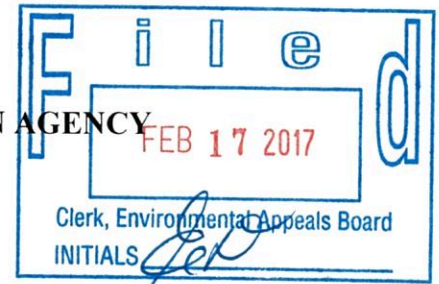


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



_____))
In re:))
General Electric Company) RCRA Appeal Nos. 16-01, 16-02, 16-03,
16-04 and 16-05
Permit No. MAD002084093))
_____))

ORDER GRANTING REQUEST FOR EXTENSION OF TIME FOR AMICUS CURIAE BRIEFS AND ESTABLISHING DEADLINE FOR RESPONSES

The Housatonic Rest of River Municipal Committee (“Municipal Committee”) has filed a motion requesting an extension of time for submission of amicus curiae briefs in connection with five petitions for review of a Resource Conservation and Recovery Act (“RCRA”) permitting decision concerning the Housatonic Rest of River remedial action. *In re General Electric Co.*, RCRA Appeal Nos. 16-01 through 16-05. The Municipal Committee indicates that it intends to submit an amicus brief “devoted solely to expressing support for portions of the Region’s selected remedy” and that other interested persons may join in that brief or, perhaps, file separate amicus briefs. Petitioner General Electric Company (“GE”) opposes the Municipal Committee’s request. The Municipal Committee represents that the following interested persons have assented to the motion: U.S. Environmental Protection Agency Region 1, the Commonwealth of Massachusetts, the State of Connecticut, the Massachusetts Audubon Society, and C. Jeffrey Cook. The Municipal Committee further represents that, as of the time of filing, it had not heard back from the following parties as to whether they oppose the motion: Housatonic River Initiative and the Berkshire Regional Action Team.

The applicable federal regulations authorize “any interested party” to file an amicus brief in a petition for review of a RCRA permitting decision. 40 C.F.R. § 124.19(e). Under the regulations, an amicus brief is due 15 days after the filing of a response brief. *Id.* Previously, the Board established February 14, 2017, as the common deadline for filing response briefs for all five petitions in this matter. *See In re General Electric Co.*, RCRA Appeal Nos. 16-01 through 16-05 (EAB Jan. 24, 2017) (Order Granting Request for Extensions of Time for Response and Reply Briefs). Because response briefs were filed on February 14, 2017, under the timetable in the regulations, amicus briefs would be due by March 1, 2017. The Board also established the common deadline of March 27, 2017, for reply briefs. *Id.* The Municipal Committee now asks the Board to align the deadline for amicus briefs with the deadline for reply briefs, so that all amicus briefs and all reply briefs will be due on March 27, 2017.

GE opposes the Municipal Committee’s request on several grounds. First, GE argues that granting the extension would “facilitate the circumvention of this Board’s prior orders in this matter, giving the Municipal Committee the opportunity to submit an additional brief to which none of the other parties to this proceeding, including GE, would be able to reply.” Second, GE argues that the Municipal Committee’s motion is untimely. Third, GE argues that the Municipal Committee lacks standing to seek an extension of the deadline for an amicus brief that any other interested person might wish to file. In addition, GE argues that should the Board grant the Municipal Committee’s request for extension of time to file an amicus brief, GE should be allowed to file a reply brief and requests that the deadline for its reply be April 17, 2017.

The Board is not persuaded that the Municipal Committee’s request would “circumvent” the Board’s prior scheduling orders, nor that it is “untimely.” If anything, the Municipal Committee’s request furthers the Board’s interest in establishing an efficient and orderly briefing

schedule. Although the Board's January 24, 2017 Order did not specifically address the timing of amicus briefs, nothing in that Order precludes any interested party from participating as amicus curiae. The fact that the Municipal Committee waited until February 14, 2017, to seek an extension – that is, they waited until the day response briefs were due -- is of no consequence. The regulations require only that a motion for extension be filed “sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.” 40 C.F.R. § 124.19(g). While the amount of time that constitutes “sufficiently in advance” will necessarily vary depending on the particular circumstances of the appeal, here the Board finds that the Municipal Committee's request – filed approximately two weeks before an amicus brief would otherwise be due – is timely.

GE argues that it would be “unjust and inconsistent” to allow the Municipal Committee to file an amicus brief after all response briefs have been submitted and at the same time that reply briefs are due because that would deny GE -- and the other petitioners -- the opportunity to reply to arguments raised in any amicus brief. In reply to GE's opposition, the Municipal Committee claims that a petitioner is not entitled to reply to an amicus brief.

We find the positions advocated both by GE and the Municipal Committee to be overbroad. The Municipal Committee clearly qualifies as an interested party entitled to file an amicus brief; as long as the Municipal Committee does not file an amicus brief in the proceeding initiated by its own petition, it gains no unfair advantage. And despite GE's insistence that it “must have sufficient opportunity to reply,” the regulations in Part 124 do not provide an automatic right to respond to an amicus brief. Nevertheless, while the regulations do not explicitly provide for responses to amicus briefs, neither do they disallow them, and the Board

possesses the inherent authority to “do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal.”¹ 40 C.F.R. § 124.19(n).

Given the complexity of this matter, the Board finds that (1) an extension of time for submitting amicus briefs is appropriate here, and (2) each petitioner and each respondent should have the opportunity to respond to all initial filings – including amicus briefs – in the proceeding to which they are parties. To ensure an orderly process and consistent with the Board’s prior orders for these petitions, the Board now orders that the common due date for amicus briefs for all five petitions shall be **March 27, 2017** and that the common deadline for responding to an amicus brief shall be **April 17, 2017**. Each amicus brief and each response thereto may not exceed 7,000 words absent advance leave of the Board to exceed that word limit. *See* 40 C.F.R. § 124.19(d)(3).

Additionally, the Board will allow each petitioner and each respondent in a given proceeding the opportunity to respond to any amicus brief filed in connection with that proceeding. No other responses to amicus briefs will be permitted. Further, the subject matter of each response shall be limited to issues and arguments raised in the amicus brief.

¹ As GE notes, in previous cases the Board has allowed parties to respond to amicus briefs. *See, e.g., In re Town of Newmarket Wastewater Treatment*, NPDES Appeal No. 12-05, at 7 (EAB Feb. 27, 2019) (Order); *In re Peabody Western Coal Co.*, CAA Appeal No. 11-01 (EAB Sept. 21, 2011) (Order Granting Peabody Western Coal Company’s Motion for Leave to File a Response to U.S. EPA Region 9’s Amicus Brief). The Municipal Committee argues that these cases are irrelevant because they pre-date the 2013 revisions to the regulations, which include a specific provision on the timing of amicus briefs. The Municipal Committee’s argument is not persuasive because the 2013 amendments were intended to “codify current procedural practices.” Revisions to Procedural Rules, 78 Fed. Reg. 5281, 5283 (Jan. 25, 2013).

Because the Board has before it multiple petitions, some clarification is in order. First, an interested person may file an amicus brief in any proceeding *other* than a proceeding to which it is already party; that is, a party may not participate in a proceeding as an amicus curiae if it is already a party to that proceeding. Second, a person may respond to an amicus brief in a proceeding *only* if that person is already a party to *that* proceeding.

So ordered.

Dated: February 17, 2017

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing ORDER GRANTING REQUEST FOR EXTENSION OF TIME FOR AMICUS CURIAE BRIEFS AND ESTABLISHING DEADLINE FOR RESPONSES issued February 17, 2017, in the matter of *In re General Electric Co.*, RCRA Appeal Nos. 16-01, 16-02, 16-03, 16-04, and 16-05, were sent to the following persons in the manner indicated:

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Dated: FEB 17 2017



Annette Duncan
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