

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ORAL ARGUMENT

	:
IN THE MATTER OF:	:
	: RCRA Appeal No.
GENERAL ELECTRIC COMPANY,	: 21-01
	:
Permit No. MAD002084093	:
	:

Thursday,
September 2, 2021

Video-Teleconference

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 p.m. EDT

BEFORE:

THE HONORABLE KATHIE A. STEIN
Environmental Appeals Judge

THE HONORABLE AARON P. AVILA
Environmental Appeals Judge

APPEARANCES:

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ALSO PRESENT:

Emilio Cortes, Clerk of the Board

Ammie Roseman-Orr, Senior Counsel

Jon Fleuchaus, Counsel

1 P-R-O-C-E-E-D-I-N-G-S

2 1:29 p.m.

3 MR. CORTES: May I have your
4 attention, please. No recordings of these
5 proceedings is allowed. A transcript will be
6 prepared by the court reporter and will be posted
7 on this docket for this matter on the
8 Environmental Appeals Board website.

9 The Environmental Appeals Board of the
10 United States Environmental Protection Agency is
11 now in session. Today we will hear all argument
12 in the matter of General Electric Company, Docket
13 No. 2084093, RCRA Appeal No. 21-01. The
14 Honorable Judges Kathie A. Stein and Aaron P.
15 Avila now presiding.

16 JUDGE STEIN: Thank you. Good
17 afternoon, everyone. The Environmental Appeals
18 Board is hearing oral arguments this afternoon on
19 an appeal filed by the Housatonic River
20 Initiative and the Housatonic Environmental
21 Action League with respect to a permit that was
22 issued by Region I of U.S. EPA to the General

1 Electric Company.

2 This has been designated or docketed
3 RCRA Appeal No. 21-01. And the appeal
4 established disposal and clean up requirements
5 with respect PCB contamination in the Housatonic
6 River in Massachusetts and Connecticut. 2018, as
7 many of you know, the Board heard an email of an
8 earlier version of this permit. And we remanded
9 two or sent back two issues to the Region for
10 further consideration, one of which will be
11 focused on today.

12 In particular, we remanded the permit
13 to the Region for further consideration and for
14 permit provision that required General Electric
15 to dispose of the contaminated materials offsite
16 rather than onsite. The petitioners have
17 challenged several aspects of the revised permit
18 issued by Region I following remand. The
19 argument will proceed in the following order.

20 First, we will hear from petitioners,
21 the Housatonic River Initiative and Housatonic
22 Environmental Action League. Second, Region I

1 will have an opportunity to respond followed by -
2 - third, by the General Electric Company.

3 Fourth, we will hear from two amici or friends of
4 the court, or in this case, first, Judith Knight
5 representing Citizens Against the PCB Dump for
6 Berkshire-Litchfield Environmental Council, the
7 Schaghticoke Tribal Nation, and then we will also
8 hear from Matthew Pawa representing the
9 Housatonic Rest of River Municipal Committee.

10 Finally, if petitioner wishes to reserve time for
11 rebuttal, the rebuttal will follow after we've
12 heard from the two amici.

13 Before we begin, I want to ask
14 everyone to bear with us as we are using a new
15 platform and getting used to a new platform to
16 enable us to make this argument more broadly
17 available than just the parties and their
18 counsel. It's critically important that the
19 court reporter be able to accurately capture and
20 transcribe the argument. So if there are any
21 technical difficulties that you're having with
22 your presentation or the court reporter is

1 having, please pause and let us get those
2 corrected before proceeding. And if presenters
3 have difficulty with their audio, let us know
4 immediately.

5 This is a very important case, and the
6 Board very much appreciates the effort the
7 parties have made in preparation for this
8 argument. We know that the time you've spent is
9 considerable. We are pleased that so many people
10 are able to observe the argument as it is
11 presented by clicking on a link on the Board's
12 website. As the website notes, a transcript of
13 the argument will at a later date be posted to
14 the Board's website where you can also have the
15 pleadings in the case.

16 We ask that you think of today as an
17 opportunity to have a conversation with us about
18 the important issues in the case. You can assume
19 that we have read the briefs and are thoroughly
20 familiar with the record. We're going to ask
21 each party and participant a large number of
22 questions that will help us in our deliberations.

1 Please do not assume from our
2 questions that we have made any decisions
3 regarding any of the issues in this case because
4 I can assure we have not. But rather, we're
5 going to use this as an opportunity to listen, to
6 probe your legal positions, and be sure we
7 understand your positions and the legal and
8 record support on which it is based. I would now
9 like to call on one attorney from each party to
10 introduce today's presenters.

11 When I call your party, will the
12 attorney speaking first for that party turn on
13 your camera and microphone and state your name
14 and the names of any co-counsel who are
15 presenting with you and the party you're
16 representing? Then please turn off your camera
17 so that we can proceed to the next party. And
18 we'll go through this in order.

19 And petitioners can let us know then
20 if they want to reserve time for rebuttal. With
21 that, let me turn it over to -- I believe we're
22 going to hear first from petitioners. And I

1 believe Ms. Parker is presenting first.

2 MS. PARKER: Your Honor, my name is
3 Stephanie Parker. I'm one of three attorneys
4 representing the petitioners who are the
5 Housatonic River Initiative, Incorporated and the
6 Housatonic Environmental Action League,
7 Incorporated. My co-counsel are Andrew Rainer
8 and Katy Garrison. Just as a sort of
9 administrative housekeeping matter for the Court,
10 the three of us will be breaking up our argument
11 into topic areas.

12 So I will be spending approximately 15
13 minutes of our time on the issue of the location
14 of the disposal site. Ms. Garrison will be
15 spending approximately 10 minutes on the issue of
16 the extent of the cleanup, and Mr. Rainer will be
17 spending approximately 5 minutes on the issue of
18 the failure to consider alternative technologies.
19 And we will be seeking to reserve 10 minutes of
20 our time for rebuttal.

21 JUDGE STEIN: Thank you. We'll hear
22 now from the Region.

1 MR. KILBORN: Yes, Your Honor. John
2 Kilborn for EPA Region I in this matter, and it
3 is only me that is presenting today.

4 JUDGE STEIN: Thank you. General
5 Electric?

6 MR. AKOWUAH: Good afternoon, Your
7 Honors. My name is Kwaku Akowuah. I represent
8 General Electric. I'm joined today by James
9 Bieke.

10 JUDGE STEIN: And Ms. Knight?

11 MS. KNIGHT: Good afternoon, Your
12 Honors. I'm Judith Knight. I'm representing
13 Schaghticoke, the Citizens Against the PCB Dump
14 and Citizens for PCB Removal, Berkshire-
15 Litchfield Environmental Council and the
16 Schaghticoke Indian Tribe.

17 JUDGE STEIN: Thank you, Ms. Knight.
18 Mr. Pawa?

19 MR. PAWA: Good afternoon, Your
20 Honors. I'm here to present on behalf of the
21 Housatonic Rest of River Municipal Committee
22 which is comprised of appointed representatives

1 from the towns of Great Barrington, Lee, Lenox,
2 Sheffield, and Southbridge, Massachusetts.

3 JUDGE STEIN: Thank you very much.
4 With this, we will begin with petitioners, and
5 Ms. Parker, if you want to begin.

6 MS. PARKER: Thank you, Your Honor.
7 We are here today because in a stunning reversal
8 of course, the Region now proposes to move 1.3
9 million cubic yards of PCB contaminated waste,
10 not to a licensed facility in another city but
11 right next to the Housatonic River on a highly
12 permeable site that petitioner's expert has
13 referred to as a textbook example of where not to
14 locate a landfill. This PCB dump will be
15 adjacent to the October Mountain State Forest.
16 It will be directly within an area designated by
17 the Commonwealth years ago as an area of critical
18 environmental concern. For a community that has
19 to endure years of struggle as a result of GE's
20 contamination, this proposal simply adds insult
21 to injury.

22 (Simultaneous speaking.)

1 JUDGE STEIN: -- with a question here.
2 And I think I have you on two different screens.
3 So I don't know if it connected twice. But I
4 understand you're focused on the Housatonic River
5 area and the concerns of the community. But I'm
6 trying to understand as a legal matter whether or
7 not legally the Board's focus should be
8 exclusively on risk to the Housatonic River or
9 whether we should be focused on a risk to the
10 environment more generally. And I know there was
11 not just the Housatonic River but where the
12 materials may be disposed of as well.

13 MS. PARKER: Right. I mean, I think
14 it's a broader inquiry because if you go back,
15 the EPA has gone through or purported to go
16 through the nine permit criteria that has been at
17 issue throughout these multiple appeals. And if
18 you look at those, for example, one of the
19 primary criteria considers applicable state and
20 federal regulations, what they call ARARs.

21 And when you look at those, those take
22 into consideration things like whether the

1 disposal facility is located in an area of
2 critical environmental concern. And so there are
3 factors that are going into the nine primary
4 selection criteria that are broader than just the
5 river itself. It's looking at the greater
6 environment surrounding it.

7 (Simultaneous speaking.)

8 JUDGE STEIN: Go ahead, Judge Avila.

9 JUDGE AVILA: Can I follow up on that?

10 I guess I'm a little confused. On page 21 of
11 your petition, you say, it's hard to imagine any
12 set of facts in which disposing of all
13 contaminated waste at a location far away from
14 the river would create a greater risk to the
15 river environment in disposing of the waste at a
16 site only 1,000 feet from the river.

17 That seemed to me to be, like, you're
18 arguing that the relevant inquiry was just the
19 Housatonic River area. But it seems -- is that
20 your argument? What's the legal basis for that
21 as opposed to looking at also what the impacts
22 would've been if something was taken offsite,

1 away from the Housatonic River?

2 MS. PARKER: Yes, so maybe I
3 misunderstood Judge Stein's initial question. I
4 thought she was asking, do you look specifically
5 at the body of water versus the surrounding
6 environment? And so that's what I was directing
7 my first answer to.

8 But in terms of whether you're looking
9 at the Housatonic's greater river environment
10 versus a location elsewhere, I think for purposes
11 of assessing whether the Region has adequately
12 explained inconsistencies in its prior and
13 present decision making, which is really what the
14 legal inquiry is here, you have to look at the
15 region and comparing disposing of materials at a
16 location offsite, away from the river versus
17 disposing of materials at a location adjacent to
18 the river. That was the analysis of the region
19 in 2014. That was the analysis of it again in
20 2020.

21 And the legal problem here for the
22 Region is that it reached a diametrically

1 opposite conclusion under both of those sets of
2 analysis. But when you go back to the actual
3 analysis itself in 2020 which is key, you go to
4 that supplemental comparative analysis, you see
5 that all of the factors that the Region went
6 through came out the same as they did in 2014,
7 yet the Region reached a completely different
8 result. And so I think it's not that, as a
9 generalized matter, we're not concerned about the
10 greater environment. But in terms of what
11 matters for purposes of this appeal, it's the
12 Housatonic River environment because that's what
13 the permit is geared towards.

14 (Simultaneous speaking.)

15 JUDGE AVILA: Go ahead.

16 JUDGE STEIN: Judge Avila, go ahead.

17 JUDGE AVILA: I guess one question I
18 have is under the -- what's -- under the 2016
19 permit, what was your understanding as to --
20 what's your understanding under the 2016 permit
21 where would PCB contaminated soil that was less
22 than 50 parts per million go?

1 MS. PARKER: Under the -- that was
2 less than? My understanding was under the 2016
3 permit, the Region was recommending that it all
4 be removed offsite.

5 JUDGE AVILA: Yeah, but I think, as I
6 read the permit, it could've gone to a municipal
7 landfill offsite. It didn't have to go to an PCB
8 caliber, for lack of a better word, landfill. Is
9 that your understanding?

10 MS. PARKER: I'm not sure that, just
11 sitting here, I have a specific understanding in
12 terms of the distinction between the different
13 landfills. I just know that it was technically
14 removed offsite.

15 JUDGE STEIN: So let me -- I want to
16 follow up one other question for you, counsel,
17 and that is I'm particularly focused on EPA's
18 offsite rule as well as the criteria, whether
19 they're under RCRA or CERCLA. It would seem to
20 talk about the environment more generally. And
21 I'm not sure that under those criteria the
22 location, whether onsite or offsite, to which

1 this waste is disposed is an irrelevant
2 consideration for us. Do you have any legal
3 authority that would support the view that you
4 shouldn't be looking at where the waste is
5 disposed, even if it's offsite?

6 MS. PARKER: I don't have any specific
7 legal authority to point Your Honors to at the
8 moment. But when you go through the Region's
9 2016 analysis and you go through the 2020
10 analysis, I, at least, didn't see the Region
11 performing an analysis of what effect the
12 disposal, some faraway municipal or other
13 landfill, was going to have on an environment far
14 aware from the Housatonic. That was not an
15 analysis that I perceived the Region to even go
16 through.

17 JUDGE STEIN: Okay. Let's go back to
18 the argument. You were making some arguments
19 about the criteria. And did you raise those
20 issues in your petition or just in your reply
21 brief?

22 MS. PARKER: No, I think it was raised

1 in the petition. We went through the analysis in
2 a bit more detail in the reply. But the
3 overarching argument that the Region reversed
4 course and its decision was opposing the analysis
5 that it went through the first time is something
6 we made at the outset. But we did walk through
7 the analysis in a more step-by-step fashion in
8 the reply.

9 JUDGE AVILA: And so just on the
10 reversal point, I mean, we did remand the
11 question, the Board did, on whether or not
12 offsite was proper under the last permit and not
13 expressing any opinion on that. So in some
14 sense, doesn't that kind of wipe the table clean
15 and for the Region to get a new explanation?

16 MS. PARKER: No, and I say no because
17 the Region wants to be able to approach this as
18 if it gets to start over and start from scratch.
19 But we can't start from scratch. It's clear from
20 the decision from this Board that you have to
21 look at the entire permit history, all of the
22 administrative record that encompasses both the

1 prior appeals, the prior permit, and then what
2 happened on remand.

3 You can't just approach it in a vacuum
4 because what happens is there are inconsistencies
5 between the EPA's position on the prior appeal
6 and findings and conclusions in the prior appeal.
7 And if those are inconsistent with the positions
8 it reaches now, this Board said in its remand
9 decision that it frequently remands permits where
10 there were discrepancies or inconsistencies
11 between conclusions and the administrative
12 record. And so the administrative record is a
13 broad concept but encompasses not just this
14 remand but what went on before.

15 And so where the Region reaches a
16 different conclusion, it has to explain those
17 inconsistencies. And that's where the Region
18 falls short here. There's not -- the Region
19 points back to the supplemental comparative
20 analysis, but you have to dig into the meat of it
21 and you have to look factor by factor at what was
22 actually found. And then --

1 (Simultaneous speaking.)

2 JUDGE STEIN: So let me ask you a
3 question because as I read it, among the facts
4 that were found in the GE -- General Electric is
5 one, had to do with the permeability of the
6 soils, the size of the aquifer, and its location
7 with regard to drinking water. Has the Region
8 changed -- I'm not asking about legal
9 conclusions. But I take it none of those facts
10 have changed. Is that correct?

11 MS. PARKER: Exactly. So that's one
12 of our core points is that the facts about the
13 surrounding environment and the facts about the
14 construction of the UDF itself are the same, both
15 in 2016 and 2020. So for example, the drinking
16 water issue that you raise, the EPA was
17 previously concerned about effects on drinking
18 water. And the way that water flows in that
19 area, the proximity to water supply, those facts
20 were all the same in 2016 as they are presently.
21 It's just that EPA has now taken the position
22 that it's no longer concerned -- or feels it

1 doesn't have to be concerned with the proximity
2 to drinking water supply. But the underlying
3 facts are the same.

4 JUDGE STEIN: I would agree with you
5 up to a point. But I think what this Board did
6 in 2016 is to find that the Region's analysis was
7 conclusory with respect to some of those facts.
8 And in particular, we were very focused on a
9 determination it made that it wasn't eligible for
10 a TSCA waiver. And we did point out some
11 inconsistencies in its record.

12 But having done that, why is the
13 Region not -- I realize your -- obviously, you're
14 free to have a different opinion as to what that
15 means. But having done that and having gone
16 back, I'm not convinced they changed their view
17 of the three factual points that I mentioned.
18 But they have changed, obviously, the conclusion
19 and analysis of what that means for purposes of
20 disposal. Is that a correct summation of where
21 things stand?

22 MS. PARKER: The Region on remand did

1 change its position on the TSCA issue. But
2 that's only a single factor in the overall
3 analysis. And there's nothing to indicate that
4 that is the predominate factor or it was the
5 driving factor in the Region's decision. I mean,
6 what's critical here is the Region went through
7 this sort of mechanical exercise of putting
8 together a supplemental comparative analysis.

9 But when you actually read the content
10 of it, it's clear that the driving force for the
11 Region's change of position was not that it
12 changed its mind about TSCA or anything else. It
13 was that the Region was driven by a desire to
14 make sure that the settlement agreement reached
15 in 2020 did not fall apart after various
16 stakeholders had signed on to it. It had been
17 announced to the public in 2020. There was a lot
18 of money promised to all the municipalities that
19 were affected.

20 And months later was when the Region
21 actually purported to go through the supplemental
22 comparative analysis. And if you look at

1 specifically Attachment B to the FCA, you can see
2 that it's just permeated with language about the
3 settlement agreement and the Region's concern
4 that not selecting hybrid disposal would cause
5 additional delay in implementation of the remedy.
6 And that argument itself is hard to believe given
7 how it's taken over 20 years just to get to this
8 point that delay would somehow be the animating
9 factor here.

10 JUDGE STEIN: Let me ask you a few
11 questions about the settlement agreement. And I
12 want to ask you both about the public comment
13 period as well as the settlement negotiations.
14 Did any of your clients participate in those --
15 what we have referred to as the, I guess,
16 mediated settlement discussions?

17 MS. PARKER: So basically, no, not in
18 any substantive way. Our client, HEAL, was
19 essentially left out of those discussions. HRI
20 was excluded. It attended a total of two in-
21 person meetings with a mediator, but HRI was
22 excluded once it became clear that HRI was not

1 going to support any type of onsite disposal.

2 And it's not just HRI and HEAL that
3 although they were excluded, it's not just them
4 that subjectively feel that they were left out of
5 the process. If Your Honors look at the sense of
6 public comments that were attached to our reply
7 brief and that are in the record, you can see
8 that same theme and sentiment reflected
9 throughout the public that they felt that the
10 settlement process was done underhandedly, that
11 there was no opportunity for citizen involvement.
12 And that's what happened.

13 There was no administrative record.
14 Stuff was done behind closed doors. There was no
15 opportunity for the public to weigh in, in terms
16 of the proposals that were at issue or understand
17 what the respective positions were of the
18 different stakeholders.

19 (Simultaneous speaking.)

20 JUDGE AVILA: But I just want to be
21 clear. Didn't -- under the settlement agreement,
22 the Region was only obligated to propose a draft

1 permit, correct?

2 MS. PARKER: You mean following the
3 settlement?

4 JUDGE AVILA: Yes.

5 MS. PARKER: Correct.

6 JUDGE AVILA: And it took public
7 notice and comment on that draft permit. And the
8 settlement agreement did not in any way constrain
9 what the Region could do in issuing the final
10 permit, right? Is that right?

11 MS. PARKER: Right. I don't believe
12 that the terms of the settlement agreement itself
13 constrains the Region. As a practical matter,
14 did the existence of the settlement agreement
15 constrain the Region?

16 It's our argument that it absolutely
17 did and that it's not believable that after 20
18 years of basically litigating and dealing with
19 this site when the Region was on the cusp of
20 having resolution once and for all, it was really
21 going to ever come out with a proposal result
22 that was anything other than hybrid disposal and

1 bring everybody back to the table. So that's the
2 big issue here is that the Region's analysis was
3 not done by means of applying, denying criteria
4 in good faith. It was done to preserve a result
5 that was already decided. And that's --

6 (Simultaneous speaking.)

7 JUDGE AVILA: Go ahead, Judge Stein.

8 JUDGE STEIN: Judge Avila, go ahead.

9 JUDGE AVILA: Then if that were true,
10 then the record would show that the Region's
11 conclusion was clearly erroneous, correct, under
12 our standard?

13 MS. PARKER: Right. And we say that
14 it does because if you actually look at the
15 analysis under the SCA, you can see that it
16 doesn't support -- all the factors point in the
17 same direction that they pointed in 2016. But
18 yet the Region at the end of that analysis comes
19 out with a completely contrary conclusion
20 basically and comes right out and says there's
21 not further delay which is about the settlement
22 agreement.

1 I also just want to point out I do
2 want to -- I'm mindful of my time. So I do want
3 to give my colleagues time to present as well.
4 But I just want to point out the notion of this
5 being hybrid disposal, the term that the Region
6 has used obviously repeatedly. But in reality,
7 it's not much of a hybrid at all.

8 You have 100,000 cubic yards of waste
9 going offsite, 1.3 million going onsite. So
10 basically, you have less than 8 percent of the
11 waste that goes offsite versus onsite. So we use
12 the term, hybrid, a lot because that's what we
13 have called it. But I think it's important to
14 keep in mind that it's really not a true hybrid
15 solution.

16 JUDGE STEIN: Well, I have several
17 questions for you on this issue. I would say
18 that it's fair to say that I think the Board has
19 for the majority of the questions, not all of
20 them, on this issue. So I'd like to proceed with
21 some of them.

22 MS. PARKER: Okay.

1 JUDGE STEIN: Obviously, the public
2 comment process is very important to the Board.
3 In fact, just about a month ago, the Board
4 remanded a case to the Region for a different --
5 in a different case, the GSP Granite Shore
6 Merrimack case for failure to provide adequate
7 public comment. But as I understand it, you're
8 not claiming that you didn't have an opportunity
9 to file comments during the public comment
10 period. What you're claiming is that the Region
11 was not -- well, I don't want to put words in
12 your mouth. You're not challenging the adequacy
13 of the public comment period, but you didn't have
14 a chance to, correct?

15 MS. PARKER: But when you say, you,
16 Your Honor, I assume you mean my particular --
17 the petitioner specifically --

18 (Simultaneous speaking.)

19 JUDGE STEIN: Correct. I apologize,
20 yes.

21 MS. PARKER: Okay. Yeah, I mean, the
22 petitioner specifically did have an opportunity

1 and did submit -- it's pretty extensive public
2 comments during the comment period. There were
3 some greater concerns with the timing because of
4 some severe storms and weather that had gone on
5 in the region affected in terms of the overall
6 public's ability to effectively comment. And
7 there were some requests that went on for
8 extensions.

9 They didn't get everything they
10 wanted. But position -- in the comments. Our
11 position is more that the comments were
12 essentially falling on deaf ears at that point.
13 And it wasn't a meaningful -- it wasn't heard in
14 a meaningful way because the decision had been
15 made.

16 JUDGE STEIN: Did any positions of the
17 permit change as a result of the public comment
18 period?

19 MS. PARKER: I'm not sure, Your Honor,
20 if there was some other minor position that's not
21 really been at issue in the briefing that may
22 have changed. But certainly none of the issues

1 with the location of the disposal facility or its
2 nature or any of the issues that are challenged
3 in our brief changed as a result of anything that
4 petitioners or others said.

5 JUDGE STEIN: Okay. Now I wanted to
6 ask you about if waiver of the -- the ARAR waiver
7 and the ACEC requirements, was this issue
8 addressed in the comments of your clients or
9 anybody else during the 2020 comment period?

10 MS. PARKER: So the issue was
11 addressed in substance. The term, ACEC, and a
12 direct regulatory cite was not included in our
13 public comments. But in petitioner's public
14 comments, they specifically challenged the issue
15 of the disposal -- the UDF being placed in a very
16 environmentally sensitive area near October
17 Mountain in area with a lot of environmental
18 sensitivity and recreational value.

19 And so the sentiment and the substance
20 of the ACEC challenge was there. We don't
21 understand it to be the requirement for public
22 comment which is typically done by laypersons

1 that they need to recite verbatim the legal
2 arguments that may be presented later in briefing
3 with the assistance of counsel, but that the
4 substance of the challenge to the disposal
5 location needs to be presented. And it's our
6 position that was certainly done.

7 Importantly, the ACEC issue is not
8 some type of -- something out of left field
9 that's brand new that the Region had no idea was
10 coming and didn't have an opportunity to deal
11 with. That's been something that's been at issue
12 throughout the permit proceedings, both before
13 and now. So it's not like the Region didn't have
14 an awareness of -- that this was a continuing
15 issue in the case.

16 JUDGE STEIN: Right. And I know that
17 the Region specifically asked for comment on the
18 waiver. And just to clear, the Board does not
19 expect pro se petitioners to cite legal chapter
20 and verse. But they do expect that the comments
21 be specific enough to alert the permit issuer to
22 the issues in general being raised or to the

1 issues being raised so they can adequately
2 respond. Now one other question I had for you
3 relates to the De Simone report. Can you tell me
4 when that was prepared?

5 MS. PARKER: The De Simone report was
6 prepared in connection with the briefing. But I
7 can't remember offhand the exact month or the
8 year it was. I know petitioners did consult with
9 Dr. De Simone to assist them in drafting their
10 public comments. But, like, the actual report,
11 the way it appears in the record was not
12 generated until later. But that's why the
13 substance of the public comments is the same
14 essentially as what is in Dr. De Simone's report
15 in terms of information about geology and
16 whatnot.

17 JUDGE STEIN: And under Board rules,
18 typically the Board would not consider documents
19 ordinarily that are not part of the
20 administrative record. As I understand it, this
21 document is not in the administrative record. On
22 what basis would you urge that the Board consider

1 the report?

2 MS. PARKER: Yes, so there's a couple
3 of basis, and we go through it in some detail in
4 our opposition to the Region and GE's motion to
5 strike. But basically, the Board can consider
6 extra record material under certain
7 circumstances. One of them is if there's
8 information that the Agency should have
9 considered but did not.

10 And we submit that the expert report
11 is one of the type of information because it goes
12 over the characteristics of the disposal site
13 location and the soil characteristics that were
14 not adequately explored in the Region's 2020
15 analysis. Also, if there's technical or
16 specialized information that can assist the Board
17 in rendering its decision, that's another area
18 where the Board can consider extra record
19 material. And certainly we feel that the nature
20 of Dr. De Simone's report is sufficiently
21 technical to meet that.

22 And again, also the Board can consider

1 extra record material that responds to something
2 that the Region put in to its response to the
3 comments after the first time. So the Region had
4 put in a new report that dealt with the direction
5 of groundwater flow in the area. And part of Dr.
6 De Simone's report addresses how groundwater flow
7 is unpredictable because of the nature of the
8 site.

9 And like I said, the substance of the
10 report is in the public comments. So even if the
11 Region -- I mean, even if the Board, for some
12 reason, does not consider the physical report
13 itself, the substance should be fairly considered
14 as part of the comments. I do see that my time
15 is low, and I --

16 (Simultaneous speaking.)

17 JUDGE STEIN: Yeah, I'm going to ask
18 the Clerk to add an additional five minutes to
19 your time which I will also do for the Region and
20 General Electric's time so that -- Judge Avila,
21 do you have any more questions for Ms. Parker
22 before we turn to the next presenters?

1 JUDGE AVILA: I do not.

2 JUDGE STEIN: Okay. So if the Clerk
3 would add an extra five minutes, and we'll turn
4 to the next presenter.

5 MS. PARKER: I think Ms. Garrison is
6 going to speak next.

7 MR. CORTES: I just wanted to clarify
8 that that was the five minute warning.

9 JUDGE STEIN: Okay. I don't know
10 whether you have heard me, Mr. Cortes. But can
11 we add an extra five minutes so that --

12 MR. CORTES: Yes, of course.

13 JUDGE STEIN: -- we have ten more
14 minutes in this opening presentation?

15 MS. GARRISON: Good afternoon, Your
16 Honors. My name is Katy Garrison, and I also
17 represent the petitioners. The reason --

18 (Simultaneous speaking.)

19 JUDGE STEIN: Can you turn your video
20 on, please?

21 JUDGE AVILA: It's on for me.

22 MS. GARRISON: My video is on. I'm

1 not in the spotlight yet, it looks like.

2 JUDGE STEIN: Okay.

3 MS. GARRISON: There we go.

4 JUDGE STEIN: All right. Okay.

5 MS. GARRISON: Thank you. The purpose
6 of this entire process is for General Electric to
7 clean up the PCBs from the river. When monitored
8 natural recovery is used as a cleanup method,
9 there are principles for how to do MNR. The
10 proposed permit does not adhere to those
11 principles because there are no performance
12 standards for levels of contaminant in the
13 sediments, soils, or surface waters.

14 A reasonable time frame within which
15 to achieve a performance standard has not been
16 set. And if it turns out that the river is not
17 cleaning itself up within a reasonable time
18 frame, there's no mechanism for actually doing
19 anything about it. The Region's response to
20 these points appears to be sort of a scramble
21 after the fact to come up with some performance
22 standards for the MNR reaches from the permit.

1 The Region is asking this Board to accept, for
2 example, that the amount of contamination flowing
3 over the dam is somehow a performance standard
4 for actually cleaning up the river.

5 JUDGE AVILA: Can I interrupt? What
6 performance standard would you propose we can
7 place for this, not what the Region has now?

8 MS. GARRISON: There should be a
9 numerical concentration-based threshold for all
10 reaches of the river for PCBs in sediments and
11 soils.

12 JUDGE AVILA: And so why isn't the
13 performance measure in the permit kind of a proxy
14 for that? I mean, rather than measuring the
15 direct concentration, instead you're measuring
16 the effect on fish, biota performance, downstream
17 transport and the like. And why isn't that
18 essentially a proxy for what you're looking for?

19 MS. GARRISON: The Region may be
20 assuming that fish tissue concentrations where
21 fish are caught and a couple of species in
22 whatever they're reach they're caught on a given

1 day may bear some relation to concentrations in
2 sediments and soil. I don't believe there's been
3 any studies to support that there is a specific
4 relationship. In fact, there's been very few
5 studies, sampling done in any of the MNR reaches.

6 There's very sparse data for what is
7 actually going on in those reaches. And the
8 concern is that there could very well be hotspots
9 in those areas now. Or during the 13 years that
10 there's going to be remediation in the upstream
11 reaches, significant amounts of PCBs could flow
12 downstream and create new hotspots. And if that
13 happens, there's absolutely no way to actually
14 clean them up.

15 JUDGE AVILA: Maybe I should also take
16 one step back in the sense of, why is this
17 properly before us in this appeal? I mean, that
18 wasn't really the issue on remand, and we
19 resolved the prior -- Board resolved the prior
20 appeal. So why is this properly before us now?

21 MS. GARRISON: This is properly before
22 the Board because the Region opened the door to

1 the issue by introducing a brand-new sediment
2 flood plain alternative that was never before
3 presented. And that inherently included a
4 decision about how much contamination to leave in
5 place and how much to take out. When the Region
6 changes the remedy in this way, it's permissible
7 for -- and appropriate for petitioners to point
8 out that it's not an effective remedy. It's not
9 actually any better despite the way they've
10 touted it as bringing more benefits and reducing
11 the risks. And it does not comply with the
12 principles for MNR.

13 (Simultaneous speaking.)

14 JUDGE STEIN: Why isn't the Board's
15 prior decision on this, in effect, the law of
16 this case? In other words, the Board looked at
17 this issue. This issue was raised in the first
18 appeal. Board looked closely at it. The Board
19 rendered a decision. Why -- isn't this just a
20 second bite at the apple?

21 I mean, I hear your point that there
22 is now more waste going offsite. But there's not

1 in the area of the river that you are focused on,
2 the lower reaches of the river, that the PCB
3 concentrations are, in fact, lower than they are
4 in some of the upper reaches. Why -- how do you
5 ever get to closure on a permit deal if
6 everything gets decided in the first appeal is
7 suddenly fair game in the second appeal?

8 MS. GARRISON: It wouldn't have been
9 fair game if the Region hadn't opened the door,
10 first of all. Second of all, the remedy is so
11 utterly inadequate here, so fundamentally flawed
12 that it really cannot be left to stand. And
13 while I wasn't there in the last appeal, I'm not
14 sure from having read the order that the Board
15 fully appreciated the nature of the issue with
16 these flaws.

17 It's not a matter of where do we draw
18 the line. It's the fact of there is no line at
19 all. There is no standard. There is no
20 performance standard whatsoever for the MNR
21 reaches for the contamination contained the
22 river.

1 JUDGE AVILA: Let me just -- I know
2 we've got your other counsel who wants -- who's
3 arguing. But just to be clear, are you just
4 challenging the performance standard as to MNR?
5 Or are you arguing that some other remedy itself
6 should have been guiding those particular areas,
7 for example, that those areas should have been
8 excavated? Or are you just challenging the
9 performance standard?

10 MS. GARRISON: I'm challenging the
11 fact, with respect, that there is no performance
12 standard.

13 JUDGE AVILA: Okay.

14 (Simultaneous speaking.)

15 MS. GARRISON: There is no remedy.
16 It's monitoring. It's just monitoring with no
17 actual accountability mechanism for if it turns
18 out that there actually is a lot more PCBs than
19 expected. In terms of what this Board should do,
20 you should remand the issue to the Region to
21 either set a performance standard for MNR for
22 sediment and soils or if it cannot come up with a

1 performance standard that it feels is adequately
2 protective of human health and the environment
3 that would be effective through MNR, then there
4 should be an actual effective remedy such as
5 removal of the PCBs.

6 JUDGE STEIN: I don't have any. Do
7 you have any further questions for Ms. Garrison?

8 JUDGE AVILA: No, I don't.

9 JUDGE STEIN: Anything else you want
10 to leave us with before you turn it over to co-
11 counsel?

12 MS. GARRISON: Yes, I'll turn over the
13 floor. I guess I would just like to point out
14 the lack of any numerical concentration-based
15 standards, it's really not a matter of scientific
16 discretion or judgment. It's an error of law and
17 something that was so fundamental to the original
18 consent decree that is not being fulfilled. With
19 that, I'll turn over the floor to my colleague.

20 JUDGE STEIN: Thank you very much.

21 MS. GARRISON: Thank you.

22 MR. RAINER: Thank you, Your Honors.

1 It's Andrew Rainer for the petitioner. I'll be
2 brief. I would like to direct Your Honors'
3 attention to two particular things in the record.

4 First is the response to comments of
5 the Region with respect to the issue of
6 alternatives and what it refers to as alternative
7 -- innovative technology. What the Region says
8 it is going to do is it is going to now begin
9 discussions with stakeholders about alternatives.
10 It is now going to issue a challenge competition
11 to identify technologies applicable to the site.

12 It is now going to proceed to test
13 these innovative technologies at the site. And
14 it is then going to establish operational --
15 assess the challenges and cost effectiveness of
16 these technologies. These are exactly what the
17 Region should have done 20 years ago when it
18 promised to consider alternative technology.

19 It never once asked anyone or itself
20 to test the effectiveness of thermal desorption
21 at this site. And the arbitrariness of their
22 ruling on this is manifest from the following.

1 In their 2014 comment, the Region said it would
2 not -- it rejected the use of thermal desorption
3 on the grounds, and I quote, it has not been
4 demonstrated on Housatonic River materials. That
5 was their justification in 2014.

6 And in 2020, they say, oh, we didn't
7 need to do that. That is the paradigm, in my
8 view, of arbitrary and capricious decision
9 making. There is no justification where you have
10 an active and involved community telling you for
11 20-plus years, since before the 2000 consent
12 decree, we are begging you to consider
13 alternative technology. There is no
14 justification for never once having tried thermal
15 desorption or bioremediation on the site.

16 (Simultaneous speaking.)

17 JUDGE STEIN: Can I ask you a question
18 which I think the Board is concerned about? How
19 is it that this issue was opened essentially in
20 this proceeding, a similar question that I put to
21 your colleague, since that issue was raised and
22 decided by the Board in proceeding number one? I

1 would like to hear your best articulation of why
2 we should -- I'm not denigrating the points that
3 you're making, but I'm trying to understand why
4 it is that under our precedent we should consider
5 it now.

6 MR. RAINER: Two reasons, Your Honor,
7 and of course I knew you would ask this. First,
8 if you consider that what you asked the Region to
9 do on remand was to figure out what it was going
10 to do with the 1.4 million cubic yards of PCB
11 contaminated material if it hadn't fully properly
12 evaluated the wisdom of offsite disposal. I
13 respectfully submit that just as the Region had
14 come back and said, oh, we can do 100,000 cubic
15 yards offsite and 1.3 million cubic yards onsite,
16 they could have said, we can do 500,000 cubic
17 yards offsite and we could treat the balance on
18 this same facility 1,000 yards from the river in
19 an effective fashion.

20 If the Region had chosen to do that,
21 Your Honors, I respectfully submit that would've
22 been an entirely proper exercise of their -- of

1 the remand request. I'm sure that GE would
2 disagree with me. But I respectfully submit that
3 is the reason why it was before the Region to
4 consider because when it was trying to decide,
5 what is the proper thing to do with 1.4 million
6 cubic yards of material, treatment was one of the
7 things that it should've taken into account.

8 Second answer, I've obviously read
9 your very -- I know both of Your Honors
10 participated in the last ruling. I read it
11 carefully. But I don't think that you -- I don't
12 know that you had the chance to fully appreciate
13 the extent to which the community spoke out on
14 this issue, unfortunately apparently not in the
15 particular four months that preceded in the
16 particular four-month comment period.

17 But we tried to lay out in our opening
18 brief literally the fact that my client, the
19 Housatonic River Initiative and HEAL, beginning
20 in the 1990s, over 20 years ago, beginning in the
21 1990s, they sought to have the Region consider
22 this. At the time of the consent decree, they

1 withdrew their objection on a promise by the
2 regional administrator that it would be
3 considered. And so I understand the importance
4 of finality.

5 I understand the importance of
6 process. But you are talking -- and Your Honors
7 will recall that my clients appeared the last
8 time pro se. I didn't have the benefit of the
9 talents of my two wonderful colleagues today, and
10 they simply didn't have that benefit.

11 And so to excuse them as concerned
12 citizens who are not being paid for a minute --
13 nor are we, frankly. But the concerned citizens
14 are not being paid for a minute for the time that
15 they've devoted to this. And I can tell you from
16 knowing them for all these years, these are
17 people who have nothing but the best of this
18 community at heart, the folks at HRI and HEAL.

19 They have always been concerned about
20 the environment, and they raised this issue.
21 Literally I ask Your Honors to read the
22 recitation in our opening brief of all the things

1 they did to ask that this be considered. And
2 that is the reason why, respectfully, I would ask
3 you to consider it again.

4 JUDGE AVILA: Can I ask one followup
5 question on that? I know we're out of time. But
6 just to be clear, are you making a factual kind
7 of argument that this is reopened because the
8 matter in which the Region looked at the disposal
9 issue? Or is it more of a legal argument that
10 the Region really couldn't reopen the disposal
11 question without reopening the treatment issue?

12 MR. RAINER: Well, I'm saying as a
13 practical matter, Your Honor, if they're trying -
14 - Your Honors asked them to consider what --
15 whether offsite disposal was the only available
16 option. And what they came back with was some
17 combination -- I mean, I would say largely onsite
18 disposal, but some combination. And what I'm
19 saying is they should have -- having heard the
20 complaint, if nothing else, in the administrative
21 appeal process about the failure to consider
22 alternative -- they should have, for once out of

1 the 20 years that this was before them, thought
2 to do some assessment or ask GE to do some
3 assessment of the viability of this. In their
4 brief, the Region points to the fact that there
5 had been -- that GE had considered in its -- in
6 the corrective measure study of 2007 that I had -
7 - that there was some references in that study to
8 thermal desorption.

9 And actually, Your Honor, I went back
10 and looked at it. Your Honors, I went back and
11 looked at it, and the conclusion that was reached
12 in the corrective measure study was that this
13 was, quote, an implementable process for sediment
14 and soil, and further, that there were commercial
15 vendors available that could implement it at this
16 site at the level of 99.99 percent effectiveness.
17 So I mean, what I'm saying is on the merits,
18 having had this issue come before Your Honors,
19 having been raised by my clients for a decade,
20 the suggestion that I'm making that it was proper
21 for them to consider it this time around I think
22 is more than reasonable.

1 JUDGE STEIN: Well, thank you very
2 much.

3 MR. RAINER: Thank you.

4 JUDGE STEIN: Judge Avila, any further
5 questions?

6 JUDGE AVILA: No, thank you very much.

7 JUDGE STEIN: I'm going to add 10
8 minutes to the time total of the Region and
9 General Electric because I think we went
10 collectively about 10 minutes over. So let's add
11 an extra five minutes to the Region's time. So
12 the Region will have 30 minutes. And 5 minutes
13 to General Electric's time, and it will have 20
14 minutes.

15 (Simultaneous speaking.)

16 JUDGE STEIN: And Mr. Cortes, did you
17 get that change in the time?

18 MR. CORTES: Yes, I did annotate the
19 change in the times, Your Honor.

20 JUDGE STEIN: Thank you. Mr. Kilborn,
21 I'm particularly interested in your response to
22 the concerns that have been raised by the

1 petitioners.

2 MR. KILBORN: Certainly, Your Honor.

3 Good afternoon, Your Honors. John Kilborn,

4 Office of Regional Counsel on behalf of EPA.

5 Along with me are Brian Grant from the EPA Office

6 of General Counsel and David Dowton from the

7 Office of Enforcement and Compliance Assurance.

8 We coordinated closely with both of those

9 attorneys.

10 I first want to say that one thing is

11 clear. The river contains uncontrolled

12 contamination that poses human health and

13 ecological risks that need to be addressed. The

14 Region's remedy will do just that and restore the

15 river.

16 Let me start out -- and there's a

17 number of issues that have been discussed. But

18 let me start off with the process issues and

19 dealing with the settlement agreement and

20 petitioners' arguments in that regard. First is

21 that the Region clearly follows the regulations

22 that govern the issuance of RCRA permits. And

1 there's been no allegation that those procedures
2 were not followed in terms of the issuance of the
3 statement of basis, the draft permit in the
4 comment period.

5 JUDGE STEIN: Did you make any changes
6 in the permit in response to public comments? I
7 understand there's no obligation to do so. But
8 I'm just curious if you could inform the Board as
9 to whether or not any changes were made based on
10 the public comments.

11 MR. KILBORN: Yes, Your Honor. If you
12 turn to the December 2020 response to comments,
13 Attachment A has a list of those changes where we
14 did respond to comments that were made. And as
15 was discussed, EPA, the Region was not bound by
16 the settlement agreement. And we did consider
17 extensively the public comments, issued a very
18 detailed response to comments, and did make
19 changes to the permit.

20 JUDGE STEIN: How do you respond to
21 their argument that by the time of the public
22 comment process, the settlement was sort of

1 baked? The cake was in the oven. How do you
2 respond to the concern that the citizens raise?

3 MR. KILBORN: Right. Well, as I said,
4 the express terms of the settlement agreement
5 does not bind the EPA. And it is entirely proper
6 for a Region for a permitting authority to engage
7 in discussions with settlement stakeholders and
8 then come up with a settlement agreement. The
9 EAB's website supports ADR, alternative dispute
10 resolution.

11 And it makes sense for prior to
12 issuing a permit for EPA to have the discussion.
13 The EAB has approved in some permitting decisions
14 of settlements that have occurred prior to public
15 comment and notice of a permit. For example, In
16 re Veolia, a recent decision, an earlier
17 decision, Thermalkem Rock, Puerto Rico Aqueduct,
18 all involve situations where the EAB has approved
19 a course of action where the Region has had
20 discussions prior to public comment.

21 JUDGE STEIN: How long was the public
22 comment period here?

1 MR. KILBORN: Sixty-six days,
2 extensively advertised, and the outreach for the
3 public comment period is set forth in detail in
4 the introduction to our response to comments.

5 JUDGE AVILA: Just so I'm clear, under
6 the settlement agreement, I think you -- I just
7 want to make sure I have this right. The Region
8 is obligated to propose a particular draft
9 permit, but it wasn't obligated to come up with
10 any particular final permit. And under the
11 settlement agreement, it was only the, as I
12 understand it, various groups agreed to forebear
13 from bringing a challenge before the Board if the
14 final permit ended up like the draft permit. Is
15 that a fair characterization?

16 MR. KILBORN: That's correct, Your
17 Honor. So the idea is the settlement agreement
18 has a contingent agreement that's largely the
19 agreements contained in that document that's
20 conditioned and contingent upon EPA issuing a
21 permit that complies with the settlement
22 agreement but did not obligate EPA to do so.

1 JUDGE AVILA: Let's say, for example,
2 if you have not selected in this -- in the final
3 permit to do the onsite Woods Pond landfill
4 option, I suppose GE could have come before the
5 Board?

6 MR. KILBORN: Correct.

7 JUDGE AVILA: And this Board is under
8 no obligation to endorse the permit now that it's
9 on appeal. Is that correct?

10 MR. KILBORN: Correct, correct. So
11 the course of action that the Region conducted is
12 a way to resolve these disputes in a productive
13 manner. And the petitioners' course suggested in
14 their petition of having discussions and then
15 issuing the permit or doing the analysis the way
16 they've discussed would place the Region in a
17 procedural straightjacket that could not allow us
18 to resolve these disputes.

19 I will add that the Region did due
20 process, and process beyond the regulatory
21 requirements. There was extensive outreach for
22 the notice. There were three separate hearings

1 over ten hours, and the mediation was in no way a
2 secret. HRI and others participated in the
3 mediation, and Region held a public meeting in
4 December 2018 about the mediation before most of
5 the substantive discussions occurred and kept the
6 citizens (unintelligible) informed of discussions
7 as they proceeded.

8 JUDGE STEIN: I would like to know
9 whether or not -- I know petitioners' counsel
10 asserted that her clients were excluded from the
11 negotiations, one at the outset and the other
12 after a couple meetings. Could you clarify the
13 Region's view as to whether the petitioners were
14 excluded from those negotiations or not?

15 MR. KILBORN: No, the petitioners were
16 not excluded from the negotiations. The
17 petitioners were included in the negotiations.
18 We wanted to come to an agreement with HRI. That
19 was the goal as we entered into the negotiations
20 to come up with a remedy that all parties could
21 support. So they were included, and we have in
22 our petition cited record material about their

1 participation in the discussions.

2 JUDGE STEIN: I would like to thank
3 you. But I'd like to move -- I have several
4 questions, as I imagine Judge Avila does as well,
5 about the substance. And so unless you have
6 anything further on the process that you want to
7 tell us, I'd like to move to some of the
8 substantive issues now.

9 MR. KILBORN: Yes, that's fine, Your
10 Honor.

11 JUDGE STEIN: So this is similar to
12 some questions that I asked or that he asked
13 petitioners. But is there any legal basis for
14 focusing only on the Housatonic River ignoring or
15 not considering risk from disposal in offsite
16 locations?

17 MR. KILBORN: Well, to directly answer
18 your question, Your Honor, I do not know whether
19 there's any legal basis. What the Region did is
20 documented in the supplemental comparative
21 analysis. In terms of what we looked at, we did
22 -- in looking at the alternatives, we did

1 consider things such as greenhouse gas emissions
2 to transport the material to the offsite
3 location, the injuries and fatalities that could
4 result in that transport, impacts to local
5 communities.

6 But we did not -- in that SCA, we did
7 not look at impacts to the actual disposal
8 facility. We don't -- typically, disposal
9 facilities are not selected until actually work
10 is ongoing. And we do rely -- as we mentioned in
11 the offsite rule which requires that facilities
12 that receive CERCLA waste be in compliance with
13 rules and regulations and not having releases.

14 JUDGE STEIN: Let me focus in
15 particular on a comparison between the 2016
16 permit and the 2020 permit. As I read the 2016
17 permit, it required disposal at any licensed
18 facility. Does that not mean that PCBs lower
19 than 50 ppm could or would have gone to a
20 municipal landfill? There were particular
21 landfills that were being considered, both for, I
22 think, greater than 50 ppm and under 50 ppm --

1 parts per million, excuse me.

2 MR. KILBORN: Yes.

3 JUDGE STEIN: But under the terms of
4 the 2016 permit, am I correct that PCBs under 50
5 parts per million would have gone to an out of
6 state municipal landfill?

7 MR. KILBORN: I believe that's
8 correct, Your Honor. One of the things that
9 happens in cleanup and disposal is that an effort
10 is made to characterize waste. And if there's
11 certain sections that are of the excavated
12 material that are of lower levels, then that can
13 be put into facilities that may be less expensive
14 because they have less for -- they can accept
15 lower levels of PCB waste, that would happen.

16 JUDGE STEIN: So why then within the
17 2020 settlement -- which with respect to the
18 Woods Pond landfill, I'm not sure that's the
19 actual name that you're using. But which for
20 waste less than 50 parts per million require a
21 facility with many enhancements or additional
22 requirements that would exist over a traditional

1 municipal landfill, there's leachate collection.
2 There are a couple of liners. There's
3 groundwater monitoring. Why would it be
4 inappropriate for the Board to look at a
5 comparison between those two options, one measure
6 of determining the risks of disposal in this
7 case?

8 MR. KILBORN: Well --

9 JUDGE STEIN: Are we going to things
10 in the record?

11 MR. KILBORN: I'm sorry?

12 JUDGE STEIN: Are we going to things
13 that are in this record?

14 MR. KILBORN: Right. Well, one reason
15 is that we want the UDF to have extra protection
16 -- to be extra protected. We have -- I received
17 many comments and concerns about the location of
18 the UDF and we are sensitive to those concerns.
19 And so to respond to those concerns, we have
20 built in extra protection such as the caps and
21 leachate collection into the UDF.

22 JUDGE AVILA: Can I ask about that

1 construction of the UDF? I thought I heard
2 petitioner's counsel to argue that the nature of
3 the landfill -- onsite UDF landfill was the same
4 as this -- this construction of it is the same as
5 what was considered in 2016 and not selected. Is
6 that true or not?

7 MR. KILBORN: Correct. The design is
8 the same. But I'm sorry. So the proposed or
9 evaluated in 2016, the design was the same.
10 Petitioners, though, however, I think
11 mischaracterized the situation by saying the
12 situation that EPA came up with a diametrically
13 opposed -- or a diametrically opposite
14 conclusion. That's not the case.

15 There's a number of differences such
16 as in 2020, it is only lower levels of PCBs that
17 are going into the UDF and not as proposed in the
18 last time, all levels of PCBs. And there's a
19 number of advantages and enhancements in the
20 remedy that made this situation very different
21 than the other one such as increased excavation,
22 a decreased reliance on capping, the removal to

1 two dams which will increase the natural flow of
2 the river. So we see this as a very different --
3 we see this as a different -- many different
4 facets of the remedy.

5 JUDGE STEIN: I'll ask you a question
6 that I asked a few minutes ago because I'm not
7 sure that you understood my question. But I want
8 to be sure that I'm clear on your answer. If
9 under the 2016 permit PCBs with waste, with
10 concentrations of less than 50 parts per million
11 could go to a municipal landfill, under the
12 current permit, PCBs with concentrations of less
13 than 50 parts per million go to a landfill that
14 requires under the terms of the permit added
15 provisions, why is not a comparison between those
16 two scenarios the appropriate way to look at risk
17 of disposal, at least in part?

18 MR. KILBORN: I think there may be
19 logistic -- so I think -- Judge Stein, I think
20 your -- so I think there's logistical issues that
21 could make it very -- make it difficult for EPA
22 to practically segregate material that is lower

1 than 50 that would then go into a municipal
2 landfill. In other words, we can only send waste
3 to a municipal landfill if it's appropriate if we
4 can proper sampling. And you asked -- so you
5 asked whether that's theoretically possible, and
6 my answer to that is yes.

7 But one of the things that is going on
8 that features of the UDF is hydraulic dredging.
9 And so that will entail dredging and putting it
10 in, if feasible. And we believe it is likely
11 that it is feasible, the material into dredging
12 and put them into a pipe and where there'll be
13 pipe into the UDF. So I think there may be
14 logistical issues in terms of trying to segregate
15 the material so that the 50 parts per million can
16 go offsite.

17 JUDGE AVILA: I -- I'm sorry, Judge
18 Stein. Were you going to follow up?

19 JUDGE STEIN: No, it's okay. Go
20 ahead.

21 JUDGE AVILA: I guess at bottom, in
22 some sense, I think what petitioners are saying

1 this is a cleanup of the Housatonic River site.
2 A cleanup of the Housatonic River site shouldn't
3 involve creating another landfill in the
4 Housatonic River area.

5 MR. KILBORN: Mm-hmm.

6 JUDGE AVILA: So what's -- and that's
7 not protective of human health and the
8 environment in the sense of the Housatonic River
9 environment. So what's your response to that?

10 MR. KILBORN: Well --

11 JUDGE AVILA: As opposed to taking it
12 offsite.

13 MR. KILBORN: Correct. We believe we
14 are not going to leave an unprotected landfill in
15 Berkshire County. We believe in the UDF, the
16 landfill, is safe and protective. It's only
17 going to have lower levels of PCBs.

18 We'll have the safeguard features that
19 Judge Stein mentioned in terms of leachate
20 collection and impermeable cap and to have
21 extensive monitoring. It's going to be over a
22 quarter mile from the river. And with lower

1 levels, the levels are low enough that under the
2 federal TSCA law that regulates PCBs, the TSCA
3 would allow -- in a cleanup would allow PCBs less
4 than 50 to remain without a cleanup in a lower
5 occupancy and fenced area.

6 JUDGE AVILA: But aside from the
7 concentration being disposed here, being less
8 than 50 parts per million, which of those things
9 that you just mentioned is different from 2016?

10 MR. KILBORN: It's primarily the low
11 levels of PCBs. In addition, there are other
12 parts of the -- the petition would have -- are
13 focusing entirely on the UDF area and not looking
14 at the broader aspects of the remedy as we did in
15 the SCA. And in our supplemental comparative
16 analysis of alternatives, we looked at the
17 picture of the remedy of the whole in terms of
18 the enhancement to the river cleanup, the removal
19 of two dams, the faster initiation and completion
20 of the cleanup, the ability of the UDF to clear
21 the hydraulic dredging to eliminate 50,000 truck
22 trips from the public roads which we think is an

1 important feature.

2 JUDGE STEIN: Well, for the benefit
3 those who may not be familiar, the UDF is Upland
4 Disposal Facility, otherwise known as the Woods
5 Pond Landfill. But let me ask this one final
6 time. Would disposal in the UDF be safer than
7 disposal of the materials in the municipal
8 landfill?

9 MR. KILBORN: Yes, it would be. Yes,
10 it would be. The Upland Disposal Facility has
11 features that are typically not found in a
12 municipal landfill such as the double leachate.
13 In the unlikely event that there is a leak, the
14 leachate collection will allow that to be
15 detected. And it will collect the leachate. So
16 there are added protections beyond a municipal
17 landfill.

18 (Simultaneous speaking.)

19 JUDGE STEIN: Go ahead.

20 JUDGE AVILA: Could I ask one followup
21 question? Was there -- I thought there was a
22 waiver -- a TSCA waiver associated with this UDF

1 of the Section 761.61(a) requirement. Am I right
2 about that?

3 MR. KILBORN: That's correct, Your
4 Honor. The --

5 JUDGE AVILA: Could you educate me on
6 exactly what that means, what they were -- what
7 that waiver meant?

8 MR. KILBORN: Sure. Under 761.61(c),
9 also called the PCB Mega Rule that there's three
10 avenues for handling PCB remediation waste.
11 There's the self implementing under 761.61(a)
12 where you can -- a party can clean up without
13 prior EPA approval. There are -- under Section
14 B, there are pre-set ways to dispose of waste,
15 and one is a chemical waste -- a toxic chemical
16 waste landfill. And then under 761.61(c), a
17 determination issued by the appropriate regional
18 administrator that an alternative means of
19 cleaning up the PCBs was not presented
20 unreasonable with the human health and the
21 environment which we did hear EPA issued that
22 determination under TSCA 761.61(c) as Attachment

1 E to the permit.

2 JUDGE STEIN: So I want to turn now to
3 petitioner's concerns about what they claim are
4 the reversal findings or conclusions on the part
5 of the Region. The Board remanded this issue in
6 part -- the offsite/onsite issue in part because
7 of inconsistent statements, what the Board called
8 inconsistent statements by the Region. How has
9 the Region addressed the Board's concern in that
10 regard?

11 MR. KILBORN: Well, in response to the
12 remand, the Region did take a new look at the
13 remedy and has changed the remedy in terms of
14 coming up with the hybrid disposal and the other
15 enhancements to the river cleanup and issued an
16 80-page response to comments detailing the
17 rationale for the cleanup and conducted the
18 supplemental comparative analysis. So I believe
19 that those things show the considered nature and
20 the rationale behind their decision, including
21 the extensive administrative record. So I think
22 the record is clear and consistent and explains

1 the reasons behind our cleanup decision.

2 JUDGE STEIN: Am I correct that the
3 Region hasn't changed its view that the soil is
4 permeable at the Upland Disposal Facility?

5 MR. KILBORN: Yeah, that'd be correct
6 and one reason for the double liners and
7 monitoring levels that'll be required to detect
8 any contamination.

9 JUDGE STEIN: Turning to the waiver of
10 the ARAR that the Region engaged in, how is it
11 that onsite disposal leads to a speedier cleanup?
12 I mean, haven't we just changed to litigating in
13 some sense or how many people we're litigating?
14 I mean, we still have an appeal here. And
15 whichever way this comes out, I imagine there's
16 going to be a further appeal. So how is that
17 really part of the calculation here?

18 MR. KILBORN: Well --

19 JUDGE STEIN: And that's part of the
20 reason you relied on. I'm trying to understand
21 it a little better.

22 MR. KILBORN: That is one reason, Your

1 Honor. One of the reasons, Your Honor, that we
2 believe that -- well, one thing is that under the
3 settlement agreement, GE is required to commence
4 the design and planning of this -- of the
5 cleanup. So even though we are under the appeal
6 process, the settlement agreement has these
7 obligations for GE.

8 Otherwise, GE would not be required to
9 start work which is a long process to do the
10 design and sampling for this new method. It
11 could be a three- to four-year process. So even
12 though we have these appeals, hopefully we'll
13 resolve them soon and we'll be three to four
14 years -- we could be three to four years ahead of
15 the process than we otherwise would've been.

16 JUDGE AVILA: Could I ask -- or sorry,
17 Judge Stein.

18 JUDGE STEIN: It's okay.

19 JUDGE AVILA: Could I ask just one
20 thing about landfills generally? At this site,
21 am I correct that as part of the initial remedial
22 action before the Rest of River part of this

1 remedy came in, weren't there two landfills
2 created or utilized, the Hill 78 and the Building
3 71?

4 MR. KILBORN: That's correct. For the
5 GE plant cleanup, the consent decree covers the
6 GE plant of 52 acres in Pittsfield and the first
7 two miles of the Housatonic River. And for that
8 cleanup, there are two landfills -- on plant
9 landfills, one of which is able to take or took -
10 - they're both closed and covered -- took
11 material that was the less than 50 parts per
12 million. And the other took materials greater
13 than 50 parts per million, in other words,
14 greater than what will be going into the UDF.
15 And in Section 1(a) of -- 2(a) of our response to
16 comments, we describe the -- described both
17 landfills and the air monitoring that has taken
18 place which has not shown exceedances and the
19 groundwater monitoring which has not shown
20 leaking from those two landfills.

21 JUDGE AVILA: And are those landfills
22 built to the same specifications or less

1 specification than the UDF that's contemplated by
2 the permit that's before us?

3 MR. KILBORN: Yes, the one in Hill 78
4 was built on an existing landfill. So it did not
5 include a liner or liner leachate collection.
6 And it did have an impermeable cover. And the
7 other landfill had an impermeable cap but just a
8 single liner.

9 JUDGE AVILA: So Hill 78 capped no
10 liners at all. Building 71 capped a single
11 liner. And here we're talking about at least cap
12 and double liner and other --

13 MR. KILBORN: Right. The UDF will
14 have the impermeable cover, will have two liners
15 in leachate collection. What that is, there's a
16 diagram in our statement of basis. I believe it
17 is a drainage layer going down, a drainage layer,
18 then a pipe that collects any leachate that comes
19 from the landfill to prevent it from -- to
20 prevent pressure from getting into the liner, and
21 then another pipe leachate collection underneath
22 the first liner. So the how the -- if there's a

1 leak, it'll be tested prior to this getting put
2 into place. But if there was a leak, it would be
3 that second pipe under the first liner that you
4 would detect the leak.

5 JUDGE AVILA: And I just want to make
6 sure I heard you correctly earlier. Did you say
7 that the groundwater monitoring at Hill 78 and
8 Building 71 hasn't shown any increase in the
9 groundwater concentration of PCBs?

10 MR. KILBORN: That's correct, right.
11 There's further details in response to comments.

12 JUDGE STEIN: I have a couple
13 questions. First, were any comments submitted on
14 the route for the pipeline?

15 MR. KILBORN: On the route of the
16 pipeline? No, Your Honor. I think there's some
17 comments about potential habitat loss of the
18 route for the pipeline. But I don't recall any
19 specific comments on the route.

20 JUDGE STEIN: And if comments had been
21 submitted on the route, could it have been
22 altered?

1 MR. KILBORN: Would it have been
2 altered?

3 JUDGE STEIN: I said could, not would.

4 MR. KILBORN: Yes, yes. It could be
5 altered because right now it's in the -- I think
6 it's largely in -- going to be in an existing
7 utility right of way. So that and we've got one
8 -- the reason we put it where it is, is because
9 it would be in a utility right of way. And that
10 would minimize habitat disruption.

11 JUDGE STEIN: Okay. I'm going to --
12 I have a few more questions. I realize your time
13 is up. But I want to be sure that I hear what
14 you have to say in response to petitioner's
15 arguments about why this Board should consider
16 the arguments they're making about monitored
17 natural recovery and about treatment. So if you
18 could speak to both of those issues, and I will
19 add further time to petitioner's rebuttal.

20 MR. KILBORN: Yes, thank you, Your
21 Honor. We believe that the arguments on MNR have
22 already been decided and then goes beyond the

1 scope of the remand. As to MNR, petitioners
2 argue that because we changed the upstream -- and
3 just to clarify, the MNR is primary in
4 Connecticut, the downriver portion -- that would
5 change in the upriver cleanup, opens up the MNR.
6 However, EPA in its supplemental comparative
7 analysis does address that and found that the
8 2016 and the 2020 remedies have similar
9 performance in the downstream reaches for the two
10 pertinent performance standards which are fish
11 and fish tissue and PCB transport. So --

12 JUDGE STEIN: Don't they argue that
13 there could be a hotspot? And if you're not
14 looking at this, how are you going to know if
15 there's a hotspot?

16 MR. KILBORN: Well, we have done the
17 sampling of the sediment of the -- we have done
18 sampling of the sediment of the downriver and MNR
19 reaches. The sediments are very low, an average
20 of 0.2 parts per million as opposed to a sediment
21 cleanup level which is -- in the upriver which is
22 1. So for exposure, a mere hot -- a mere -- a

1 hotspot doesn't necessarily pose a risk.

2 So on the average, the sediment levels
3 are very low. And so -- and this hotspot
4 argument also is new. But it's also a new
5 argument.

6 In addition, the petitioners make a
7 big deal about the fact that there's no sediment
8 -- specific sediment performance standard. But
9 as I said, the levels are very low and below the
10 performance standard. So there wasn't one set.
11 Also, there's no surface water performance
12 standard. There's no surface water performance
13 standard because EPA had performed a peer review
14 risk assessment and found no human health risk
15 from the surface water and no drinking -- there's
16 no drinking use of the river.

17 I want to make one quick -- one note
18 that petitioners in their reply put in a block
19 quote on page 21 attributed to EPA. That is not
20 EPA's statement. It is an EPA summary of an
21 adverse comment. So I wanted to draw that to the
22 Board's attention.

1 JUDGE STEIN: What about treatment?

2 MR. KILBORN: Okay.

3 JUDGE STEIN: You've heard some very
4 heartfelt comments about the importance of
5 treatment to the petitioners here and how long
6 they have been urging the Region to look at
7 treatment and thermal absorption. And they've
8 argued that notwithstanding the particular
9 posture of this case that the Board should
10 consider it. What does the Region say in
11 response?

12 MR. KILBORN: Sure. The -- in the --
13 well, EPA has done an extensive look at treatment
14 in thermal desorption as explained in the 2016
15 and 2020 response to comments. And petitioners'
16 information that they've supported most recently
17 has not changed our view on thermal desorption.
18 And petitioners have not -- have never really
19 wrestled with or rebutted our response to
20 comments in terms of the issues of the thermal
21 desorption, in terms of it's not been proven
22 large scale and has significant drawbacks.

1 The thermal desorption has air
2 emission. It would take a long time to implement
3 and delay the river cleanup. And there would
4 still be the extract from the treatment and still
5 need to be treated. And the landfill,
6 bioremediation was also not proven in any large
7 scale projects.

8 Counsel for petitioners talked about
9 some language from the 2014 document which is
10 basically cherry-picked, taken one comment out of
11 context, and ignored the broader scale of what
12 EPA has done in terms of significant evaluations
13 in thermal desorption. We did not do a pilot
14 test of thermal desorption because its treatment
15 efficient is known. However, what also is known
16 is the other drawbacks of treatment itself.

17 So I think that the Board has ruled in
18 its GE decision that changing one portion of a
19 remedy doesn't open up the entire remedy for more
20 evaluation. And that's what we urge the Board to
21 do here to rule that these two facets of
22 petitioner's arguments are outside the scope and

1 already decided. Otherwise, a permit process is
2 never ending. Your Honor, if you may, if I can
3 have 30 seconds to confer with co-counsel before
4 I close.

5 JUDGE STEIN: Sure.

6 MR. KILBORN: One second.

7 JUDGE STEIN: Judge Avila, will you
8 have any further questions or not?

9 JUDGE AVILA: No, thank you.

10 MR. KILBORN: Excuse me.

11 (Pause.)

12 MR. KILBORN: Thank you, Your Honors.

13 Judge Stein, I want to respond to your initial
14 question on whether there's a per se legal
15 requirement to consider the environmental impact
16 of offsite disposal. That would be an unworkable
17 rule and would impede the Region's implementation
18 of CERCLA and RCRA.

19 We retain the -- impact. The
20 information is available. The problem is that
21 that information is typically not available for a
22 number of reasons, first for the facilities below

1 50 parts per million.

2 There are numerous of such facilities,
3 and there's not a standard list. The facilities
4 open and close, and we can't bind GE to go to a
5 specific location. That's something that needs
6 to be determined at the cleanup.

7 The TSCA facilities that take the more
8 heavily contaminated PCB waste are a smaller
9 universe. But still, we can't bind GE of any
10 remedies (audio interference). It's something
11 that needs to be considered at a later date.

12 JUDGE STEIN: Well, I'm not sure your
13 paraphrasing of my question is correct because I
14 never asked about a per se rule. But I think my
15 question was broader and more general about
16 whether the criteria called for looking at the
17 environmental impact more broadly. And
18 presumably, the basis for the offsite rule is to
19 assure that whatever location EPA is discussing
20 of this material that you're not just moving
21 waste from one site to another.

22 So I hear the logistical pieces that

1 you're mentioning. But I think that you're not
2 correctly stating my question. Judge Avila, do
3 you have anything further?

4 JUDGE AVILA: No, thanks.

5 JUDGE STEIN: With that, thank you
6 very much. And thank you for that --

7 JUDGE AVILA: Thank you.

8 JUDGE STEIN: -- clarification.

9 MR. KILBORN: Thank you, Your Honors.

10 JUDGE STEIN: And let's turn now to
11 General Electric who has 20 minutes for their
12 argument.

13 MR. AKOWUAH: Good afternoon, Your
14 Honors. My name is Kwaku Akowuah of Sidley
15 Austin. I'm joined today by my colleague, Jim
16 Bieke. Together we represent GE which supports
17 the Region's revised permitting decision,
18 including its inclusion -- its selection of a
19 hybrid disposal option.

20 I think what the record shows here is
21 that the Region's approach on remand is
22 reasonable in its approach in terms of bringing

1 stakeholders together to try and come up with a
2 consensus resolution to this dispute and
3 ultimately adopting a remedy that promotes a more
4 comprehensive and faster cleanup, and also
5 ultimately reasonable in its results. The
6 remand, the Region took into consideration the
7 points that the Board raised in the last round,
8 in particular the points about inconsistency in
9 terms of treatment of the TSCA regulations and
10 safety of the UDF and location and permeability
11 of the soil.

12 JUDGE STEIN: So how did they actually
13 take into account the inconsistencies?

14 MR. AKOWUAH: This time around, they
15 were perfectly consistent, unlike last time where
16 the Region said at points the UDF will be safe
17 and protective, but then at points seemed to
18 suggest the opposite. This time through, I think
19 all the way through the materials on remand, the
20 Region was clear. The UDF is safe and protective
21 of human health. The response to comments,
22 Section 2(a), goes into great detail about the

1 reasons for the Region's conclusion.

2 In terms of permeability, yes, Judge
3 Avila, the soils are permeable at the site.
4 That's been known for some time. But what the
5 Region decided this time, taking into
6 consideration TSCA and its regulations and
7 practices around the country is that the
8 permeability issue can be addressed through use
9 of a synthetic liner, and here, a double
10 synthetic liner solution with a double leachate
11 collection mechanism and surrounding groundwater
12 monitoring. What the Region found is that when
13 these techniques, which are best in class and
14 have been used for decades, are employed, they're
15 effective to 99.9 percent. And --

16 JUDGE AVILA: Sorry to interrupt, but
17 I think petitioners' point is, is that all those
18 things were true in 2016, yet it wasn't selected.
19 So what is different now that led to its
20 selection?

21 MR. AKOWUAH: Well, what changed first
22 is that the Region last time failed to exercise

1 considered judgment. On remand, they considered
2 fully the safety and protectiveness of the UDF.
3 Upon that reconsideration and reevaluation, they
4 realized the UDF is safe and protective, and
5 that's reflected in Attachment D, the revised
6 permit, which contains a risk-based approval.

7 The other thing that changed, of
8 course, is the hybrid disposal approach.
9 Petitioners say, well, that's not much of a
10 hybrid really, just 100,000 cubic yards going
11 offsite, a greater volume remaining onsite. But
12 there are a couple of points to make about that.

13 One is that actually the 100,000 is a
14 floor, not a ceiling. There's a guarantee or a
15 requirement in the permit that at least 100,000
16 cubic yards go offsite. But the actual
17 segregation of highly contaminated material
18 versus less contaminated material is described in
19 detail in Attachment E. And so there's not a
20 precise ratio that's prescribed by the permit.
21 There's an approach to segregating very highly
22 contaminated material from the less contaminated

1 materials that's prescribed.

2 So it's also in addition to a broader
3 and more comprehensive and frankly adequate
4 consideration of the TSCA regulations and the
5 safety and effectiveness of the UDF facility.

6 But also on top of it that the most contaminated
7 materials don't go into the UDF at all. Those
8 are key changes that explain why this time
9 around, the Region's analysis is, one, correct,
10 and second, not at all arbitrary and capricious
11 because there's been -- there had been change.

12 JUDGE AVILA: And what was your
13 understanding of the 2016 permit for materials
14 that were less than 50 parts per million? Where
15 could they go under the 2016 permit? Could they
16 go to any municipal landfill?

17 MR. AKOWUAH: That's my understanding,
18 yes. At least it wasn't prescribed in the
19 permit. What was prescribed is offsite disposal
20 --

21 (Simultaneous speaking.)

22 JUDGE AVILA: At an appropriate

1 facility?

2 MR. AKOWUAH: An appropriate facility.

3 Here what you have under 2020 is the disposal of
4 the less contaminated material -- and I'll come
5 back to a technical point on that in a moment --
6 the disposal of the less contaminated materials
7 in a UDF facility that is designed as if it were
8 going to hold the most contaminated material.

9 It's engineered to a standard that would be
10 protected even if the most contaminated materials
11 were there. On a technical point, the UDF may
12 contain materials that are above 50 parts per
13 million in certain circumstances.

14 What Attachment E to the revised
15 permit describes is an approach to taking the
16 weighted average of certain materials, whether
17 it's sediment and soils. And there are different
18 approaches to different reaches and to different
19 bodies and material. But the point is that it
20 involves a weighted average so that there may be
21 some material in a composite set of contaminated
22 material that has a weighted average of less than

1 50 parts per million that is over -- that some
2 component parts of it may be over 50 parts per
3 million, so just to be clear about that aspect.

4 (Simultaneous speaking.)

5 JUDGE AVILA: Can I just clarify? Is
6 that kind of --

7 MR. AKOWUAH: Sure.

8 JUDGE AVILA: -- I make my peanut
9 butter and jelly sandwich and the left side of it
10 only has a centimeter of it and the right side
11 has three inches of it? You have to take the
12 average of that whole peanut butter to figure out
13 how much the concentration is in the peanut
14 butter and jelly sandwich?

15 MR. AKOWUAH: Perhaps. If I can
16 perhaps modulate on the metaphor, it would be to
17 say if you were to prescribe one centimeter on
18 average of the thickness of peanut butter on the
19 left side and three inches on the right side.
20 Some aspect of -- some part of the one centimeter
21 side might be a little bit above and some that
22 might be a little bit less. You'd take the

1 average, and that's what we're saying here. And
2 that's a technical point, but I do want to make
3 it clear.

4 JUDGE AVILA: And I take it that's why
5 the permits of average concentration would less
6 than --

7 (Simultaneous speaking.)

8 MR. AKOWUAH: Exactly, exactly.

9 JUDGE STEIN: I want to ask you about
10 the record for the 2016 permit. And I realize
11 these may or may not have been part of the
12 General Electric team at that time. But
13 nonetheless, am I correct in understanding that
14 the cost estimates that were done with respect to
15 the 2016 permit costed out how much should go to
16 a TSCA landfill, which has a lot more bells and
17 whistles, versus a non-TSCA landfill, that those
18 cost estimates were used to calculate the overall
19 costs of the various disposal options? Am I
20 correct in understanding that? If you don't
21 know, feel free to consult your co-counsel.

22 MR. AKOWUAH: If I could take a moment

1 to consult.

2 MR. BIEKE: My name is James Bieke.
3 I'm assisting Mr. Akowuah in this presentation.
4 And I was there for 20, 30 years now at this
5 site. But what we did last time was where EPA --
6 they were very rough estimates.

7 Yes, GE didn't have any -- made some
8 estimates. But EPA's estimates that were in the
9 record were rough estimates based on some general
10 possible divisions between TSCA material and non-
11 TSCA material. So they were very rough, but
12 that's how they were done.

13 JUDGE STEIN: Thank you. So I want to
14 direct to you the same series of questions that
15 we have been asking of each of the counsel with
16 respect to the legal authority to consider.
17 You're looking at the nine criterion when you're
18 looking risk to the environment. Does EPA have
19 an obligation to focus principally or exclusively
20 on the Housatonic River? Or is its obligation
21 broader than that?

22 MR. AKOWUAH: I don't think that the

1 legal sources are prescriptive precisely in what
2 ought to be considered. So yeah, in terms of the
3 consent decree and RCRA criteria, they speak to
4 the overall health -- overall human health and
5 protection of the environment in terms of
6 761.61(c) and the risk-based approval. And
7 again, it speaks of permission may be given or
8 must be given if the -- for disposal if their
9 finding is that it will not be an unreasonable
10 risk of injury to health or the environment.

11 And similarly, the president's power
12 delegated to the EPA under CERCLA to waive ARAR
13 speaks in general terms about human health and
14 the environment. So I don't see in any of the
15 source of law a requirement that in any
16 particular case, the Region's consideration, the
17 permit issuer's consideration is to be limited
18 specifically, nor frankly just on the face of it
19 that it must be all encompassing. I think
20 there's discretion that is built into the legal
21 standard.

22 JUDGE AVILA: Is another way

1 potentially of looking at this is under the nine
2 criteria, does it make more sense to mandate that
3 something that's less than 50 parts per million
4 go to an onsite facility that's actually built to
5 receive typical PCB waste greater than 50 parts
6 per million or to let it go to a municipal
7 landfill?

8 MR. AKOWUAH: I'm not sure about a
9 mandate, but I think it makes all the sense in
10 the world to say that it's safer if the materials
11 goes into a facility like the UDF that is
12 designed and engineered to hold PCB containing
13 materials safely for a duration that EPA found in
14 terms of liner effectiveness to be 400 to 800
15 years to be effective to 99.9 percent. I think
16 that's safer than having to go just to any
17 municipal landfill. And I think that's -- to the
18 extent that's the comparison, I think what the
19 Region has prescribed here in the permit is safer
20 from an overall perspective than saying the
21 materials may go where they go.

22 JUDGE AVILA: And presumably, that's

1 why the materials that are greater than 50 parts
2 per million have to go to a TSCA landfill which
3 there's a smaller universe of because they have
4 greater protections or they're built differently
5 than a municipal landfill.

6 MR. AKOWUAH: That's right. The PCB
7 remediation waste would have to be disposed of in
8 a manner consistent with 761.61. That might be a
9 TSCA landfill that's designed and prescribed
10 under .75. It might be risk-based approval. But
11 yes, it would take into account that these are
12 waste that meet the PCB remediation waste
13 criteria and would have to be handled
14 accordingly.

15 JUDGE AVILA: I'm sorry. I used TSCA
16 incorrectly there. I appreciate the correction.

17 JUDGE STEIN: So how do the nine
18 criteria now support a very different remedy than
19 the Region mandated in 2016? Is this really just
20 about cost? Or is there more to it than that?

21 MR. AKOWUAH: There's more to it than
22 that. In the response to comments, there's an

1 executive summary beginning at page 9 that I
2 think highlights what the Region's view was, that
3 you have an overall approach that will lead to a
4 faster start to the cleanup. A faster start
5 means PCBs out of the river and into a landfill
6 sooner.

7 That's a good thing. You also have an
8 approach that -- the hybrid approach that, as
9 Your Honors have pointed, means that the less
10 contaminated portion of the material will go into
11 a highly protective landfill environment that's
12 designed as if it were going to receive more
13 contaminated material. And then the more
14 contaminated materials are going offsite.

15 So to the extent that there's a focus
16 specifically on the Housatonic, of course those
17 materials have to go somewhere. But they won't
18 be in the UDF which, again, is designed to be
19 safe and protective and to monitor in numerous
20 ways the possibility of any leakage. But if it
21 were to occur and the remote possibility that
22 that did occur, the higher concentration of PCB

1 waste won't be in the UDF.

2 (Simultaneous speaking.)

3 MR. AKOWUAH: That matters too. And
4 then the -- yes, Your Honor?

5 JUDGE AVILA: I may be repeating
6 myself a little here. But isn't there something
7 a little counterintuitive to cleaning up the
8 Housatonic River area and building yet another
9 landfill in the Housatonic River area to do that?
10 I mean, it's kind of -- intuitively, doesn't that
11 kind of seem a little odd?

12 MR. AKOWUAH: No, not at all, Your
13 Honor. I take the point. But what the Region
14 has also pointed out is all offsite disposal has
15 other environmental and human health
16 implications, whether it's an increase in
17 accidents.

18 The production -- there'll be a
19 greater number of fatalities from accidents if
20 all the material has to be shipped offsite, has
21 to travel, an increase in greenhouse gas
22 emissions. So there are other aspects overall --

1 to the overall picture. And I think that's what
2 the Region is looking at, in addition to the
3 safety of the UDF and in addition to a point that
4 the Region emphasized a number of times which is
5 we're going to get a faster start on cleaning up
6 the river, pulling out the PCBs, the contaminated
7 soils and sediments, and getting them into a
8 contained environment from which they won't
9 escape.

10 JUDGE STEIN: So I, in the remaining
11 time, have a few questions from -- the
12 petitioners have strenuously objected to the
13 mediation process that was used here to their
14 exclusion from that process, to the fact that it
15 was a very small group to begin with. They made
16 a number of allegations in their brief about what
17 they believe this is all about. And I would like
18 to have GE respond to petitioners' arguments.
19 And then additionally, I'm going to want to be
20 sure that you cover GE's views on the other two
21 issues we've been asking about which is the
22 treatment and monitored natural recovery.

1 MR. AKOWUAH: Yes, Your Honor. I'm
2 happy to address those points. From GE's
3 perspective, what the Region did in pulling
4 stakeholders together, really a broad array of
5 stakeholders, principally those who had been
6 directly involved in the prior round of
7 litigation before this Board to try to come
8 together and build a consensus and at least limit
9 the potential for litigation and further delays.

10 I think that was the right thing to
11 do. I think it was frankly creative and laudable
12 on their part. And it accounts for the fact that
13 today you have that exchange of views.

14 And that process led to the fact that
15 the Commonwealth of Massachusetts no longer is
16 here opposing onsite disposal. Environmental
17 NGOs that were here last time in opposition --
18 Berkshire Environmental Action League -- or I'm
19 sorry, Team, and the Massachusetts Audubon
20 Society -- support the remedy. The State of
21 Connecticut supports the remedy.

22 So I think what you have out of that

1 process of engagement is a consensus that really
2 is laudable. It also produced a more
3 comprehensive cleanup. There'll be less capping
4 in the river, more removal of contaminated
5 sediments and soils, treatment up to residential
6 standards of certain houses and stretches in the
7 flood plain.

8 So we have a more comprehensive
9 cleanup. It will move more quickly, and that's
10 all to the good as far as I can see. In terms of
11 the exclusion point, I don't think that's a fair
12 characterization at all.

13 As I understand it, HRI joined the
14 negotiations, saw that there was momentum in the
15 direction of some onsite disposal, and then
16 withdrew. That's not an exclusion. If you walk
17 away from the table, you walk away from the
18 table. That's very different from being excluded
19 from it.

20 Same -- or a similar story with HEAL,
21 not quite the same story. As I understand it,
22 they didn't come to the table because the

1 mediation was to be conducted under a
2 confidentiality requirement to which they
3 objected. I've been in many mediations over the
4 years. I've never been in one that didn't have a
5 confidentiality component.

6 ADR is designed to allow parties to
7 exchange candid views. And if everyone knew that
8 what they said was going to be immediately in the
9 press or splashed around in the papers in the
10 next round of litigation, the candor would go
11 away. So I think that was inherent in the
12 settlement process really that they would -- that
13 there would be these kinds of limitations. And
14 again, that's not an exclusion. That's a choice
15 not to come to the table which was theirs to
16 make.

17 JUDGE STEIN: I see your time is up,
18 but I'd like to just take a few minutes to
19 address the other two issues that we've been
20 talking about in which are a great deal of
21 concern to petitioners.

22 MR. AKOWUAH: Certainly, Your Honor.

1 Our position is that neither issue is properly
2 before the Board. The Board was quite clear as
3 we read the 2018 decision about the issues that
4 were to be remanded to the Region for further
5 consideration, one of which was the disposal of
6 contaminated sediments and soils.

7 And so I think that in combination
8 with the portion of the Board's decision, it
9 addressed and resolved and denied the petition of
10 HRI with respect to treatment. That is, as Your
11 Honor said, law of the case for these purposes.
12 And I think that's consistent with the Board's
13 decision in cases like In re Upper Blackstone and
14 the like, or that what's remanded and the scope
15 of issues properly presented after remand are
16 limited to those issues remanded in the first
17 round plus new portions of the permit. And the
18 treatment of MNR issues are exactly as they were
19 before.

20 JUDGE STEIN: But how do you respond
21 to the argument that if EPA stuck to the scope of
22 the remand, that might be true? But given that

1 EPA and then the settlement of the parties
2 pursued a broader cleanup with respect to the
3 elimination of a few dams, less capping, more
4 removal, that opens up these other issues.

5 MR. AKOWUAH: I think what was opened
6 up where the aspects of the permit that were
7 changed. So if there were a party that had
8 opposed the removal of dams or had said, no, no,
9 the capping should remain, I think that party
10 could have commented otherwise. And that's the
11 prerequisites to bringing a claim before the
12 Board and would've had an entitlement to do it.

13 But changing one aspect of the permit,
14 I don't understand really the argument that it
15 reopens everything, including matters that were
16 litigated and resolved in a prior round. There's
17 no precedent cited for that view, either from the
18 Board or from any other court. And I think it
19 would be really disruptive to the EPA's process
20 because in seeking public comment, it would be
21 hard for the Region to know exactly what to ask
22 for comment about.

1 Anything that someone thought was
2 related to something that had been done might be
3 open. Other parties might see it differently.
4 But I think a rule such as the one that I
5 understand arises from the Board's precedent that
6 says what's fair game is what was remanded and
7 what comes back up and anything that changed on
8 remand that channels and focuses and makes most
9 efficient the litigation process.

10 JUDGE AVILA: Can I ask one question,
11 Judge Stein, before we're done here?

12 JUDGE STEIN: Yes.

13 JUDGE AVILA: And I probably should've
14 asked the Region this. But if you could help me
15 out on the MNR. The general theory of how that's
16 going to work is basically -- I don't know what
17 the half life of PCBs are. It's huge, I would
18 imagine. But there's a general theory that as
19 time goes on, they're either going to wash down
20 and get diluted or be covered up with future
21 sediment going forward. Is that kind of what is
22 occurring, where the MNR is occurring, that's

1 what's going to happen?

2 MR. AKOWUAH: They washout, degrade,
3 get covered up. So what the Region said is in
4 2016 and again the response to comments in 2020
5 is they're very low -- we're talking about
6 Reaches 9 through 16, so southwestern
7 Massachusetts and then the Connecticut reaches
8 almost to the sound. The PCB levels are very low
9 and have been falling.

10 So it makes sense to watch and wait
11 and then use these standards, look at the biota,
12 look at the fish and what the concentrations of
13 PCBs are there, both because we're trying to
14 protect the fish and people who might consume
15 them. If the levels are falling, then that tells
16 us something. Also we'll take a look at the
17 downstream transport.

18 If there are PCBs flowing down the
19 river and those concentrations are increasing, we
20 can continue to take a watch and wait approach.
21 The Board approved that approach last time. We
22 don't think it's properly before the Board. But

1 in any event, we do believe that once again the
2 Region has explained its position.

3 JUDGE STEIN: Anything further, Judge
4 Avila?

5 JUDGE AVILA: No.

6 JUDGE STEIN: Thank you very much.

7 MR. AKOWUAH: If I may take, as Mr.
8 Kilborn did, 15 seconds to consult with --

9 JUDGE STEIN: Yes, you may.

10 MR. AKOWUAH: -- Mr. Bieke? I don't
11 need it. Mr. Bieke told me he's got nothing
12 further. Thank you, Your Honors.

13 JUDGE STEIN: Okay. Thank you very
14 much. And now we would like to hear from Ms.
15 Knight on behalf of their clients.

16 MS. KNIGHT: Hello? Can you hear me?

17 JUDGE STEIN: I can hear you. I don't
18 see you. Oh, now I see you. Okay.

19 MS. KNIGHT: Good afternoon. Thank
20 you so much for the opportunity to speak today.
21 I think one of the main points I want to make in
22 my five minutes is to let this Court know that

1 there absolutely is not consensus or support for
2 this settlement agreement in the community.

3 How I came to this case, I don't
4 normally practice environmental law, is I was
5 hired by the citizens of Lee to sue the Select
6 Board who signed off on the settlement agreement
7 and doing so without their authority. All five
8 towns -- Southbridge, Lee, Lenox, Great
9 Barrington, and Sheffield -- none of the citizens
10 of those towns were informed about the settlement
11 negotiations, that there was a possibility of a
12 PCB dump that was going to be placed anywhere,
13 much less in Lee. None of that was made
14 available to the public.

15 There is now a lawsuit pending
16 Superior Court on those issues. So the
17 representation that somehow the settlement
18 negotiations was known by the community and
19 adopted by the community. That's just not true.

20 The Rest of River Committee was formed
21 in 2013. The Rest of River Committee is the
22 committee of the five towns I just mentioned,

1 Southbridge, Lee, Lenox, Sheffield, and Great
2 Barrington. You're going to hear from Attorney
3 Pawa in a minute. He represents the committee.

4 In 2013, it was formed by the five
5 towns just as an information gathering group with
6 regard to the GE cleanup. That's it. In 2016,
7 of course there's a permit where there'd no
8 landfills created in Berkshire County. That's
9 what everyone understood the situation to be.

10 When it was remanded back in 2018, the
11 Rest of River went underground. They were not --
12 the representatives of each of the five towns
13 were not authorized to negotiate secretly out of
14 the presence of the public on any deal with GE,
15 EPA, or the rest. And we had no information or
16 idea that this was even occurring until the
17 settlement agreement was announced in the media
18 February 10th, 2020.

19 And it was announced as if it was a
20 fait accompli. This is a done deal. So I'm
21 fascinated to hear from Attorney Kilborn that the
22 EPA was not bound by the agreement that they

1 signed because in the court -- the Superior
2 Court, the argument is being made that this
3 agreement is binding. And I would suggest to you
4 that after that point when they were -- you have
5 asked about the public comments that were made to
6 the EPA site.

7 Two things, the way this was announced
8 to the public was this was a done deal and it's
9 happening. So I think people were discouraged by
10 making public comments. And also, it's unlikely
11 that -- or it was impossible that the EPA could
12 change its position. This was happening.

13 So I think that to the extent that
14 there weren't more comments, that's one of the
15 reasons. And the second is that three weeks
16 after the settlement agreement was announced, we
17 were all hit by COVID and the pandemic. And
18 Massachusetts essentially shut down on March
19 13th. Of course, everything closed.

20 And it was a very disorienting period
21 for a lot of people during those several months
22 that followed. And that was the comment period.

1 That was the comment period open to the public
2 during COVID. And I think that may have also
3 impacted why there wasn't more comments, instead
4 there weren't, but also the idea that there was
5 nothing that the public could do about this.

6 In 2016, the site was -- the landfill
7 was not proposed, it was rejected. It was not
8 just chosen, it was rejected. And it was
9 rejected because the ground and the area, the
10 geological conditions there are made of sand and
11 gravel, highly permeable. There's no ground
12 underneath which would keep the PCBs from leaking
13 beyond the -- once they get to the ground --
14 excuse me, the sand and the gravel, there's no
15 ground underneath -- no ground barrier to keep
16 them from going to the groundwater.

17 That is in a report from Dr. David De
18 Simone. So it's terrible. It's a textbook
19 terrible place to put a landfill site. And yet -

20 -

21 (Simultaneous speaking.)

22 JUDGE AVILA: Can I interrupt for one

1 second? So on that point, so you're saying
2 there's no -- it's sand and gravel and there's no
3 kind of clay, impermeable strata beneath the sand
4 and gravel before the groundwater. Is that what
5 you're saying?

6 MS. KNIGHT: That's correct. That is
7 what I'm saying, yeah, yeah. So for many a
8 reason, meaning most of it, that site was
9 rejected. And somehow in 2018 after a secret
10 settlement agreement was reached, they decided on
11 the very same area? That is counterintuitive to
12 take PCBs out of the river and then put them in a
13 landfill right next door where maybe they won't
14 leach in the river a year from now, but 10 years
15 from now, 20 years from now?

16 So the overall environment is not --
17 and the betterment of the environment is not
18 being addressed by this resolution. This
19 resolution is for GE and to save GE money.
20 That's it. It's not to serve the environment.

21 And I say this sincerely, not just to
22 go through the motion. But it's the job of the

1 EPA to best look out for the area. And creating
2 a landfill right next to a river in a
3 geologically poorly suited spot is a terrible
4 resolution.

5 And moreover, this doesn't address any
6 -- the settlement agreement doesn't address any
7 issues with respect to the Schaghticoke Tribe --
8 Indian Tribe in Connecticut where they live off
9 the river. They fish in the river. They use the
10 river for many things. And there's no resolution
11 or treatment addressed for the tribe in
12 Connecticut when the river reach down there.

13 So this only perpetuates the solution
14 that has come up in secret, only perpetuates the
15 problem that GE created when we put the PCBs in
16 the river in the first place. So the solution,
17 we find, was to go back to the 2016 order where
18 it should all be removed offsite and out of
19 Berkshire County.

20 JUDGE AVILA: I should know this, but
21 did any of your clients make public comments
22 during the public comment period?

1 MS. KNIGHT: Your Honor, I believe
2 they did, but I can't say for sure. Not to my
3 knowledge necessarily, but I believe that many of
4 -- I know they were involved at that time.

5 JUDGE AVILA: Did they comment on the
6 public comment period on the draft permit?

7 MS. KNIGHT: Yes, yes, yes. I don't
8 know for sure, but I believe they did.

9 JUDGE AVILA: Okay.

10 MS. KNIGHT: I was told I was out of
11 time. So I'm happy to keep talking.

12 JUDGE STEIN: I don't have any further
13 questions. I don't either, but thank you very
14 much.

15 JUDGE STEIN: Thank you very much.

16 (Simultaneous speaking.)

17 MS. KNIGHT: Thank you very much for
18 the opportunity. Thank you.

19 JUDGE STEIN: Pawa?

20 MR. PAWA: Thank you very much, Your
21 Honors. Matt Pawa on behalf of the Housatonic
22 Rest of River Municipal Committee representing

1 the five towns of Great Barrington, Lee, Lenox,
2 Sheffield, and Stockbridge. The Region's
3 decision that the Upland Disposal Facility is
4 protective of human health and environment was
5 not clearly erroneous.

6 And by the way, I want to go right to
7 an issue that you raised, Your Honor, which is
8 whether or not the nine RCRA criteria allow
9 consideration of the human health and environment
10 writ large or only with respect to a small
11 particular geographic local area. There's
12 nothing in the RCRA nine criteria or any law that
13 I'm aware of that would restrict consideration to
14 the particular local geographic area. Obviously
15 my clients are most concerned with the local
16 geographic area. But as a matter of law, we're
17 not aware of any such restriction.

18 But this remedy, this cleanup is very
19 comprehensive and very protective of human health
20 and the environment. And there's nothing clearly
21 erroneous about it. There's a large list of
22 things that we insisted on in this mediation that

1 we achieved in this extraordinarily detailed
2 settlement which I know you've read, including
3 Attachment C to the settlement, which goes into
4 extraordinary detail about exactly how this
5 cleanup will be conducted.

6 And I want to list just a few of the
7 things that we achieved in this settlement and
8 that makes EPA's decision not clearly erroneous.
9 First of all, GE is on the hook indefinitely. It
10 has to post a 150 million dollar bond to protect
11 the local environment, and it's obligated in
12 perpetuity to monitor for leaks and maintain the
13 Upland Disposal Facility. That was a very
14 significant achievement in this remedy.

15 GE has to consult with our clients and
16 with the community at large and minimize work
17 activity in a way that minimizes impact and
18 minimizes waste transport through residential
19 areas which is one of the concerns we had for
20 this facility in 2016. GE has to document the
21 conditions of the roads and return them to their
22 preconstruction condition. GE has to connect

1 homes to public water that are located within 500
2 feet of the Upland Disposal Facility.

3 GE has to remove some 96 acres of
4 additional material that it wouldn't have had to
5 otherwise without this new permit and this
6 settlement agreement. There's more residential
7 properties that are being cleaned up, up to 28 of
8 them if the property owners so desire. There's
9 potential for additional riverbed removal beyond
10 what was contemplated in the 2016 permit.

11 Two dams are being removed. And the
12 river, because of that, will be hydrologically
13 connected and ecologically restored in those
14 sections. But there may well be hydraulic
15 pumping as we've discussed today, which if it's
16 required and if it's feasible, will result in
17 50,000 fewer truck trips through these
18 communities.

19 EPA has routinely authorized disposal
20 of low level PCB waste at landfills that are
21 unlined, as Your Honor noted in your questions.
22 The TSCA regs allow less than 50 parts per

1 million sediments and soils to be deposited at
2 municipal landfills that are typically unlined.
3 And EPA, as we've cited in our brief, allows
4 electric power generators to do the same thing in
5 terms of less than 50 ppm waste.

6 The Region even identified 24 cleanup
7 sites where PCB soils and sediments have been
8 disposed of in local or onsite landfills. There
9 was no about face here by the Region. As Your
10 Honors noted in your last decision in 2018, the
11 Region had found in 2016 in its remedy that both
12 onsite and offsite disposal would provide, quote,
13 high levels of protection. So the idea that
14 there was an about face is incorrect.

15 I want to respond to one of the
16 comments we just heard from the amicus -- counsel
17 for the amicus that our committee, the Housatonic
18 Rest of River Municipal Committee, was formed in
19 2013 merely for information gathering. The
20 committee was formed in 2013 in order to
21 negotiate with GE and see if we could come up
22 with a resolution. It took a long time for the

1 parties to be ready to get there, and it took a
2 remand from Your Honors finding that there was
3 inconsistencies in the record with respect to
4 onsite and offsite disposal for us all to get
5 there.

6 But it's a commendable process we went
7 through. And I really want to disabuse, Your
8 Honors, of any notion that this was a GE dictated
9 solution. That comes through loud and clear as a
10 theme in the brief of HEAL and HRI, and it's
11 absolutely not true.

12 And it's belied by the record in this
13 case. It's belied by the settlement agreement.
14 It's belied by the permit. This was a hard
15 fought and very difficult negotiation.

16 And we got -- that was my own timer
17 going off. I apologize. We got so many things
18 out of this remedy that we never could have
19 gotten without this kind of a negotiation. And
20 there's nothing that HRI or HEAL have cited that
21 suggest that mediating or engaging in ADR is
22 somehow inappropriate.

1 There was a public process. There was
2 a permitting process. There was a draft permit.
3 There was comment open to the public. All of
4 that was done by the book.

5 And the fact that there was a
6 settlement, you (unintelligible) that. And were
7 the settlement negotiations confidential? Well,
8 of course they were. You can't negotiate, as
9 counsel for GE pointed out, if you don't have
10 confidentiality because no one is free to speak
11 their mind. This is simply the way all
12 settlements happen.

13 So this was a very salient outcome for
14 the Region. The Housatonic Rest of River
15 Committee would never be in the position it's in
16 now of defending this agreement, this permit,
17 this cleanup if it weren't protective of human
18 health and the environment. And we respectfully
19 submit that the comprehensive nature of this
20 cleanup and the highly detailed and nature of the
21 vast improvements over the 2016 cleanup in terms
22 of the extent of the cleanup demonstrate that

1 there's no -- there cannot be any clearly
2 erroneous nature in what EPA has done in issuing
3 this new permit.

4 JUDGE STEIN: I have one question for
5 you which is, have the towns expressed a view
6 with respect to the issue of thermal absorption?
7 Is that in the record?

8 MR. PAWA: They have not.

9 JUDGE STEIN: Judge Avila, do you have
10 any questions?

11 JUDGE AVILA: No, thanks very much.

12 MR. PAWA: Thank you. And if I may
13 just add one final note, and that is that the
14 Region found the public sentiment was mixed. It
15 did not find that it was all one sided. So the
16 Region was correct.

17 My clients are strongly supportive of
18 the remedy. There have been some voices on the
19 other side of the community. The EPA was correct
20 that that was mixed sentiment. So thank you very
21 much, Your Honor.

22 JUDGE STEIN: Thank you. I think

1 we're going to go to rebuttal and at this point.
2 And my understanding from the clerk is that --

3 MR. RAINER: It's me. It's me, Your
4 Honor, Mr. Rainer. Your Honor?

5 JUDGE STEIN: Okay. I just want to
6 clarify the time before we get moving with the
7 clerk. My understanding is the petitioners have
8 used all of their time. But we will allow -- I'm
9 going to allow 15 minutes for rebuttal given that
10 everybody has gone over some and that should
11 balance it out. And that is a change, Mr.
12 Cortes, that if you could allow petitioners 15
13 minutes for rebuttal, I would appreciate it.

14 MR. RAINER: So thank you, Your Honor.

15 MR. CORTES: Yes, Your Honor. Will do.

16 MR. RAINER: Thank you very much, Your
17 Honor. So I want to start with the process
18 issues because Your Honor, Judge Stein, indicated
19 that your concerned and have expressed that the
20 Board has expressed itself about process issues
21 recently. So first of all, it has not been
22 mentioned today, although it is in the record as

1 part of our opposition to the motion to strike,
2 that two United States senators wrote to the
3 Region and asked them to extend the comment
4 period here because the western Massachusetts and
5 southern Connecticut regions had been hit by a
6 hurricane in a period immediately preceding the
7 deadline, not to mention what has already been
8 mentioned about COVID.

9 So the notion that they shouldn't have
10 given another couple of -- I believe the request
11 was for something like six or seven weeks. The
12 notion that they couldn't give an additional
13 seven weeks under those conditions, I
14 respectfully submit -- suggest that there was
15 another agenda at play. And the other agenda had
16 to do with the idea that they were going to get
17 this through before December when we all know
18 there was a possible change in the
19 administration.

20 And I respectfully submit it was
21 completely inappropriate with those kinds of
22 conditions for them to deny the extension. And I

1 ask you to read the letter from the two United
2 States senators. Second, with respect to whether
3 one of my clients, HEAL, participated in the
4 process, the answer is they categorical did not.

5 They were not invited. They were not
6 included. And the idea -- if this Board were to
7 establish a precedent that suggested that, yes,
8 mediation is a valuable tool, yes, ADR is a
9 valuable tool, but it must be conducted under
10 conditions where everyone can be heard.

11 And it occurred to me why is that Your
12 Honors are put in the position of having to ask,
13 did this person get to participate, did this
14 person get to participate? The reason you have
15 to ask is because, in fact, there is no record.
16 There is no administrative record of this
17 proceeding which is why it is improper to have
18 such a process unless everyone is involved.

19 And if you were to rule that -- and I
20 looked at the Veolia decision. And I understand
21 that Your Honors think that it's important and
22 good to have settlement negotiations. And I

1 don't disagree with that. But what I'm saying is
2 when you have entities that are involved in this
3 as my client, it isn't a valid process unless
4 they are included and they were not.

5 JUDGE AVILA: Can I just --

6 (Simultaneous speaking.)

7 JUDGE STEIN: Does the federal Dispute
8 Resolution Act apply to the mediation?

9 MR. RAINER: I'm sorry. I'm not
10 familiar with the statute, Your Honor.

11 JUDGE STEIN: Okay. Thank you.

12 (Simultaneous speaking.)

13 JUDGE AVILA: Can I just ask one
14 question?

15 MR. RAINER: Yes, Your Honor.

16 JUDGE AVILA: Could GE and the Region
17 have come up with a settlement all on their own,
18 not included anyone else and come up with a
19 settlement? And then with that said, we'll
20 propose a draft that says X, and we'll go through
21 the public comment process. Would that have been
22 inappropriate?

1 MR. RAINER: Well, I mean, I've been
2 doing environmental law for many years, Your
3 Honor. And in past years, that did happen. The
4 PRPs and the agencies got together and had
5 private settlement -- confidential settlement
6 negotiation, and then released a draft proposal.
7 That certainly did happen in past times in my
8 experience.

9 But whether -- Your Honor, Judge
10 Avila, asked very pointedly about whether the
11 settlement was binding. And I respectfully
12 submit that my good friend, Mr. Pawa, has
13 answered your question perhaps better than I did.
14 And I ask you to look at the document he
15 suggested you look at which is that the
16 settlement agreement makes completely clear that
17 this was the deal.

18 And what is the further evidence that
19 we have that this was the deal? I mean, we're
20 not sitting here -- I don't sit here and make
21 inflammatory accusations. I'm trying to -- or I
22 would like to ask Your Honors to look at the SCA

1 where in reaching a conclusion that the onsite
2 facility was the most protective of human health
3 and the environment, they specifically referenced
4 the fact, for example, quoting them, that this
5 proposal was the best because it had the support
6 and commitment not to challenge by GE.

7 They went on to say that the Region
8 cleared the path towards fewer, if any, appeals
9 and fast implementation. So the Region was
10 relying on that process as a basis -- as a stated
11 basis for their conclusion that this was the best
12 remedy. Now let's just talk about the -- I mean,
13 we said this in our reply. No one -- I don't
14 believe Your Honors, no one believes that this --
15 the putting an Upland Disposal Facility 1,000
16 feet from the river is the solution that is most
17 protective of human health and the environment.

18 And when you look at the factors that
19 they go through in SCA, you will see control of
20 sources favors offsite disposal. Compliance with
21 ARARs favors offsite disposal. This is their
22 analysis. This is the analysis in the 2020 SCA.

1 Long-term reliability favors offsite
2 disposal. Short-term effectiveness favors offsite
3 disposal. Implementability favors offsite
4 disposal. This is in their analysis. And the
5 thing that they say pushes back is the settlement
6 agreement. That is what the Agency itself in its
7 own document says is the reason that they came
8 out the way they did.

9 I'm sorry. There is one other thing
10 that was favoring onsite disposal. It was saving
11 General Electric 200 million dollars which they
12 have generously agreed to give some of that -- 50
13 million of that to the town in exchange for this
14 settlement agreement. That's actually what
15 happened here.

16 Now Your Honors have repeatedly today
17 asked this question about, what about disposal in
18 other municipal landfills? I was thinking about
19 it. I'm, like, why does he keep asking this?

20 And then it occurred to me, because it
21 wasn't analyzed by the Agency. If Your Honors
22 believed that the correct calculus requires a

1 consideration of whether there are other
2 municipal landfills besides this one that can
3 accept the lower level waste, then they should've
4 analyzed it. They didn't analyze it.

5 So I mean, that's -- again, I would
6 say if you look the standards in the
7 Administrative Procedure Act, that's a pretty big
8 one. That's a pretty big gap. If Your Honors are
9 going to base a decision on the fact that some of
10 this waste could go to other municipal landfills,
11 I would respectfully submit that needed to have
12 been part of the analysis and it wasn't.

13 All right. I'm going to turn the time
14 over to my co-counsel. But I do want to say two
15 more things before I do. The first one is Mr.
16 Kilborn suggested to you that it's not necessary
17 -- excuse me. Mr. Akowuah suggested to you that
18 it would be -- that the settlement agreement was
19 more protective than the prior settlement
20 agreement.

21 In other words, he says to you this is
22 a more protective settlement. And I say to you if

1 they're saying it's more protective -- Mr.
2 Akowuah is saying it's more protective -- then I
3 respectfully submit that is why we are allowed to
4 point out again the ways in which it is less
5 protective. And that's the door opening argument
6 that we made earlier.

7 All right. Ms. Terrell, I'm going to
8 turn the baton over to her. She talked to you
9 about the MNR, but she didn't mention, and I want
10 to be sure to ask you to look at the -- attached
11 to our reply brief is the MNR guidance on
12 sediment.

13 The MNR guidance, we're asking that
14 Your Honors consider that as the binding
15 standard, the standard that says there must be
16 performance standards, there must be a time
17 deadline, and there must be a contingent remedy
18 if something goes wrong. And we respectfully
19 submit that none of those things is contained in
20 this permit. All right. With Your Honors
21 permission, I'm going to turn it over to Ms.
22 Terrell.

1 MS. GARRISON: It's Ms. Garrison now.

2 MR. RAINER: I beg your pardon.

3 MS. GARRISON: Thank you. I just want
4 to respond to four arguments that were made by
5 Attorneys Kilborn and Akowuah. First is this
6 notion that the levels of PCBs in the downstream
7 reaches are low. First of all --

8 JUDGE STEIN: I'm not seeing your
9 camera on yet. There you are.

10 MS. GARRISON: Thank you. There are
11 only 60 data points in the 21st century covering
12 over 100 river miles of the downstream reaches.
13 The lack of information about whether or not PCBs
14 are actually in these reaches is extremely low.
15 We do know from the information in the National
16 Remedy Review Board site information packet that
17 there's a great deal of variability in general
18 when it comes to distribution of PCBs that they
19 did look at and that there's a tendency for PCBs
20 to aggregate in hotspots.

21 That's not a new concept. The idea
22 that there are residual risks to the communities

1 from MNR is not a new concept. This has been
2 discussed throughout the process long before I
3 even became involved.

4 And it's frankly absurd that the
5 Region is arguing that they had no idea that the
6 communities were concerned about whether or not
7 there's PCBs in the downstream reaches that
8 haven't been studied. And if the PCB levels are
9 low in the downstream reaches, GE and the Region
10 should be happy to put that low level right into
11 the permit. Let's write it into the permit and
12 make it binding so that nobody gets hurt.

13 Secondly, I would like to address the
14 comments that were made by Attorney Akowuah about
15 Your Honor's question about which processes,
16 Judge Avila, are actually going to do something
17 to the PCBs in the river. This is an argument
18 that we raised in our initial brief. And the
19 Region in response said, oh, yeah, we understand
20 what the processes are for MNR.

21 But they still didn't identify a
22 specific process for how these PCBs are somehow

1 going to get cleaned up. I've looked through the
2 record. The record is very big, as you know.
3 But all I found are vague references to natural
4 processes. I don't think there's a clear
5 understanding due to the lack of sampling and the
6 lack of data on the downstream reaches for what
7 is actually supposed to be expected if MNR works
8 as it should and cleans up the river.

9 Third, I'd like to address a comment
10 that was made that petitioners are somehow making
11 a big deal about sediment as opposed to fish
12 tissue. It's frankly a little absurd to me that
13 that point would be made because if we actually
14 look back to the original consent decree back in
15 1999, you find in Appendix G a document which
16 became the initial -- we called it the 2000
17 permit that sort of set forth the process for how
18 the cleanup was going to work. This document was
19 effectively incorporated into the consent decree.

20 And that refers to standards for the
21 Interim Media Protection Goal, IMPGs, which
22 expressly states as a requirement the proposed

1 IMPGs for sediment, surface water, and flood
2 plain soils shall include numerical
3 concentration-based goals for constituents in
4 such media. There have been throughout the
5 initial health assessment process much discussion
6 of exposure pathways. And one of those exposure
7 pathways was direct contact with sediments. This
8 is part of the purpose of the cleanup is to make
9 sure there's not too high concentrations of PCBs
10 in sediments. The idea that we're making a big
11 deal out of it is shocking. Lastly --

12 JUDGE AVILA: I'm sorry. Has your
13 clients in their comments ever proposed what the
14 concentration of PCBs should be as a permission
15 standard?

16 MS. GARRISON: Well, I don't believe
17 that it's incumbent upon my clients to conduct a
18 scientific study to come up with a standard. But
19 the Region did state that in its response brief
20 that the concentrations are low. And they
21 referred 0.18 parts per million.

22 Why don't we lock that number in if

1 anything goes about 0.18 parts per million? I
2 don't know. I shouldn't be substituting my
3 judgment for human health scientists that can
4 tell us what's actually safe. But just to give
5 you an example, there are --

6 JUDGE AVILA: And to be clear, my
7 question was just whether your client had
8 proposed one.

9 MS. GARRISON: Oh, sure. No, the
10 answer is no.

11 JUDGE AVILA: Okay.

12 JUDGE STEIN: And so if you could wrap
13 up quickly because you're actually out of time
14 and I know you want to give your co-counsel a
15 minute or two to say something.

16 MS. GARRISON: Yes. So just my last
17 point, and I don't think Ms. Parker has any
18 further comments. But there have been issues
19 made about -- points that have been raised about
20 this notion that the Region and GE didn't tweak
21 the downstream standards. And so they're trying
22 to draw a distinction about the scope issues.

1 My response to that is that the Region
2 explicitly stated when announcing this settlement
3 to the public that removing more contaminated
4 sediment reduces the residual risks. And that's
5 what I'm talking about today are those residual
6 risks. And what we heard from GE's counsel today
7 is that when there are residual risks, GE can be
8 required to watch and wait. Respectfully, that
9 does not comply with CERCLA or the consent
10 decree. Thank you. Unless you have questions,
11 that's the remainder of our time.

12 JUDGE AVILA: I don't have any. Thank
13 you very much.

14 JUDGE STEIN: I don't have anything
15 further. I want to thank everyone, all of the
16 parties and counsel for their arguments today.
17 And the case is now submitted.

18 MR. CORTES: These proceedings before
19 the Environmental Appeals Board are now
20 adjourned.

21 (Whereupon, the above-entitled matter
22 went off the record at 4:03 p.m.)

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Before: U.S. EPA/EAB

Date: 09-02-21

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