

## TOWN OF LEE, BOARD OF HEALTH

### NOTICE OF ADJUDICATORY HEARING

#### I. Background

The Board of Health of Lee, Massachusetts (LBOH) will conduct an adjudicatory hearing at the Lee Middle and High School Auditorium located at 300 Greylock Street, Lee, MA 01238, on November 19, 2022 starting at 10:00 AM.

The purpose of the hearing is for the Lee Board of Health (LBOH) to determine, under the legal standards of MGL c. 111, §§ 31 and 143, whether a large PCB disposal facility (hereinafter Upland Disposal Facility (UDF)) GE wants to install in Lee, Massachusetts, will or will not be a risk of health to the residents of Lee and adjacent communities.

The United States Environmental Protection Agency (EPA) denied GE a permit to install the UDF in Lee in 2016 but reversed itself and granted the permit in 2020.

LBOH invited EPA to participate at its forthcoming adjudicatory hearing to which EPA kindly responded by introducing into evidence at the forthcoming LBOH adjudicatory hearing the entire administrative record of its decisions to deny in 2016, and then to grant in 2020 the requested permit to GE to build the UDF in Lee.

EPA has the power under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to preempt contrary decisions based of state and local laws. EPA does not have the power to preempt regulations of Boards of Health in Massachusetts issued to prevent risks of health to the residents of local towns. MGL c. 111, §§ 31 and 143, were enacted in Massachusetts in 1861. The Massachusetts Supreme Court (MASC) ruled in 1985 that State and Federal Agencies do not have the power to preempt decisions of Boards of Health in Massachusetts related to health risks to the residents of a town. *Arthur D. Little v. Commissioner of Health of Cambridge* 395 Mass. 535; 481 N.E.2d 441; 1985 Mass.

EPA argues in its response to the LBOH invitation to participate at its forthcoming adjudicatory hearing, that *Arthur D. Little Id.*, applies only to the United States Department of Defense. LBOH disagrees with this narrow interpretation and will request MASC to resolve the disagreement in case LBOH finds that the UDF presents a risk to the health of residents in Lee, and GE decides not to abide by LBOH regulations.

LBOH jurisdiction is limited to issues dealing with the health of Lee's residents, thus unlike EPA, it cannot make risk/benefit or cost/benefit analyses as EPA has done in granting GE the permit to install the projected UDF in Lee. LBOH might disagree with conclusions reached by EPA but has no quarrel with decisions in which EPA balanced the risk of health to residents of Lee against risks of health to many others impacted by contamination of the Housatonic River with PCBs, the donation of 25 million dollars by GE to some local units, the donation of one half million dollars to Mass Audubon, and as well as other factors. LBOH has an interest in all these issues, but those factors cannot be balanced by LBOH against risks to the health of residents of Lee as EPA has done. That said, LBOH will take into account the EPA records of its two decisions in 2016 and 2020 in evaluating whether under its legal standards set by **MGL c. 111, §§ 31 and 143 the UDF presents or does not present a risk of health to the residents of Lee.**

LBOH has requested GE to participate at the projected hearing and provide all evidence it has that the UDF will not become a risk to the health of residents of Lee. LBOH will hold an open mind until after the adjudicatory hearing as to whether the UDF presents or does not present a health risk to the residents of Lee.

David J. De Simone, PhD, a geologist with enormous knowledge and experience, and co-recipient of the 2020 EPA Region 1, Environmental Merit Award for Scientific Research, has made available to LBOH his research and conclusions regarding the proposed UDF. This report was entered into the EPA administrative record where it was balanced by EPA with other factors. This type of balancing is not allowed by the jurisdictional basis on which Boards of Health operate when issuing regulations.

The conclusions of David J. De Simone are disturbing to LBOH and would like GE to challenge these conclusions before or at the adjudicatory hearing. These are the conclusions of David J. De Simone that LBOH finds disturbing:

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.)

The Lee Board of Health is also very concerned about the health impact to residents of Lee from thousands of dump-trucks traveling through the streets of Lee loaded with wet mud containing PCBs.

This is the way EPA understands how PCBs contaminated the environment.

PCBs entered the air, water, and soil during their manufacture, use, **and disposal; from spills and leaks during their transport; and from leaks in products containing PCBs.**(Emphasis here only).

EPA estimates that the pounds of PCBs to be removed from the Housatonic and transported to the UDF range between one hundred to six hundred thousand that is 50 to 300 tons of PCBs.

EPA has assured the public that the maximum concentration of PCBs in the dredged mud, to be transported to the UDF facility, will be 50ppm PCBs. Taking a conservative figure of 150 tons of PCBs the tonnage of mud with 50ppm of PCBs is 3 million tons of contaminated mud.

Three million tons of dredge mud will require 200,000 loads in 15 tons-dump-trucks. Dump trucks passing through the streets of Lee at one-half minutes intervals, (24/hour) amount to 48,384 dump-truck loads per year. (24 x 8 hours x 252 working days per year = 48,384).

It will take GE four years to complete the transfer of 200,000 tons of dredge mud to the UDF. Four years during which the residents of Lee will be exposed to PCB contaminated mud leaking and spilling from the dump trucks' sides and undercarriages.

## II. **Evidence to be Entertained by LBOH at the Adjudicatory Hearing**

- a) The LBOH understands that the UDF is either supported or opposed by many residents of Lee and adjacent communities, however, LBOH does not consider such support or opposition relevant to any decision to be reached after the hearing by LBOH.

- b) LBOH will decide whether or not 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 requests all interested parties supporting or opposing the UDF to introduce such expert testimony either before the hearing or most preferable at the hearing so that members of LBOH can request further clarifications from the experts if needed.
- c) LBOH has been referred by EPA to the entire administrative record of its UDF decisions in 2016 and 2020 and will take into account this record in its decision.
- d) LBOH has received further communications from EPA's counsel via US mail or electronic mail. These communications will be tendered into the record.
- e) LBOH has entered in the record the undated report of David J. De Simone cited in the aforementioned background section together with Dr. De Simone's curriculum vitae and publications. This report was accepted by EPA into its administrative record in spite of having been filed late.
- f) LBOH has **Three** concerns which need to be addressed at the hearing:
  - 1) Whether the liner proposed for the UDF will eventually leak as predicted by EPA and cited by De Simone in his testimony "First, even the best liner and leachate collection systems will ultimately fail due to natural deterioration..."(53 Federal Register 33345, August 30, 1988).
  - 2) Whether the predicted leaks will result in a health risk to the residents of Lee and adjacent communities.
  - 3) Whether approximately 200,000 tons of dredge mud containing 50ppm PCBs transported from the river and flood plain to the UDF will result in a health risk to the residents of Lee due to spills from the sides and undercarriages of dump-trucks traveling through LEE every two- and one-half minutes day after day for four years.

### III. Schedule for the Adjudicatory Hearing

- A. Introduction into the record of all communications received by EPA.

- B. Introduction into the record of expert De Simone qualifications and testimony, and LBOH decision to accept or reject the proposed expert testimony.
- C. Introduction on the record of all other experts, who have either submitted expert reports to LBOH, with qualifications and reports and decisions by LBOH to accept or reject their proposed testimony.
- D. After the conclusion of expert testimony LBOH will reserve one hour for questions to LBOH from attendees to the hearing. Questions from attendees will be limited in time to two minutes each.

#### **IV. The Issue of GE the Applicant for Installation of the UDF**

LBOH requests GE, the applicant for the UDF, to present expert testimony either before, or most preferable at the hearing to the three issues of concern to LBOH: 1) whether the proposed liner will eventually leak, 2) whether the leaking liner will present a risk of health to the residents of Lee, and 3) whether the daily transport of hundreds of thousands of tons of mud contaminated with PCBs through the streets of Lee present a danger to the health of residents of Lee.

Lack of participation by GE will be taken by LBOH as an inference that GE has no evidence that the UDF will not result in a risk of health to the residents of Lee and adjacent communities.