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

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| In the Matter of: | ) | |
| | ) | |
| GENERAL ELECTRIC COMPANY, | ) | RCRA Appeal No. 16-01 |
| | ) | |
| Modification of RCRA Corrective Action Permit No. MAD002084093 | ) | |
| | ) | |

COMMONWEALTH OF MASSACHUSETTS' SURREPLY

RESPECTFULLY SUBMITTED
BY: /s/ Jeffrey Mickelson

April 14, 2017


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## INTRODUCTION

The Commonwealth of Massachusetts (Commonwealth) files this Surreply to respond to three newly raised issues or arguments by General Electric Company (GE) in its March 27, 2017 Reply to the Commonwealth's Response to GE's Petition for Review. Specifically, GE raises for the first time in its Reply three new issues or arguments: 1) that the Commonwealth has a controlling statutory duty under CERCLA § 104(c)(9) to assure that sufficient capacity exists for the disposal of hazardous wastes generated in-state and that EPA is allowing the Commonwealth to avoid this obligation; 2) the national disposal capacity of existing hazardous waste landfills; and 3) the Commonwealth's intention in promulgating 310 CMR 30.708, which prohibits a hazardous waste facility in an ACEC.

## ARGUMENT

### I. The Commonwealth has Not Failed to Comply with the Requirements of CERCLA § 104(c)(9)

In its Reply, GE argues that CERCLA § 104(c)(9) requires each state to adequately assure the availability of hazardous waste disposal facilities with sufficient capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the state, and that "[i]t is arbitrary for EPA to allow Massachusetts to avoid this obligation …." Reply at 2. In support of this claim, GE refers to the *1993 Hazardous Waste Capacity Assurance Plan for the Commonwealth of Massachusetts, Phase I* (Attachment 1 to GE's Reply) and the *Massachusetts 2010-2020 Solid Waste Master Plan (April 2013)* (Solid Waste Master Plan, excerpts provided as Attachment 1 to this Surreply). Reply at 2. GE states that the 1993 Capacity Assurance Plan reported that the Commonwealth had no hazardous waste landfill capacity, and that the Solid Waste Master Plan indicated that this continues to be the

case. Id. Based on this information, GE alleges that the Commonwealth has failed to meet "a controlling statutory duty to assure that sufficient room exists for the disposal of hazardous wastes generated in-state...." Reply at 3. GE's oversimplified characterization of the Commonwealth's obligation under CERCLA § 104(c)(9) is misleading, as discussed below.

CERCLA § 104(c)(9) provides as follows:

... the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—

**(A)** have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date the state enters into a contract or cooperative agreement..., [and]
**(B)** are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority ...

On page 6 of its Reply, GE refers to and quotes from *EPA's 2015 National Capacity Assessment Report: Capacity Planning Pursuant to CERCLA Section 104(c)(9)* (National Capacity Assessment Report, excerpts provided as Attachment 2 to this Surreply) in discussing the existing national hazardous waste landfill capacity. However, GE fails to mention other provisions in the Report concerning CERCLA § 104(c)(9) that undercut GE's claim. For example, the National Capacity Assessment Report states: 1) Section 104(c)(9) requires that EPA "not provide ***any remedial action funding*** to a state unless the state first enters into a [contract or cooperative agreement] that assures the availability of adequate capacity to manage

hazardous wastes generated in the state" for the following 20 years; 2) that such "adequate capacity must be ***within a State or outside a State*** in accordance with an interstate agreement or regional agreement or authority"; 3) that the national planning process discussed in the National Capacity Assessment Report ***"was developed to help support states in fulfilling [the Section 104(c)(9)] mandate"***; and 4) that "***adequate national capacity exists***." National Capacity Assessment Report at 1 (emphasis added). GE, while fully aware of the complete text of this Report, makes a general allegation that the Commonwealth is not meeting its obligation under CERCLA § 104(c)(9) without even mentioning - let alone – addressing the above provisions of the Report. In short, it is misleading for GE to rely upon the National Capacity Assessment Report when discussing the existing national hazardous waste landfill capacity, but fail to disclose this text when alleging the Commonwealth's failure to comply with CERCLA § 104(c)(9).

GE's reliance on the Solid Waste Master Plan is completely off-point and misleading. GE would have the Board believe that the Solid Waste Master Plan bolsters its position that the Commonwealth is not complying with CERCLA § 104(c)(9). The Solid Waste Master Plan "addresses trash that is produced by residents and businesses (referred to as "Municipal Solid Waste" or "MSW"), as well as waste primarily from building construction and demolition (C&D debris), and smaller amounts of sludge from wastewater treatment, non-hazardous industrial solid waste, and other wastes that are managed at solid waste facilities." Master Plan at 4-5. While it is true that the Solid Waste Master Plan states that a decline in landfill capacity is expected, the Plan deals with ***solid waste***, not hazardous waste, which is obvious by its title. And, as GE acknowledged in its Reply, "... the state **solid** waste disposal regulations ... do not apply to the sediment and soil that would be subject to on-site disposal here (emphasis original)."

Reply at 8. The Solid Waste Master Plan is clearly irrelevant to CERCLA § 104(c)(9) and the disposal capacity of hazardous waste in the Commonwealth.

For the above reasons, GE's claim that the Commonwealth has failed to meet its responsibilities under Section 104(c)(9) is completely without merit.

## II. Existing Hazardous Waste Landfills Provide Sufficient Disposal Capacity for the Foreseeable Future.

In its Reply, GE claims it should be allowed to construct an on-site hazardous waste landfill because nationwide landfill capacity "is not infinite," and there currently exists a "national problem of creating and maintaining adequate landfill capacity for hazardous wastes." Reply at 6-7. In support of this argument, GE quotes from the National Capacity Assessment Report discussed above, as follows, "the [hazardous waste] industry is consolidating and restructuring as indicated by the existence of fewer landfills.... The dynamic hazardous waste market and the uncertainty of the permitting process make it difficult to guarantee that the current surpluses of hazardous waste management capacity will continue to exist." Reply at 6. While this is an accurate quote from the National Capacity Assessment Report, GE fails to mention the ultimate conclusion of the Report, which is that "[b]ased on its analysis of the data presented in this Report, [EPA] has determined that **adequate national capacity for the treatment and disposal of hazardous waste exists** for 20 years (i.e., year 2034) and **through the year 2039**." National Capacity Assessment Report at 12 (emphasis added). Accordingly, the uncertainty that GE's tries to inject concerning the national hazardous waste landfill capacity is unsupported by the Report it cites and should be viewed as no more than a distraction by the Board.

## III. GE's Discussion of the Commonwealth's Regulatory Intention in Promulgating 310 CMR 7.08 is Irrelevant to the Board's Review of EPA's Decision to Require Off-Site Disposal and Completely Unsubstantiated.

The Commonwealth's hazardous waste regulation at 310 CMR 30.708, which is an ARAR for purposes of the Rest of River remedy, prohibits locating a hazardous waste facility in an ACEC. In its Reply, GE claims that the public perceived the promulgation of this regulation as an attempt to constrain EPA's disposal decision. In support of this claim, GE relies upon three letters attached to its Reply as Attachments 3-5.

First, the question of the Commonwealth's alleged intention in promulgating this regulation is irrelevant to the Board's review of EPA's decision to require off-site disposal. The Massachusetts Department of Environmental Protection (MassDEP) lawfully promulgated its hazardous waste regulation and EPA, in turn, properly identified it as an ARAR for the Rest of River remedy. GE itself acknowledges that at the time of the designation of the Upper Housatonic ACEC, MassDEP already had a prohibition in its solid waste regulations on siting a solid waste disposal facility in an ACEC. Reply at 8. MassDEP's amendment to 310 CMR 30.708 similarly established a prohibition on siting a hazardous waste disposal facility in an ACEC. In any event, the underlying "intention" of an agency's promulgation of a regulation identified by EPA as an ARAR is irrelevant to the Board's review of a decision by EPA to require off-site disposal.

Second, the three letters relied upon by GE fail to support its characterization of the Commonwealth's regulatory intention. Each letter is discussed below.

Attachment 3 (Lee Community Development letter): Letter from Lee Community Development Corporation to Ian. A. Bowles, Secretary, Massachusetts Executive Office of

Environmental Affairs, Re: Proposed Upper Housatonic River Area of Critical Environmental Concern (ACEC) (February 6, 2009).

On page 9 of its Reply, GE relies upon the Lee Community Development letter, which opposed the designation of an ACEC, in part, because the designation may result in another layer of regulatory tools that would negatively impact economic development projects. The letter stated that "[t]he ACEC we are told, is a tool that may prevent" GE from creating a PCB dump within the Housatonic corridor. (Attachment 3 to GE's Reply at 2). GE's reliance on this letter in support of its position that the public perceived the promulgation of 310 CMR 30.708 as an attempt to constrain EPA's disposal decision is misplaced. First, this letter commenting on the ACEC designation pre-dates by four years the notice of hearing and public comment period for the proposed amendment to 310 CMR 30.708 (Notice of Public Hearing and Comment Period provided as Attachment 3 to this Surreply). Furthermore, the statement in the letter that "[t]he ACEC we are told, is a tool that may prevent" the ability of GE to create a PCB dump within the Housatonic corridor is vague and speculative.

Attachment 4 (Olver letter): Letter from Congressman John W. Olver to Ian Bowles, Secretary, Massachusetts Executive Office of Energy and Environmental Affairs (March 6, 2009).

On page 9 of its Reply, GE relies upon the Olver letter, which supported the ACEC designation, stating that "the ACEC and its accompanying regulations comprise ARARs, and thus must be considered by EPA and [GE] in its operations within the designated area and that [t]his contingency is one of the greatest potential benefits of the proposed ACEC designation." (Attachment 4 to GE's Reply at 1-2). However, this letter on the ACEC designation also pre-dates by four years the publication of the notice of hearing and public

comment period for the draft regulation, and the opinion expressed by Congressman Olver in that context does not evidence the Commonwealth's regulatory intention.

Attachment 5 (GE letter): Letter from GE to John Fischer, Massachusetts Department of Environmental Protection, Re: Proposed Revisions to Massachusetts Hazardous Waste Regulations Respecting ACECs (August 23, 2013).

This letter by GE opposing MassDEP's proposed amendment to 310 CMR 30.708 is self-serving and deserves no consideration by the Board.

For the above reasons, GE's claim that these three letters somehow evidence the Commonwealth's intention in promulgating 310 CMR 7.08 is misleading and have no bearing on the Board's review of EPA's decision to require off-site disposal.

## CONCLUSION

GE's newly raised arguments should not prevail and its Petition should be denied.

## STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this Surreply contains 2417 words in accordance with 40 C.F.R. § 124.19(d)(3).

## CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2017, true and correct copies of the Commonwealth's Motion for Leave to File Surreply were served:

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