

# TOWN OF LEE BOARD OF HEALTH

*Robert Wespiser, MD~ Chairperson~ Carisa Vincent, RN~ JoAnn Sullivan*

**DECISION  
BOARD OF HEALTH OF LEE  
ADJUDICATORY HEARING  
ON THE MATTER OF THE PROJECTED UDF  
April 27, 2023**

The Housatonic River Initiative "HRI" petitioned the Lee Board of Health of Lee, Massachusetts "LBOH" to hold an adjudicatory hearing to establish whether a facility projected to be installed in Lee would be a risk of health to the residents of Lee and adjacent communities. HRI based its request on expert testimony supplied to LBOH by HRI, and implications of possible nefarious activity by EPA for granting the permit for the installation of the facility referred hereinafter as UDF.

HRI submitted to LBOH a report from David J. DeSimone which was very disturbing to the LBOH. In Expert DeSimone's words:

**"My primary concern for this site as a landfill is that a leak in the liner and leachate collection system will eventually occur; then, leachate will have no natural sediment barrier to flow in the subsurface." EPA has stated "First, even the best liner and leachate collection systems will ultimately fail due to natural deterioration..."(53 Federal Register 33345, August 30, 1988). "The sand and gravel aquifer will become contaminated, and leachate will easily infiltrate underlying bedrock. This is a poor site for a landfill" (emphasis added).**

**"The bottom line is the geology of the proposed PCB landfill location is very likely to result in leachate contamination of surficial and bedrock aquifers if leachate penetrates the landfill liners. Based upon site geology, PCB disposal in a landfill in this location is a very poor choice that may result in PCB contamination of the sand and gravel aquifer and the underlying Stockbridge marble aquifer."(De Simone's Report found in EPA's administrative record.) (Emphasis in the original De Simone's Report Exhibit-1.**

The implication that something nefarious might have occurred is described by HRI:

**"Let's be honest. What happened in this case is that, after the Board (Environmental Appeals Board) issued its remand decision, GE, the Region, and a number of other parties entered into closed-door settlement discussions that did not become part of the administrative record. GE threatened that, if the others did not agree to extensive on-site disposal of contaminated sediments, it would**

tie up the remediation of the river in court for decades, and the communities would end up with three, not one, on-site dumps. At the same time, GE offered that, if the communities would agree to one on-site dump and allow it to save \$200 million (the difference in cost between on-site and off-site disposal), it would pay \$55 million of that savings to the towns. Sadly, GE also offered large amounts of money to others, such as the Audubon Society, to agree to a deal. The Region, for its part, saw the deal to get a 23-year-old “monkey” off its back.” (Reply Brief HRI in RCRA 21-01 at Page 1).

HRI is referring above to the 2016 EPA peer-reviewed decision of its scientists and engineers ordering GE to move all PCBs removed from the River, Pittsfield, Lee, Lenox, Great Barrington, Sheffield, and Stockbridge to a certified toxic dump site located outside the State of Massachusetts. This final decision was appealed by GE to the Environmental Appeals Board consisting of a triumvirate of administrative judges who overturned the part of its order requiring the PCBs to be buried at an out of state location. This GE win opens the door for the construction of the projected dump in Lee.

Given the seriousness of charges and the content of Expert DeSimone’s Report, LBOH agreed to move ahead with the requested Adjudicatory Hearing.

Adjudicatory Hearings in Massachusetts are quasi-judicial proceedings governed by the Massachusetts Rules of Evidence.

LBOH made it clear to all participants that:

LBOH will decide whether the UDF presents or does not present a risk to the health of residents of Lee and adjacent communities, based solely on expert testimony. LBOH requested all interested parties supporting or opposing the UDF to introduce such expert testimony either before the hearing or most preferably at the hearing so that members of LBOH can request further clarifications from the experts if needed. (Ex.- 1).

Notice of the projected adjudicatory hearing was sent to all interested parties on October 11, 2022. Between October 11, 2022, and November 8, 2022, LBOH sought and found independent of HRI, EPA or GE the projected engineering of the UDF. (Ex.-5) and raised with EPA specific questions addressing the issue of whether construction of the UDF might be a risk to the health to the residents of Lee and adjacent communities. EPA fully cooperated with LBOH in providing evidence EPA used in granting the permit for GE to construct and operate the UDF. (Exs. 1 to 4, and 6 to 12). All the aforementioned Exhibits were posted on November 8, 2022 on the web page of the Lee Board of Health through its website [www.tritownhealth.org](http://www.tritownhealth.org) HRI was contacted and urged to make sure that the experts it intended to testify at the hearing read Exhibits 5 and 9 which deal directly with the engineering of the UDF.

The scheduled Adjudicatory Hearing took place on November 19, 2022. HRI introduced into the record the testimony of three experts. The first expert was Dr. David DeSimone; the same expert whose report was submitted by HRI in October of 2022 which also contained his qualifications. (Ex.-1).

Dr. DeSimone testified at the hearing that he had not read Exhibits 5 and 9 and that in fact he had not read anything related to the matter under consideration since 2020 (date of his report January 2020. Transcript at page 19). He offered no opinion as to whether the UDF as presently engineered as per Exhibits 5 (dated November 24, 2021) and 9 (dated November 8, 2022) presents a risk to the health of residents of Lee and adjacent communities. (Transcript at pages 21 and 22).

HRI then introduced the testimony of David Carpenter. Dr. Carpenter is the foremost expert on the dangers of PCBs in the United States. His expert qualifications were previously submitted by HRI to LBOH through Dr. Carpenter's sworn testimony in *American Kids et al. v. Sandra Lyon et al. Case No. 215-cv-02124-PA (AJWx)* partially quoted here.

"My name is David O. Carpenter, and I am a public health physician, educated at Harvard College where I graduated magna cum laude in 1959 and at Harvard Medical School where I graduated cum laude in 1964. I have pursued a career in biomedical research and public health rather than patient care. I served as Director of the Wadsworth Center for Laboratories and Research of the New York State Department of Health from 1980-1985, then became the founding Dean of the School of Public Health of the University at Albany, a position I held until 1998. My present position is Director of the Institute for Health and the Environment at the University at Albany. The Institute has been designated as a Collaborating Centre of the World Health Organization. I am also Professor in the Department of Environmental Health Sciences in the School of Public Health. I have over 400 peer-reviewed publications in the general fields of neuroscience and environmental health and am active in research and training. I teach graduate courses in environmental health, radiation biology and neurobiology/neurotoxicology."

Dr. Carpenter acknowledged he had not considered Exhibits 5 and 9 and offered no opinion as to whether the UDF as presently engineered would be a risk to the health of the residents of Lee. (Transcript pages 74-86).

HRI introduced the testimony of Clare Lahey describing her qualifications as an expert in statistics. Her qualifications and testimony have been posted on the web page of the Lee Board of Health. The content of her testimony is that EPA's decision in granting the permit for the UDF was arbitrary and capricious and an abuse of discretion. This issue is currently being litigated by HRI before the

Environmental Appeals Board. (*In Re: 2020 Revised pert etc. RCRA 21-01*). If the Environmental Appeals Board rules against HRI, they can appeal the issue to the First Circuit Court of Appeals. If they lose there, after a panel in the First Circuit Court of Appeals. If unsuccessful, then to an en-banc hearing in the same Court and eventually if it becomes necessary to the United States Supreme Court.

Her oral testimony mentioned that publications she had studied concluded that a percentage of the thousands of dumps across the United States leak and therefore the LBOH should evaluate the risk of leaks from the UDF based on this evidence. While she makes such a suggestion, the role of Boards of Health in Massachusetts is clear. Boards of Health in Massachusetts were established by MGL c. 111, §§ 31 and 143 in 1861 to safeguard the health of town residents and were granted power of issuing regulations to satisfy this end. Boards of Health are normally run by volunteers, have insignificant budgets and rely daily on expert testimony provided by State and Federal Agencies like The Massachusetts Departments of Health and Environmental Protection Agency the Federal Drug Administration. Boards of Health do not have the resources to hire scientists, engineers, physicians, or statisticians or take on lengthy studies on their own. There are rare occasions like this one in which the legal standard for reviewing the safety of an action by an agency is different from the legal standards to which Boards of Health must abide. (Ex.-2).

Ms. Lahey suggestion would involve locating all dumps in the United States engineered as the UDF, determine how many of these dumps have leaked, and whether the leaks contain PCBs and then evaluate the risk of the UDF leaking. This study is beyond the parameters set for this hearing and does not answer the question of whether the UDF as presently engineered presents a risk of health to the residents of Lee and adjacent communities.

HRI offered the testimony of its members all quoting different published articles about PCB dangers and dump leaks studied by others. LBOH took all these different publications under advisement and has posted them on its web site. LBOH is unable to consider all these publications as evidence in this hearing as all are hearsay testimony not admissible in an adjudicatory hearing under Massachusetts Rules of Evidence.

After November 19, 2022, BOH allowed introduction of additional testimony of Dr. David Carpenter. Dr. Carpenter submitted an Affidavit in which he stated his concern about evaporation of PCBs from the dump based on his studies of several toxic dumps located in the vicinity of the Hudson River that led to a concern that residents living within four miles of toxic dumps could be impacted by air carried PCBs. Dr. Carpenter's analysis suffers from the same flaws referred to above expressed by statistician Lahey described in the previous paragraph.

EPA agreed to participate in the adjudicatory hearing based on the premise stated in Exhibit-1, that BOH's judgment will be based "solely on expert testimony" and introduced into the record the opinions of its scientists and engineers who were forced by the EAB to oversee the dump to be located within the State of Massachusetts.

LBOH has evaluated all expert testimony introduced into the record by both parties and has concluded that based on all the expert testimony presented, LBOH was unable to conclude increased risk to health because the testimony introduced does not support that conclusion.

That said, LBOH would like to make some comments on the voluminous expert and non-expert testimony introduced into the record by residents of Lee who are understandably concerned about housing within its town border a toxic dump scheduled to introduce 2,000,000 tons of mud and soil containing 25-50 parts per million of PCBs for generations to come. (Ex.-9).

1. The Lee Board of Health is representing Lee, not the larger Housatonic region designated in the “rest of the river” agreement.
2. The dump, UDF, is only located in Lee.
3. PCB contaminated materials will be removed from their location in other towns, lessening those towns’ total burden of exposure to PCB’s.
4. The UDF brings additional PCBs to those already existing in Lee. Lee is the only town, including Pittsfield, in the entire GE/Housatonic cleanup, in which this increase in PCB burden occurs. The dump(s) in Pittsfield contain material collected only in Pittsfield.
5. In the long experience with landfills and liners, numerous examples of failure and eventual, environmental contamination have occurred. No technology appears to be foolproof.
6. Although the town of Lee’s current water supply is at a higher elevation than the UDF, the aquifer is in a lower elevation. A containment breach may likely contaminate lower elevation water resources. Lee should not have to accept a “forever event” with more

PCB contamination and the accompanying increase in health risks. The possible future use of the aquifer should not be discounted.

7. Lee is the least economically advantaged town in the “rest of the river” group. Environmental injustice appears to be playing a role in the decision to locate the dump in the town of Lee. (Consideration should be given to involvement of well-established resources within the EPA and other organizations for examination of environmental justice concerns.)
8. Monitoring of the UDF is frequently mentioned as an important factor in maintaining safety. The responsibility for monitoring appears to be placed solely in the hands of GE’s contractors. GE has a history of monitoring failures that have been documented in the public press. Utilizing GE as the responsible monitor does not appear to maximize the health of Lee residents given this history.
9. Concern has been raised regarding the lack of detail in the GE conceptual design plan provided to date. The EPA has responded that GE must submit a final design document with many more details. Many of these design and process details will have bearing on the risk to health of the residents of Lee. Given that these future details are not available, the Lee Board of Health is unable to fully assess the effect that many factors have on health. Many elements are not yet delineated, including but not limited to handling of PCBs, transportation, containment, contamination of equipment, and monitoring reliability.
10. The Lee Board of Health acknowledges that the overall focus of the EPA is to balance many different factors, including compromises in addressing cost and effects on human health. The Lee Board of Health, however, does, and should limit its interest to the risk to health concerning only the residents of Lee.

11. There appears to be a significant lack of data regarding the safety experience and other dumps in other similar situations across the US. Comparison of health risks in various remediation scenarios have not been available. Much of the analysis on both sides of the controversial issues appears to rely on speculation and extrapolation.

**By taking these concerns into consideration, The Lee Board of Health hereby considers that the proposed UDF may pose an increased risk to the health of the residents in Lee.**

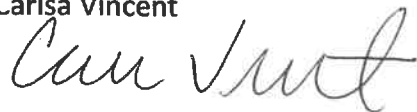
Additionally, the LBOH will refer this matter and all evidence collected to the Town of Lee which has already taken legal action seeking a jury to award the Town sufficient funds outside the purview of GE and EPA to remove all the PCBs from the Town of Lee.

As voted and approved by the Lee Board of Health on April 27, 2023

Robert Wespiser MD, Chair Lee Board of Health



Carisa Vincent



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