contrary to their contention, EPA did not have to test (or require testing of) thermal desorption or bioremediation on Housatonic River sediment before making its decision. Thermal desorption was thoroughly evaluated under the CD-Permit remedy evaluation criteria in

[19] HRI and HEAL also assert that they raised the thermal desorption issue prior to the 2014 comment period. HRI/HEAL Br. at 28. This claim likewise does not affect the Board's bases for rejecting the thermal desorption argument in its prior decision.

GE's Revised Corrective Measures Study Report and EPA's 2014 Comparative Analysis, see RTC at 23; and as the Board recognized, EPA provided a "detailed rationale" for rejecting thermal desorption. See 17 E.A.D. at 579. In addition, EPA previously provided several sound reasons for rejecting bioremediation, and the Board found those reasons supportable. *Id*. at 581-82. Again, in 2020, following the remand, EPA provided its justification for not selecting these treatment technologies. RTC at 23-28.[20]

Similarly, HRI and HEAL's claim that the Revised Permit violated CERCLA's preference for treatment is unsupported. As the Board explained when it rejected the same claim in 2018, CERCLA requires only that a remedy include treatment technologies "to the maximum extent practicable" and that EPA issue an explanation if it does not choose such a technology (CERCLA § 121(b)(1)); and here the "record documents the extensive examinations undertaken by the Region and GE of possible corrective measures that involve alternative treatment technologies." See 17 E.A.D. at 583-84 n.63. Further, in its 2020 Response to Comments, EPA has again presented its reasoning for why the Revised Permit comports with CERCLA's preference for treatment. RTC at 24-25.

III. HRI and HEAL's Challenge to Monitored Natural Recovery for Portions of the River Is Not Properly Before the Board and Has No Substantive Basis.

The Revised Permit specifies MNR as the remedy for several downstream reaches of the River – specifically, the flowing sub-reaches of Reach 7 and all of Reaches 9 through 16, including in Connecticut. Revised Permit Section II.B.2.h. HRI and HEAL's third challenge to the Revised Permit is that the specification of MNR for large stretches of the River is arbitrary,

[20] As shown above, the two extra-record statements relied upon by HRI and HEAL, which were prepared by proponents of bioremediation and thermal desorption (HRI/HEAL's Attachments 9 and 10), are not appropriate for consideration by the Board.

capricious, and in conflict with CERCLA because it is not protective of human health and the environment. HRI/HEAL Br. at 33, 34-35. The *amici* Citizens for PCB Removal and the Schaghticoke Tribe likewise challenge the MNR remedy for the Connecticut reaches of the River (Reaches 10-16) as unprotective. Br. of *Amici* Supporting HRI/HEAL at 10-11. These "MNR" claims are not properly before this Board and, in any case, are incorrect.[21]

A. HRI and HEAL's Claims Challenging MNR Are Not Properly Before the Board.

In its prior appeal, HRI challenged EPA's adoption of MNR for the same reaches of the River as the Revised Permit, and the Board rejected that challenge on substantive grounds, noting that HRI had not shown that EPA's reasons for adopting MNR for those portions of the River were erroneous. 17 E.A.D. at 537-40. This issue was thus not remanded, and the MNR requirements are unchanged from those in the 2016 Permit. As a result, this issue is not properly before the Board now.

To avoid this result, HRI and HEAL claim that EPA reopened this issue when it increased the volume of sediments to be removed from the River (an issue that was not otherwise part of the remand). HRI/HEAL Br. at 47-48. That claim is groundless. Although, as discussed above, the Revised Permit did increase the extent of removal in certain areas of the Rest of River *other than* the MNR reaches, neither the Board's remand nor EPA's decision on remand,

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[21] At the beginning of their argument on this issue, HRI and HEAL insert a long paragraph of assertions about GE's prior opposition to dredging in the Hudson River nearly 30 years ago. HRI/HEAL Br. at 33-34. That paragraph relies on an extra-record document (their Attachment 11) that is not properly before the Board. In any case, that paragraph has no relevance whatever to the issues before the Board. We note that, in fact, GE has completed a massive dredging project in the Hudson River under EPA supervision and received from EPA a Certification of Completion of that project, which has been upheld in federal district court. See *New York v. EPA*, No. 1:19-CV-1029, 2021 WL 922228 (N.D.N.Y. March 11, 2021).

including the requirement for increased removal in certain other areas, affected the continued specification of MNR for the same reaches as in the 2016 Permit. Thus, HRI and HEAL cannot justify their attempt to relitigate this issue.[22]

B. HRI and HEAL's Claims Challenging MNR Are Mistaken.

HRI and HEAL present three contentions in support of their challenge to MNR. Apart from the fact that these arguments are not properly before the Board, each of them is mistaken and in no way shows that EPA's selection of MNR for certain reaches was clearly erroneous.

1. The Revised Permit contains general Performance Standards applicable to the MNR reaches, and EPA has fully evaluated MNR for those reaches.

HRI and HEAL first contend that the Revised Permit does not set Performance Standards for the MNR reaches, and that this conflicts with the Consent Decree's requirements for Performance Standards and with CERCLA and EPA guidance on MNR. HRI/HEAL Br. at 35-39. This contention is incorrect. In accordance with the CD requirement to establish Performance Standards for the Rest of River Remedial Action (CD ¶ 33; CD-Permit Condition II.J) and the CERCLA requirement for standards or levels of control (CERCLA § 121(d)(2)(A), 42 U.S.C. § 9621(d)(2)(A)), the Revised Permit contains Performance Standards and levels of control for the Rest of River Remedial Action. As described below, these include general Performance Standards that apply to the overall Rest of River, including the MNR reaches. There is no requirement in the CD or CERCLA that there be specific separate Performance Standards or levels of control for each particular reach of the River.

[22] Although Citizens for PCB Removal and the Schaghticoke Tribe were not involved in the prior appeal, they cannot raise this issue as *amici* since the scope of the current appeal is limited to the remanded permit conditions and any changed conditions, *In re Upper Blackstone*, 15 E.A.D. at 302, and the MNR provisions are neither.

Section II.B.1.b.(1) of the Revised Permit establishes Biota Performance Standards, including a short-term biota standard of an average PCB concentration of 1.5 milligrams per kilogram ("mg/kg") for fish fillets in each reach of the River, including explicitly each MNR reach. It also establishes long-term standards of 0.064 mg/kg for fish fillets in each reach in Massachusetts, 0.00018 mg/kg for fish fillets in each reach in Connecticut, and 0.075 mg/kg in duck breast tissue in all areas along the River. In addition, Section II.B.1.a.1 establishes a Downstream Transport Performance Standard specifying certain PCB loads for flux over two dams in the River – Woods Pond Dam and Rising Pond Dam. The flux standard for Rising Pond Dam will reflect PCB concentrations in upstream reaches, including the MNR sub-reaches of Reach 7. These Performance Standards, which HRI and HEAL ignore, satisfy the CD and CERCLA requirements; there is no need for specific numerical standards for every portion of the River.

In addition, HRI and HEAL have miscited EPA guidance documents (their Attachments 12 and 13) in a futile attempt to support their argument. They purport to quote language – namely, a requirement for "clearly defined performance criteria based on site-specific remedial action objectives" (HRI/HEAL Br. at 37) – that is not found in either of the guidance documents which they cite for that quotation. Those guidance documents relate to the use of MNR to address contaminated groundwater and/or soil, and in that context, they discuss the use of "performance monitoring." They do not address or require the use of specific numerical performance criteria for portions of a surface waterbody for which EPA has selected MNR as the remedy.

Moreover, EPA demonstrated in its 2016 Response to Comments that MNR is appropriate for the reaches where it is the selected remedy. EPA correctly reasoned that: (1)

PCB concentrations in those reaches are low and diffuse over a large area; (2) the sediment in those reaches is relatively stable; (3) human health and ecological risks in those reaches are generally low; and (4) there are decreasing trends in fish and benthic invertebrate PCB levels in Reaches 9-16 in recent years. 2016 Response to Comments at 191-92. EPA further showed that the selection of MNR for these reaches is consistent with its guidance. *Id*. at 192. In its prior decision, the Board held that HRI had not demonstrated that those reasons are wrong. 17 E.A.D. at 538-39. Moreover, EPA has fully evaluated the sediment/floodplain remedy, including the MNR components, under the remedy evaluation criteria in the CD-Permit, as described in its 2014 Comparative Analysis and 2020 Supplemental Comparative Analysis, and found that it best satisfied those criteria. Nothing more was required.[23]

2. The Revised Permit contains time frames for attainment of the general Performance Standards.

HRI and HEAL next argue that the Revised Permit erroneously fails to establish a time frame within which MNR must be effective. They claim that EPA guidance indicates that MNR may be selected only where natural processes are expected to be effective in a reasonable time period, and they conclude that EPA has failed to analyze that timing issue. HRI/HEAL Br. at 39-44. That contention is likewise misguided for several reasons.

[23] GE does not concede EPA's conclusion in 2014 that, of all the sediment/floodplain alternatives evaluated then, the 2014 alternative "is best suited to meet the [CD-Permit's] General Standards in consideration of the Selection Decision Factors," 2014 Comp. Analysis at 59, or its recent conclusion that "the 2020 Alternative is better suited [than the 2014 Alternative] to meet the General Standards of the 2000 Permit in consideration of the Selection Decision Factors of the 2000 Permit," Supp. Comp. Analysis at 24. GE reserves the right to challenge those conclusions if the Revised Permit is revised further so that it is materially inconsistent with the current Revised Permit.

To begin with, as discussed above, EPA has justified the selection of MNR as appropriate for the reaches where the Revised Permit prescribes that remedy. Further, the Revised Permit's general Performance Standards described above, which apply to those MNR reaches, include time frames for attainment; and they provide that if the standards are not met in those time frames, GE must evaluate the cause and propose additional response actions as necessary, and EPA will determine additional response actions in accordance with the CD. Specifically, the short-term biota performance standard provides that it must be achieved in each river reach "within 15 years of completion of construction-related activities for that reach (or if the reach is subject to [MNR], upon completion of the closest upstream reach subject to active remediation)." Revised Permit Section II.B.1.b.(1)(a). It provides further that, if that standard "is exceeded in any two consecutive monitoring periods after the 15-year period specified above, [GE] shall evaluate and identify the potential cause(s) of the exceedance and propose, to EPA for review and approval, additional actions necessary to achieve and maintain the Performance Standard," and EPA "will determine any additional actions necessary to achieve and maintain the Performance Standard in accordance with the [CD]." *Id*.[24] Similarly, the Downstream Transport Performance Standard provides that, if it is exceeded "in any three or more years within any 5-year period following completion of construction-related activities," GE must evaluate the potential cause(s) and propose additional actions as necessary to achieve the standard, and EPA will determine such additional actions in accordance with the CD. *Id*. Section II.B.1.a.(1).

[24] The Revised Permit's long-term biota performance standard provides for continued monitoring to assess progress toward the specified levels even after the short-term standard has been attained. Revised Permit Section II.B.1.b.(1)(b).

Moreover, as discussed in Section II.B.1, EPA has fully evaluated the Rest of River remedy, including the MNR components, and determined that MNR is suitable and appropriate for the reaches where it was selected. It has further shown, as also noted above, that that determination complies with EPA guidance on selection of MNR.

3. HRI and HEAL's argument that the Revised Permit fails to provide for contingent response actions is incorrect.

HRI and HEAL's final contention is that the Revised Permit must provide for contingent response actions if MNR is not effective in a reasonable time frame. HRI/HEAL Br. at 44-46. That contention also fails.

As already noted, the Revised Permit's general Performance Standards provide that if they are not met in the specified time frames, GE must evaluate the cause(s) and propose additional response actions as necessary, and EPA will determine additional response actions in accordance with the CD. The appropriate additional response actions, if necessary, will depend on the evaluation of the cause(s) for nonattainment of the subject Performance Standard.

Furthermore, as also discussed above, EPA has fully evaluated the Revised Permit remedy under the remedy evaluation criteria in the CD-Permit and found that it, including the MNR elements, is best suited to meet those criteria. That fully satisfied the requirements under the CD, the CD-Permit, and CERCLA.

CONCLUSION

For the foregoing reasons, GE respectfully submits that the Board should deny HRI and HEAL's petition in its entirety.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R § 124.19(d)(1)(iv), undersigned counsel certifies that the foregoing General Electric Company's Response to Petitioners' Brief contains 9,837 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 Response meets the 14,000-word limitation specified in 40 C.F.R. § 124.19(d)(3).

STATEMENT REGARDING ORAL ARGUMENT

In the event that oral argument is held in this appeal, GE requests the opportunity to participate in the oral argument.

Respectfully submitted,

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Dated: May 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2021, I served one copy of the foregoing General Electric Company's Response to Petitioners' Brief on each of the following by electronic mail:

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