



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**New England Region**  
**Five Post Office Square -- Suite 100**  
**Boston, Massachusetts 02109-3912**

*Via Electronic Mail: ccrbonifaz@gmail.com*

October 5, 2022

Cristóbal Bonifaz, Esq.  
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Law Office of Cristóbal Bonifaz  
180 Maple Street  
Conway, Massachusetts 01341

Re: GE-Pittsfield/Housatonic River Site/Rest of River  
Petition to Town of Lee Board of Health by Housatonic River Initiative

Dear Attorney Bonifaz:

Thank you for your letter to me dated September 28, 2022 regarding the decision of the Town of Lee Board of Health (“BOH”) to hold an adjudicatory hearing to determine whether the Upland Disposal Facility (“UDF”) to be constructed in the Town of Lee to facilitate the cleanup of the Housatonic River presents a health impact to Lee residents. You state that after the hearing the BOH will decide whether or not the UDF presents or does not present a health risk to Lee residents and adjacent communities and “will either ban or allow the construction of the proposed UDF.”

Your letter requests that EPA provide information about the safety of the UDF and appear at the forthcoming adjudicatory hearing. Your letter also asserts that the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”) does not preempt a decision of the BOH issued under certain state laws.

A. The Request for Information by the Lee Board of Health.

As for your request that EPA provide information regarding EPA’s decision to site the UDF in the Town of Lee, EPA points the BOH to the Administrative Record for EPA’s 2020 Permit decision, as discussed below. The risks posed by the currently uncontrolled PCB contamination, the components of the cleanup of the Housatonic River, and the construction of the UDF that will facilitate the River’s cleanup are all addressed in a Permit that EPA issued to the General Electric Company in 2020 and made effective in March of this year. The EPA’s national Environmental Appeals Board (EAB) affirmed the Permit in all respects in a decision dated February 8, 2022.

The Permit is based upon an extensive Administrative Record that provides the rationale for and the data supporting the Permit. The BOH can refer to this Record for information regarding EPA's decision and the safety of the UDF. The Administrative Record for the Permit is available on-line (except for records that are privileged or otherwise controlled) at <https://semspub.epa.gov/src/collection/01/AR66478>. Of specific relevance are EPA's *Response to Comments* dated December 2020, EPA's *Determination on Remand and Supplemental Comparative Analysis* dated July 2020, and EPA's *Statement of Basis for EPA's Proposed 2020 Revisions to the Remedial Action for the Housatonic River "Rest of River"* dated July 2020. With respect to the safety and effectiveness of the UDF, the Statement of Basis at Page 8, the Permit requirements at Section II.B.5, and the Response to Comments at Section II.A have information on these issues.

The BOH can also refer to documents EPA filed in the appeal of the Permit before the EAB. (In particular, see Section III of EPA's Response to Petition, Document 19, and documents attached to Document 19, in EAB closed docket RCRA 21-01 at [www.epa.gov/eab](http://www.epa.gov/eab)). Note that as it relates to the UDF, Document 19 discusses the difference between the Permit that EPA issued in 2016 and the current Permit. Document 19 can be found here: [Region 1's Response to Petition of Housatonic River Initiative and Housatonic Environmental Action League, Document 19](#)

Your letter attaches an undated report of Dr. David J. De Simone, which appears identical to Dr. De Simone's report that HRI submitted as an attachment to its appeal Petition to the EAB filed on March 5, 2021. EPA addressed the report in EPA's Response to Petition (Document 19), starting on Page 20. (Note that the report was not submitted during the comment period for the Permit.)

EPA's December 2020 *Response to Comments* summarized EPA's findings regarding the UDF as follows:

Unless addressed, the contamination [in the Housatonic River] poses a current and future threat to humans through direct contact and fish consumption and a current and future threat to ecological receptors. In essence, the sediments are being removed from an area where they are currently causing unacceptable risks to humans and the environment, to an area that is designed to prevent environmental and human health impacts. The excavated materials with the highest levels of contamination will be transported to an off-site location for disposal. At the UDF, the lower levels of contaminated soils and sediments will be sequestered in a proven, engineered containment cell with a low-permeability cap and a low-permeability double bottom liner with leachate collection that will be inspected, maintained, and monitored to ensure that it is protective of human health and the environment. Permit, II.B.5, II.C.

B. Request for Testimony at the BOH Hearing.

As for the request that EPA appear and testify at the hearing, EPA respectfully declines that request. The Permit and EPA's cleanup are based upon the Administrative Record, and the relevant information regarding the safety of the UDF is found in the Administrative Record, including in the documents described above.

C. The Authority of the Town of Lee BOH to Ban the UDF.

Your letter states that should the BOH issue an order banning the construction of the UDF that such a ban is not preempted by the federal CERCLA statute. As a general matter, federal law preempts or supersedes state and local laws, regulations, ordinances, and other legal actions when they conflict with the federal law. This so-called conflict preemption occurs "when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*, 589 F.3d 458, 472 (1st Cir. 2009) (quoting *Good v. Altria Group, Inc.*, 501 F.3d 29, 47 (1st Cir. 2007)). Conflict preemption is rooted in the Supremacy Clause of the U.S. Constitution (Art VI, Clause 2), which invalidates state laws that "interfere with, or are contrary to the law of [C]ongress, made in pursuance of the [C]onstitution." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L. Ed. 23 (1824)). Note that preemption applies to state and local action, and the constitutionality of local action is analyzed in the same manner as that of state laws. *See id.* at 605.

Several federal courts, including the U.S. District Court for the District of Massachusetts, have applied preemption principles to uphold CERCLA cleanups. Specifically, federal courts have held that municipalities lack the authority to impose requirements that conflict with CERCLA cleanups and "pose an obstacle to accomplishment of CERCLA's objectives" to cleanup hazardous substances. *See, e.g., Town of Acton v. W.R. Grace & Co. Conn., Technologies, Inc.*, 2014 WL 7721850, \*9 (D. Mass. Sept. 22, 2014). In the *Town of Acton* case, the federal court for the District of Massachusetts held that CERCLA preempted a municipal bylaw that imposed more stringent groundwater cleanup standards because the bylaw would conflict with EPA's selected cleanup and "would displace the judgment rendered by the EPA and deprive it of 'the flexibility needed to address site-specific problems.'" *Town of Acton* at \*11; *see also United States v. City & Cnty of Denver*, 100 F.3d 1509, 1512 (10<sup>th</sup> Cir. 1996) (CERCLA preempts municipal ordinance conflicting with selected clean-up plan).

Other federal courts have held that CERCLA preempts municipal ordinances that ban the management of hazardous waste in a manner that conflicts with a selected CERCLA remedy, similar to a potential ban of the UDF. In *City & County of Denver*, the Tenth Circuit ruled that CERCLA preempted a municipal zoning ordinance that prohibited the maintenance of hazardous waste in industrially zoned areas. 100 F.3d at 1512 ("A zoning ordinance which bars the maintenance of hazardous waste dramatically restricts

the range of options available to the EPA... [and] would prevent a permanent on-site remedy.”). In *Fireman's Fund Ins. Co. v. City of Lodi, California*, the Ninth Circuit ruled that CERCLA preempted two different state actions that conflicted with CERCLA's liability and cost-sharing schemes. 302 F.3d 928, 947 (9th Cir. 2002). There's no indication that the First Circuit would differ from its sister circuits' decisions supporting CERCLA's supremacy over any local action impeding an ongoing clean-up.

The decision that you cite, *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals of Cambridge*, 395 Mass 535 (1985), does not support the proposition that the BOH has the authority to ban the UDF, in conflict with the ongoing CERCLA clean-up of the Housatonic River. In fact, the Massachusetts Supreme Court in that case expressly ruled that federal action preempts conflicting state municipal laws, regulations, ordinances, or legal actions. *Arthur D. Little, Inc.*, 395 Mass at 548 (“State law, including municipal regulations, can be preempted by an act of Congress if the State law ‘conflicts with federal law’”) (quoting other cases)). Furthermore, *Arthur D. Little, Inc.* is irrelevant to the specific question at issue because it was about whether the Constitution's grant of war and defense powers to the Federal government can preempt a state regulation prohibiting the testing, storage, transportation, and disposal of five highly toxic chemical warfare agents. *Id.* at \*537. Therefore, that case has no bearing on whether the BOH can override an ongoing CERCLA cleanup.

Banning the installation of the UDF directly conflicts with the CERCLA cleanup plan for the Housatonic River that EPA selected pursuant to the Permit. Accordingly, CERCLA preempts any action by the BOH to impede or stop the ongoing cleanup of the Housatonic River, and the *Arthur D. Little, Inc.* case does not say otherwise.

Please let me know if you have any further questions.

Sincerely,

**JOHN KILBORN** Digitally signed by JOHN  
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Board of Selectmen, Stockbridge  
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Senator Elizabeth Warren  
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Congressman Richard Neal  
Senator Adam G. Hinds  
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