

Exhibit 24

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
No. 22-1398**

**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.**

**On petition for review of a permit issued
by the United States Environmental Protection Agency**

**BRIEF OF THE HOUSATONIC REST OF RIVER
MUNICIPAL COMMITTEE**

**Matthew Pawa
Seeger Weiss LLP
1280 Centre Street, Suite 230
Newton, MA 02459
617 641-9550
mpawa@seegerweiss.com**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
TABLE OF KEY DOCUMENTS	iv
TABLE OF OTHER ABBREVIATIONS	v
INTRODUCTION	1
ISSUES PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE.....	5
I. The PCB contamination in the Housatonic River.....	5
II. The Committee and the Five Towns.....	5
III. The procedures for making the cleanup decision.....	6
IV. EPA issues the 2016 Permit, which requires GE to ship all contaminated material out of state.....	7
V. The EAB rejects EPA’s offsite disposal decision.....	10
VI. The Settlement Agreement: hybrid disposal, more PCB removal, and an end to delay.....	11
VII. EPA issues the 2020 Permit.....	17
VIII. The EAB denies HRI/HEAL’s petition for review of the 2020 Permit.....	20
SUMMARY OF ARGUMENT	22
STANDARD OF REVIEW	24
ARGUMENT	25
I. The permit modification process was proper.....	25
II. EPA correctly concluded that the selected remedy was the most protective option available.....	33
A. EPA properly waived the ACEC regulation.....	33
B. EPA applied the relevant criteria and reasonably concluded that the selected remedy was the best choice.....	45
C. HRI/HEAL’s other arguments about the UDF should be rejected.....	49
CONCLUSION	50
CERTIFICATE OF COMPLIANCE.....	51
CERTIFICATE OF SERVICE	52

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Adams v. EPA</i> , 38 F.3d 43 (1st Cir. 1994).....	24, 35, 36, 37
<i>Baltimore Gas & Elec. v. NRDC</i> , 462 U.S. 87 (1983).....	24
<i>Cinderella Career & Finishing Schools, Inc. v. FTC</i> , 425 F.2d 583 (D.C. Cir. 1970).....	26
<i>City of Taunton v. EPA</i> , 895 F.3d 120 (1st Cir. 2018).....	24
<i>Dep’t of Com. v. New York</i> , 139 S. Ct. 2551 (2019).....	22, 28
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935).....	26
<i>Marasco & Nesselbush, LLP v. Collins</i> , 6 F.4th 150 (1st Cir. 2021).....	23, 44
<i>Pension Ben. Guar. Corp. v. LTV Corp.</i> , 496 U.S. 633 (1990).....	26
<i>Silva v. Garland</i> , 27 F.4th 95 (1st Cir. 2022).....	42
<i>Texaco v. FTC</i> , 336 F.2d 754 (D.C. Cir. 1964).....	26
<i>Upper Blackstone Water Pollution Abatement Dist. v. EPA</i> , 690 F.3d 9 (1st Cir. 2012).....	24, 37, 41

STATUTES

5 U.S.C. § 554(d)	28
5 U.S.C. § 706(2)(A).....	23
42 U.S.C. 9621(d)(2).....	7, 33
42 U.S.C. § 6976(b)	6, 23
42 U.S.C. § 9613(h)	6
42 U.S.C. § 9621(d)(4)(B)	<i>passim</i>
Mass. G.L. Ch. 21D	10

REGULATIONS

16 C.F.R. § 3.1	26
40 C.F.R. § 761.75	8, 9
Mass. Reg. § 16.40(4)(d)	32

ADMINISTRATIVE DECISIONS

<i>In re General Electric,</i> 17 E.A.D. 434 (EAB Jan. 26, 2018)	<i>passim</i>
<i>In re General Electric,</i> 18 E.A.D. 575 (EAB Feb. 8, 2022)	<i>passim</i>

TABLE OF KEY DOCUMENTS

<u>Abbreviation</u>	<u>Document</u>
2007 Permit	RCRA Permit (Oct. 2007)
2014 SOB	Statement of Basis (June 2014)
2016 Permit	RCRA Permit (Oct. 2016)
2016 RTC	Response to Comments (Oct. 2016)
2020 Draft Permit	Draft RCRA Permit (July 2020)
2020 GE Comment	Comment by GE on 2020 Draft Permit (Sept. 2020)
2020 HEAL Comment	Comment by HEAL on 2020 Draft Permit (Sept. 2020)
2020 HRI Comment	Comment by HRI on 2020 Draft Permit (Sept. 2020)
2020 MA Comment	Comment by Massachusetts on 2020 Draft Permit (Sept. 2020)
2020 Permit	RCRA Permit (Dec. 2020)
2020 RTC	Response to Comments (Dec. 2020)
2020 SA	Settlement Agreement (Feb. 2020)
2020 SCA	Supplemental Comparative Analysis (July 2020)
2020 SOB	Statement of Basis (July 2020)
CD	Consent Decree, <i>U.S. v. GE</i> , No. 99-30225 (D. Mass. Oct. 2000)
RCMS	Revised Corrective Measures Study (Oct. 2010)

TABLE OF OTHER ABBREVIATIONS

<u>Abbreviation</u>	<u>Full term</u>
ACEC	Area of Critical Environmental Concern
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 <i>et seq.</i>
Committee	Intervenor Housatonic Rest of River Municipal Committee
EAB	Environmental Appeals Board
EPA	U.S. Environmental Protection Agency, N. England Region
EPA Br.	Brief of the U.S. Environmental Protection Agency (Dec. 2022)
Five Towns	The Towns of Great Barrington, Lee, Lenox, Sheffield, and Stockbridge (all in Berkshire County, Massachusetts)
GE	Intervenor General Electric Co.
HEAL	Petitioner Housatonic Environmental Action League
HRI	Petitioner Housatonic River Initiative
HRI/HEAL Br.	Brief of Petitioners HRI & HEAL (Oct. 2022)
PCBs	Polychlorinated biphenyls
RCRA	Resource Conservation & Recovery Act, 42 U.S.C. § 6901 <i>et seq.</i>
Rest of River	The portion of the Housatonic River at issue in this proceeding
TSCA	Toxic Substances Control Act, 15 U.S.C. § 2601 <i>et seq.</i>
UDF	Upland Disposal Facility

INTRODUCTION

EPA's decision ordering General Electric to clean up its polychlorinated biphenyls ("PCBs") pollution from the Housatonic River and adjoining lands will bring an end to a decades-long process to restore the environment and protect public health. The Housatonic Rest of River Municipal Committee ("Committee"), which acts for the five towns in western Massachusetts most directly affected by the cleanup, strongly supports this cleanup. These five towns are Great Barrington, Lee, Lenox, Sheffield, and Stockbridge ("Five Towns").

In 2014-2016 EPA tried to order General Electric ("GE") to ship all PCB-laden waste out of state—a decision that the Committee supported at the time. But the EPA's Environmental Appeals Board ("EAB") vacated and remanded that decision. Faced with a clear legal risk that the towns would lose their arguments to prevent *all* PCB disposal within their jurisdictions, the Committee accepted EPA's invitation to join settlement talks with GE and many other stakeholders. After protracted and difficult negotiations, EPA and these stakeholders reached a Settlement Agreement, in which GE and the other stakeholders agreed not to seek review of EPA's cleanup decision, provided this final cleanup decision was substantially similar to the cleanup outlined in their Agreement.¹ This Settlement

¹ The other stakeholders who agreed to the settlement were GE, the Five Towns represented by the Committee, the State of Connecticut, the City of Pittsfield, the Massachusetts Audubon Society, the Berkshire Environmental Action Team, and

Agreement proposed “hybrid” disposal, in which GE would ship the most highly contaminated material out of state, while other wastes with lower average concentrations of PCBs would be disposed of at a new, state-of-the-art facility in Berkshire County. The Settlement Agreement also: (1) required cleanup of significantly more contaminated sediments and soils from the River and adjoining lands; (2) dictated far-reaching and detailed conditions to GE regarding the construction and operation of the disposal facility; (3) required GE to begin investigation and design work immediately; and (4) included a financial compensation package to account for disruption to the towns from a cleanup process that will take over a decade to complete.² Neither the additional PCB removal nor the expedited start would ever have been incorporated into EPA’s cleanup decision absent the Settlement Agreement.

EPA spent five months writing a detailed order (in the form of a draft RCRA permit to be issued to GE) along the lines described in the settlement agreement, made some changes to the draft permit in response to more than 400 comments

C. Jeffrey Cook. All had previously participated in the proceedings before the EAB. HEAL declined to participate in the mediation, and HRI quit after two sessions.

² The compensation provisions run exclusively between GE and the Five Towns (as well as other stakeholders such as the City of Pittsfield); there are no obligations imposed on EPA by this part of the Settlement Agreement, and the compensation piece of the Agreement is not part of EPA’s cleanup decision.

from the public, and ultimately issued a final permit to GE another five months later, which largely conformed to the cleanup provisions in the Settlement Agreement. In a comprehensive decision, the EAB rejected challenges to EPA's decision. This Court should do the same.

The petitioners in this action—the Housatonic River Initiative (“HRI”) and Housatonic Environmental Action Team (“HEAL”) (collectively, “HRI/HEAL” or “Petitioners”)—present two fundamentally flawed objections to EPA's disposal decision. First, Petitioners contend that it was improper for EPA to engage in settlement negotiations with stakeholders before revising its disposal decision. But there is no rule of law that forbids EPA from mediating with stakeholders before proposing a cleanup—nor should there be. This is particularly true in a situation like this one, where PCBs have remained uncontrolled in the Housatonic River for years because of successful litigation by one of these very stakeholders. Put differently, the mediation itself had very real environmental benefits in the form of adding speed and extra PCB removal, and removing litigation-related uncertainty. EPA had ample discretion to mediate and to sign the Settlement Agreement. It would be unwise to devise a new rule of law discouraging such settlement talks.

Second, HRI/HEAL are also wrong to suggest that EPA has now contradicted its earlier analysis proposing out-of-state disposal of all PCBs removed from the River. In point of fact, EPA has *always* acknowledged the small

risk over the long-term of a leak from an onsite landfill, but has *never* said that onsite disposal is unsafe—nor could it, because EPA routinely authorizes new landfills to dispose of contaminated material from large cleanups. If EPA had said that onsite disposal was unsafe back in 2014-16, it never would have lost the first round in the EAB. And EPA was fully justified in embracing onsite disposal on round two, because (1) the most highly contaminated waste is still being shipped offsite; (2) EPA’s main justification for 100% offsite disposal had been rejected by the EAB; and (3) perhaps most importantly, hybrid disposal is manifestly part of a package that includes substantial environmental benefits, including significantly more PCB removal, and an expedited start to cleanup design. Although Petitioners quibble with details about whether some of the more contaminated waste might end up in the local facility, they do not really contest any of these central points. For these and other reasons, their petition for review should be rejected.

ISSUES PRESENTED FOR REVIEW

The Committee fully supports all aspects of EPA’s cleanup decision. It submits this brief to address two issues where the Committee believes its input would be most valuable. The two issues are:

1. Was it improper for EPA to propose a cleanup drawn from EPA’s settlement with GE, the Committee, and other stakeholders?

2. Was EPA's decision to dispose of some waste in a local disposal facility arbitrary and capricious?

STATEMENT OF THE CASE

I. The PCB contamination in the Housatonic River.

Throughout most of its length, the Housatonic River is polluted with PCBs. The source of these PCBs was an electrical transformer facility operated for many years by GE in Pittsfield, Massachusetts. In 2000, EPA agreed with GE on the process that EPA would follow in deciding how to clean up contamination in different segments of the River, including an area designated as "Rest of River." AR9420, JA__ (CD).³ "Rest of River" is the area at issue in this petition; it begins two miles downstream of the former GE facility and ends 125 miles later, where the river enters Long Island Sound. The most heavily contaminated stretches of "Rest of River" are the upstream portions in Massachusetts.

II. The Committee and the Five Towns.

The Committee is an intergovernmental organization formed in 2013 to represent the interests of the Five Towns. These Five Towns are located in Berkshire County along the portions of the Housatonic River that will bear the brunt of the cleanup, as more than a million cubic yards of contaminated materials

³ References to the administrative record will take the form of "AR####, at X" where "####" represents the relevant document ID and "X" is the internal pagination.

are dredged or dug up. The purpose of the Committee has been to represent these communities in connection with the cleanup and to seek monetary compensation from GE for socioeconomic damage caused by the contamination and the cleanup process. The Committee has for almost ten years participated in discussions and litigation with EPA related to the cleanup, including participation in both proceedings before the EAB; it also participated in the negotiation of the Settlement Agreement at issue in this petition. The Court granted the Committee's motion for intervention on June 22, 2022.

III. The procedures for making the cleanup decision.

The agreement between EPA and GE took the form of a consent decree ("CD") entered by a federal district court in 2000. *See* AR9420 (JA___) (CD). The CD requires EPA to embody its cleanup order for Rest of River in a modification to a permit issued to GE under the Resource Conservation and Recovery Act ("RCRA"). *Id.* ¶ 22(n). Using the RCRA permit modification process to order a large cleanup is unusual, because it gives GE and others a statutory right to seek immediate review of EPA's cleanup decision—first in the EAB, and then in this Court. *See* 42 U.S.C. § 6976(b). This is different from most federal cleanups, where EPA issues the cleanup decision under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which defers judicial review of the cleanup decision until the cleanup has been fully carried out. 42

U.S.C. § 9613(h). But while the cleanup selection procedures are drawn from RCRA, the standards applicable to the merits of EPA’s decision are drawn mostly from CERCLA. *See* AR9420, ¶ 22(p) (JA___) (CD). For example, the CD requires EPA to evaluate cleanup options by applying nine criteria—criteria that are very similar to the criteria used in selecting CERCLA cleanups.⁴ Similarly, the CD authorizes EPA to use CERCLA to determine to what degree the cleanup must comply with state laws that would be applicable or relevant and appropriate to the cleanup.⁵ *See* AR9420, ¶¶ 8(a); 22(p) (JA___) (CD).

IV. EPA issues the 2016 Permit, which requires GE to ship all contaminated material out of state.

In 2014, EPA proposed a cleanup decision for Rest of River, which was eventually embodied in a 2016 modification to GE’s RCRA permit (“2016 Permit”). *See* AR593921 (JA___) (2016 Permit). The 2016 Permit required GE to excavate and remove almost 1 million cubic yards of soil and sediment from the River and surrounding areas, and to dispose of this material at a “licensed existing

⁴ To be more precise, the CD required EPA to articulate the nine criteria in a permit to be subsequently issued to GE. *Id.* ¶ 22(n) (JA___); *see also* AR280170, at 20-23 (JA___) (2007 Permit with the nine criteria).

⁵ These “applicable or relevant and appropriate requirements” are referred to by CERCLA practitioners as “ARARs.” The Petitioners appear to agree that the CD validly conferred on EPA the authority to use CERCLA’s rules on when ARARs must be followed or waived. *See* Arg. § II.A, below; 42 U.S.C. 9621(d)(2). The Petitioners also appear to agree that EPA was required to use the nine criteria from the CD and the 2007 Permit to make its cleanup decision. *See* Arg. § II.B, below.

off-site disposal facility,” *e.g.*, at a facility in Youngstown, a village in western New York on the Niagara River. *Id.* at 52 (JA___) (2016 Permit); AR580275, at 9-3 (JA___) (RCMS). Still other contaminated areas of the River were to be covered with “engineered caps”—a synthetic membrane designed to isolate PCBs in the riverbed below the cap. *See* AR593921, at 32 (JA___) (2016 Permit).

In opting for offsite disposal, EPA rejected GE’s proposal, which was to dispose of all contaminated material at one (or more) of three sites: (1) a former sand and gravel facility near Woods Pond on the Lee/Lenox line; (2) an undeveloped area on Forest Street in Lee; and (3) another undeveloped area near Rising Pond in Great Barrington. *See* AR593922, at 236-41 (JA___) (2016 RTC). Of these three sites, the Woods Pond site was easily the most practical choice, because it was right next to some of the most contaminated areas of the River, and because it was a former sand and gravel facility rather than undeveloped woodland. *Id.* at 241.

In making the case for offsite disposal, EPA had to contend with the fact that full offsite disposal costs nearly \$200 million more than full onsite disposal, because of all the cost associated with shipping a large volume of waste to offsite facilities in places like western New York, and then paying those facilities to store the waste permanently. *See* AR558621, at 39 (JA___) (2014 SOB); AR580275, at 9-3 (JA___) (RCMS). EPA justified the cost by relying primarily on criteria

developed under the Toxic Substances Control Act (“TSCA”) to evaluate PCB landfills. *See* 40 C.F.R. § 761.75(b). Each of the three proposed onsite locations failed to satisfy certain of these TSCA criteria—for example because of their permeable soils or topography. *See* AR593922, at 239 (JA___) (2016 RTC); *In re General Electric*, 17 E.A.D. 434, 559 (EAB Jan. 26, 2018) (“*GE I*”). But what EPA did *not* say in 2016 (and has never said) was that onsite disposal was unsafe. Although EPA said there was a “non-zero potential” chance that an onsite landfill would leak, EPA nonetheless “did not note any concern with the protectiveness of on-site disposal,” as the EAB later pointed out. *See* AR593922, at 244 (JA___) (2016 RTC); *GE I*, 17 E.A.D. at 563. Instead, EPA concluded that, whichever option was selected, both off-site and on-site disposal would “provide high levels of protection.” AR558621, at 35 (JA___) (2014 SOB); *see also GE I*, 17 E.A.D. at 563.

These conclusions about protectiveness called into question EPA’s reliance on the TSCA siting criteria. TSCA authorizes EPA to waive these criteria at specific sites, and has a provision that specifically says that a liner at the bottom of the landfill may be used as a substitute for impermeable soils. 40 C.F.R. § 761.75(b)(2) & (c)(4). GE proposed using such a liner, and listed other cleanup sites where EPA had issued such a waiver and built a landfill to dispose of PCB waste removed from the site. In fact, EPA has since conceded that onsite landfills

are routinely implemented, including at sites with PCBs and with more mobile contaminants, and including in New England, where sites with impermeable soils are infrequent. For example, the Region has identified some 24 cleanup sites where PCB soils and/or sediments have been disposed of in local/on-site landfills. *See* AR650441, at T-3 (JA____) (2020 RTC). These sites include two landfills in Pittsfield holding 245,000 cubic yards of PCB-contaminated material from an earlier phase of the Housatonic cleanup. *Id.* Also on the list is the New Bedford Harbor site, where EPA has authorized disposal of up to 550,000 cubic yards of PCB-contaminated sediments into a “confined aquatic disposal cell.” *Id.* More broadly, of the 119 priority cleanup sites in Region 1, almost 60 have capped or covered areas, presumably including sites with contaminants that (unlike PCBs) are highly mobile. *Id.* at 12.

V. The EAB rejects EPA’s offsite disposal decision.

GE and other parties filed petitions in the EAB, challenging the 2016 Permit. The EAB rejected almost all these challenges, including challenges by HRI seeking more cleanup, and challenges by GE seeking less.⁶ But GE’s challenge to

⁶ The Committee supported the offsite disposal requirement in the 2016 Permit, but challenged the Region’s decision not to require GE to comply with a state law requiring compensation for impacts associated with certain aspects of the cleanup. *See* Mass. G.L. Ch. 21D. The EAB rejected the argument that a compensation requirement should have been included in the 2016 Permit, but expressly acknowledged that the municipalities could potentially pursue their claim for relief in other forums. *GE I*, 17 E.A.D. at 553-55.

the disposal decision was successful. The EAB cited the Region's finding that both onsite and offsite disposal had high levels of protectiveness, and that the Region's decision to reject onsite disposal was "predicated in large part" on the TSCA siting criteria. *See GE I*, 17 E.A.D. at 559. The EAB concluded that it was unreasonable for the Region to have relied on these TSCA siting criteria without explaining why it had not waived these criteria, as it had at many other cleanup sites:

GE pointed out ... that the Agency has granted waivers for on-site disposal where appropriate at other contaminated sites, and GE argued that such waivers can and should be granted for GE's proposed on-site disposal locations here. Nowhere . . . did the Region explain why it believes a TSCA waiver for on-site disposal at any of the locations suggested by GE would be inappropriate or attempt to distinguish the cited waiver decisions.

GE I, 17 E.A.D. at 566. The EAB went on to remand to the Region the "provisions of the Final Permit pertaining to these [disposal] issues." *Id.* at 584-85.⁷

VI. The Settlement Agreement: hybrid disposal, more PCB removal, and an end to delay.

In the wake of the EAB's 2018 decision, EPA invited all parties who had participated in the proceedings before the EAB to a mediation—including GE, the

⁷ The EAB also remanded on one other minor issue, which was the extent to which GE might have to undertake additional cleanup to accommodate future activity by third parties (*e.g.*, utilities) who might disturb or uncover contaminated soil. *GE I*, 17 E.A.D. at 584.

Five Towns, the City of Pittsfield, the Massachusetts Audubon Society, C. Jeffrey Cook, the Berkshire Environmental Action Team, the State of Connecticut, and the two groups that are petitioning this Court. The proposed mediation was subject to a confidentiality agreement, because candid, informal discussions were the only hope of settling the parties' differences over onsite disposal, which was (and is) a subject of intense public debate in Berkshire County. One of the Petitioners (HEAL) did not participate because it refused to sign the confidentiality agreement; the other Petitioner (HRI) quit mediation after two meetings. *See* HRI/HEAL Br. at 10 n.6. After months of intense negotiations, the remaining parties signed a Settlement Agreement in February 2020. *See* AR643538 (JA__) (2020 SA).

This Settlement Agreement proposed certain key revisions to be made to the cleanup plan that EPA had issued in 2014-2016, and required the signatories not to challenge any permit the Region issued so long as it was "substantially similar" to this proposed revision. *Id.* at 3. But the agreement acknowledged that the permit would "be subject to ... public comment," and authorized the parties to challenge the permit if it ended up being inconsistent with the Settlement Agreement, *e.g.*, as a result of changes made in response to public comments. *Id.* at 2-3 (JA__) (2020 SA).

The revised cleanup plan described in the Settlement Agreement has three key components, all of which were substantially adopted in the permit that was eventually issued by the Region (“the 2020 Permit”). *See* AR650440 (JA__) (2020 Permit).

First is hybrid disposal. Under this part of the cleanup plan, the most contaminated waste will be sent offsite, and other waste will be permanently stored in a new “Upland Disposal Facility” (“UDF”) to be built by GE at the former sand and gravel facility near Woods Pond. *See* AR643538, at 8-12 (JA__) (2020 SA). The waste eligible to be sent to the UDF is subject to certain key limits. The average concentration of PCBs in banks and floodplain soils sent to the UDF from certain areas must be less than 50 parts per million, and the average concentration of PCBs in sediments sent to the UDF from a given segment or “reach” of the River must be less than 25 ppm. *See id.* at Att. C (JA__) (2020 SA). As a result of these limits, EPA has since estimated that the average concentration of PCBs in *all* UDF materials will be 20 to 25 ppm. *See* AR650441, at 61 (JA__) (2020 RTC).⁸ Waste that would cause exceedances of these limits must be sent to an out-of-state

⁸ This average is a relatively low concentration of PCBs. For example, as the Region has pointed out, utilities are allowed to send certain PCB waste to ordinary municipal landfills (many of which are unlined) if the PCB concentration in that waste is below 50 parts per million. *See* AR650441, at 12 (JA__) (2020 RTC).

facility; at a minimum, GE must send at least 100,000 cubic yards of such waste out-of-state. *See* AR643538, at 8-9 (JA__) (2020 SA).

The UDF is also subject to demanding design and operational standards, all of which are designed to prevent any leaks from re-contaminating the environment. *See id.* at 9-11 (JA__) (2020 SA). It must have two liners at the bottom and a low-permeability cap at the top, which is expected to prevent leaks for 400 to 800 years. *See* AR650441, at 12, 8 (JA__) (2020 RTC). There will be a leachate collection system located between the first and the second liner, to remove any liquid that gets past the first liner.⁹ The bottom of the UDF must be located at least 15 feet above “a conservative estimate” of the elevation of the groundwater table, which is to be measured at the highest point it reaches over the course of the four seasons.¹⁰ There is also to be a network of groundwater monitoring wells between

⁹ As EPA noted, “the liner and final cover system rely on well-established engineering procedures to provide a containment system meeting acceptable factors of safety and to provide adequate isolation of the sediments from the environment and human exposure. ... Once the UDF is filled and the final low-permeability cover system is installed, water infiltration into the UDF will be essentially cut off, thereby eliminating a primary potential pathway for any future source of leakage and reducing the amount of leachate that will be generated.” *Id.* at 18 (JA__) (2020 RTC).

¹⁰ *See* AR643538, at 10 (JA__) (2020 SA); AR650440, at 54 (JA__) (2020 Permit). This buffer of soil between the bottom of the UDF and the water table is valuable because PCBs are not mobile contaminants. As the Region has observed, the tendency of PCBs to sorb onto soil and organic matter is “so overwhelming” that PCBs move up to 3,000 times more slowly than the groundwater itself moves. *See* AR650441, at 21 (JA__) (2020 RTC).

the UDF and the River, to detect any leaks that somehow get past the second liner.

See AR643538, at 11 (JA__) (2020 SA); AR650440, at 55-56 (JA__) (2020 Permit). All these systems must be maintained indefinitely by GE, which has posted a \$150M bond to cover these costs essentially into perpetuity. *See* AR650441 at 19, 50 (JA__) (2020 RTC). In short, the UDF is designed to be generally equivalent to a facility permitted to accept “much higher PCB contamination levels.” *Id.* at 12 (JA__) (2020 RTC).

Second is that the Settlement Agreement significantly improves the non-disposal parts of the remedy compared to the 2016 Permit (even though the EAB sustained this part of the 2016 Permit), including by removing an additional 143,000 cubic yards of PCB-contaminated material from in and around the River. AR647210, at 20 (JA__) (2020 SCA). These enhancements include:

- **More sediment removal.** GE must remove more PCB contamination from six different reaches of the River. The extra PCB removal means nearly 100 additional acres of the River will meet cleanup standards, without having to rely on river-bottom caps to isolate residual contamination in these areas. *See* AR650441, at 10 (JA__) (2020 RTC). This additional sediment removal significantly reduces risks. River-bottom caps are vulnerable to damage from floods and storms (which will only intensify with climate change), which could cause resuspension of contaminated sediments. *See* AR647211, at 23 (JA__) (2020 SOB).
- **More residential soil removal.** GE must remove PCBs from up to 28 additional residential properties. This additional soil removal will reduce concentrations below cleanup standards, freeing these properties from potential land use restrictions. *See id.* at 12 (JA__) (2020 SOB).

- **Possibly more riverbank removal.** GE must evaluate certain bank soils that would have been left in place by the 2016 Permit, and propose additional removal of contaminated soils if necessary. *See* AR650440, at 23 (JA__) (2020 Permit); AR643538, at 4 (JA__) (2020 SA); AR647211, at 10 (JA__) (2020 SOB).
- **Improvement of the river habitat.** GE must remove two dams downstream of Woods Pond and associated contaminated sediments. This will “greatly increase long-term habitat quality” in these areas and reduce downstream transport of PCBs. *See* AR647211, at 10, 24 (JA__) (2020 SOB).
- **Hydraulic pumping & fewer truck trips.** GE must evaluate, again under EPA supervision, whether material from Reach 5C, Woods Pond, and adjacent backwaters can be pumped directly to the UDF. This feature promises to eliminate nearly 50,000 truck trips from the roads of Lee and Lenox. *See id.* at 16 (JA__) (2020 SOB).
- **Fewer adverse impacts on community.** GE is required to minimize waste transport through residential areas and to consult the community about work activities, scheduling, traffic routes, and recreational enhancements. *See* AR643538, at 7 (JA__) (2020 SA); AR650440, at 74-75 (JA__) (2020 Permit).

Third, the Settlement Agreement required GE to “commence and perform investigation and design work as contractual obligations” starting on the effective date of the Settlement Agreement. *See* AR643538 at 3 (JA__) (2020 SA). And this work has begun: some 20 years after the CD was entered, GE has at last submitted a [Statement of Work](#), as well as many other documents detailing preparations for this massive remediation project. After more than a decade of study and many years after the first administrative challenge to EPA’s 2016 Permit, this is a huge step forward in the long history of the Rest of River cleanup.

Finally, the Settlement Agreement has provisions that run exclusively between GE and certain stakeholders. These provisions require GE to provide substantial compensation and services to the Five Towns comprising the Committee, including a \$55 million payment, consultation with local officials throughout the cleanup, and a commitment to repair damage to roads caused by GE's cleanup-related truck traffic. *Id.* at 13 (JA__) (2020 SA). The payment and services to be provided by GE to the Towns settled the Towns' claims for socioeconomic impacts associated with the Housatonic site—claims that the Towns have pursued for almost a decade, and that the EAB explicitly left open in its 2018 decision. *See GE I*, 17 E.A.D. at 551-53.

VII. EPA issues the 2020 Permit.

Five months after the Settlement Agreement was signed, EPA issued a draft permit in July 2020, and invited public comment. AR647214 (JA__) (2020 Draft Permit). The 2020 Draft Permit took the form of a redline showing changes EPA was proposing to make to the 2016 Permit that had been remanded by *GE I*. These changes substantially followed the changes proposed in the Settlement Agreement, but the Region added important details—*e.g.*, clarifying GE's obligation to remove certain riverbank soils upon request, and specifying different methods of determining how much sediment to remove in another part of the River itself. *See* AR649378, at 6-7 (JA__) (2020 GE Comment) (pointing out the differences). The

draft permit was accompanied by a Supplemental Comparative Analysis (“2020 SCA”), which described EPA’s evaluation of its revised proposal under the nine criteria that the parties had previously agreed upon. *See* AR647210 (JA__) (2020 SCA).

This analysis in the 2020 SCA included a lengthy explanation of EPA’s decision to waive compliance with a Massachusetts law that forbids locating a landfill within an “Area of Critical Environmental Concern” (“ACEC”). *Id.* at B-3 to B-7 (JA__) (2020 SCA). Although the 20-acre UDF is located at a former sand and gravel quarry next to two existing landfills, it is nominally within a much larger (12,280-acre) ACEC designated under Massachusetts law. However, as the SCA pointed out, EPA is authorized to waive compliance with state law where compliance would “result in greater risk to human health and the environment than alternative options.” 42 U.S.C. § 9621(d)(4)(B). EPA found that the extra PCB removal and reduced delay associated with hybrid disposal more than sufficed to justify waiving the ACEC rule, and explicitly invited the public to comment on this decision. AR647211, at 39 (JA__) (2020 SOB).

In fact, EPA concluded that complying with the ACEC rule could cause “irreparable damage,” because it would preclude a “significantly more permanent, protective, and faster cleanup.” This conclusion from the 2020 SCA bears quoting at some length:

Disposal ... off-site, as opposed to the Upland Disposal Facility, would negate the substantially greater protections to human health and the environment brought about by, among other items, significantly greater PCB removal, removal of two dams, the hydraulic pumping of material to the landfill, and increased protectiveness at over twenty floodplain properties. Finally, prohibiting the Upland Disposal Facility may cause irreparable damage. As mentioned above, the potentially indefinite delays that may accompany the selection of off-site landfilling would bring continued risks of exposure to PCBs. ... In short, the opportunity to have a significantly more permanent, protective, and faster cleanup, at a location that poses significantly fewer risks, with an assurance that all the highly contaminated material is still taken off-site, will all be negated by being forced to comply with [the ACEC rule].

AR647210, at B-6 to B-7 (JA__) (2020 SCA).

EPA extended the comment period to 66 days, held three hearings and ultimately received over 400 comments from the public. AR650441, at 45, 85 (JA__) (2020 RTC). HEAL submitted a comment arguing, among other things, that the UDF was a bad idea because of the permeable soils at the site and because of the effect a leak might have on neighboring properties. AR649388, at 5-7 (JA__) (2020 HEAL Comment). HRI submitted a 40-page comment arguing that EPA should have tried to use a “thermal desorption” technique instead of isolating PCBs in a disposal facility (either onsite or offsite). AR649355 (JA__) (2020 HRI Comment). Neither the HRI comment nor the HEAL comment said anything about the ACEC rule or about EPA’s decision to waive it.

Three months later, in December 2020, EPA issued the 2020 Permit, which was accompanied by a 140-page response to public comments. AR650440 (JA__)

(2020 Permit); AR650441 (JA__) (2020 RTC). The 2020 Permit had several revisions prompted by public comments, some of them substantial—*e.g.*, adding a requirement for GE to undertake air monitoring at the UDF site. *See* AR650441, at A-5 (JA__) (2020 RTC). EPA responded to HEAL’s comment by pointing out that the cap and the double liners constitute “an engineered barrier system that has been used for many decades at landfills across the nation,” and that the liner system in particular “is recognized as a best available liner technology to contain waste materials and has been shown to have a service life of 400 [to] 800 years.” AR650441, at 18 (JA__) (2020 RTC). On this basis, EPA concluded that the liner system would protect “against concerns regarding permeability of the underlying soils,” making “a leak . . . *extremely unlikely to occur.*” *Id.* at 13, 19 (JA__) (2020 RTC) (emphasis added). The Region also pointed out that, even if a leak did occur, groundwater monitoring would identify the release, and “GE would be required to take corrective actions necessary to protect human health and the environment.” *Id.* at 19 (JA__) (2020 RTC). The Commonwealth of Massachusetts also submitted a comment in which it stated that it did not object to the waiver of the ACEC rule. AR649382, at 1 (JA__) (MA Comment).

VIII. The EAB denies HRI/HEAL’s petition for review of the 2020 Permit.

HRI/HEAL filed a petition seeking review of the 2020 Permit in the EAB, which the EAB denied. Among other things, HRI/HEAL argued that (1) the

Settlement Agreement precluded EPA from properly considering public comments; (2) the Region's 2020 Permit contradicted its 2016 conclusion that offsite disposal was safer than onsite disposal; and (3) the Region erred by waiving compliance with the ACEC rule.

The EAB rejected all of these arguments. *See In re General Electric*, 18 E.A.D. 575 (EAB Feb. 8, 2022) (“*GE II*”). The EAB found that the Settlement Agreement did not preclude the Region from adhering to the appropriate cleanup selection criteria, or considering public comments. On the merits of onsite disposal, the EAB found that the Region did not change its factual premises between 2016 and 2020, but did change its evaluation of this information—and that this change in position was appropriate given (among other things) the remand of the 2016 Permit. *Id.* at 629. On the waiver of the ACEC rule, the EAB found that HRI/HEAL's argument was itself waived because it had never been presented to EPA before the 2020 Permit was issued, and that in any event EPA's ACEC waiver was justified by all the benefits connected to the UDF (*e.g.*, the extra PCB removal and expedited start to cleanup design). *Id.* at 639-41.

SUMMARY OF ARGUMENT

Petitioners make two basic arguments about hybrid disposal, both of which are incorrect.

First, Petitioners argue that, in the wake of the EAB’s first decision, EPA should not have mediated their disagreements with other stakeholders, and that this prelude to the 2020 Permit suffices to invalidate the entire permit. HRI/HEAL also suggest that a settlement outlining a proposed cleanup is *per se* incompatible with a dispassionate analysis of the nine cleanup selection criteria, and with EPA’s obligation to consider public comments. Yet EPA could and did make changes to the cleanup in between the settlement and the 2020 Permit, including in response to public comments. More fundamentally, there are multiple cleanups that could plausibly satisfy the nine criteria, and EPA had discretion to choose between them; weighing the pros and cons of complex cleanups is not an equation with a unique answer. And it was acceptable, even wise, for EPA to be influenced by the value of getting the buy-in of key stakeholders—including in particular GE, which had already put off cleanup by at least five years with its successful challenge to EPA’s first cleanup decision. *See Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2574 (2019) (proper for agency officials to discuss their “policy preferences and ideas ... with affected parties”). Getting cleanup started after 20+ years was a win for

the environment and for human health; EPA was not obliged to keep beating its head against the wall.

Second, Petitioners argue that hybrid disposal was substantively the wrong call, and in particular that EPA should not have waived compliance with the State ACEC rule, which would otherwise forbid putting a landfill at the UDF site. But here HRI/HEAL simply ignore the fact that hybrid disposal was part of a package with massive environmental benefits, including more PCB removal and an expedited start to cleanup. These benefits made the remedy more protective than the only realistic alternative, which was to re-propose the 2016 Permit with a different rationale (and less PCB removal), and hope that the EAB did not (prompted by GE's inevitable challenge) remand it again, leading to another lost half-decade. Under these circumstances, EPA's waiver of the ACEC rule was entirely appropriate—all the more so since the UDF site is a quarry that has essentially none of the special ecological features the ACEC rule was designed to protect. Moreover, HRI/HEAL never objected to EPA's waiver of the ACEC rule, so they cannot fault EPA now for failing to adopt their objection.

The bottom line is that the Committee believes the best outcome for the River and the people who live near it is to get started on this cleanup as soon as possible. Because the truth is that there already *is* a local PCB disposal facility of sorts in Berkshire County—the Housatonic River. And the PCBs in *this* facility

are not capped, and not controlled. It is well past time to clean up the River and isolate the PCBs in properly-designed facilities where they belong.

STANDARD OF REVIEW

The Committee agrees with the standard of review described in EPA's brief, and incorporates that discussion herein. EPA Br. 23-25. This Court should review the permit under the Administrative Procedure Act's arbitrary and capricious standard. *See* 42 U.S.C. § 6976(b); 5 U.S.C. § 706(2)(A). Arbitrary and capricious review is "narrow," and agency decisions can be vacated only if the agency (1) "has relied on factors which Congress has not intended it to consider"; (2) "entirely failed to consider an important aspect of the problem"; (3) "offered an explanation for its decision that runs counter to the evidence before the agency," or (4) has made a decision that "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Marasco & Nesselbush, LLP v. Collins*, 6 F.4th 150, 172 (1st Cir. 2021) (internal quotation marks omitted). Applying this standard, this Court has said that it will "not ... substitute its judgment for that of the agency," *id.*, and that it will "uphold a decision of less than ideal clarity" whenever the decision "finds support in the record and has a rational basis." *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 20 (1st Cir. 2012). Where the issues turn on "a scientific determination, as opposed to simple findings of fact," the deference is greater still; in such cases "a

reviewing court must generally be at its most deferential.” *Baltimore Gas & Elec. v. NRDC*, 462 U.S. 87, 103 (1983); *see also Adams v. EPA*, 38 F.3d 43, 49 (1st Cir. 1994) (“an agency is entitled to deference with regard to factual questions involving scientific matters in its own area of expertise.”). Finally, this deference applies not only to the decision by EPA’s New England office, but to the EAB’s decision as well. *City of Taunton v. EPA*, 895 F.3d 120, 126 (1st Cir. 2018).

ARGUMENT

I. The permit modification process was proper.

The public was fully included in the remedy selection decision. HRI/HEAL say otherwise, arguing that EPA short-circuited the public comment process by reaching an agreement beforehand with the parties who had challenged the 2016 Permit—an agreement that supposedly compromised EPA’s “neutrality.” But Petitioners are incorrect, for four reasons.

First, the Settlement Agreement did not cut off public comment, or prevent EPA from giving public comments a fair hearing. The Settlement Agreement acknowledged the permit would “be subject to ... public comment,” and authorized the parties to seek review of the Permit if it ended up being inconsistent with the settlement, *e.g.*, as a result of changes made in response to public comments. *See* AR643538, at 2-3 (JA__) (2020 SA). As the EAB found, HRI/HEAL admitted at oral argument before the EAB that the Settlement

Agreement did not “legally constrain [EPA] in how it modified [the] 2016 Permit.” *GE II*, 18 E.A.D. at 653 (EAB’s summary of oral argument). In fact, when the draft permit was issued, GE objected (without success) to what it believed were departures from the settlement.¹¹ And EPA changed the permit again based on public comments—for example, by adding an air monitoring requirement absent from the Settlement Agreement. *See* AR650441, at A-5 (JA__) (2020 RTC). EPA legitimately listened to the public during the lengthy comment process.¹²

Second, HRI/HEAL’s attack on EPA’s “neutrality” is unpersuasive.

Petitioners rely on a fact sheet that EPA published on the key elements of the Settlement Agreement, and say this fact sheet shows that EPA had already “committed itself” to the cleanup described in the Settlement Agreement.

HRI/HEAL Br. at 21; AR643539, at 4 (JA__) (fact sheet). Petitioners go on to compare EPA’s position to statements made by FTC commissioners prejudging

¹¹ *See, e.g.*, AR649378 at 6-7 (JA__) (2020 GE Comment) (objecting to apparent departure from settlement related to removal of additional riverbank soils); AR650440, at 23 (JA__) (2020 Permit) (leaving the requirement unchanged).

¹² The time and resources EPA devoted to revising the cleanup plan described in the Settlement Agreement also belie the notion that the cleanup was a done deal once the agreement was signed. EPA spent five months carefully revising the 2016 permit, and then another three months writing 140 pages of responses to more than 400 public comments (some of which EPA accepted, as described above).

respondents in adversarial matters pending before them.¹³ But the two situations are not the same. The FTC is a quasi-judicial agency, and its commissioners serve as judges in formal, trial-like proceedings that often work substantial deprivations of property interests protected by the due process clause.¹⁴ That situation is very different from this one. The EPA regional officials who issued the fact sheet were making a policy choice rather than imposing liability in an adversarial proceeding. Their obligation to take public comments is a statutory duty designed to ensure better decision-making, rather than a constitutional obligation imposed to prevent deprivations of property or other rights. Moreover, very much unlike the FTC commissioners, EPA said nothing to suggest any unwillingness to consider a particular comment or commenter. On the contrary, the fact sheet that supposedly illustrates EPA's "entrenchment" repeatedly advised the public of its opportunity to comment, and said that it would make a final decision only "after considering and responding to comments." AR643539, at 4 (JA__) (fact sheet).

¹³ HRI/HEAL Br. at 21; *Texaco v. FTC*, 336 F.2d 754 (D.C. Cir. 1964); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970).

¹⁴ *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) (FTC is "quasi-judicial" agency); 16 C.F.R. § 3.1 (FTC proceedings are "formal adjudicative proceedings"); cf. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) (formal adjudications must follow a set of "trial-type procedures," but informal adjudications "do not include such elements").

More fundamentally, EPA is not required to be agnostic about the fate of its cleanup proposals—on the contrary, practically *every* cleanup plan EPA issues for public comment is accompanied by an explanation from EPA that lays out EPA’s best arguments about why the public should approve the proposal.¹⁵ It is no more than human nature to hope that others will embrace rather than criticize a draft of practically any document, whether it be a RCRA permit or a judicial opinion. Petitioners cite no case to suggest that this mindset would constitute improper agency bias.

Third, it was not improper for EPA to consult others in the period before the draft cleanup plan was issued. The process for writing a draft permit is not highly regulated; the administrative record does not typically contain initial versions of the draft permit or other records of EPA’s informal deliberations. In handling complex cleanups regulated under RCRA and CERCLA, EPA can and does consult others during this period, including consultants and responsible parties. There is, for example, no rule against *ex parte* communications with decision-makers issuing a permit. *Cf.* 5 U.S.C. § 554(d) (no *ex parte* communications in formal adjudications). Petitioners’ assumption seems to be that there is only one

¹⁵ For example, the 2014 draft permit was accompanied by a glossy “Statement of Basis” extolling the benefits of full offsite disposal. AR558621 (JA___) (2014 SOB).

possible remedy that can be chosen under the selection criteria, and that if outsiders have influenced the outcome from what it would have been in a vacuum, then that outcome must be illegal. But this premise is wrong: the very nature of discretion implies the discretion to choose among any of several valid cleanups. In exercising this discretion, it was proper for EPA officials to discuss their “policy preferences and ideas ... with affected parties.” *New York*, 139 S. Ct. at 2574. This is particularly true when these other parties have legal rights to bring administrative litigation that threatens to undo (and already has undone once) the remedy EPA selects, thereby indefinitely deferring steps to address uncontrolled pollution.

This discussion with affected parties is exactly what happened here. All parties to the mediation understood the cleanup had to conform to the remedy selection criteria, and EPA (by virtue of being the permit issuer) self-evidently had the most leverage to lead this analysis. Moreover, EPA had special justification to mediate in this case, given the unique appeal rights held by GE, the Five Towns, and others—rights absent in the typical CERCLA remedy selection but that existed here because the CD obligated EPA to select the remedy using RCRA procedures. *GE I*, 17 E.A.D. at 486 n.19. Mediation was the Region’s best hope to reduce litigation-related delays, which are relevant to remedy selection factors such as protectiveness, implementability, and community support. Because PCBs will

remain uncontrolled in the River until GE finally starts to clean them up, by 2020 EPA understandably (and wisely) put a high value on getting this cleanup started as quickly as possible.

EPA's approach was also consistent with any sane conception of administrative law.¹⁶ After having its cleanup derailed for years by the 2016 appeal, EPA offered to mediate with all parties to this appeal to try to head off a second remand and commence a long overdue cleanup. Petitioners lament the public's exclusion, but there is no known way to negotiate with the public at large, and mediations almost always occur in a confidential setting as standard operating procedure. Moreover, the public *did* have a seat at the table: the elected Select Boards of the affected municipalities, here acting through their appointees on the Committee, were and are the best voices of the people in our democratic system. The City of Pittsfield, the State of Connecticut, the Berkshire Environmental Action Team, Mass Audubon and even an individual resident (C. Jeffrey Cook) also had a seat at the table—and Petitioners were invited to participate as well. As noted above, HEAL chose not to participate in the mediation because of the confidentiality agreement, and HRI quit the mediation after the two sessions.

¹⁶ Notably, RCRA guidance explicitly authorizes EPA officials to negotiate settlements of permit appeals. EPA OSWER #9521.00-01, [*RCRA Permit Appeals Guidance Manual*](#) (Oct. 3, 1990), at 13-14.

HRI/HEAL Br. at 10 n.6. Yet Petitioners argue this multilateral effort was somehow *less* inclusive than their preferred procedure, which would have been for EPA simply to announce a draft permit from on high, without consulting anyone. This makes no sense.

Finally, HRI/HEAL are wrong to suggest that EPA's decision was improper because GE is providing compensation to the Five Towns. HRI/HEAL Br. at 21. As noted above, the compensation provisions in the Settlement Agreement run exclusively between GE and the Five Towns (as well as other stakeholders such as the City of Pittsfield); there are no obligations imposed on EPA by this part of the Settlement Agreement, and the compensation piece of the Agreement is not part of the 2020 Permit. *See* AR543538, at 13-19 (JA__) (2020 SA). The payment and services to be provided by GE to the Towns settled the Towns' claims for socioeconomic impacts associated with the Housatonic Rest of River cleanup—claims that the Towns have pursued for almost a decade, and that the EAB explicitly left undisturbed in its 2018 decision. *See GE I*, 17 E.A.D. at 551-53. And money or no money, the Town representatives who make up the Committee know they will be judged based on how well this cleanup works out over decades, long after the money is spent. As the Committee has publicly stated many times, this remedy is, under the exceptional circumstances present here (including GE's

unique rights to appeal), the best outcome for human health and the environment, irrespective of the money to be paid by GE to the Towns and other stakeholders.

Moreover, Petitioners' attack on the Towns' motives is beside the point.

HRI/HEAL cite no case in which an agency's decision has been vacated because of a side deal between stakeholders. Nor could they: the question at issue in this case is not whether the Towns' actions were appropriate, but whether *EPA's* decision was appropriate. Stakeholders are *routinely* motivated by factors that are different from the factors that EPA is required to consider—*e.g.*, regulated parties like GE have business interests that EPA could never consider directly, and members of the public often support or oppose cleanups based on considerations (*e.g.*, threats to property values, land reuse scenarios) that are irrelevant to EPA. So while the ultimate fact that a stakeholder supports the remedy is certainly relevant to EPA's decision, EPA has no duty to weigh the factors motivating that support. The services and compensation GE is providing to the Towns should not distract the Court from its task, which is to evaluate EPA's decision, not the Towns'.

In short, the approach the Region took in 2020 was a sincere attempt to *engage* stakeholders and was, if anything, in the best tradition of public service. It was the very opposite of an arbitrary and capricious process.¹⁷

¹⁷ Petitioners also suggest that it was denied a "reasonable" amount of time to submit its comments, because of COVID-19 and a storm. HRI/HEAL Br. at 23-24. Not so. The Settlement Agreement proposed most of the key details about the

II. EPA correctly concluded that the selected remedy was the most protective option available.

Process aside, EPA's 2020 Permit was also substantively the right call—and certainly one well within EPA's broad discretion to make technical judgments about how to protect human health and the environment. HRI/HEAL argue that EPA should not have waived compliance with the Massachusetts ACEC rule, and that it acted inconsistently when it approved a landfill in 2020 after rejecting an allegedly similar option in 2016. Petitioners also argue that the EAB made factual errors about the PCB concentrations in the UDF and should have considered a geologist's report that was created months after the final permit was issued, and well after the public comment period ended. Each of these arguments should be rejected.

A. EPA properly waived the ACEC regulation.

1. Introduction

The UDF site is within an “Area of Critical Environmental Concern” (“ACEC”), a zone of special ecological interest designated under state law, where

UDF in February 2020, some seven months before the comment period closed; almost a decade earlier GE had issued its own detailed proposed for landfilling contaminated sediment at the UDF's location, so the basic idea was not new. AR580275, at 9-40 (JA__) (RCMS). Even after the draft permit was announced on July 14, 2020, there were three hearings and an extension of the comment period, until September 18, 2020. EPA Br. at 19; AR650441, at 3 (JA__) (2020 RTC). Petitioners had plenty of time to evaluate the UDF.

solid waste landfills are not allowed. 310 Code Mass. Reg. § 16.40(4)(d). That said, the 20-acre UDF is only a very small part of the entire 12,280-acre Upper Housatonic River ACEC, and the site (unlike other parts of the Housatonic ACEC) does not have high ecological value. The administrative record confirms what the satellite pictures plainly show: the UDF site is “in close proximity to two other landfills,” and is “an area consisting of virtually all previously disturbed areas, and has only 0.6 acre of any type of woodlands, with the rest being a low-value, disturbed gravel area.” AR650441, at 10, 22 (JA___) (2020 RTC). HEAL’s comment on the 2020 remedy acknowledged this as well; it said the UDF site “was previously used ... [for] sand and gravel mining operations,” and the gravel piles there previously caused illegal discharges to the River. AR649388, at 5 (JA___) (HEAL letter). EPA’s view was similar in 2016, when it found that habitat at the site might be “improved” over the long run by a landfill. AR593922, at 241 (JA___) (2016 RTC).

Acting pursuant to its explicit authority under federal law, EPA waived the landfill prohibition in the state ACEC rule. CERCLA’s “ARARs” provisions authorize EPA to waive a cleanup’s compliance with state laws where such compliance “will result in greater risk to human health and the environment than

alternative options.”¹⁸ EPA’s waiver decision was based on an extensive analysis by EPA, which focused on the benefits of avoiding litigation-related delay and the value of obtaining GE’s agreement to remove significantly more contaminated soil and sediment (143,000 cubic yards’ worth). *See* AR647210, at B-3 to B-7 (JA__) (2020 SCA). EPA invited comment on this analysis. AR647211, at 39 (JA__) (SOB 2020). HRI/HEAL declined this invitation, as did every other member of the public; the only comment that even mentioned EPA’s ACEC waiver was a comment by the Commonwealth of Massachusetts stating that it had no objection to the waiver. AR649382, at 1 (JA__) (MA Comment).

But now Petitioners say that EPA’s decision was “nonsensical,” that it threatens the “precious ecological resources” at the UDF site, HRI/HEAL Br. at 27, 28 n.12, and that it was somehow improper for EPA to rely on the value of avoiding litigation delay and obtaining additional PCB removal, *id.* at 27-28. Petitioners’ objections to the ACEC waiver should not be considered here because they were never presented to EPA in time to affect the final permit, and are therefore waived in this Court. *See* II.A.2, below. Moreover, Petitioners are

¹⁸ *See* AR650440, at C-10 (JA__) (2020 Permit); 42 U.S.C. § 9621(d)(4)(B). As noted above, ARARs stands for “applicable or relevant and appropriate requirements.” Section 121(d)(2) of CERCLA requires EPA to ensure that cleanups comply with ARARs, subject to this waiver rule and certain other limits. 42 U.S.C. § 9621(d)(2).

wrong on the merits: it was reasonable for EPA to consider the value of avoiding litigation-related delays and obtaining removal of additional contaminated material from the River. *See* II.A.3, below.

2. HRI/HEAL did not preserve their objection to EPA's ACEC waiver.

HRI/HEAL's objection to the waiver of the state ACEC law is not properly before the Court, because the objection was not raised during the public comment period. Comments must not only identify a mistake in the agency's proposal, but must "show why the mistake was of possible significance," and must do so "in a way which could reasonably have permitted the agency to examine [the petitioner's] contentions." *Adams*, 38 F.3d at 51 (quotation marks omitted). In *Adams*, this Court went on to hold (1) that certain objections to a permit were preserved, because the petitioner cited the specific rule EPA had violated and also complained about harms to the very resources the rule was designed to protect, and (2) that certain other objections by the petitioner had been "meaningfully refashioned and refined" after their initial presentation to EPA, and were therefore not preserved. *Id.* at 50, 52.

Petitioners failed to meet the *Adams* standard. HRI/HEAL say section 2 of HEAL's comment "clearly raised" the ACEC issue, HRI/HEAL Br. at 30, but they

cite no specific page and do not quote the comment.¹⁹ Even read generously, section 2 of the HEAL comment does not refer to the Housatonic ACEC or the ACEC regulations, and does not even assert that the UDF site has any ecological value. On the contrary, the relevant part of the comment acknowledges that the UDF site “was previously used by the Lane Construction Company for its sand and gravel mining operations.” AR649388, at 5 (JA__) (2020 HEAL Comment). And the overall gist of this part of the comment is that the UDF site has permeable soils that will aid transport of PCBs. *Id.* Yet these soils have no relevance to any ecological features at UDF site protected by the ACEC regulation. The remainder of section 2 talks about areas near the site (*e.g.*, businesses, schools, and residences) that could be affected by the UDF, either because of a leak or because of depressed property values. But again, this is quite different from objecting to EPA’s decision to locate the UDF within an ACEC, or engaging with EPA’s reasons for waiving the ACEC rule.

Applying the *Adams* standard confirms that the ACEC issue was not preserved. HEAL certainly asserted that putting the UDF at its proposed location was a mistake, but it did not say “why the mistake was of possible significance.”

¹⁹ Petitioners do not argue that the HRI comment letter (or any other comment letter) raised the ACEC waiver. HRI’s letter was focused solely on urging EPA to adopt a “thermal desorption” technique to treat PCBs. *See* AR649355 (JA__) (2020 HRI Comment).

Adams, 38 F.3d at 51 (quotation marks omitted). For example, HEAL did not say that the UDF site was within an ACEC or even that the UDF site contained any of the “precious ecological resources” it now emphasizes. HEAL also did not say anything to contradict EPA’s analysis of the ACEC waiver, which focused on the benefits of avoiding delay, the unsuitability of other landfill locations, and the value of obtaining GE’s agreement to undertake additional soil and sediment removal. *See* AR647210, at B-3 to B-7 (JA__) (2020 SCA). There is simply no way that EPA could have construed this comment about permeable soils and neighboring properties as a criticism of any part of its ARARs analysis or as expressing even a general concern about the ecological value of the UDF site.

This situation is completely different from the preserved objection in *Adams*, where the petitioner’s comment specifically cited the rule that EPA allegedly violated, and also complained about injuries to the marine resources that were protected by that rule. By contrast, HRI/HEAL’s failure was less excusable, because HRI had already run into waiver problems in the litigation over the 2016 Permit, and because EPA had specifically invited comment on its ACEC waiver. *In re GE*, 17 E.A.D. at 582-83; AR647211 at 39 (JA__) (2020 SOB). HRI/HEAL really should have known better than to sit on their ACEC objection.

In these circumstances, EPA plainly “did not have the opportunity to assess or respond” to Petitioners’ objection before issuing the 2020 Permit, and so

“simple fairness” prevents this Court from entertaining the challenge now. *See Blackstone*, 690 F.3d at 31 (quotation marks omitted). If HRI/HEAL believed the ACEC threatened “precious ecological resources” at the UDF site, they should have told EPA at the time. The ACEC issue is not preserved.²⁰

3. EPA’s ACEC waiver was reasonable.

Even if Petitioners’ ACEC argument were properly before the Court, EPA’s decision to waive the ACEC rule was reasonable. EPA acknowledged that off-site disposal was the “strongest” disposal option for preventing re-releases of contamination, because any leak from an on-site facility (though “extremely unlikely”) could affect the River. AR647210, at 31 (JA__) (2020 SCA); AR650441, at 19 (JA__) (2020 RTC). But EPA also concluded that on-site disposal was nonetheless “strong” and effective, mainly because of many safeguards designed to prevent, detect, and respond to any leak. AR647210, at 31 (JA__) (2020 SCA). Ultimately, EPA embraced limited on-site disposal because it

²⁰ HRI/HEAL suggest EPA’s pre-comment period discussion of its proposed ACEC waiver somehow made it unnecessary for HRI/HEAL to comment, HRI/HEAL Br. at 31, but the whole point of the preservation requirement is to notify the agency of *objections* to its proposals. HRI/HEAL also cite the portion of EPA’s response to comments where EPA acknowledged the Commonwealth’s suggestion that the ACEC rule would have to be waived. *Id.*; AR650441, at 63 (JA__) (2020 RTC). But this was not a comment that would have notified EPA of an objection to the ACEC waiver or to any part of EPA’s waiver analysis. On the contrary, the Commonwealth stated that it did *not* object to the waiver. *See* AR649382, at 1 (JA__) (MA commenter letter).

was part of a cleanup that includes other major features that offset this small long-term leak risk. These key advantages included “the substantially greater protections to human health and the environment brought about by, among other items, significantly greater PCB removal, removal of two dams, the hydraulic pumping of material to the landfill, and increased protectiveness at over twenty floodplain properties.” *Id.* at B-6 (JA___) (2020 SCA). EPA also emphasized that “the potentially indefinite delays that may accompany the selection of off-site landfilling would bring continued risks of exposure to PCBs.” *Id.* at B-6 (JA___) (2020 SCA). EPA concluded that “the opportunity to have a significantly more permanent, protective, and faster cleanup, at a location that poses significantly fewer risks, with an assurance that all the highly contaminated material is still taken off-site, will all be negated by being forced to comply” with the ACEC rule. “ *Id.* at B-7 (JA___) (2020 SCA).

Over two pages of their brief, HRI/HEAL Br. at 27-28, Petitioners make two conclusory objections to this analysis, each of which should be rejected.

First, HRI/HEAL say that the remedy enhancements and expedited start have “nothing to do with the actual relative risks posed ... by on-site versus off-site disposal.” HRI/HEAL Br. at 28. But this is simply not true. The question EPA faced was whether compliance with the Massachusetts ACEC rule would “result in greater risk to human health and the environment than alternative

options.” 42 U.S.C. § 9621(d)(4)(B). After the EAB’s vacatur of the disposal portion of the 2016 Permit, EPA effectively had three options: (1) doubling down on offsite disposal, in which case it would have re-proposed the same remedy the EAB had just partially vacated; (2) disposing of PCBs at another location in Berkshire County, *i.e.*, at one of two other totally unsuitable sites evaluated by GE, on Forest Street and near Rising Pond; or (3) negotiating a settlement in which GE agreed to more and faster PCB removal, with hybrid disposal at the UDF site, and the highest concentrations of PCB waste going offsite. AR647210, at 35 (JA__) (2020 SCA). HRI/HEAL believe that options #1 was superior, but EPA came to a different conclusion.²¹ More specifically, EPA decided that option #1 would “result in greater risk to human health and the environment” because (among other factors) it presented more risk of another successful appeal, with all the resulting delay, and would also permanently leave more PCBs in and around the River, including on nearby residential properties. HRI/HEAL do not argue that EPA could have somehow obtained more PCB removal and less delay without a settlement that included hybrid disposal, or that EPA was unreasonable when it

²¹ Petitioners do not argue for option #2. Although the Forest Street and Rising Pond locations were outside the Upper Housatonic ACEC, they were blatantly unsuitable, because of (among other reasons) their high ecological value and significant distance from the areas where most PCB removal would occur. AR647210, at B-4, B-6 (JA__) (2020 SCA).

concluded that (as the EAB put it) these features were “part of a package deal with the hybrid disposal option.” *GE II*, 18 E.A.D. at 646 (quotation marks and citations omitted).²² HRI/HEAL also never say that this extra PCB removal and expedited start are not valuable and important remedy enhancements.

What Petitioners do suggest is that the law artificially restrains EPA from even *considering* either the reduced delay or the remedy enhancements. In other words, Petitioners seem to believe that EPA should have evaluated the risks posed by the disposal options in isolation, without considering their admittedly inevitable effect on the rest of the remedy. HRI/HEAL Br. at 28. And this naive refusal to see the connection between the disposal choice and the rest of the cleanup is a recurring blind spot in Petitioners’ brief.²³ But this sort of siloed analysis is not

²² To state the obvious, there was no way for EPA to enhance the remedy without compromising on offsite disposal. Without such a compromise, EPA would have had to re-propose an offsite disposal option that the EAB had already vacated once, and to backtrack on other parts of the remedy that the EAB had sustained, so as to try to make GE undertake far more extensive PCB removal. Even assuming all this would have survived GE’s inevitable challenge in the EAB and in this Court, there was zero chance that EPA would have been able to get GE to undertake an expedited start to such an expansive, expensive cleanup (as it is now doing as part of the settlement). This would have been a recipe for many more years of fruitless litigation with GE and another remand, with PCBs drifting down the River uncontrolled all the while.

²³ See, e.g., HRI/HEAL Br. at 23 (“[n]o one seriously believes” that hybrid disposal is more protective than offsite disposal—but with no mention of the remedy enhancements and expedited start that make the selected remedy more protective) (emphasis removed).

what the statute requires. The question EPA faced was whether compliance with the Massachusetts ACEC rule would “result in greater risk to human health and the environment than alternative options.” 42 U.S.C. § 9621(d)(4)(B). And as noted above, EPA reasonably concluded that the “alternative option” to offsite disposal was hybrid disposal with more PCBs removed and less delay. HRI/HEAL assert that the statute put these plus factors (more PCBs removed, less delay) out of bounds, akin to a jury instruction not to consider inadmissible evidence. But HRI/HEAL do not cite any case or parse any statutory language that would support requiring EPA to adopt this sort of tunnel vision.²⁴ EPA did not act improperly when it considered whether waiving the ACEC rule would unlock a remedy that starts sooner and removes more PCBs.

Second, Petitioners argue that the EAB (as opposed to EPA’s New England regional office) acted improperly when it cited the impacts full offsite disposal (*i.e.*, HRI/HEAL’s preferred option) would have had on communities outside Massachusetts. HRI/HEAL Br. at 28. For example, the EAB cited the greenhouse gas emissions associated with shipping ~1 million cubic yards of contaminated material hundreds of miles out of state, or the risk posed to these out-of-state

²⁴ Section 9621(d)(4)(B) is not ambiguous on this point, but even if it were, this Court should defer to the EAB’s reasonable construction of the statute. *Silva v. Garland*, 27 F.4th 95, 112 (1st Cir. 2022).

communities by disposing of this material in *their* backyards. *GE II*, 18 E.A.D. at 648. As the EAB pointed out, *id.* at 648, n.45, HRI and HEAL have at times expressed some uneasiness about this aspect of their position, but Petitioners now argue that section 9621(d)(4)(B) *requires* EPA to ignore these risks to communities outside Massachusetts. This is not the law; CERCLA does not codify NIMBYism. Instead, it authorizes waiver of the ACEC rule if compliance would result in greater “risk to human health and the environment,” without any geographic focus or preference for some communities over others. Petitioners are also mistaken to suggest (HRI/HEAL Br. at 28) that the EAB adopted this position as a post-hoc justification for the Region’s decision. The EAB relied on impacts to communities outside Massachusetts as a small part of the justification for the waiver of the Massachusetts ACEC rule, but then so did the Region.²⁵ AR647210, at B-4 (JA__) (2020 SCA). There is no gap between the EAB and the Region on this point. More broadly, the whole issue of impacts on communities outside Massachusetts is a sideshow, because EPA’s primary rationale for waiving the ACEC was and is the value of avoiding delay and removing more PCBs—benefits

²⁵ Petitioners’ argument on the ACEC was never presented to EPA’s New England office in the first place, so the EAB would in any event have had some justification for developing new arguments to rebut it.

that are purely local, and that are obtained only by the remedy that EPA selected. Petitioners' geographic argument should be rejected.

In sum, Petitioners' ACEC objection was never presented to EPA before it issued the 2020 Permit, so EPA can hardly be faulted for not considering it. Even if the objection had been preserved, EPA made an appropriate judgment call, well within its discretion, when it found that hybrid disposal, with all its attendant benefits, presents less risk than offsite disposal. The HRI/HEAL petition is a textbook example of an attempt to persuade this Court to “substitute its judgment for that of the agency”—an invitation this Court should decline. *Marasco & Nesselbush*, 6 F.4th at 172 (internal quotation marks omitted).

B. EPA applied the relevant criteria and reasonably concluded that the selected remedy was the best choice.

EPA compared hybrid disposal to full offsite disposal using the nine criteria listed in the 2000 Permit, and concluded that hybrid disposal was superior. Petitioners disagree. According to HRI/HEAL, “almost all” of these criteria “point[ed] to offsite disposal as the most favorable option,” which supposedly made it arbitrary and capricious for EPA to select hybrid disposal. HRI/HEAL Br. at 32. But HRI/HEAL (1) overstate the advantages of offsite disposal; and (2) assume away the most relevant fact—namely, that hybrid disposal was (as noted above) part of a “package deal” with enormous benefits for human health and the

environment, including more PCB removal and an expedited start to cleanup. It was reasonable for EPA to conclude that these benefits and many others outweighed any advantages of offsite disposal.

First, even without considering the extra PCB removal and reduced delays, the advantages of full offsite disposal are hardly overwhelming. EPA found that, over the very long-term, there was a “non-zero” potential for the UDF to leak PCBs to the River, and that this risk was not present for the full offsite disposal option that HRI/HEAL prefer. *See* AR593922, at 244 (JA__) (2016 RTC). HRI/HEAL are correct that this single factor—the slight, long-term risk of a leak—affected EPA’s evaluation of multiple criteria, including overall protectiveness (#1), source control (#2), and long-term reliability (#4). AR647210, at 31-35 (JA__) (2020 SCA). But even considering the disposal options in isolation (without considering the extra PCB removal and reduced delays), the head-to-head comparison of offsite versus hybrid disposal was still a mixed bag. For example, there was no clear winner under the short-term effectiveness criterion (#7); the UDF parcel has some construction impacts, but they are offset by lower greenhouse gas emissions and more than 30,000 fewer truck trips.²⁶ And hybrid

²⁶ *Id.* at 36-37 (JA__) (2020 SCA). As the 2020 SCA pointed out, the full offsite disposal option also contemplated “construction of a temporary rail yard and loading facility along with access roads and staging areas,” all of which are unnecessary with hybrid disposal. *Id.* at 36 (JA__) (2020 SCA).

disposal has one clear and obvious advantage: cost (#9). *See id.* at 39 (JA___) (2020 SCA). The UDF is estimated to cost \$141M versus some \$300M for offsite disposal. In short, even without considering the extra PCB removal and the reduction in delay, it would be at least a close call whether full offsite disposal is better than hybrid disposal—which is to say, it is the sort of judgment that EPA should have discretion to make, without second-guessing by the federal courts. Put differently, EPA routinely disposes of PCBs and other hazardous waste at landfills built at large cleanup sites. *See* AR650441, at T-3 (JA___) (2020 RTC). Petitioners have never articulated a compelling reason why EPA lacked discretion to do the same here, even without considering the remedy enhancements connected to the disposal decision.²⁷

Second, EPA reasonably concluded that hybrid disposal brought with it additional PCB removal and an expedited start to the cleanup, and that these

²⁷ Petitioners argue that EPA correctly valued offsite disposal in 2016, and that it inexplicably departed from this conclusion in 2020. HRI/HEAL Br. at 32. But if anything, EPA’s painful *over*-valuation of offsite disposal in 2016 illustrates the weakness of the case for offsite disposal. In 2016, EPA was comparing full offsite disposal with full (not hybrid) onsite disposal. This presumably should have been an easier “win” for the offsite disposal option. But even then, the advantages of offsite disposal were so marginal that EPA’s decision was “predicated in large part” on other considerations—unpersuasive and unreasonable considerations, as the EAB later found when it vacated the disposal part of the 2016 Permit. *GE I*, 17 E.A.D. at 559. Specifically, the EAB found that EPA had relied heavily on TSCA landfill siting criteria to reject onsite disposal, and that this reliance was unreasonable given EPA’s willingness to waive these same TSCA criteria at many

benefits made hybrid disposal the best choice to protect human health and the environment. As EPA explained:

[Hybrid disposal] is part of a Settlement Agreement that includes numerous enhancements to the floodplain and sediment remedies, an expedited start to implementation, and community coordination and benefits. These benefits serve to further protect human health and the environment and provide better short- and long-term protectiveness when compared to [offsite disposal].

See 647210, at 32 (JA___) (2020 SCA). This was clearly a reasonable determination, and one that Petitioners do not actually challenge. For example, Petitioners do not argue, nor could they, that this extra PCB removal and reduced delay have a trivial impact on the overall remedy. *See* § II.A.3, above. They also do not argue, nor could they, that it would have been possible for EPA to incorporate these features into an even bigger cleanup featuring full offsite disposal. *Id.* Instead, HRI/HEAL simply ignore the connection between the remedy enhancements and hybrid disposal, and act as if it is self-evident that EPA acted arbitrarily by failing to do the same. Petitioners' argument should be rejected.

In sum, HRI/HEAL do not challenge EPA's evaluation of any particular factor; instead, HRI/HEAL simply give no weight to all the remedy enhancements,

other cleanup sites. *Id.* In short, even compared to full onsite disposal, the case for offsite disposal was never that strong to begin with.

without any justification; they then rely on this partial analysis to disagree with EPA's overall conclusion that the pros of hybrid disposal outweighed the cons. But the bottom line is that, even without the remedy enhancements, deciding to spend an extra ~\$160M to haul a million cubic yards of PCB waste for hundreds of miles was always going to be something of a heavy lift for EPA, particularly when there are so many other cleanup sites where similar waste has been disposed of at facilities built onsite. And in this instance, compromising on hybrid disposal made it possible to remove more PCBs from the River, and to start to do it sooner. The Committee decided after careful consideration that this was an acceptable compromise—and it certainly was an option that was well within EPA's discretion to accept. Once again, the Court should decline HRI/HEAL's invitation to substitute its judgment for EPA's.

C. HRI/HEAL's other arguments about the UDF should be rejected.

HRI/HEAL make two other arguments on the UDF, both of them insubstantial. *First*, HRI/HEAL say the EAB believed that the UDF would contain only PCB wastes with concentrations below 50 ppm, as opposed to wastes with an *average* concentration below 50 ppm. *See* HRI/HEAL Br. at 25. But the EAB clearly stated in many places its understanding that the 50 ppm number was an average; the instances where it did not use the word "average" were merely shorthand references, not errors. *See, e.g.*, 18 E.A.D. at 659, 670, 675. *Second*,

HRI/HEAL say the EAB erred in not considering a geologist's report that HRI/HEAL submitted for the first time to the EAB, months after the 2020 Permit was issued. *See* HRI/HEAL Br. at 36-37. But the EAB acted properly in declining to consider a document never presented to the Region, for all the reasons stated in EPA's opening brief to this Court. EPA Br. at 50-52.

CONCLUSION

The Committee respectfully requests that the Court deny HRI/HEAL's petition.

January 13, 2023

Respectfully submitted,

**THE HOUSATONIC REST OF RIVER
MUNICIPAL COMMITTEE**

By its attorneys,

/s/ Matthew Pawa
Seeger Weiss LLP
1280 Centre Street, Suite 230
Newton Centre, MA 02459
617 641-9550
mpawa@seegerweiss.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,394 words, excluding the parts of the brief exempted under Rule 32(f).

January 13, 2023

/s/ Matthew Pawa

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2023, I electronically filed the foregoing brief with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

/s/ Matthew Pawa