

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

In the Matter of:
GENERAL ELECTRIC COMPANY
Modification of RCRA Corrective Action

Permit No. MAD002084093

RCRA Appeal No. 16-02

HOUSATONIC RIVER INITIATIVE, INC REPLY TO
“REGION 1’s RESPONSE TO PETITION OF
HOUSATONIC RIVER INITIATIVE, INC FOR
REVIEW OF FINAL MODIFICATION OF RCRA CORRECTIVE
ACTION PERMIT ISSUED BY REGION 1”

Respectfully Submitted
Dated this 24th Day of March, 2017

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HRI Reply Region 1's Response to HRI Comments

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION
March 24, 2017

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Appeal from Permit Decision.
Docket No MAD002084093
Statute: Resource Conservation and Recovery Act

I hereby certify that including The Table of Contents and Attachments this petition to the Environmental Appeals Board is under 14,000 words. (3847 words).

Sincerely,
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CERTIFICATE OF SERVICE

I certify that a copy of this HOUSATONIC RIVER INITIATIVE, INC REPLY TO "REGION 1's RESPONSE TO PETITION OF HOUSATONIC RIVER INITIATIVE, INC FOR REVIEW OF FINAL MODIFICATION OF RCRA CORRECTIVE ACTION PERMIT ISSUED BY REGION 1" has been sent to the counsel and representatives listed below.

March 24, 2017
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THE ARGUMENT

Region 1 argues our petition is flawed in three ways.

First, Region 1 states HRI “simply expresses differences of opinion on inherently technical matters within EPA’s expertise.” Region 1 argues that “simply articulating these preferences does not demonstrate error.” Citing *Upper Blackstone Water Pollution Abatement Dist. V. United States EPA*, 690 F. 3d 9, 23 (1st Cir. 2012), *cert. denied*, Ct. 2382 (May 13, 2013), Region 1 argues that in the case of changing conditions, and “science-based policymaking contexts [...] the EPA is required to exercise its judgment even in the face of some scientific uncertainty.” Asserting, “HRI never justifies why EPA’s exercise of discretion in selecting a cleanup based on the CD-Permit was flawed. While HRI may have opted for a different approach, this difference of opinion does not constitute reviewable error or abuse of discretion.” (Region 1’s Response to Petition of Housatonic River Initiative, Inc. for Review of Final Modification of RCRA Corrective Action Permit Issued by Region 1 (Region 1’s Response), Page 2.)

Region 1 mischaracterizes our argument. The issue for HRI is not a question of whether Region 1 has exercised proper or improper discretion in its Final Remedy, but rather our assertion that Region 1 has sacrificed the very science it has gathered in the course of its responsibilities: to first study and characterize the extent of contamination in the Housatonic River system, and then to investigate appropriate remediation approaches and determine the proper Corrective Actions to limit the risks to human health and the environment.

We presented extensive evidence, including photographs collected and promoted by both the Commonwealth and Region 1 that clearly demonstrates the ability to successfully remediate and restore highly sensitive areas, including vernal pools, in the first two miles of the River. For

Region 1 to argue in the Final Remedy that similar sensitive areas in Rest of River ought not to be remediated is not a proper example of the exercise of discretion in the face of scientific uncertainty, but rather a case of contradicting its own clearly demonstrable scientific success and certainty. We again refer the Court to the United States Army Corps of Engineers (ACOE) 2007 report demonstrating the highly successful reduction of PCB levels from 1,534 ppm to less than 2 ppm followed by the successful restoration of that portion of the River.

Indeed, in support of our position, Region 1 responds to GE's contention in Comments C17, C18 that "Any restoration attempted after a project of the nature and scope of SED 9/FP 4 MOD would not be fully effective or reliable in returning these habitats to their pre-remediation ecological condition," with the counter assurance that: "While remediation of the river and floodplain at this scale cannot be accomplished to any meaningful level without impacts to the present state of the river and floodplain, the restoration activities will mitigate impacts caused by the remediation. Over the long-term, **restoration activities will return the processes sustaining diverse river and floodplain communities ... Thus, EPA has concluded that implementing remediation and restoration as required in the Final Permit Modification will result in the return of the functions, values, characteristics, vegetation, habitat, species use, and other attributes, to the extent feasible and consistent with the remediation requirements.**"

("Response to Comments on Draft Permit Modification and Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River "Rest of River" GE-Pittsfield/Housatonic River Site, October 2016", (EPA Response to Comments), pages 88-89) (emphasis added.)

Clearly, Region 1 is as confident as HRI that well-planned rigorous restoration can repair the temporary damage of remediation. And clearly in this critical case HRI is not simply expressing "differences of opinion on inherently technical matters within EPA's expertise" but

asking Region 1 to ask GE to implement the science it knows will work. In this case, EPA's exercise of discretion, and its decision to ignore significant aspects of the technical expertise and experience it gained studying the river and remediating the first two miles in selecting a Final Remedy is indeed, by its own admission, flawed.

We have posited that this process began somewhere after Susan Svirksy and her team, including Weston Solutions, finished its remarkably thorough investigations for the Environmental Risk Assessment and Human Health Risk Assessment. Region 1 made great efforts to educate the public about that work and to build a consensus for a thorough cleanup. This public outreach culminated in April 2011 with the Three Day Charrette Region 1 held in Lenox, Massachusetts.

HRI offered extensive selections from the testimony of these nationally-known experts about both the scientific and technical challenges of remediation and restoration, and possible solutions for Rest of River. Collectively, Keith Bowers, Mike Palermo, Ed Garland, Mark Velleux, and Susan Svirsky of Region 1 made a persuasive case for a more rigorous cleanup than the Final Remedy.

The combination of clear resistance from both GE and the significant pressure GE put on several local constituencies, its comprehensive public relations claim that a cleanup would in fact destroy the river, and its growing influence on the Commonwealth had a visible effect on Region 1. Thus began a series of confidential negotiations with the both the Commonwealth and GE from which the public was excluded.

As Region 1 admits: "In light of GE's and Massachusetts's concerns, EPA and Massachusetts developed a modified approach that includes, consistent with GE's concerns, significantly less PCB contaminant removal in particular Core Areas for threatened and

endangered species.” (EPA Response to Comments, pages 24-25). The discretion Region 1 exercised in this case has less to do with “science-based policy-making” and technical matters than political compromise.

Region 1's second issue with our petition is its claim that “HRI has not responded to EPA's Response to Comments regarding several arguments, and has not explained why EPA's response was clearly erroneous or otherwise warrants review. 40 C.F.R §124. 19(a)(4). Without substantively confronting EPA's considered response to comments, a petitioner cannot hope to garner review, particularly where, as here, the matters in dispute are inherently technical in nature and accordingly warrant deference by the Board to determination made on the record by EPA's experts.” (Region 1 Response, Page 2).

Region 1's contention may be accurate in the extreme, but it is offered without context. Beginning with our 1994 Comments to the Preliminary Investigation of Corrective Measures (PICM), HRI has constantly and continuously commented on all matters of concern regarding the Housatonic River, EPA and GE. HRI is the EPA TAG recipient and Region 1 is well aware that besides our previous comments over many years, that beginning in 1998, we have constantly and continuously attended meetings and made extensive technical comments regarding every aspect of the cleanup at the EPA Housatonic River Citizens Coordinating Council (CCC). Indeed, the many Region 1 employees who have attended these many meetings have heard these objections articulated so very often they could easily present them word by word to this Court.

We submitted our comments regarding Region 1's Draft Permit Modification and Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River “Rest of River” GE-Pittsfield/Housatonic River Site on October 23, 2014. It took EPA almost two years to respond in October 2016 with a 463-page document that while clearly addressing the concerns of

GE and the Commonwealth, merges the concerns of 140 other commenters together, without clear distinction. Region 1 explains this decision on Page 12 of "Response to Comments on Draft Permit Modification and Statement of Basis for EPA's Proposed Remedial Action for the Housatonic River "Rest of River" GE-Pittsfield/Housatonic River Site" (Response to Comments): "In EPA's responses, EPA uses the term "commenter" to refer to the commenter except for purposes of comments from General Electric Company (GE), entities of the Commonwealth of Massachusetts, and the State of Connecticut. Those three entities are parties to the Decree, and all have a formal role in the remedy selection process. In light of that role, EPA believes it would assist the reader in understanding and readability if comments from those parties are identified by name, rather than the term "commenter."

Here is an example of how Region 1 amalgamated the numerous specific concerns of a variety of commenters, and then responded to their concerns: "**Comments 19, 20, 40, 41, 49, 65, 69, 74, 188, 189, 194, 230, 326, 328, 336, 344, 349, 372, 375, 376, 378, 379, 388, 402, 412, 413, 427**: Many comments were received voicing concern that the proposed remedy is not sufficiently extensive to effectively remediate the PCB contamination in the river and floodplain. The commenters noted that PCBs are known to be a serious problem and the remedy will leave too much of the PCB mass, and inappropriately high PCB concentrations, in the environment. Some commenters noted that humans and ecological receptors in the area will continue to receive low-level PCB exposure, with consequent health and ecological risk. One commenter remarked that this would be the least-extensive remedy ever implemented at a PCB site and another expressed support for the most extensive of the various alternatives evaluated. One commenter stated that the proposed plan was developed by a small group of self-appointed environmental experts. One commenter noted that future generations will recognize the importance of a more extensive

cleanup. One commenter asked why Region 2 supported a stringent cleanup of the Hudson whereas Region 1 proposed a weakened incomplete approach for the Housatonic.

“EPA Response 19, 20, 40, 41, 49, 65, 69, 74, 188, 189, 194, 230, 326, 328, 336, 344, 349, 372, 375, 376, 378, 379, 388, 402, 412, 413, 427: While many commenters suggested the remedy did not go far enough in removing PCBs, many other comments, including from GE, objected that the remedy required too much remediation. For example, many commenters who live near Reach 5A are opposed to any remediation in this reach, whereas other commenters preferred no remediation in all of Reach 5, and only dredging of Woods Pond.” (“Response to Comments,” page 30)

Commenters then had to rely on the grid Region 1 created in **Attachment D Cross-Reference Response Matrix for Public Comments on the 2014 Draft Permit Modification and Statement of Basis *Response to Comments Housatonic River "Rest of River"*** to locate Region 1's responses to their specific comments.

While we appreciate the complex task Region 1 faced to respond to so many commenters, Region 1's decision to organize its Response to Comments in this manner, and its decision not to respond in a simple and direct way to HRI's 2014 Comments placed an unnecessary and unreasonable burden on us to respond in a timely way to their responses.

Given the great delay and overly-complex form its comments took, it is disingenuous for Region 1 to attempt to disqualify our concerns on these grounds. There is the added irony that Region 1 asserts that HRI hasn't responded to the central concerns of its Comments given that in almost every respect, Region 1's responses merely reiterated the comments we have been hearing in recent years to our concerns expressed in prior comments and at CCC meetings.

A simple example: **“EPA Response 228, 262, 407:** Regarding the question as to why EPA

has not selected a longer-term solution and “complete remediation,” EPA considered a wide range of cleanup options, including those with larger volumes of contamination being removed from the river and less reliance on capping (e.g. Alternative SED8 in the Comparative Analysis). As discussed in response to other comments, EPA based its remedy selection on an evaluation of all the remedy selection criteria. Based on this analysis, EPA selected a balanced remedy that significantly reduces fish consumption risks. EPA’s rationale for the extent of remediation in the Final Permit Modification is documented in its Statement of Basis and Comparative Analysis, as supplemented by this Response to Comments. EPA continues to believe that the remedy in the Final Permit Modification is appropriate and significantly reduces the risks associated with fish consumption. For a “complete remediation” option as described by commenter, the closest alternative evaluated was the SED 8 alternative. While the SED 8 alternative does remove more PCBs than other alternatives, and reduces the downstream transport of PCBs more fully than other alternatives, it also had higher costs, and higher short-term impacts than other alternatives. In light of EPA’s evaluation of all nine criteria pursuant to the Permit, EPA determined that the selected remedy was the best suited remedy.” (“EPA Response to Comments,” pages 75-76.)

This comment is entirely consistent with recent Region 1 responses. It strains credibility to imagine that Region 1 is not thoroughly familiar with our response to these claims. And again it is more than a bit unfair to ask the Court to disqualify our Petition on the grounds that HRI hasn’t responded to these Comments.

Additionally, Region 1 states in its 2016 Response to Comments: “Throughout the duration of the Rest of River project, EPA has kept the local community and other interested stakeholders up to date on various project investigations and activities ... Throughout the Rest of River process, EPA has held an informal public input period for many deliverables generated for

the Rest of River process..." ("EPA Response to Comments," Page 2.)

Yet HRI was never informed by Region 1 that our ability to petition EAB was dependent upon a timely response to EPA's Response to Comments. That Region 1 has leveled similar claims against other petitioner/stakeholders is an indication that Region 1 has failed in its mission to adequately inform us and other likely commenters about this critical aspect of the appeals process.

Finally, while HRI found the wait for EPA's Response to our 2014 Comments onerous, we nevertheless correctly anticipated Region 1's criticisms of our 2014 Comments by reiterating our "inherently technical" concerns with the draft Remedy with an extensive presentation by our TAG Technical Advisor Peter L. deFur, PhD. to the Housatonic CCC on November 18, 2015."

<https://semspub.epa.gov/work/01/585182.pdf>

HRI raised and reiterated on that occasion several specific technical, scientific issues that go to the heart of what we believe to be examples of Region 1's erroneous findings of fact and erroneous exercises of discretion. These concerned:

- Fish tissue contamination
- Insufficient active remediation
- Failure to address "core areas"
- Failure to acknowledge and incorporate habitat restoration

One important example from Dr. deFur's presentation: despite Region 1's insistence that highly sensitive areas of Rest of River ought not to be remediated because of the likely damage remediation might cause, and the implied inability to correct and restore that damage, Dr. deFur presented clear evidence that "The nine plant species listed in the Draft Permit and Intended Final Permit as too important to permit a full clean up are depicted in the second slide. All but one of these plant species can be obtained from existing facilities at present. Bur oak is common in other areas of the New England region. And three sources of these plants explain that the ninth

species, Tuckerman's Sedge, could be cultured from seeds obtained from existing plants, by one of the Natural Heritage programs that has permits to collect and culture these plants. It turns out that neither the plants nor the habitats are an impediment to a more comprehensive remedial plan in terms of restoration." (Peter L. deFur, PhD to the Housatonic CCC on November 18, 2015, Page 2)

Similarly, Region 1 is well aware of our longstanding and continuing history of raising the issues of "MNR, Riverbank Cleanup, Floodplains and Vernal Pools, Bioremediation, Institutional Controls and Volatilization." (Region 1's Response to HRI Comments, Page 14). In fact, HRI first raised our objections to Monitored Natural Recovery in our 1994 Comments on the PICM. Region 1 is aware that HRI has hosted workshops on most of these issues because representatives of Region 1 attended these workshops. HRI's concerns about volatilization at David Gibbs home on Newell Street in Pittsfield prompted EPA to do indoor air testing. We have many times brought David Carpenter, MD, a leading expert on PCBs and volatilization, to speak at public meetings. We have hosted several symposia with researchers and representatives of many companies involved in bioremediation.

On Pages 16-17 Region 1 raises the issue of our objections to Monitored Natural Recovery stating: "If the Board substantively considers the argument, HRI's objection is puzzling because alternative SED 8/FP 7, which HRI favors, *includes MNR for the same river reaches as the selected remedy.*" Region 1 neglects to acknowledge that HRI and other stakeholders were only presented with a range of cleanup/treatment options developed by GE and EPA. Our endorsement of SED 8/FP 7 was prompted by our belief that this was merely the most comprehensive cleanup we were offered. In no way does that choice imply that we agree with every aspect involved with SED 8/FP 7. Nor does it in any way imply a change in our judgment that Monitored Natural Recovery will in no way accomplish a reduction of

contamination, and is therefore an inappropriate approach for any aspect of the Rest of River Remedy.

Given these realities, we ask that the EAB reject Region 1's argument that our "petition fails to satisfy Board's procedural requirements."

Region 1's third major contention is that "HRI in some cases simply did not raise some of its arguments in its comments on the Draft Permit Modification ("Draft Permit") AR558619, counter to 40 C.F.R. 124.13, 124.19(a)(4)(ii)." (Region 1's Response to HRI Comments, Page 3).

Region 1 specifically cites our failure to raise arguments about "CERCLA preference for treatment" and HRI's preference for thermal desorption." (Region 1's Response to HRI Comments, Page 14).

Region 1 is well aware that HRI has raised the issue of CERCLA's preference for treatment year after year, meeting after meeting. In our July 15, 1994 comments on the PICM, we wrote: "More emphasis needs to be placed on the effective removal, treatment and disposal of PCBs in order to restore our river so that we may once again fish it and swim it without unacceptable risk."

In our February 22, 2000 "Memorandum Of Law In Support Of Motion To Intervene" in Federal Court, one of our main contentions was that the 2000 Consent Decree "DOES NOT RESOLVE THE PCB CONTAMINATION PROBLEMS IN BERKSHIRE COUNTY," and in support of that argument we immediately cited CERCLA's clear preference for treatment: "CERCLA Section 9621(b), General rules for cleanup standards, clearly states: (1) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and

disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available.

“The President shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or containment. In making such assessment, the President shall specifically address the long-term effectiveness of various alternatives.”

As to the issue of why HRI has now expressed a preference for Thermal Desorption while we did not do so in our 2014 Comments, there is a simple explanation. There have been recent breakthroughs in the technology which have demonstrated new found practical capacities to effectively treat much larger amounts of contaminated soils and sediments. USAID and the Republic of Vietnam engaged in a lengthy and comprehensive examination of a variety of treatment modalities, and they subsequently chose Thermal Desorption. The very clear success Thermal Desorption has demonstrated in remediating high levels of dioxin-contaminated soil at the Danang Airbase now makes Thermal Desorption much more relevant to the Rest of River cleanup than it was before.

CONCLUSION:

HRI believes the issues we have raised in our Petition are important enough to warrant the exercise of EAB review. HRI believes that Region 1 has not made comments compelling enough, or presented technical or scientific bases that effectively mitigate our concerns that warrant dismissal of our claims.

Region 1 cites *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997) to argue “On matters that are fundamentally technical or scientific in nature, the Board will defer to EPA’s technical expertise and experience, as long as EPA adequately explains its rationale and supports its reasoning in the AR.”

But Region 1 fails to meet this standard. Region 1’s decision not to remediate core areas in Reach 5 clearly reveals correctable limitations in “EPA’s technical expertise and experience.”

Again, we ask only for a more rigorous application of the standards of CERCLA: “permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or containment.”

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