IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 22-1398

HOUSATONIC RIVER INITIATIVE,
HOUSATONIC ENVIRONMENTAL ACTION LEAGUE

***Petitioners*,**

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
New England Region,

***Respondent*,**

GENERAL ELECTRIC COMPANY,
HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE,

Intervenors.

On Petition for Review of Final Action of the
United States Environmental Protection Agency

BRIEF OF THE GENERAL ELECTRIC COMPANY AS RESPONDENT-INTERVENOR

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RESPONDENT-INTERVENOR'S UPDATED RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Respondent-Intervenor General Electric Company ("GE") states that it is a publicly held corporation, that it has no parent corporation, and that no publicly held company or other entity owns 10% or more of the stock of GE. (Note: This is a revised disclosure statement that reflects stock ownership changes that occurred following the submission of GE's prior Rule 26.1 Disclosure Statement, which was included in GE's Motion for Leave to Intervene, filed on June 16, 2022, and which was also separately filed on June 22, 2022.)

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GLOSSARY OF TERMS

2016 Permit	Final Modified RCRA Permit issued by EPA on October 24, 2016
A.R.	Administrative Record
Board	EPA's Environmental Appeals Board
CD-Permit	Reissued RCRA Permit (incorporated in Consent Decree and reissued by EPA effective Dec. 7, 2007)
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	U.S. Environmental Protection Agency
EPA.Br	Brief of Respondent EPA
GE	General Electric Company
HEAL	Housatonic Environmental Action League
HRI	Housatonic River Initiative
J.A.	Joint Appendix
mg/kg	milligrams per kilogram
PCBs	polychlorinated biphenyls
Pet.Add.	Addendum to Brief of Petitioners HRI and HEAL
Pet.Br.	Brief of Petitioners HRI and HEAL
ppm	parts per million
RCRA	Resource Conservation and Recovery Act
Region	New England Region of U.S. Environmental Protection Agency
Revised Permit	Final Revised Modified Permit issued by EPA on December 16, 2020

TSCA	Toxic Substances Control Act

STATEMENT REGARDING ORAL ARGUMENT

Respondent-Intervenor General Electric Company ("GE") respectfully suggests that oral argument would assist the Court's consideration of the issues presented by the parties on this petition for review, and it requests an opportunity to participate in the oral argument.

INTRODUCTION

In 2000, the United States District Court for the District of Massachusetts entered a Consent Decree executed by Respondent-Intervenor the General Electric Company ("GE") and by the United States, the Commonwealth of Massachusetts, the State of Connecticut, and other entities. *United States et al. v. General Electric Co.*, Civil Action No. 99-30225-MAP *et seq*. (D. Mass. Oct. 27, 2000) ("Consent Decree"). The Consent Decree addressed polychlorinated biphenyl ("PCB") contamination that resulted from GE's former industrial facility in Pittsfield, Massachusetts, located adjacent to the Housatonic River, and that is present throughout a site called the GE-Pittsfield/Housatonic River Site.

The Consent Decree called for remediation of that PCB contamination to proceed in two principal stages. The first stage concerned the cleanup of the most heavily contaminated areas, which included GE's former facility itself, certain nearby areas, and the two miles of the Housatonic River and floodplain immediately downstream of GE's facility. The Consent Decree detailed the remedial work that GE, in cooperation with the United States Environmental Protection Agency ("EPA"), would perform in that first stage. That work was completed in 2018 (at a cost to GE of hundreds of millions of dollars), subject to certain ongoing obligations, has been found to be "remarkably successful" (see page 8, *infra*), and is not at issue in this case.

What is at issue here is the second stage of the cleanup, relating to the "Rest of River" – namely, the portion of the Housatonic River and its floodplain beginning approximately two miles downstream of the former Pittsfield facility and extending through western Massachusetts and Connecticut. With respect to this second stage of the cleanup, the Consent Decree established a process for working through numerous interrelated issues – many of them highly technical – to be addressed in selecting a cleanup remedy for the Rest of River. Specifically, after investigation and evaluation, EPA would select a remedy for the Rest of River and specify that remedy in a modification of an existing permit that had been issued to GE by EPA under the Resource Conservation and Recovery Act ("RCRA"), with the remedy to be implemented under the Comprehensive Environmental, Response, Compensation, and Liability Act ("CERCLA").

On December 16, 2020, the EPA New England Region ("the EPA Region" or "the Region") issued a revised modified RCRA permit to GE (the "Revised Permit"). That Revised Permit, which specifies the remedy selected by EPA for the Rest of River, is found in the Administrative Record ("A.R.") 650440, Joint Appendix ("J.A.") ___-___, and in the Addendum to Petitioners' Brief ("Pet.Add.") at 111-253.[1]

[1] Documents referenced herein are cited to the Administrative Record, the index to which EPA filed on July 5, 2022, and the Joint Appendix and/or to the Addendum to Petitioners' Brief for the documents provided therein.

The Revised Permit was the culmination of a lengthy process that included a prior round of administrative appeals. In 2016, the EPA Region issued an earlier version of the Revised Permit ("the 2016 Permit"). Numerous parties, including GE and one of the current Petitioners, the Housatonic River Initiative ("HRI"), raised a variety of challenges to the 2016 Permit in EPA's Environmental Appeals Board ("the Board"), which, under EPA regulations, is the initial arbiter of disputes relating to RCRA permits issued by the EPA Regions. The Board issued its decision in 2018. *In re General Electric Co.*, 17 E.A.D. 434 (EAB 2018) ("*Gen. Elec. I*"), Pet.Add.254-405. In that decision, the Board set aside a key provision challenged by GE – a permit condition requiring GE to transport all sediments and soils excavated during the Rest of River remedy to an out-of-state disposal facility, rather than disposing of them at a facility located within the Rest of River site. The Board held that the EPA Region committed "clear error" in setting that disposal requirement, and it therefore remanded that requirement to the Region for reconsideration. *Id.* at 569, Pet.Add.389.

On remand, the EPA Region held mediated negotiations with GE, the six Massachusetts municipalities through which the Rest of River flows (Pittsfield, Lenox, Lee, Stockbridge, Great Barrington, and Sheffield), the State of Connecticut, and several other stakeholders (the Berkshire Environmental Action Team, the Massachusetts Audubon Society, and C. Jeffrey Cook, a local property

owner). The Region then executed a Settlement Agreement with all of those parties (the "Settlement Agreement") setting forth a proposed revised cleanup remedy for the Rest of River. That proposed remedy included a "hybrid" disposal approach that differed from both the all-off-site disposal approach that EPA had selected in the 2016 Permit (and that the Board vacated and remanded) and the all-on-site disposal approach that GE had previously advocated. That "hybrid" approach involves off-site disposal of the most contaminated sediments and soils and on-site disposal of the remaining, less contaminated materials in a disposal facility utilizing state-of-the-art design and construction features. A.R.643538, J.A.___-___.

The Settlement Agreement did not bind the EPA Region to issue a final revised RCRA permit in accordance with the terms of the Agreement. Rather, it expressly acknowledged that a revised permit would be "subject to a regulatory public comment process," and provided that the parties to the Agreement "agree not to challenge the Revised Permit ***unless*** it is inconsistent with the terms of this Settlement Agreement." *Id*. at 2, 3, J.A.___, ___ (emphasis added).

Following the execution of the Settlement Agreement, the EPA Region issued a draft Revised Permit, which included the proposed new "hybrid" disposal approach described above. After receiving hundreds of public comments, the Region responded in detail to the comments received and issued the final Revised

Permit, which reflects the hybrid disposal approach as well as certain other refinements to the 2016 Permit. That Revised Permit is supported by GE and the other parties to the Settlement Agreement.

However, Petitioners HRI and the Housatonic Environmental Action League ("HEAL") challenged the Revised Permit in the Board. The Board carefully considered Petitioners' challenges, including their objections to hybrid disposal, and, after briefing and oral argument, rejected those objections in full. *In re General Electric Co.*, 18 E.A.D. 575 (EAB Feb. 8, 2022) ("*Gen. Elec. II*"), slip op. in Pet.Add.406-530.[2] The EPA Region then notified GE, that, given the Board's decision, the Revised Permit represented EPA's final permit decision, which became enforceable and effective on March 1, 2022. Pet.Add.108.

In their opening brief ("Pet.Br."), Petitioners advance two primary types of objections to the Revised Permit – one procedural and one substantive. First, they challenge the Region's decision to engage in negotiations with GE, the local municipalities, and other parties prior to issuing a proposed revised permit. This procedural objection is contradicted by longstanding EPA practice and judicial precedent showing that it is valid for agencies to employ negotiation as part of their process for selecting a proposed action that is then subject to public comment.

[2] Although the Board's February 8, 2022 decision has now been published, it is cited in this brief, for ease of reference, to the slip opinion provided in the Addendum to Petitioners' Brief.

Second, Petitioners contend that the Region's selection of the remedy specified in the Revised Permit was arbitrary and capricious. To prevail on that challenge, they would need to show that the Region reached an irrational decision based on the evidence or failed to explain its decision in light of that evidence. Petitioners have not come close to carrying that heavy burden; indeed, they have ignored significant aspects of the record and significant parts of the Region's and the Board's explanations for why the Revised Permit, including the portions challenged by Petitioners, reflects a reasonable exercise of agency decisionmaking.

Both of these points are demonstrated in the Brief of U.S. Environmental Protection Agency ("EPA.Br.") and shown further in the present brief for GE.[3] The Court should therefore deny the petition for review.

STATEMENT OF THE CASE

A. Consent Decree

The 2000 Consent Decree embodied a comprehensive settlement of responsibility for the cleanup of the GE-Pittsfield/Housatonic River Site, including the Rest of River. A.R.9420, J.A.___-___. For most areas of that site, the Consent Decree specified the remediation to be undertaken. For the Rest of River, however, the Consent Decree established a *process* for selection of a remedial

[3] On several points, particularly relating to procedural defects in Petitioners' arguments, this brief relies on and cross-references to EPA's brief.

action in accordance with an earlier version of the RCRA permit that was incorporated into the Consent Decree ("CD-Permit"). A.R.38267 at 56-83, J.A.___-___, reissued in 2007, A.R.280170, J.A.___-___.

The CD-Permit specified that GE would evaluate remedial alternatives based on nine enumerated criteria, and that EPA would evaluate and address those criteria in selecting the Rest of River remedial action. CD-Permit Conditions II.G, II.J, J.A.___-___, ___-___.[4] The Consent Decree also required EPA to propose a Rest of River remedial action in the form of a draft modification of the CD-Permit. Consent Decree ¶ 22.n, J.A___; CD-Permit Condition II.J, J.A.___-___. After taking public comments, EPA would issue its final modification of the CD-Permit specifying the Rest of River remedial action. Consent Decree ¶ 22.p, J.A.___; CD-Permit Condition II.J, J.A.___-___. The Consent Decree stated that the final modification of the CD-Permit would be appealable to the Board under 40 C.F.R § 124.19, and then to this Court under Section 7006(b) of RCRA, 42 U.S.C. § 6976(b). Consent Decree ¶¶ 22.q, 141.b(ii)&(iii), J.A.___-___, ___-___. The

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

Consent Decree requires GE to implement the remedial action specified in the final modification of the CD-Permit under CERCLA. Consent Decree ¶ 22.w, J.A.____.

Under the Consent Decree, GE, in cooperation with EPA, invested hundreds of millions of dollars to clean up the first two miles of the River, beginning at the former GE Pittsfield facility, and to remediate numerous areas at the GE facility, several nearby areas, and properties in the floodplain adjacent to the first two miles of the River.[5] Those cleanup activities are now complete. As EPA has recognized and the Board noted, the cleanup actions for the first two miles of the River "have been found to be 'remarkably successful.'" *Gen. Elec. II,* slip op at 12, Pet.Add.418, quoting *Gen Elec. I*, 17 E.A.D. at 511, Pet.Add.331.

B. Initial Modified Permit and First Appeal to the Board

In October 2016, the EPA Region issued the 2016 Permit selecting a cleanup remedy for the Rest of River. A.R.593921, J.A.___-___. The 2016 Permit was challenged in the Board by GE and several other parties, including Petitioner HRI and five Massachusetts municipalities downstream of Pittsfield through which the Rest of River flows.[6] In its January 2018 decision, the Board rejected the

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[5] *See* EPA, *EPA Cleanups: GE-Pittsfield/Housatonic River Site*, https://www.epa.gov/ge-housatonic/cleaning-housatonic#WhyCleanUp (last updated Feb. 18, 2022).

[6] Those five municipalities, which consist of the Towns of Lenox, Lee, Stockbridge, Great Barrington, and Sheffield, have formed the Housatonic Rest of River Municipal Committee, which is a respondent-intervenor in this appeal.

challenges to the 2016 Permit brought by HRI, the municipalities, and other groups. *See generally Gen. Elec. I*, 17 E.A.D. 434, Pet.Add.254 *et seq*. It also upheld the 2016 Permit against GE's arguments except in two respects. Most notably, after reviewing GE's challenge to the 2016 Permit's requirement of out-of-state disposal of sediments and soil from the Rest of River, the Board held that the EPA Region had committed "clear error" by failing to exercise "considered judgment" in selecting that requirement, and it remanded the disposal requirement to the Region for further consideration. *Id.* at 559-69, Pet.Add.379-89.

C. Activities on Remand

Following the Board's decision, and with notice to the public, the EPA Region engaged in mediated negotiations with GE, the six municipalities in the Rest of River, the State of Connecticut, and other stakeholders, as described above.[7] The parties entered into those negotiations "with the objective of identifying whether there was one negotiated resolution of the permit dispute before the [Board] that would result in a protective cleanup that is more comprehensive and faster, that minimizes the disputes and litigation going forward concerning the cleanup, and that is consistent with the overall Consent Decree for the Site." Settlement Agreement, A.R.643538, at 2, J.A.___. The parties to the

[7] As discussed further below, HRI and HEAL ultimately elected not to participate in those negotiations.

mediated negotiations ultimately agreed that there was such a resolution, and accordingly executed a Settlement Agreement, effective in February 2020, which included agreement on a number of issues, including the hybrid approach to disposal of excavated sediments and soils. In July 2020, the EPA Region issued a draft of a Revised Permit incorporating elements of the Settlement Agreement and requested public comment on the draft Revised Permit. A.R.647214, text in J.A.___-___.

The EPA Region explained its reasons for proposing the draft Revised Permit in a *Statement of Basis for EPA's Proposed 2020 Revisions to the Remedial Action for the Housatonic River "Rest of River"* ("Statement of Basis"), A.R.647211, J.A.___-___, and a *Determination on Remand and Supplemental Comparative Analyses of Remedial Alternatives for the General Electric (GE)-Pittsfield/Housatonic River Site Rest of River* ("Supplemental Comparative Analysis"). A.R.647210, J.A.___-___. Both documents described the differences between the 2016 Permit and the Revised Permit. The Supplemental Comparative Analysis also analyzed the proposed Rest of River remedial action under the nine remedy evaluation criteria specified in the CD-Permit. That analysis included a detailed comparison with alternatives that were not selected.

D. Final Revised Permit

On December 16, 2020, the EPA Region issued the final Revised Permit. A.R.650440, Pet.Add.111.[8] It was accompanied by a lengthy statement of the Region's responses to the public comments ("Response to Comments"). A.R.650441, J.A.___-___.

As noted above, the Revised Permit specifies a hybrid disposal approach for sediments and soils removed from the Rest of River. Under the hybrid approach, GE is required to send the material with the highest PCB concentrations to an off-site licensed disposal facility, and to construct, for the remaining material, an Upland Disposal Facility in a previously disturbed industrial area associated with a former sand and gravel operation, located over 1,000 feet from the River, outside the 500-year floodplain, and over 15 feet above the groundwater table. The Upland Disposal Facility will be used for the disposal of excavated sediments and soils that meet certain Acceptance Criteria stated in the Revised Permit. Revised Permit, Section II.B.5.a.(1), Pet.Add.169. In particular, the Acceptance Criteria prescribe that materials may be placed in that facility only if they contain average PCB concentrations below certain specified thresholds – 50 parts per million

[8] The Rest of River segments or reaches subject to the Revised Permit are shown on Figures 1 and 2 of the Revised Permit, Pet.Add.203-04, and on a figure in EPA's brief at 10.

("ppm") for soils from a given area or 25 ppm for sediments from a given river reach.[9] Revised Permit, Attachment E, Pet.Add.250-53.

The Revised Permit also establishes numerous engineering requirements for the Upland Disposal Facility to ensure that it constitutes a state-of-the-art facility where "the lower levels of contaminated soils and sediments will be sequestered in a proven, engineered containment cell." Response to Comments at 11, J.A.___. For that purpose, the facility must: (1) have a maximum design capacity of 1.3 million cubic yards and adhere to certain areal and height limitations; (2) be constructed with a double liner that has low permeability and a specified minimum thickness and is chemically compatible with PCBs; (3) have a bottom liner installed a minimum of 15 feet above a conservative estimate of the seasonally high groundwater elevation; (4) include primary and secondary systems to collect leachate (the liquid that percolates downward from the deposited materials); (5) be capped with a low-permeability cap and vegetation to reduce the infiltration of water from precipitation and to prevent contact with the waste material; and (6) be subject to long-term groundwater monitoring. *Id*. Section II.B.5, Pet.Add.169-71.

[9] The average PCB concentration for material from a given area or river reach is to be calculated as a volume-weighted average, which is the average concentration weighted by the volume of each batch of material that goes into the total for that area or reach.

These safeguards are designed to ensure that the Upland Disposal Facility will safely contain the PCB contaminants in the excavated materials placed there. In fact, as the Region explained, "[c]ommercial landfills permitted to accept much higher levels of PCBs than those to be disposed in the [Upland Disposal Facility] are built to the same or similar design standards prescribed for the [Upland Disposal Facility]." Response to Comments at 13, J.A.___.

The Revised Permit further specifies that all excavated sediments and soils that do not meet the Acceptance Criteria for placement in the Upland Disposal Facility – in particular, those that contain an average PCB concentration of more than 50 ppm for soils from a given area or 25 ppm for sediments from a given river reach – must be transported to a licensed out-of-state landfill. *Id*. Section II.B.6, Pet.Add.172. Further, at least 100,000 cubic yards of sediments and soils must be sent to such an out-of-state landfill. *Id*.

In addition to addressing disposal, the Revised Permit requires the removal of more PCB-containing sediments and soils from the Housatonic River and floodplain than the 2016 Permit. *See* EPA's Supplemental Comparative Analysis at 8-10, J.A.___-___. It also requires that the sediments removed from certain portions of the river near the Upland Disposal Facility be pumped hydraulically to that facility, if feasible. Revised Permit Sections II.B.2.c.(2)(b), II.B.2.d.(2)(c), and II.B.2.e.(2), Pet.Add.140, 142, 143. Use of hydraulic pumping would significantly reduce the

number of truck trips necessary to carry sediments from the river to the Upland Disposal Facility, thereby reducing local truck traffic and the risk of traffic accidents. Further, the Revised Permit requires GE to remove a dam and the remnants of another dam and to remove sediments that have accumulated in the ponded waters above those dams, improving the river habitat and eliminating the risk of dam failure. *Id*. Section II.B.2.f.(1)(d), Pet.Add.144. Finally, the Revised Permit reflects GE's agreement to commence investigation and design work on the Rest of River remedial action in February of 2020 and to continue that work during the pendency of any appeals by others, thus expediting the Rest of River remedial action. *Id*. Section I.A.2, Pet.Add.120-121. Consistent with that commitment, GE has begun and is currently conducting that work.

The Revised Permit is otherwise generally the same in substance as the 2016 Permit. In particular, the two components of the Revised Permit that are challenged by Petitioners here other than hybrid disposal are identical to those contained in the 2016 Permit. Those are: (1) the Revised Permit's specification of the remedy of monitored natural recovery for several downstream reaches of the river, where PCB concentrations are much lower;[10] and (2) the EPA Region's decision not to

[10] As defined in the Revised Permit, monitored natural recovery is a remedy for contaminated sediment that uses ongoing, naturally occurring processes to contain, destroy, or reduce the bioavailability or toxicity of contaminants in sediment, and requires monitoring of surface water, sediment, or biota to see if recovery is occurring at the expected rate, and the maintenance of institutional controls until

incorporate specific treatment technologies for removed materials (namely, thermal desorption and bioremediation) into the remedy.

Most of the parties that participated in the prior appeal – including the five municipalities that comprise the Rest of River Municipal Committee (identified in note 6 on page 8, *supra*), the City of Pittsfield, the State of Connecticut, the Berkshire Environmental Action Team, the Massachusetts Audubon Society, C. Jeffrey Cook, and GE – support the remedy specified in the Revised Permit.[11] In addition, the Commonwealth of Massachusetts stated in comments to EPA that it has no objection to the Revised Permit. A.R.649382, J.A.___-___.

E. Second Appeal to the Board

In January 2021, Petitioners HRI and HEAL appealed the Revised Permit to the Board, challenging the hybrid disposal approach, the EPA Region's decision not to require treatment of removed materials, and the adoption of monitored natural recovery for some river reaches. After briefing and oral argument, the Board issued its decision in February 2022, rejecting Petitioners' arguments in their entirety. *Gen. Elec. II*, Pet.Add.406-528. The Board's decision comprehensively analyzed all of

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the necessary reductions have occurred. Revised Permit Definition 21, Pet.Add.118. The Revised Permit specifies that remedy for portions of Reach 7 and all of Reaches 9 through 16. *Id*. Section II.B.2.h, Pet.Add.148.

[11] That support was either stated in comments on the draft Revised Permit or through execution of the Settlement Agreement, or both.

Petitioners' arguments against the hybrid disposal approach and concluded that Petitioners had failed to show that the Region erred in adopting that approach. In particular, the Board rejected Petitioners' contentions that EPA had arbitrarily reversed its position from the 2016 Permit on several issues relating to disposal, including compliance with EPA's regulations under the Toxic Substances Control Act ("TSCA"). With regard to Petitioners' other challenges, the Board held that those claims were simply reiterations of arguments made and lost in the prior appeal and thus not properly before the Board following the remand.

Petitioners then filed their petition for review in this Court.

STANDARD OF REVIEW

Section 7006(b) of RCRA, 42 U.S.C.§ 6976(b), which provides jurisdiction for this Court's review of the Revised Permit, states that "[s]uch review shall be in accordance with sections 701 through 706 of Title 5," the judicial review provisions of the Administrative Procedure Act ("APA").

Under the APA, as this Court has held, the Court may overturn EPA's action only if that action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), quoted in *City of Taunton v. EPA*, 895 F.3d 120, 126 (1st Cir. 2018), and *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 20 (1st Cir. 2012). *See also City of Pittsfield v. EPA*, 614 F.3d 7, 10 (1st Cir. 2010). This Court has further recognized that,

under the Supreme Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), a court may not overturn a challenged agency action as arbitrary and capricious unless the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Quoted in *City of Taunton*, 895 F.3d at 126, and *Upper Blackstone*, 690 F.3d at 20.

With respect to Petitioners' argument that EPA has unlawfully changed its position from that taken in connection with the 2016 Permit, the Supreme Court held in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009), that a change in agency policy complies with the APA when the agency provides a "reasoned explanation" for its revised position, including showing that "the new policy is permissible under the statute" and that there are "good reasons" for it. Subsequently, in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016), the Supreme Court again stated that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." Likewise, in *Emhart Industries, Inc. v. United States Dep't of Air Force*, 988 F.3d 511 (1st Cir. 2021), this Court upheld a CERCLA settlement agreement specifying a remedy for the Centredale Superfund Site in Rhode Island even though it

incorporated response actions previously found to be arbitrary, where EPA subsequently provided an adequate explanation of its reasons for including those response actions.[12]

This Court has further explained that, in cases such as this one, where the Court is reviewing an EPA permit that has previously been upheld by the Board, the Court's deference to EPA "goes to the entire agency action, which here includes *both the EPA's permitting decision and the [Board's] review and affirmance of that decision*." *City of Taunton*, 895 F.3d at 126 (emphasis added) (quoting *Upper Blackstone*, 690 F.3d at 20). Thus, this Court has indicated that, in such an appeal, it will consider the Board's own standard of review under EPA's regulations in 40 C.F.R. § 124.19(a), which requires petitioners to demonstrate that each of its challenges is "is based on … [a] finding of fact or conclusion of law that is clearly erroneous." 40 C.F.R. §124.19(a)(4)(i). *See City of Pittsfield*, 614 F.3d at 11-12.[13]

Additionally, this Court has pointed out that the deference to the agency is especially great where the issue involves the "scientific and technical nature of the

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[12] The decisions cited by Petitioners on this issue, Pet.Br.19, are consistent with that longstanding rule. They simply indicate that an agency's reversal of course is arbitrary ***if*** it fails to provide good reasons or an adequate explanation for its new determination.

[13] While the above decisions cited a prior version of 124.19(a)(4)(i), that version, like the current version, established a "clearly erroneous" standard.

EPA's decisionmaking." *City of Taunton*, 895 F.3d at 126 (quoting *Upper Blackstone*, 690 F.3d at 20).

SUMMARY OF ARGUMENT

First, Petitioners' claim that the EPA Region's selection of the Rest of River remedial action violated the APA because it was not the result of a proper administrative process is unsupportable. The Region carefully evaluated the revised remedy under the applicable remedy evaluation criteria. Then, in accordance with the Consent Decree and established RCRA permit procedures, the Region issued its proposed revised remedy, including its evaluation, for public comment, took public comments on it, and issued a detailed response to the comments received. The fact that the proposal had previously been discussed and agreed to in settlement negotiations among stakeholders (to which Petitioners were invited but declined to participate) does not undermine the validity of the Region's action. As judicial decisions have recognized, such mediated negotiations are a proper and reasonable way for an agency such as EPA to develop a proposed course of action that will then be submitted for public notice and comment.

Petitioners claim that the extensive public proceedings following the proposal of the Revised Permit were a mere "façade" because the EPA Region had "already committed to the remedy in the Settlement." Pet.Br.15. But, as Petitioners conceded before the Board, that contention is incorrect; the Settlement

Agreement did not bind the EPA Region to the remedy. In fact, the Settlement Agreement expressly reflected the possibility that, after the public comment period, the Region might adopt a remedy inconsistent with that Agreement.

Second, the Court should reject Petitioners' argument that the EPA Region acted arbitrarily by selecting a hybrid approach to disposal, in which the most heavily contaminated materials will be sent off-site for disposal and the rest will be disposed of on-site in the Upland Disposal Facility subject to numerous protective safeguards. As an initial matter, Petitioners are wrong to contend that the Region "reverse[d] course" or made an "about-face" from the 2016 Permit. *See* Pet.Br.19, 24. In 2016, the Region had considered two all-or-nothing options – either ***all on-site*** disposal or ***all off-site*** disposal – before selecting the latter. In the Revised Permit, the Region considered and selected a new option, ***hybrid*** disposal, that it had not previously considered in 2016.

Further, Petitioners give short shrift to a significant reason why the Region reconsidered its original disposal decision – namely, that the Board directed the Region to reconsider because it held that the Region's reasons for initially choosing all off-site disposal were clearly erroneous. And, as the Board found, the Region's reasoning was much stronger the second time: "[I]n issuing the 2020 Permit the Region jettisoned the conclusory and inconsistent reasoning underlying the 2016 Permit's selection of off-site disposal in favor of a careful analysis of the

degree of protection provided by the design requirements of the Landfill (including the reduced PCB levels it will contain)." *Gen. Elec. II,* slip op. at 67, Pet.Add.473. It is clearly not arbitrary for an agency to adopt a new approach after its initial decision has been reviewed and found wanting and after completing a more consistent and more probing analysis of the issue.

In any event, as controlling precedent dictates, an agency may validly change course if it acknowledges that it is making a new decision and rationally explains its new approach. Here, the EPA Region expressly acknowledged that it was adopting a different approach to disposal than it had in 2016 and exhaustively explained its reasoning, including its decision to waive a state regulation that would have prohibited on-site disposal at the selected location, as CERCLA expressly authorizes EPA to do. While Petitioners have made plain that they disagree with the Region's policy determination regarding disposal, they have not come close to showing that that decision was irrational or unexplained.

Third, Petitioners' challenge to the EPA's Region's specification of monitored natural recovery for certain downstream reaches of the river is unsupportable. The Region provided several reasons for its adoption of monitored natural recovery for these river reaches (an issue within its technical expertise); and, as the Board found, Petitioners did not show that those reasons were inappropriate or erroneous. Further, contrary to Petitioners' contentions, the

Revised Permit includes performance standards that apply to the reaches subject to monitored natural recovery, establishes time frames for the achievement of those performance standards, and provides for contingency actions if those standards are not met within the prescribed time frames.

Fourth, Petitioners' challenge to the EPA Region's decision not to require specific types of treatment (namely, thermal desorption or bioremediation) for the removed sediments and soils is without merit. As to thermal desorption, apart from procedural defects in Petitioners' claim, that technology was fully evaluated by the Region, which provided a detailed rationale for rejecting it – a decision well within its technical expertise. As to bioremediation, the Region presented several reasons for rejecting that technology as well, and Petitioners have not shown that those reasons were erroneous. Finally, Petitioners' claim that the Revised Permit violates CERCLA's preference for treatment is wrong. The Revised Permit does provide for some treatment, although not using the technologies favored by Petitioners. Moreover, CERCLA requires only that a remedy include treatment technologies "to the maximum extent practicable" and that EPA issue an explanation if it does not choose such a technology. The EPA Region met that requirement here.

ARGUMENT

I. The EPA Region Followed Proper Procedures in Issuing the Revised Permit.

Petitioners' first argument is that the EPA Region's remedy selection, including the on-site disposal component of the hybrid approach, was not the result of a proper administrative process, but rather the result of private closed-door settlement discussions in which there was no public input. Pet.Br.20-24. They claim that the public comment period was a meaningless "façade" because the Region had already agreed to the revised remedy in the Settlement Agreement. *Id*. at 15. These claims are baseless.

A. The Region's Use of Mediation to Develop a Proposed Remedy Prior to Issuing it for Public Comment Was Appropriate.

To begin, as the Board pointed out, the record shows that the EPA Region carefully considered and evaluated the revised remedy, including the hybrid disposal approach, under the nine remedy evaluation criteria set out in the CD-Permit, both on its own and in comparison with other alternatives. *See Gen. Elec. II,* slip op. at 94, Pet.Add.500. The Region described its evaluation in detail in both its Supplemental Comparative Analysis (at 27-39, J.A.___-___) and its Statement of Basis (at 28-35, J.A.___-___). Then, in accordance with the Consent Decree and the established procedures for modifying a RCRA permit, the Region proposed its revised remedy, including the hybrid disposal approach, along with its

evaluation under the applicable criteria, for public comment in the draft Revised Permit. The Region took public comments on the draft Revised Permit and issued a response to the comments, including a detailed response to the comments on the hybrid disposal alternative and the Upland Disposal Facility. *See* EPA's Response to Comments at 11-22, J.A.___-___. Thus, EPA fully complied with RCRA's public participation requirements, and Petitioners do not contend otherwise. *See also* EPA.Br.27-28.

Petitioners' procedural challenge focuses instead on the fact that the proposed remedy, including the hybrid disposal approach, was previously discussed in mediated settlement negotiations and specified in the February 2020 Settlement Agreement. Petitioners, however, do not identify any statute, rule, or precedent that casts doubt on an agency's authority to use mediated discussions as a mechanism to inform the agency's deliberations on what permit proposal to adopt and put forward for public comment. To the contrary, both EPA and other federal agencies have long used such mediated discussions to develop proposed rules or other agency actions for public comment. Far from endorsing anything like Petitioners' procedural arguments, courts have blessed those efforts as being consistent with the APA, so long as the proposed decision was then subject to notice and comment, with the potential that the agency could change its mind.

For example, in an analogous situation, the court in *Ass'n of National Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1173 (D.C. Cir. 1979), stated:

> "This court has never suggested that the interchange between rulemaker and the public should be limited prior to the initiation of agency action. The period before the Commission first decides to take action on a perceived problem is, in fact, the best time for a rulemaker to engage in dialogue with concerned citizens.… [A]n expression of opinion prior to the issuance of a proposed rulemaking does not, without more, show that an agency member cannot maintain an open mind during the hearing stage of the proceeding."

See also NRDC v. EPA, 859 F.2d 156, 194-95 (D.C. Cir. 1988) (*per curiam*) (recognizing that, after EPA reached a settlement agreement requiring it to propose a certain rule, it was free to change its mind based on comments); *Action for Children's Television v. FCC*, 564 F.2d 458, 470-78 (D.C. Cir. 1977) (rejecting an argument that an agency was required to solicit comments on a proposal made during a closed-door meeting, so long as it took and considered comments on the ultimate proposed rule).

In this case, it was entirely reasonable for the EPA Region to engage in mediation. As the Board noted, EPA policy strongly supports use of such alternative dispute resolution procedures, and the Board itself has successfully used such negotiated procedures to resolve other permitting disputes. *Gen. Elec. II,* slip op. at 96 n.46, Pet.Add.502. Further, as the Board also recognized, the Region's prior experience before the Board – when multiple parties sought review and the Board rejected the Region's initial disposal decision – underscored the litigation

risks that the Region faced and sought to mitigate through a negotiated resolution. *See id*. at 96-97, Pet.Add.502-03. That is particularly true in this case where the mediation involved not just the permittee, but also numerous other stakeholders, including governmental parties and environmental organizations, with an interest in the remedy.

In addition, Petitioners' procedural challenge to the Region's decision to pursue settlement through mediation conflicts with the principle that, in the absence of a specific statutory or regulatory prohibition, agencies are free to follow their own procedures, subject to the APA's minimum requirements. As the Supreme Court stated in *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 101-02 (2015):

> "Time and again, we have reiterated that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.' [Quoting *Fox Television*, 556 U.S. at 513.] Beyond the APA's minimum requirements, courts lack authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.' [Quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978).] To do otherwise would violate 'the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.' *Id*., at 544,...."[14]

Petitioners identify nothing in the APA or any other statute that precluded the Region from opting to engage in mediated discussions. It follows that the Region

[14] This statement in *Perez* was focused on the APA's rulemaking requirements, but the *Fox* case cited in *Perez* concerned an arbitrary and capricious challenge to an enforcement order.

was free to engage in such discussions, and free to propose a permitting decision following a Settlement Agreement reached as a result of those discussions. The Region did, of course, need to seek public input on its proposed decision, consistent with the prescribed Consent Decree and RCRA permit process. The Region did that and more.

As the Board noted, the Region gave notice of the public comment period by a press release on its website and e-mailed notice to all members of its Citizen Coordinating Council (which include Petitioners), with links to the Draft Permit and Statement of Basis, as well as to all persons on its mailing list and by numerous newspaper, radio, and on-line advertisements; and it held three public hearings lasting over 10 hours. *Gen. Elec. II,* slip op. at 33, Pet.Add.439; *see also* Response to Comments at 3-7, J.A.___-___ (describing opportunities for public comment on draft revised permit). As EPA's brief explains, the Region exceeded the requirements of applicable law in offering these opportunities for comment. EPA.Br.18-20.

The cases cited by Petitioners for their procedural argument, Pet.Br.21, are not relevant. Those cases concern settings where an agency acts in a "quasi-adjudicatory" capacity, in the manner of a judge, and thus must adhere to due process standards similar to those that apply to a judge. As the D.C. Circuit has explained, these adjudicatory standards have no application when an agency is

putting out a proposal for public comment. *Ass'n of National Advertisers*, 627 F.2d at 1173. That makes sense because when an agency issues a proposal for public comment, the agency is not in a "neutral" posture. The agency has already made a tentative decision and is announcing what it thinks is the right thing to do. To be sure, the agency must respond to the comments that it receives and, if the agency adheres to its original position, it must rationally explain why any comments opposing its proposal did not persuade the agency to change its mind. In this case, as we show in Section II and as the Board found, the EPA Region did just that. The APA did not impose further procedural requirements on the Region. *See Perez*, 575 U.S. at 101-02.

In addition to attacking negotiated rulemaking procedures generally, Petitioners seek to cast aspersions on GE's conduct. Specifically, Petitioners assert that GE threatened in the settlement discussions that, if others did not agree to on-site disposal, it would tie up remediation of the Housatonic for decades and there would be three on-site disposal facilities. Pet.Br.21-22. Petitioners do not provide any factual support for that false accusation. They cite two items in the record, but neither supports their claim. *Id*. at 22 n.8. The first is a statement by a municipal official that selectmen were "concerned" that, in the absence of a settlement, litigation could drag on and could result in three landfills rather than one. That statement says not a word about GE's conduct in the negotiations. The second

item is an EPA presentation which touts as a benefit of settlement that it would eliminate the risk of three disposal sites. AR644044 at 8, J.A.___. That presentation likewise says nothing about GE's conduct or any "threats." In short, these materials do not in any way indicate that GE ever made the threats asserted by Petitioners – and the fact is that GE did not. At most, these materials indicate that public officials were weighing a range of possible litigation outcomes and that one benefit of settlement is that it would ensure that there would be only one local disposal site.

In the end, both the public officials and the other parties to the Settlement Agreement recognized that the agreed-upon measures "would achieve a cleanup that is protective, faster, and more comprehensive" than continued disputes. Settlement Agreement, A.R.643538, at 2, J.A.___. And, in fact, GE agreed to and has continued to work on cleanup activities during the pendency of Petitioners' appeals, despite the litigation-related uncertainty, to avoid delay.

Petitioners also briefly suggest that the procedure followed by the Region violated a provision of the Consent Decree that requires public notice and comment on "any proposal" prior to dispute resolution. Pet.Br.20. The Board correctly recognized that this provision is "inapposite." *Gen. Elec. II,* slip op. at 99 n.47, Pet.Add.505. As the Board explained and as described in EPA's brief, the cited provision of the Consent Decree relates to a specific unique procedure

requiring EPA to notify GE of its intended final Rest of River decision for potential dispute resolution before issuing the final permit. Consent Decree ¶ 22.o, J.A.___; *see* EPA.Br.13, 30. It does not relate to or affect the general procedure for developing a Rest of River remedy and issuing it for public comment, which the Region followed here.

Petitioners' claim that CERCLA and EPA's CERCLA regulations in the National Contingency Plan require "adequate opportunities" for public involvement in the remedy selection and an opportunity for public comment before a remedy is adopted, Pet.Br.20, likewise does not help their case. Consistent with CERCLA and the National Contingency Plan, the EPA Region provided the requisite opportunity for public comment on the proposed Revised Permit before issuing a final permitting decision, and in fact, as discussed above, provided extensive notice and opportunity for comment on its proposal. Nothing in CERCLA or the National Contingency Plan required the EPA Region to take public comment before it entered into negotiations or proposed a Revised Permit. In fact, the CERCLA provision cited by Petitioners, 42 U.S.C. § 9617, clearly distinguishes between EPA's publication of a "proposed plan" and its adoption of a "final plan," and makes clear that the "reasonable opportunity" for public comment that must be provided is "regarding the proposed plan," not regarding steps prior to the publication of that proposal.

B. Petitioners' Supporting Arguments Have No Basis in Fact.

Petitioners contend that the EPA Region "became contractually committed" to the Upland Disposal Facility "in the Settlement." Pet.Br.24. That is untrue. In fact, in the Board, Petitioners "admit[ted] that Settlement Agreement did not legally constrain [the] Region in how it modified [the] 2016 Permit." *Gen. Elec. II,* slip op. at 93, Pet.Add.499.

Petitioners' concession before the Board was correct and consistent with the terms of the Settlement Agreement, which expressly states that the Revised Permit "will be subject to a regulatory public comment process" and that "the Parties agree not to challenge the Revised Permit unless it is inconsistent with the terms of this Settlement Agreement." Settlement Agreement at 2-3, J.A.___-___. These words reflect the parties' understanding that the Region might ultimately adopt a remedy different from the one described in the Settlement Agreement.

There is also no basis to Petitioners' contention that they were "exclude[d]" from the settlement discussions. Pet.Br.10, 21. Petitioners made their own decision not to participate. As noted in EPA's brief, HRI participated in at least two initial settlement meetings. EPA.Br.16. Thereafter, as Petitioners concede, HRI refused to take part in any discussions that involved consideration of on-site disposal, and both HRI and HEAL refused to participate in any settlement negotiations that took place on a confidential basis. Pet.Br.10 n.6. Having decided

not to participate in the discussions unless their pre-conditions were met, Petitioners have no standing to complain that the talks went forward without them.

Petitioners also contend that the Settlement Agreement was improper because it included payments to the local municipalities and others. Pet.Br.22. This is an odd position because many settlements, including those entered into by governmental entities, involve monetary commitments of some kind. The inclusion of such payments is irrelevant to the question here, which is whether the Revised Permit issued by the EPA Region is consistent with the requirements of federal law. In a broad sense, Petitioners' contention suggests that federal agencies should not participate in a multi-party settlement agreement that includes an exchange of money between non-federal parties, but they do not cite any authority for that proposition or identify any relevant limitation in the APA or any other statute. What is germane here is that the Region selected the remedy after engaging in the required public comment process and receiving the input of various stakeholders, and that its decision was well-explained. The financial contributions that GE agreed to provide do not make the selected remedial action any more or less protective, and they do not undercut the appropriateness of the procedure followed by the Region or the reasonableness of its decision.

Finally, we note that the Region's decision not to grant a second extension of time for public comments on the proposed remedy, which Petitioners complain

about (Pet.Br.23-24), fell well within the Agency's discretion and does not show arbitrary EPA action.[15] There is no basis for the unsupported assertion that this was done to allow the Revised Permit to be issued before the end of the Trump Administration.

II. The EPA Region Provided a Reasoned Explanation for Its Selection of a Hybrid Disposal Approach.

Petitioners argue that the EPA Region acted in an arbitrary, capricious, and unlawful manner by providing for the on-site disposal of a defined subset of soils and sediments when it previously had rejected an all-on-site disposal option, without any significant change in the underlying facts. Pet.Br.24-25. This argument is both belied by the facts and unsupportable under the applicable law.

As described above, unlike the 2016 Permit, which required all off-site disposal, the Revised Permit prescribes a hybrid disposal approach, which requires off-site transport and disposal of the most contaminated sediments and soils and provides for on-site disposal of the remainder in a state-of-the-art disposal facility in a previously disturbed industrial area. The Region did not consider a hybrid approach in 2016; it considered only all-or-nothing approaches that would have

[15] As explained in EPA's Response to Comments, the Region initially established a 45-day public comment period, which is what is required for draft RCRA permits by EPA's regulations in 40 C.F.R. § 124.10(b)(1), and then, in response to public comments, extended the period for another 21 days. Response to Comments at 3, J.A.___. The extension denied would have been a second extension.

sent excavated materials entirely to an on-site landfill or entirely to an off-site landfill located outside Massachusetts. This alone represented a significant change in facts.

Further, as the Board made clear, the Region's reevaluation of the on-site disposal issue and subsequent adoption of the hybrid disposal approach was not the Region's decision *sua sponte*, but was triggered by the Board's prior determination that the Region had "clearly erred" in selecting the all-on-site disposal option in the 2016 Permit by failing to exercise "considered judgment." *See Gen. Elec. II,* slip op. at 57, Pet.Add.463. Thus, insofar as this approach reflected a change in the Region's position regarding on-site disposal, it was a response to the Board's decision and its remand to the Region to reevaluate disposal alternatives.

Moreover, the EPA Region provided an extensive justification and explanation of the reasons for its decision on remand to adopt the hybrid disposal approach. This explanation was provided in several supporting documents – notably, the Region's Statement of Basis at 8, 13-14, and 28-35 (J.A.___, ___-___, ___-___), its Supplemental Comparative Analysis at 24-40 (J.A.___-___), and its Response to Comments at 11-22 (J.A.___-___). That is more than sufficient to uphold the new determination under the applicable standard specified in the Supreme Court's decisions in *Fox* and *Encino*, as well as under this Court's *Emhart* decision, all as described in the Standard of Review section of this brief.

Petitioners' criticisms of the Board's decision do not change that conclusion. In attempting to bolster their claim that there was no material difference between the type of landfill rejected in 2016 and that adopted in 2020, Petitioners assert that the Board incorrectly stated that the Upland Disposal Facility will accept only waste with PCB concentrations less than 50 ppm, whereas the Revised Permit specifies that the Upland Disposal Facility will receive materials with ***average*** PCB concentrations less than 50 ppm (or 25 ppm for sediments), thus allowing receipt of some individual material with higher concentrations. Pet.Br.25-26. In fact, however, the Board expressly recognized in several places that, under the Revised Permit, the only materials that will be sent to the Upland Disposal Facility are materials with ***average*** PCB concentrations less than 50 ppm. *Gen. Elec. II,* slip op. at 61, 64, 79, 80, 100, Pet.Add.467, 470, 485, 486, 506. Moreover, as the Board noted, the Region estimated in the Revised Permit that the actual average PCB concentration of the materials to be placed in the Upland Disposal Facility will be 20 to 25 ppm. Revised Permit Attachment D at D-1, Pet.Add.247, cited in *Gen. Elec. II,* slip op. at 61& 80, PetAdd.467, 486.[16]

In any case, this issue did not affect the Board's holding relating to EPA's regulations under TSCA (40 C.F.R. Part 761), which is where the 50 ppm PCB

[16] This finding, which Petitioners neither acknowledge nor challenge, refutes their claim that as much as ***half the material*** to be placed in the Upland Disposal Facility will have PCB concentrations greater than 50 ppm. Pet.Br.26.

concentration is relevant, since those regulations apply to waste materials with PCB concentrations at or above 50 ppm. As the Board explained, following its 2018 determination that the Region's effort to support its off-site disposal requirement based on the TSCA regulations was unsupported, the Region reconsidered the disposal approach and correctly found that the new hybrid disposal approach, including the Upland Disposal Facility, complied with the TSCA regulations by virtue of 40 C.F.R § 761.61(c). *See Gen. Elec. II,* slip op. at 32, 58. Pet.Add.438, 464. That provision allows EPA to approve a disposal method (as it did here) as not posing "an unreasonable risk of injury to human health or the environment" regardless of the PCB concentration of the waste or the technical requirements of EPA's TSCA landfill regulations. Indeed, the Board noted that Petitioners offered no substantive challenge to the Region's determination under that provision of the TSCA regulations (which the Board referred to as a "waiver"). *Id*. at 59 n.31, Pet.Add.465.

Petitioners also argue that the Board improperly relied on an argument that was not made by the Region – that the waste to be disposed of on-site will be low-level contaminated waste. Pet.Br.35.[17] However, the Court need not reach that

[17] As discussed above, the material to be disposed of at the Upland Disposal Facility ***will*** contain low levels of PCBs in that it will consist of materials with average PCB concentrations required to be below 50 ppm for soils and 25 ppm for sediments and, in fact, estimated to be approximately 20-25 ppm.

argument, or address its underlying assumption that the Board may sustain the Region's permitting decision only on the basis of reasons given by the Region. That is because the Board's discussion referenced by Petitioners was not necessary to uphold the Permit's hybrid disposal approach, which was adequately explained and justified by the Region, including by reference to § 761.61(c) of the TSCA regulations, as held by the Board and described above.

A. The EPA Region Acted Reasonably and in Accordance with CERCLA in Addressing a State Regulatory Requirement That Would Have Interfered with the Selected Remedy.

Petitioners argue that the EPA Region impermissibly changed its position on the application of certain state regulations. Pet.Br.26-31. As background, under Section 121(d)(2) of CERCLA, 42 U.S.C. § 9621(d)(2), a remedy selected by EPA is required to attain certain federal and state environmental requirements, known as "applicable or relevant and appropriate requirements," unless waived by EPA on one of the grounds specified in Section 121(d)(4). In this case, the Upland Disposal Facility location selected by the Region is within the boundaries of an "Area of Critical Environmental Concern" designated by the Commonwealth of Massachusetts covering a far larger area of the Upper Housatonic River Basin; and certain state regulations (listed in the Revised Permit as applicable or relevant and appropriate requirements) contain a prohibition on the placement of a landfill within such an area. Here, however, the Region exercised its express statutory

authority to waive that state-law prohibition based on one of the grounds specified in Section 121(d)(4) of CERCLA, 42 U.S.C. § 9621(d)(4) – namely, that compliance with the state regulation would result in "greater risk to human health and the environment" than the approach selected. Revised Permit, Attachment C, at C-10-C-11, Pet.Add.231-32, citing Section 121(d)(4)(B) of CERCLA, 42 U.S.C. § 9621(d)(4)(B).

Petitioners argue that the Region's waiver was an impermissible change in position that was "nonsensical," "illogical," and "arbitrary." Pet.Br.27, 29. That argument should be rejected for the following reasons.

At the outset, as the Board found, Petitioners' challenge to the Region's waiver of the state regulation fails as a procedural matter because they did not raise this issue in comments to the Region, as required by EPA's permit regulations. *See Gen. Elec. II*, slip op. at 73-78, Pet.Add.479-84. *See also, e.g.*, *Upper Blackstone*, 690 F.3d at 33, *City of Taunton*, 895 F.3d at 131-32, and *Padgett v. Surface Transportation Board*, 804 F.3d 103, 109 (1st Cir. 2015), all holding that a party that fails to raise an argument during the public comment period of the permitting process waives the argument in the reviewing court. EPA's brief demonstrates that Petitioners' attempt to circumvent this rule by claiming that their general objection to the Upland Disposal Facility was sufficient to preserve their

objection to the Region's waiver of the state regulation, Pet.Br. 30, cannot stand. EPA.Br.36-39.

In any event, the Region's waiver of this regulation was adequately supported, as the Board also concluded. *Gen. Elec. II,* slip op. at 79-88, Pet.Add.485-94. The Region waived the state regulatory prohibition on the ground that compliance with that regulation would require the disposal of all removed materials elsewhere, which would result in "greater risk to human health and the environment" than the hybrid disposal approach – which is a basis for waiver under Section 121(d)(4)(B) of CERCLA, 42 U.S.C. § 9621(d)(4)(B). Revised Permit, Attachment C at C-10 and C-11, Pet.Add.231-32.

Although the Region had relied on this state regulation in requiring all off-site disposal in 2016, there was a significant change in circumstances since then, because the hybrid approach will limit materials going to the Upland Disposal Facility to those with average PCB concentrations less than the specified levels. Further, following this change, the Region provided a detailed explanation for the waiver in issuing the Revised Permit. *See id*. and the Region's Supplemental Comparative Analysis, Attachment B at B-3 – B-7, J.A.___-___. It noted first that the Upland Disposal Facility area and the surrounding area (even though technically within the boundaries of a much larger Area of Critical Environmental Concern) have already been altered by industrial activities and include two existing

landfills, and it explained that that facility will be designed and built with multiple protective safeguards. *Id*. at B-3, J.A.__. Further, the Region explained that off-site disposal would have inherent risks, including increased truck traffic (with its attendant increase of injuries to transport workers), increased greenhouse gas and other air emissions, and a likely delay in remediation due to appeals. *Id*. at B-4, J.A,___.[18] Finally, the Region noted that the Revised Permit remedy will have numerous other benefits, including an increase in the amount of PCB-containing sediments and soils removed, the removal of dams or dam remnants, the hydraulic pumping of some removed sediments if feasible (thereby reducing local truck traffic), and a more expedited cleanup. *Id*. at B-5 – B-6, J.A.___-___.

As the Board concluded, HRI and HEAL have failed to show that these reasons for the waiver of the state regulation were erroneous. *Gen. Elec. II,* slip op. at 87-88, Pet. Add.493-94. To the contrary, that decision fell well within EPA's waiver authority under CERCLA.

[18] Contrary to Petitioners' contention, Pet.Br.28, nothing in CERCLA requires EPA, in evaluating a potential waiver of an applicable or relevant and appropriate requirement, to look only at risks in the immediate area of the cleanup and disregard risks to other communities. Rather, CERCLA broadly states, without limitation to specific localities, that EPA may waive such a requirement where compliance with it "will result in greater risk to human health and the environment than alternative options." 42 U.S.C. § 9621(d)(4)(B).

B. The EPA Region Fully Justified Its Revised Evaluation of the Applicable Remedy Selection Criteria.

Petitioners argue next that the EPA Region's conclusion that the revised approach involving on-site disposal best satisfied the nine specific CD-Permit criteria was arbitrary and capricious because the Region did not significantly change its assessment of each of the individual criteria from when it reached the opposite overall conclusion in rejecting on-site disposal in 2014. Pet.Br.31-36.

As discussed above, to the extent that the Region's conclusion represented a change from its prior position, the Region acknowledged that, in response to the Board's remand, it was adopting a different approach to disposal than it had in 2016, and it extensively explained its reasoning. This is sufficient to uphold its decision under controlling precedent, including the *Fox* and *Encino* decisions.

Moreover, changes in circumstances fully justified the change in the Region's ultimate conclusion, as the Region explained and the Board affirmed. These included: (1) the adoption of the hybrid disposal approach instead of all off-site disposal in response to the Board's remand; (2) the other benefits of the remedy noted above;[19] and (3) the fact that unlike the prior situation, when Massachusetts and every Berkshire County municipality along the Housatonic

[19] Contrary to Petitioners' argument, Pet.Br.31, it was appropriate, as the Board found, for the EPA Region to take into account the overall benefits of the revised remedy, since the Region was evaluating the Revised Permit as a whole. *Gen. Elec. II,* slip op. at 86, Pet.Add.492.

were opposed to all on-site disposal, all of the Berkshire County municipalities along the Rest of River support the hybrid disposal approach, and the Commonwealth has no objection to it. As both the Region and the Board noted, the support of state and local officials will reduce implementation concerns. *See Gen. Elec. II,* slip op. at 90-91, Pet.Add.496-97.

In short, the EPA Region provided ample justification for its conclusion that the hybrid disposal approach, in combination with the other provisions of the Revised Permit, best meets the CD-Permit's remedy evaluation criteria.[20]

C. Petitioners' Challenge to the Board's Striking of a Post-Comment Period Report Has No Basis.

Petitioners argue further that the Board acted arbitrarily in striking the majority of Dr. DeSimone's geological report, which was not submitted during the public comment period. Pet.Br.36-37. They assert that the substance of that report was included in their comments and that, in any event, such extra-record material can be considered in determining whether EPA "considered all relevant factors" or to "explain technical terms." *Id*. at 36, citing *Ruskai v. Pistole*, 775 F.3d 61, 66 (1st Cir. 2014).

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

As a general rule, a reviewing court will not consider extra-record documents. *See, e.g.*, *City of Taunton*, 895 F.3d at 132, where this Court upheld the Board's decision to strike documents submitted for the first time at the administrative appeal stage.

In this case, the issue of whether the DeSimone report should have been allowed under an exception to that rule is of little practical consequence. Petitioners themselves assert that the substance of the report was included in their comments, and the Region adequately considered in its Response to Comments the subject of the DeSimone Report – the suitability of the soils underlying the Upland Disposal Facility site and the suitability of constructing a disposal facility at that site given the required engineering safeguards. *See* EPA's Response to Comments at 13, J.A.__. Thus, the DeSimone report simply expanded on concerns that had already been raised and that the Region addressed. For that reason, this extra-record report cannot be said to show that EPA failed to consider relevant factors, nor would it aid in explaining technical issues. *See Town of Winthrop v. FAA*, 535 F.3d 1, 15 (1st Cir. 2008), where this Court declined to consider a post-comment declaration under an exception to the rule, because it simply "elaborates on concerns already addressed in the record" and thus would not bear on whether the agency "adequately considered these concerns and reasonably reached the decision it did based on the information it had at the time."

III. Petitioners' Challenge to a Monitored Natural Recovery Remedy for Certain Downstream River Reaches Is Unfounded.

The Revised Permit specifies monitored natural recovery (defined in note 10 on page 14-15, *supra*) as the remedy for several downstream reaches of the River – specifically, the flowing portions of Reach 7 and all of Reaches 9 through 16, including in Connecticut. Revised Permit Section II,B.2.h, Pet.Add.148. Petitioners contend that the specification of monitored natural recovery for these stretches of the River is arbitrary, capricious, and in conflict with CERCLA because it lacks performance standards, timelines for achieving recovery objectives, and mechanisms for a contingent response if monitored natural recovery does not achieve adequate protection. Pet.Br.38-51.

A. Petitioners' Challenge Is Procedurally Defective.

As a threshold matter, Petitioners' challenge is procedurally defective because: (1) when HRI first challenged the monitored natural recovery provisions in its appeal of the 2016 Permit, it failed to explain why EPA's reasons in its Response to Comments for choosing monitored natural recovery for the subject river reaches were erroneous, as required by the Board's rules (*see Gen. Elec. I*, 17 E.A.D. at 538-40, Pet.Add.358-60); and (2) Petitioners' challenge to those provisions in their 2021 appeal was not properly before the Board because HRI had previously raised and lost the same challenge and the monitored natural recovery

provisions were not changed in the Revised Permit (*see Gen Elec. II*, slip op. at 115-18, Pet.Add.521-24).

In addition, Petitioners' specific contention that the EPA Region did not have adequate sampling data to make a decision about monitored natural recovery, Pet.Br.44-45, is procedurally defective because it was not properly raised to the Board. As stated in the Board's 2022 decision, that argument was raised for the first time in the Board in a reply brief in the second appeal, and "we do not consider arguments raised for the first time in reply briefs." *Gen Elec. II*, slip op. at 120, Pet.Add.526. The Board also noted that Petitioners offered nothing but bald assertions regarding the insufficiency of the data and that "unsubstantiated scientific opinions in legal briefs" are given no weight. *Id*. at 121-22, Pet.Add. 526-27. *See City of Pittsfield*, 614 F.3d at 11-12, applying the Board's procedural requirements to this Court's review of an EPA permit that was upheld by the Board on the ground that the petitioner had not met those requirements.

B. Petitioners' Arguments Are Incorrect.

Apart from the procedural defects, each of Petitioners' arguments against the monitored natural recovery provisions of the Revised Permit is wrong.

With respect to their argument about inadequate sampling data, although the data on the reaches subject to monitored natural recovery may be limited, they were sufficient for the Region to conclude that monitored natural recovery was

appropriate for those reaches. As noted in EPA's brief, Petitioners have not explained why the existing data are inadequate for that purpose. EPA.Br.57. As the Region explained in 2016, the reasons for selecting monitored natural recovery for those reaches, including Connecticut, were that PCB concentrations there are much lower and more widely dispersed than in upstream reaches, that the sediment in those reaches is relatively stable, that the human health and ecological risks in those reaches are low, and there was a declining trend in PCB concentrations in fish and benthic invertebrates in those reaches. 2016 Response to Comments, A.R.593922 at 191-92, J.A.___-___. This issue was well within EPA's technical expertise; and as the Board determined in 2018, Petitioners did not show that the Region's reasons were inappropriate or erroneous. *Gen. Elec. I,* 17 E.A.D. at 539, Pet.Add.359.

Petitioners argue next that the monitored natural recovery provisions are unlawful because they do not provide for a degree of cleanup or level of control by setting a performance standard for PCBs in sediments in the reaches subject to that remedy. Pet.Br.45-48. The Board correctly and forcefully rejected this contention, finding that Petitioners' assertions on this score "are simply incorrect." *Gen. Elec. II,* slip op. at 119, Pet.Add.525. The Revised Permit contains general Performance Standards that apply to the overall Rest of River, including the reaches subject to monitored natural recovery. Specifically, Section II.B.1.b.(1) of the Revised Permit

establishes Biota Performance Standards, including a short-term standard of an average PCB concentration of 1.5 milligrams per kilogram ("mg/kg") for fish fillets in each reach of the River, including explicitly each monitored natural recovery reach. Pet.Add.129-30. It also establishes long-term standards of 0.064 mg/kg for fish fillets in each reach in Massachusetts, 0.00018 mg/kg for fish fillets in each reach in Connecticut, and 0.075 mg/kg in duck breast tissue in all areas along the River. *Id*. at 130. In addition, Section II.B.1.a.1 establishes a Downstream Transport Performance Standard limiting the amount of PCBs that can be transported over two dams in the River – Woods Pond Dam and Rising Pond Dam. *Id*. at 127-28. This standard for Rising Pond Dam will reflect PCB concentrations in upstream reaches, including the portions of Reach 7 subject to monitored natural recovery.

Contrary to Petitioners' argument, there is no need or requirement in the Consent Decree or CERCLA for a specific numerical PCB concentration limit or performance standard for sediment or for every portion of the River. In fact, as the Board found, it was reasonable for the EPA Region to rely on fish PCB levels as the best indicator of the condition of the river in the areas subject to monitored natural recovery, since the use of fish tissue concentrations is supported by relevant EPA guidance and since the Region determined that contact with the sediment in those areas does not pose a risk whereas the consumption of fish does. *Gen. Elec.*

II, slip op. at 120, Pet.Add.526. While Petitioners make the unsubstantiated assertion that fish tissue data are a poor marker of contaminant levels, Pet.Br.47, they offer no scientific evidence, and thus no basis to overturn the Region's scientifically grounded conclusion. *See City of Taunton*, 895 F.3d at 126 (courts ordinarily defer to agencies on scientific or technical matters).

Petitioners argue next that the monitored natural recovery provisions lack reasonable timeframes to achieve cleanup objectives. Pet.Br.48-50. In fact, however, the Revised Permit's general Performance Standards contain time frames for attainment. Specifically, the short-term biota performance standard provides that it must be achieved in each river reach "within 15 years of completion of construction-related activities for that reach (or if the reach is subject to Monitored Natural Recovery …, upon completion of the closest upstream reach subject to active remediation)," and that if the standard "is exceeded in any two consecutive monitoring periods after [that] 15-year period," GE must evaluate the potential cause(s) and propose actions to achieve the standard. Revised Permit Section II.B.1.b.(1)(a), Pet.Add.129-30.[21] Similarly, the Downstream Transport Performance Standard provides that, if it is exceeded "in any three or more years

[21] The Revised Permit's long-term biota performance standard provides for continued monitoring to assess progress toward the specified levels even after the short-term standard has been attained. Revised Permit Section II.B.1.b.(1)(b), Pet.Add.130.

within any 5-year period following completion of construction-related activities," GE must evaluate the potential cause(s) and propose additional actions as necessary to achieve the standard. *Id*. Section II.B.1.a.(1), PetAdd.128.

Finally, Petitioners argue that the monitored natural recovery provisions lack contingency measures if that remedy is not working. Pet.Br.50. As the Board explained, this argument is also factually inaccurate because the Revised Permit provides for contingent response actions if monitored natural recovery is not effective. As noted above, both of the general Performance Standards provide that if they are not met in the specified time frames, GE must evaluate the potential cause(s) and propose to EPA additional actions necessary to achieve the standards, and EPA will determine any such additional actions in accordance with the Consent Decree. Pet.Add.130, 128. The appropriate additional actions, if necessary, will depend on the evaluation of the cause(s) for nonattainment of the subject Performance Standard. Petitioners nowhere respond to the Board's explanation that their argument is, as a factual matter, "simply incorrect."

IV. Petitioners' Challenge to the EPA Region's Decision Not to Require Treatment of Removed Sediment and Soil Must Be Rejected.

Petitioners argue that the EPA Region's decision not to incorporate treatment technologies – namely, thermal desorption or bioremediation – into the remedy was arbitrary and capricious and violated CERCLA's preference for

treatment. Pet.Br.51-56. Like their prior arguments, these arguments are unfounded.

A. Thermal Desorption

With respect to thermal desorption, as the Board held, Petitioners' challenge should be rejected on procedural grounds because: (a) the thermal desorption issue was not raised in comments on the initial Permit, as required by EPA's regulations, when it was available for public comments; and (b) the Revised Permit made no change relating to this issue and thus Petitioners' claim was not properly raised in their challenge to the Revised Permit. *Gen. Elec. I,* 17 E.A.D. at 579-81, Pet.Add.399-401; *Gen. Elec. II,* slip op. at 107-08, Pet.Add.513-14. *See also* EPA.Br.63-64 and the cases cited on page 38, *supra*.[22]

In any event, this contention should be rejected on substantive grounds. Thermal desorption was thoroughly evaluated under the CD-Permit remedy evaluation criteria in the EPA Region's May 2014 *Comparative Analysis of Remedial Alternatives for the General Electric (GE)-Pittsfield/Housatonic River Project Rest of River*, A.R.557091 at 59-77, J.A.___-___, which provided what the Board referred to as a "detailed rationale" for rejecting thermal desorption. *Gen.*

[22] Although Petitioners claim that they have presented this request to EPA for many years, even before the comment period, Pet.Br.52, that is no substitute for raising it in comments to the Agency, as required by EPA's regulations and applicable judicial decisions.

Elec. I, 17 E.A.D. at 579, Pet.Add.399. Again, in its 2020 Response to Comments, the Region provided its justification for not selecting thermal desorption, including a specification of the numerous drawbacks of using this technology on the Rest of River sediments and soils. Response to Comments at 25, 27-28, J.A.___, ___-___; *see also* EPA.Br.64. That justification is entirely reasonable and within EPA's technical expertise.

B. Bioremediation

With respect to bioremediation, as the Board also noted, the EPA Region previously provided several sound reasons for rejecting that technology, including that it had not been demonstrated to be effective and to be able to meet project goals; and the Board in 2018 found those reasons supportable. *Gen. Elec. I,* 17 E.A.D. at 581-82, Pet.Add.401-02. In 2020, although the Revised Permit made no change in regard to that technology, the Region reiterated its justification for not selecting bioremediation. Response to Comments at 27, J.A.___. *See also* EPA.Br.68-70. In this appeal, Petitioners' argument must be rejected since they have not shown that the Region's reasons for not selecting bioremediation were erroneous. Again, this falls well within EPA's technical expertise.

C. Statutory Preference for Treatment

Petitioners' claim that the Revised Permit violated CERCLA's preference for treatment is also without merit. Again, as held by the Board, this claim is

procedurally defective because it was not initially raised in comments and the issue was not reopened in the Revised Permit. *See Gen. Elec. I,* 17 E.A.D. at 583-84, Pet.Add.403-04; *Gen. Elec. II*, slip op at 110-12, Pet.Add.516-18; *see also* EPA.Br.63-64.

Moreover, Petitioners' claim fails as a substantive matter. As noted in EPA's brief, the Revised Permit does incorporate treatment in the form of use of activated carbon. EPA.BR.66. In any case, with respect to the treatment technologies preferred by Petitioners, there was no violation of CERCLA. As the Board explained in 2018, CERCLA requires only that a remedy include treatment technologies "to the maximum extent practicable" and that EPA issue an explanation if it does not choose such a technology. CERCLA § 121(b)(1), 42 U.S.C. § 9621(b)(1). Here the "record documents the extensive examinations undertaken by the Region and GE of possible corrective measures that involve alternative treatment technologies," including those proposed by Petitioners. *Gen. Elec. I,* 17 E.A.D. at 583-84 n.63, Pet.Add.403-04. For these reasons, Petitioners' claim cannot stand.

CONCLUSION

For the foregoing reasons, HRI and HEAL's petition for review should be denied in its entirety.

Respectfully submitted,

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Dated: January 13, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of the General Electric Company as Respondent-Intervenor complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in proportionally spaced 14-point Times New Roman type.

I further certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,156 words, excluding portions exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Kwaku A. Akowuah
Kwaku A. Akowuah

Dated: January 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2023, I electronically filed the foregoing Brief of the General Electric Company as Respondent-Intervenor in the United States Court of Appeals for the First Circuit by using the Court's CM/ECF system and thereby served this brief on all registered counsel in this case through the Court's CM/ECF system.

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