No. 22-1398

United States Court of Appeals for the First Circuit

HOUSATONIC RIVER INITIATIVE; HOUSATONIC ENVIRONMENTAL ACTION LEAGUE,

Petitioners,

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY, NEW ENGLAND REGION,

Respondent,

GENERAL ELECTRIC CO; HOUSATONIC REST OF RIVER MUNICIPAL COMMITTEE,

Intervenors.

PETITION FOR REVIEW OF FINAL PERMIT DECISION - 42 U.S.C. § 6976
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, NEW ENGLAND REGION

REPLY BRIEF OF PETITIONERS HOUSATONIC RIVER INITIATIVE AND HOUSATONIC ENVIRONMENTAL ACTION LEAGUE

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I. Petitioners and the Public Were Entitled to a Remedy Decision that was Based on a Public Record, Not on Secret Settlement Communications, and that was Made by a Neutral Decision-Maker, Not a Decisionmaker that Had Already Committed Itself to a Particular Decision.

The Region argues that the only process to which Petitioners and the other members of the public were due was the opportunity to provide comment on its proposed remedy within "66 days." Region Brief, at 27-28. That is not the law. In our democracy, Petitioners and the other members of the public were entitled to have a critical decision about the environment in which they live made on the record, not in secret closed-door negotiations, by a neutral decision-maker that had not already committed itself to a decision in a Settlement Agreement.

Typical of so many of their arguments in this case, the Region and GE begin their defense of the process they followed by claiming that Petitioners "waived" any claim of lack of due process. Region Brief, at 29; GE Brief, at 31. They claim that Petitioners conceded at oral argument before the Environmental Appeals Board that the Settlement Agreement "did not constrain the Region." Id. (citing Transcript of EAB Hearing, at 25). However, this is what Petitioners actually said to the EAB: "As a practical matter, did the existence of the Settlement Agreement constrain the Region? It's our argument that it absolutely did." EAB Transcript, at 25 (emphasis added).

In this case, the Region, through its own statements at the time it announced the Settlement Agreement, and after, stated explicitly that its remedy selection was constrained by the Settlement Agreement.[1] In proudly announcing the Settlement, the Region "pledged" that it would select a remedy "consistent with the terms of the Agreement." AR647216-7. Then, in its subsequent Supplemental Comparative Analysis ("SCA") of on-site versus off-site disposal of the PCBs from the River, the Region referred to the Settlement Agreement as a consideration no less than 7 times (pgs 4, 6, 25, 30, 32, 38, and 39), attached the Settlement Agreement as an exhibit, and referred to it repeatedly in another exhibit. AR647210. Viewed objectively, without the constraint of the Settlement

[1] In their principal brief, Petitioners cited a number of cases holding that a neutral agency decisionmaker cannot publicly commit to a position on an issue before the issue comes before that decisionmaker for a formal ruling. Texaco v. FTC, 336 F.2d 754 (D.C. Cir. 1964); Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 588 (D.C. Cir. 1970). These cases come from a long line of cases holding that an agency's "objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959). See also 1616 Second Avenue Restaurant, Inc. v. New York State Liquor Authority, 75 N.Y. 158, 550 N.E.2d 910, 913-14 (N.Y. Ct. App. 1990). The Region attempts to distinguish these cases on the grounds that they involved adjudicatory decisions, as opposed to permitting decisions. However, the public is always entitled to a neutral decisionmaker, whether the setting be adjudicatory or permitting. The cases Petitioners cited are only distinguishable, if at all, because the agency decisionmakers in those cases did not go as far as the Region went in this case to commit itself to a position before accepting public comments.

Agreement, the Region could not possibly have concluded that disposal of 1.3 million tons of PCB-contaminated waste in a Dump feet from the River is "more protective of human health and the environment" than disposal in a licensed facility miles from the River and miles from the community that has suffered from PCB contamination for years. As set forth in Petitioners' principal brief, almost every one of the factors analyzed in the SCA weighed in favor of off-site disposal, and yet the Region chose on-site disposal for 92% of the PCBs. Petitioners' Brief, at 31-36.

Notably, the Region and GE do not even attempt to defend the fact that the settlement negotiations that led up to the Settlement Agreement were conducted in secret, and not "on the record," as required by the Administrative Procedure Act. There is a fundamental democratic reason why the APA requires decisions to be based on a public record, and that is so that members of the affected public, like Petitioners, and this Court can judge whether the decision was based on proper considerations, such as the protection of public health and the environment, or on improper considerations, such as threats of indefinite litigation or large monetary payments to selected persons. This Court has never held – and it should not -- that an important administrative agency decision can properly be based on secret communications with the agency that are not part of the administrative record, even if there is an opportunity for subsequent public comment on the decision.

To the contrary, both the Supreme Court and the D.C. Circuit have held:

> the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented. Moreover, where, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly.

Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977), citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419-20 (1971).

Indeed, one of the arguments that GE makes in its brief shows precisely why critical agency decisions must be based on a public record. GE contends that, in the course of the secret settlement negotiations, it never threatened the community with decades of litigation or with disposing of PCB waste in three dumps instead of one. GE Brief, at 28-29. While there is evidence in the record that GE did make these very threats, AR644044; AR647202-18:26, the important point is that the public, and this Court, will never know for sure whether such statements improperly influenced the agency's decision because the statements GE made were not recorded in the administrative record.[2]

[2] GE argues that Petitioners were not deprived of due process because they *chose* not to participate in the settlement discussions. GE Brief, at 31. While Petitioners dispute that their exclusion from the settlement discussions was voluntary, it is undisputed that Petitioners objected to a settlement process that was

The Region argues that it needs to be able to use settlement negotiations in "resolving permitting disputes" like this. Region Brief, at 28-29. While that is certainly true, the Region needed to do two things differently if it wanted to properly use settlement negotiations in this case. Notably, both of those things were spelled out in paragraph 22 of the applicable Consent Decree: 1) the Region needed to maintain a public record of what was said in the negotiations, not conduct them in secret; and 2) the Region needed to submit its proposed position in the negotiations to public comment before, not after, it entered into an agreement. The Region argues that, under the Consent Decree, these protections were available only to GE. Region Brief, at 30. The response to this is obvious: If GE was entitled to these fundamental forms of due process, so also were Petitioners and the other members of the public who have been living for decades with the toxic mess GE created.

II. The Region Has Not Shown That the Selection of Onsite Disposal in 2020 was the Result of Rational Application of the Selection Criteria.

The Region still fails to adequately explain how their factual analysis under the permit criteria supports their ultimate decision to approve construction of a Dump next to the River. Offsite disposal of the PCBs from the River came out

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not public and on the record – the same complaint they are making to this Court. AR647095.

ahead under *every* factor except cost in both 2014 and 2020.[3] It is simply not rational for the Region to claim that it applied the selection criteria and then reached a conclusion that was plainly not supported by its assessment under each of those criteria.

In addition, both the Region and GE place undue emphasis on the fact that the EAB remanded the initial Permit decision back to the Region in January 2018, implying that the EAB directed an opposite conclusion about off-site disposal. The EAB's 2018 decision says nothing of the kind. It did not mandate on-site disposal. Rather, the EAB remanded on the narrow basis that the Region had not adequately explained its conclusion that a waiver of the TSCA requirements was not appropriate. ADD388. The EAB recognized that the Region had the regulatory authority to grant waivers of a TSCA regulation – the issue was that the Region had only justified its waiver "with a single, conclusory sentence." Id. The matter was remanded for the Region to provide a more substantive explanation and to reevaluate the location decision in light of that particular factor. ADD256, 379, 381. The EAB expressly took no position on whether offsite or onsite disposal was a better option and in no way required or even encouraged the Region to change its

[3] For short-term effectiveness, the Region did not make an explicit statement in the 2020 SCA regarding which disposal option best satisfied the criteria, but there is nothing in that SCA that indicates that the Region changed its 2014 conclusion that off-site disposal presented the fewest short-term impacts.

conclusion that offsite was the best choice. ADD256-57, 381. In short, the Region, on remand, could have easily remedied the deficiency in its earlier analysis by providing the more detailed explanation that the EAB was looking for, without reversing its overall conclusion.

III. The MNR Provisions Are Not A "Remedy" for the Hundreds of Thousands of Pounds of PCBs Proposed to Be Left in the River.

The Region is asking this Court to rule that it is permissible under CERLCA to select a remedy to clean up contaminated *sediment* with no target cleanup level for *sediment*. The Permit identifies MNR as a "remedy for contaminated sediment." AR650440-3. The stated purpose of this "remedy" is "to contain, destroy, or reduce the bioavailability or toxicity of contaminants in sediment." Id. Yet, the Region claims it need not set an actual performance standard for sediment. This is contrary to any rational reading of CERCLA and violates EPA's own protocols for MNR.

A. The MNR Provisions Do Not "Attain a Degree of Cleanup" and Are Thus Not a Valid "Remedy" Under CERCLA.

Under CERCLA, "[EPA] shall select a remedial action that is protective of human health and the environment . . . ." 42 U.S.C. § 9621(b). The terms "remedy" or "remedial action" mean "those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the

environment." Id., § 9601(24). The terms include various types of active remediation and ". . . any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment . . . ." Id. CERCLA provides: "Remedial actions selected under this section or otherwise required or agreed to by the President under this chapter shall attain a degree of cleanup . . . ." Id., § 9621(d)(1) (emphasis added).

Bare monitoring of PCB concentrations in sediment, without performance standards, does not attain any "degree of cleanup," nor can it "protect," "prevent," "minimize," or "assure" anything. The MNR provisions of the Permit do not attain any "degree of cleanup" and are thus not a true "remedy." As such, the MNR provisions of the Permit are arbitrary, capricious, and contrary to law.

B. A Sediment Performance Standard is Required by EPA's Own Protocols for MNR.

As set forth in Petitioners' principal brief, EPA, through its own guidances, has repeatedly made clear that MNR must be an actual remedy. Under these guidances, what differentiates MNR from "doing nothing" is a *numerical* cleanup standard that must be achieved within a reasonable *timeframe*. This principle is seen throughout EPA's technical protocols for MNR. In addition to language cited in Petitioners' Initial Brief (p. 41), EPA's MNR protocols further provide:

- "For each site, the time frame [for MNR] is based on a decision rule (**i.e., a specific cleanup level** at which the contaminant is no longer considered a risk)." EPA/600/R-14/083, p. 25. See id., p.42 (illustrating sediment cleanup requirement in mg/kg t-PCBs).

- "An MNR remedy generally includes **site-specific cleanup levels** and remedial action objectives, and monitoring to assess whether risk is being reduced as expected." OSWER 9355.0-85, p. 9.

- "Generally, for CERCLA actions, the [record of decision] should include **chemical-specific cleanup levels** as provided in the NCP . . . ." OSWER 9355.0-85, p. 51. See also 40 C.F.R. § 300.430(f)(5)(iii)(A)(in the record of decision: "**Performance shall be measured** at appropriate locations in the ground water, surface water, soils, air, and other affected environmental media.")

- "Project managers and others should not confuse [a no action alternative] with MNR, where natural processes are relied upon to reduce an unacceptable risk to acceptable levels. The difference is often the increased level and frequency of monitoring included in the MNR alternative and the fact that **the MNR alternative includes a cleanup level and expected time frame for achieving that level**." OSWER 9355.0-85, p. 79.

- "The ROD generally should contain **numerical cleanup levels and/or action levels for sediment** and sometimes for other media . . . ." OSWER 9355.0-85, p. 192.

- "An MNA remedial action should **attain the same cleanup levels that would be defined for active remedies** . . . ." OSWER 9283.1-36, p. 32.

- "In addition, the **progress of MNA toward a site's cleanup levels should be carefully monitored and compared with expectations** to ensure that it will meet RAOs within a timeframe that is reasonable compared with timeframes associated with other methods. Where MNA's ability to meet these expectations is uncertain and based primarily on lines of evidence other than documented trends of decreasing contaminant concentrations, decision-makers should incorporate contingency measures into the remedy." OSWER 9283.1-36, p. 51.

(Emphases added.)

The toothless MNR provisions of the Permit, which provide neither a numerical cleanup level in sediment nor a timeframe for cleanup, are thus inconsistent with EPA's own protocols for MNR, which require a defined level of

remediation, a reasonable timeframe to achieve it, and a contingent response for when contaminant levels continually exceed targets. The Region's abandonment of these protocols in the Permit is arbitrary and capricious.

C. The Connecticut Sediment Sampling Data is Facially Inadequate.

The Region cites no expert opinion for its assertion that "PCB sediment concentrations in the downriver reaches are low and diffuse." Region Br. p. 55; AR593922-191. The data it cites is inadequate on their face.

The Region concedes that only 82 surface water samples have *ever* been collected in the Connecticut portions of the River – over a hundred river miles – pointing to a data table in GE's "Facility Investigation Report." A review of that table reveals that most of the referenced samples were collected during the 1970s and 1980s, and *not even one* surface water sample that was collected since the Decree was entered. In other words, the Region has based its decision on less than one surface water sample per mile of the River, and no sample has been collected in over 20 years.

The entirety of the Connecticut surface water samples in the table are summarized below:

Surface Water Sample Location	**Total Number of Discrete Samples**	**Dates Collected**
Falls Village, CT	13	10/4/1079; 11/27/1979; 3/18/1980; 3/18/1980; 3/18/1980; 3/18/1980; 3/22/1980; 3/22/1980; 4/4/1980; 4/10/1980; 4/10/1980; 4/10/1980; 6/3/1980
Near Falls Village, CT	4	1/27/1986; 3/31/1987; 4/5/1987; 8/19/1988
Falls Village Rt. 7 Bridge	32	3/27/1992; 3/27/1992; 3/27/1992; 4/16/1992; 4/17/1992; 4/17/1992; 4/18/1992; 4/18/1992; 4/19/1992; 4/22/1992; 5/31/1992; 6/1/1992; 6/1/1992; 6/1/1992; 6/2/1992; 6/2/1992 6/2/1992; 6/3/1992; 12/17/1992; 12/17/1992; 12/18/1992; 12/18/1992; 12/18/1992; 12/19/1992; 3/29/1993; 3/30/1993; 3/30/1993; 4/2/1993; 4/22/1993; 4/22/1993; 4/23/1993; 4/23/1993
Kent, CT	16	6/2/1984; 8/1/1985; 8/27/1985; 9/28/1985; 9/28/1985; 1/27/1986; 6/6/1986; 3/31/1987; 4/3/1987; 4/5/1987; 4/5/1987; 7/23/1987; 7/23/1987; 7/23/1987; 8/19/1988; 9/7/1988
Bulls Bridge Dam	4	3/26/1997; 4/23/1997; 6/25/1997; 5/30/1997
Gaylordsville, CT	13	10/4/1979; 11/27/1979; 3/18/1980; 3/18/1980; 3/18/1980; 3/18/1980; 3/18/1980; 3/22/1980; 4/4/1980; 4/10/1980; 4/10/1980; 4/10/1980; 6/30/1980

AR45113-79-80. See also AR487318-77-78 (GE graphs of PCB concentrations in surface water noting: "Insufficient data collected in Connecticut portion of the River"). Similarly, the data cited by the Region, Region Brief, at 57, show that since

the Consent Decree was entered there have been only forty individual sediment samples collected for all of Connecticut and zero surface water samples.

While the Region claims that the concentration of PCBs in sediments is very low, it cites virtually no data to support that, and the data it does cite is outdated and actually shows the opposite. Specifically, the Region asserts that the "average" PCB concentration of the "existing sediment data since 1998" is 0.18 ppm and that "PCB concentrations are far below the 1 ppm standard set where excavation or capping will occur." Region Brief, at 58. For this, the Region cites the Sediment PCB Data Summary for Connecticut report (AR574850). According to that report, PCB concentrations above 1 ppm were repeatedly found in Connecticut sediment since 1998 at depths of six to twelve inches and greater than twelve inches. AR574850-7 (Table 16).

The sediment table in the Facility Investigation Report referenced by the Region shows: only eleven discrete samples of sediment collected in Connecticut since 1998 at depths of six to twelve inches; and twelve discrete samples in Connecticut since 1998 at depths below one foot. Of those, approximately one-third of the observations had PCB concentrations greater than 1 ppm:

Depth of Sediment Sample	Number of Discrete Sediment Samples Taken in CT in 1998 and 2001 (i.e., "since 1998") at this depth	Number of samples exceeding 1 ppm at this depth	Percentage of samples exceeding 1 ppm at this depth
6-12 inches	11	3	30%
12 inches or more	12	4	33%

AR45113-156-162. Likewise, the sediment sampling referred to by the Region for Reach 9 in Massachusetts "since 1997" includes zero samples from depths of six to twelve inches and only three samples at depths below one foot. AR49294-306.

For the Region to base its decision about the proper remedy for over a hundred miles of River on this data is, to put it mildly, more than "arbitrary." The data is certainly insufficient to conclude that PCB levels throughout the Connecticut reaches are low or, given the age of the data, to conclude that "natural recovery" is "working." No scientist has opined that PCB levels are "low" throughout Connecticut, or that MNR is working. That would be like concluding that Covid has been eradicated in the U.S. based on half a dozen antigen tests.

The Region also argues, without citation, that there is no risk of direct human contact with PCBs in the MNR reaches. However, "direct contact with contaminated soil and sediment" has been identified as a primary exposure route in the River. AR456069-1. The Housatonic River downstream from the confluence of the East and West Branches has been found "one of the most attractive

recreational venues in the area" and found to support recreational canoeing, fishing, wading, and swimming, which are exposure pathways. AR219190-2131, 143. To the extent the Region is arguing that people do not use the River for recreation in the MNR reaches, that proposition is not supported by the record. The truth is that GE and EPA have not sufficiently studied sediment in the MNR reaches to ascertain the extent to which recreational users of the River are at risk of exposure.[4]

IV. The Region Has Utterly Failed its Statutory Obligation to Use Treatment Technologies to the Maximum Extent Possible.

In its brief, the Region argues that all it needs to say to this Court is that thermal desorption and other treatment technologies are not suitable for

[4] The Region attempts to characterize the lack of data as some kind of afterthought only raised in a reply brief in the second EAB appeal. That is incorrect. Petitioners raised the lack of data in their initial EAB brief in 2021, in their EAB briefs in 2018, and in many public comments. See, e.g., HRI/HEAL Initial Br. to EAB, p. 41 ("It appears that the Region doe[s] not have a detailed understanding of the contaminant boundaries or rates of attenuation that may be occurring naturally, in part because of a lack of sampling."); id. at 41 n.159 ("A compilation of Connecticut PCB sediment data was finally done in 2015, revealing just how little is known about the PCBs in Reaches 10-16."); 2018 Initial Br., p.13 ("The CMS does nothing to address PCB levels in the Connecticut portion of the river."); AR568094 ("[W]e stated (as we have many many times through the years) that it would be difficult to analyze the sufficiency of any proposed remedial action because of the lack of understandable and readable data as it pertains to Reaches 9 through 17.").

remediation of the PCBs in the Housatonic, and this Court must defer to that judgment. Region Brief, at 69. This is wrong for three reasons.

First, as detailed below, Petitioners urged the Region from 1995 to 2014 to test thermal desorption on Housatonic River sediments. The Region declined to do so. AR649388-7 to 10. Then, in 2014, the Region rejected the use of thermal desorption as an appropriate treatment technology on the grounds that thermal desorption has "not been demonstrated on Housatonic River materials." AR557091-74. To base a decision on the fact that the technology had not been tested on Housatonic River materials, after steadfastly refusing to test the technology on Housatonic River materials, is clearly "arbitrary and capricious."

Second, the Region continued to maintain in 2020 that thermal desorption was not suitable for use on Housatonic River sediments, even after Petitioners brought forward evidence that it has been successfully used at two major sediment sites as well as over 70 Superfund sites across the country (which requires EPA approval). AR649388-8.

Third, the Region's Response to Comments in 2020 actually lays out precisely what the Region should have done 28 years ago, when first beseeched by Petitioners, to explore appropriate treatment technologies for the River. AR650441-30.

V. Petitioners Properly Preserved Their Arguments Below.

Very little of the Region's brief is addressed to defending the merits of its remedy decision. The Region tries to deflect from the merits of Petitioners' substantive arguments by claiming that these arguments were waived at one point or another in the lengthy administrative process that has led up to this appeal. Petitioners urge the Court, in the strongest possible terms, *not* to base its decision in this case on arguments of waiver. Petitioners are citizens who have been trying for a quarter of a century to get an effective cleanup of the river that runs through their community from the truly horrendous contamination that GE caused. They deserve a decision on the merits of the cleanup plan, and their interest in a decision on the merits strongly outweighs any interest in "administrative finality," particularly given the fact that the Region dragged its feet for years in proposing a cleanup. In their steadfast advocacy for a comprehensive cleanup, Petitioners have raised all of the issues that are currently presented for review throughout the administrative proceedings. They have given the Region ample notice of the substance of their objections and ample opportunity to correct the errors in its decision.

A Petitioners Preserved Their Arguments on Disposal Location.

With respect to the arguments against onsite disposal, the Region argues that Petitioners somehow: (i) waived the ability to compare the 2014 and 2020

Comparative Analyses; (ii) waived the argument that the 2020 Comparative Analysis improperly focused on the Settlement Agreement; and (iii) waived the ACEC issue by not specifically mentioning ACEC in their public comments. None of these waiver arguments has merit.

With respect to the first two arguments, Petitioners' opening brief before the EAB plainly argued that the settlement process had poisoned the Region's ability to engage in objective decision-making. See Petitioners' Brief, pp. 8, 13-14, 17-19, 25. Petitioners' reply brief before the EAB elaborated on these arguments by discussing the similarities between the two Comparative Analyses. Nothing about Petitioners' manner of briefing before the EAB precludes them from making similar arguments now.

In addition, numerous public comments (including from HEAL) challenged the Region's conduct in connection with the Settlement Agreement, including the extent to which it influenced the Region's ultimate selection of onsite disposal. See, e.g., AR650441-40-42. The fact that Petitioners, when represented by counsel before the EAB, further developed these arguments does not mean that they were waived.

With respect to the ACEC issue, see Petitioners' Brief, at pgs. 29-31.

Moreover, the Region had pledged in the Settlement Agreement to select on-site disposal for 92% of the PCB waste before Petitioners had any opportunity to

submit comments on that decision. Thus, the notion that the Region was somehow prejudiced by a purported lack of notice as to the substance of Petitioners' comments rings particularly hollow.

B. Petitioners Preserved Their Arguments on MNR.

Petitioners objected to the inadequacy of the "do nothing" MNR proposal at the appropriate stages, including in their public comments and EAB appeal for the 2016 permit. Petitioners repeatedly and continually objected to the lack of scientific support for MNR. When GE first identified MNR as a proposed corrective measure, an expert consultant opined in comments filed on HRI's behalf: "The CMS does note, however, that 'long-term monitoring data' does not exist for these sites, and so it is not possible to make claims on the long-term effectiveness of MNR based remediation alternatives." AR480486. Petitioners' public comments on the 2016 permit continued to raise the lack of data to support MNR (as the Region concedes, Region Br., p.53). See AR568094 (HEAL commenting extensively on lack of data); AR568046 (HRI commenting on lack of support for MNR including "absence of information and data").

Petitioners continued to press the lack of scientific support for MNR on appeal to the EAB in 2017. They objected to the large volume of PCB-contaminated sediment proposed to remain in the River and its propensity to migrate, citing record evidence of bank instability, erosion, flooding, wide variance

in sediment concentrations, and sediment transport downstream. EAB 16-01 to 16-05, HRI/HEAL Pet. for Review, p.18-20. They highlighted expert findings that ". . . the River is not cleaning itself fast enough to significantly reduce risks in the foreseeable future." Id., p.19. They explained how they "continually urged DEP and EPA to institute an independent testing regime to more adequately determine the range and extent of PCB contamination in the Housatonic River, and to conduct a more thorough review of GE's sampling protocol" and how the agency's response had come up short. Id., p.40-45. They emphasized expert findings that: "The CMS does nothing to address PCB levels in the Connecticut portion of the river"; EPA's justification for MNR was "neither satisfactory nor entirely correct"; and "There is no evidence in the literature or in government reports that natural recovery is a highly effective, long term means of cleaning up PCBs in a fast flowing cold-water river such as the Housatonic River." Id., p.13. At oral argument, their expert explained to the Board: "The [proposal] indicates that 990,000 cubic yards will be removed . . . leaving leave more than 3 million cubic yards of contaminated soil and sediment in the Massachusetts segment of the river and its watershed. Neither of these two volumes includes estimates of how much is present in Connecticut." EAB 16-01 to 16-05, Oral Arg. Tr., p. 187.

Petitioners also objected to the ineffective "do nothing" nature of MNR. The Region tries to disqualify these objections by arguing narrowly that "lack of

numerical concentrations, timeframe, and contingency measures" were not discussed with the 2016 permit. But the comments alerted the Region to the core issue: that its MNR proposal was actually going to "do nothing." See AR568094 (HEAL commenting: "The MNR implementation is a euphemism for 'doing nothing.' Although EPA states a robust monitoring program will be implemented . . . no cost provisions or any "plan" has been submitted . . . How often will it be done? Where will it be done? What will the cost be? These are questions that EPA has been unable or refused answer in their public hearings."); AR567003 (HRI commenting: "[The proposal would] not remove enough of the PCB mass or the contaminated sediment . . . . The result is that for the foreseeable future, if not in perpetuity, the region will be contaminated with PCBs."; "…the cleanup plan is so inadequate that I believe it will leave the river contaminated forever.").

Petitioners continued to press the issue with the EAB in 2017, arguing. "The CMS does nothing to address PCB levels in the Connecticut portion of the river. The CMS simply indicates that time will heal this contamination wound by covering or washing the PCBs," EAB 16-01 to 16-05, HRI/HEAL Br., p.13, and "[…MNR] will in no way accomplish a reduction of contamination, and is therefore an inappropriate approach for any aspect of the Rest of River Remedy." EAB 16-01 to 16-05, HRI/HEAL Reply Brief, p.14-15.

In short, the citizens were not required to use the term "performance standard" or "contingency" to alert the Region to the core issue—that MNR as used in the Permit truly can "do nothing" for the River. The (then pro se) Petitioners said that in their own words, and they said it well. The Region has thus had ample notice and opportunity to address these deficiencies before the present appeal.

C. Petitioners Preserved Their Arguments on Treatment.

The Region's primary argument that Petitioners waived their request for the use of alternative treatment technologies is that Petitioners raised the issue "too early," but not specifically during the comment period for the 2014 proposed remedy. The administrative record reflects that the Petitioners have been calling for the use of treatment technologies since 1995, five years before the Consent Decree in 2000, and 16 years before the Region's first Rest of the River cleanup plan. Their efforts included:

- 1995: Hosting a conference on alternative treatment technologies available to treat PCB-contaminated sediments
- ·1998: Inspecting the thermal desorption equipment owned and operated by Maxymillian Technologies, one of GE's cleanup contractors.
- 1998: Visiting Rose Site in Lanesboro, Massachusetts, where thermal desorption was used to clean up thousands of barrels of contamination buried in the ground by GE and its contractors.

- 1998: Inspecting EPA's pilot project on the Hudson River, where EPA used an alternative treatment process in which PCBs were bound into cement for beneficial reuse.

- 1999: Issuing a newsletter, including to EPA, entitled "To Treat or Dump?" that discussed the pros and cons of different treatment technologies

- 2000: Objecting to EPA's Consent Decree because it did not commit to the use of alternative treatment technologies

- 2006: Again hosting a "Symposium on Alternative Remedial Technologies to Destroy PCBs" (attended by EPA)

- 2007-14: Brought forward information about alternative technologies at CCC meetings (attended by EPA), such as information about bench scale testing of an enzyme-based in situ treatment technology by Oil Free Technologies, information about bench scale testing of bioremediation technologies by the University of North Carolina, and information about bioremediation carried out at the New England Log Homes site in Great Barrington, Massachusetts.

AR649388. See also AR518322, AR518356, AR518399, AR518653, AR548390, AR548398. Was this advocacy sufficient to require the Region to at least address the lack of alternative treatment technologies in the 2016 cleanup plan? The record speaks for itself.

VI. Petitioners Plainly Have Standing.

Petitioners were not required to specifically argue standing in a petition filed pursuant to 42 U.S.C. § 6976. Federal Rule of Appellate Procedure 28, governing the content of briefs, makes no mention of a requirement that a petitioner explain their standing. Nor was there any reason for Petitioners to expect that the Region

would challenge their standing, given the clear record evidence of HRI and HEAL members being personally affected by the river pollution and the proposed Dump. The Region does not even attempt to substantively argue that Petitioners lack standing —it simply states that the Petition should be rejected because the subject of standing was not included. See Region Brief, p. 26. There is no basis for this Court to reject the Petition on those grounds. Indeed, 42 U.S.C. § 6976(b) provides that review may be had in the First Circuit by "any interested person."

For Article III standing, an association may bring suit on behalf of its members when: (a) at least one of its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (Harvard Corp.), 261 F. Supp. 3d 99, 104 (D. Mass. 2017). HRI and HEAL plainly meet this standard. Many members of HRI and HEAL have standing because they have been directly affected by the contamination in the Rest of River and will be negatively impacted if the proposed dump is allowed to proceed and the contamination is not properly cleaned up.

For example, Nicole Kosiorek, a member of HRI, lives near the proposed Dump, and uses the area near the Dump for recreation—it is where her family

walks, hikes and rides bikes. The Dump will also affect the value of her property: she shared her concern that she will not be able to sell her home as a result of the presence of the Dump. AR648189-43-46; HRI Affidavit. Tim Gray, the Executive Director of HRI, has expressed how the insufficient cleanup of the River has prevented him from using a significant part of his property for horses and livestock. AR200676; HRI Affidavit. Clare Lahey, a member of both HRI and HEAL, also lives close to the River and the proposed Dump. In public comments, she expressed how the PCB contamination has deterred her from selling her home or passing it along to her children. AR648189-36-38; HRI and HEAL Affidavits. Reed Anderson, another member of both HRI and HEAL, also lives close to the River and has children who attend school in close proximity to the proposed dump. AR659568-5; HRI and HEAL Affidavits.[5]

The members' harm is directly connected to the Region's arbitrary and capricious permitting decision, which, if allowed to stand, will result in construction of the Dump and will leave millions of pounds of PCBs in the River, because of the use of MNR and the failure to consider alternative technologies.

[5] These are mere examples of the effects of the River contamination and proposed dump on members of the Petitioners. The record contains additional evidence of impacts on other members, including Monica Ryan (HRI), Ed Lahey (HRI and HEAL), Deidre Consolati (HRI), Anne Langlais (HRI and HEAL), and Suzanne Salinetti (HRI). See AR648189-31-33; AR649376-66-67; AR649568-64, 374, 518-19; HRI and HEAL Affidavits.

And if the Region is forced to conduct a proper, rational, and reasonable evaluation of offsite versus onsite disposal, it is likely that it will revise its permit decision in a way that is more protective of the immediate river environment. In addition, the members' interests in reducing River pollution and preventing the construction of the Dump are clearly germane to the purposes of HRI and HEAL. HRI and HEAL Affidavits; AR649584 (comments from Ms. Herkimer explaining purpose of HEAL); AR45300 (explaining that HRI was formed with the specific mission of cleaning the River); AR518674 ("there is no group that has committed itself as doggedly as HRI to understanding and participating in every step – scientific, technical, procedural – of the slow-grinding clean-up process over the last 20 years"); AR487366 (HEAL's purpose is to advocate for a comprehensive remedy for the River cleanup that achieves a swimmable and fishable river). Therefore, there is no basis for this Court to reject the Petition on the grounds of lack of standing.

Respectfully submitted,

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Dated: February 3, 2023

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

Pursuant to the First Circuit's ECF Filing Standards and the rules cited below, I hereby certify that:

1. This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,096 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman typeface.

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Dated: February 3, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on February 3, 2023, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system: U.S. Environmental Protection Agency, General Electric Co., and Housatonic Rest of River Municipal Committee.

/s/ Stephanie R. Parker
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