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

In re: General Electric Company 2020 Revised Final Permit Permit No. MAD002084093	)	RCRA Appeal No. 21-01

EPA REGION 1'S REPLY TO PETITIONER'S OPPOSITION TO EPA'S MOTION TO STRIKE

Respectfully submitted,

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I. INTRODUCTION

The main arguments in Petitioner's Opposition to EPA Region 1's ("the Region") Motion to Strike can be broadly summarized as follows: (a) Attachments 6, 9, 10, 13, 14, 15, and 17 are proper because they prove the Region failed to consider all relevant, technical factors and because they provide expert testimony as to technical matters; (b) Attachments 6 and 8 are proper because they were submitted in response to the Region's "late-filed" documents; and (c) Attachments 5, 11, 13, 14, 15, and 17 are proper because they are appropriate for the Board's official notice. Petitioners also make secondary arguments that: (d) equitable factors, including "serious challenges presented by the pandemic and severe storms," merit leniency from the Board; (e) the Board is "justified in looking past the Administrative Record when bad faith is claimed"; (f) "the challenged Attachments should be considered part of the record because their substance, if not their form, was contained in Petitioners' public comments"; and (g) the Region's word count theory "is meritless and must be rejected." The Region responds to each of these arguments, in turn, in this Reply.

All parties agree that there are exceptional circumstances where the Board may review extra-record documents. But acceptance of Petitioners' overly permissive theories to justify the Board's consideration of untimely, extra-record materials would swallow the rules guiding Board review under Part 124 regulations: that permit decisions are evaluated on the administrative record that was actually before the Region and not some other record. The Region's primary concern is not with the substance of the attachments themselves—they contain arguments and information that have already been addressed on the record by the Region or are irrelevant. Rather, the Region is concerned that the Board's consideration of extra-record material will sow confusion over the actual basis of the Region's determinations. Such an outcome will undermine the integrity and efficiency of the

administrative process, which requires closure and finality, aims that are not advanced by a "record" that continues to evolve even after final permit issuance. The Administrative Record was complete as of final permit issuance, and that record is sufficient to explain and support the final permit decision.

II. ARGUMENT

a) If Attachments 6, 9, 10, and 14 indeed address "relevant factors," Petitioners should not be submitting them for the first time on appeal.[1]

The Region's decision was based on a consideration of all of the relevant factors and criteria in accordance with RCRA permitting decisions. Petitioners, however, attempt to justify submitting Attachments 6, 9, 10, and 14 for the Board's review by asserting they prove that the Region did not consider all of the relevant technical factors. Opposition at 8. Their theory misses the point. If the factors were indeed relevant to the Region's decision-making, then Petitioners should have timely brought these matters to the Region's attention while permit proceedings were ongoing and the administrative record was open, not after the fact and for the first time on appeal. Petitioners could have generated and submitted these documents to the Region during the public comment period. As further discussed in subsection (f) below, this is especially true given that Petitioners allege the substance of these documents was submitted during public comment.

Petitioners also justify submission of these attachments on a theory that they "provide expert testimony as to technical matters." Opposition at 8. This theory

[1] Petitioners additionally argue that Attachments 13, 15, and 17 (all EPA guidance documents) are proper because they "Are Evidence of the Region's Failure to Consider All Relevant Factors and Provide Expert Testimony as to Technical Matters." As described in the Motion to Strike, these documents do not pertain to topics at issue in this permit. Therefore, any "expert testimony as to technical matters" they provide will not aid the Board's analysis in this case. Furthermore, the Region disagrees that these documents demonstrate that the Region failed to consider all relevant factors. They should not be added to the Administrative Record.

misunderstands the Board's role in record review cases. The Board does not accept expert testimony. *See In re Town of Newmarket Wastewater Treatment Plant,* 16 E.A.D. 182, 246 (EAB 2013) (explaining that Board proceedings do not contemplate deposition of experts or any other form of discovery.) As described in the Motion to Strike, the Region should be the entity to review technical material in the first instance, because its subject matter experts are best positioned to apply their technical judgement and scientific expertise to the facts. In cases like this one, the Board's role is to review whether the Region's final decision rationally reflects the associated administrative record before the agency, not to evaluate technical information in the first instance. *See also In re Gen. Elec. Co.,* 17 E.A.D. 434, 582, n. 62 (EAB 2018) ("the Board will not consider studies presented for the first time on appeal."); *see also id.* at 580 ("EPA's administrative review structure for permits… is based on the principle that 'the locus of responsibility for important technical decisionmaking rests primarily with the permitting authority, which has the relevant specialized expertise and experience.'… The Board's role is to review the administrative record to determine whether the Region's decision was clearly erroneous or constituted an abuse of discretion, not to resolve technical issues that are best resolved by the permit issuer.") (citations omitted).

In some instances, the documents simply describe alternative remedies that the Region could have chosen.[2] In other words, they do not describe relevant aspects of a problem that the Region failed to consider, but rather issues that the Region did, in fact, evaluate, including based on the limited material Petitioners provided in comment. The

[2] For example, the content of Attachment 10 provides no support for Petitioners' assertion that the Region failed to consider thermal desorption. Rather, Attachment 10 simply outlines an alternative technical remedial option the Region could have chosen.

submission of these attachments describing alternative remedies is therefore a misplaced invitation for the Board to supplant the Region's technical decision with its own.

The cases cited by Petitioners do not support the Board's consideration of Attachments 6, 9, 10, or 14. For example, in *Ruskai v. Pistole*, 775 F.3d 61 (1st Cir. 2014), the court begins its analysis by acknowledging that the record is "somewhat unusual" because "although this petition calls for review of an agency order, the order here was the result of informal agency action, not an administrative hearing or public notice and comment" and additionally "much of the record is sealed, with some portions unavailable even to [petitioner's] counsel." *Id.* at 65-66. In other words, the petitioner in *Ruskai* did not have nearly the same opportunities to contribute to the record as did Petitioners here. Ultimately, the *Ruskai* Court granted that Petitioner's motion to supplement the record because "[t]he government declined to take a position on her [motion], and has waived any objection by affirmatively relying without objection on Ruskai's affidavit." *Id.* at 66. The Region, of course, has not waived any objections here. As none of these circumstances in *Ruskai* apply to the matter at hand, the First Circuit's acceptance of a motion to supplement the record in that case does not guide the Board's analysis here.

Second, in *City of Waltham v. United States Postal Service*, 786 F. Supp. 105 (D. Mass. 1992), the court agreed to review a non-record document (the "Amended Assessment"). That document is distinguishable, however, because it could not have been created during the time that Administrative Record was open. *Id.* at 118. This stands in contrast to Attachments 6, 9, 10, and 14 here, which Petitioners could have generated and submitted during public comment. The *Waltham* court also agreed to review other non-record documents (affidavits), but with an important condition: it would review only affidavits that "allege facts which purport to show that the [agency] failed to consider

certain aspects… or never adequately considered alternative[s]", "but *will not consider those* parts of affidavits which offer legal conclusions or *present opposing scientific determinations*…" (emphases added). *Id.* at 120. As Attachments 6, 9, 10, and 14 in the instant case all primarily "present opposing scientific determinations," the Board should follow the *Waltham* court's reasoning and deny review of them.

Third, Petitioners compare Attachment 6 (DeSimone report) to the affidavit properly submitted in *Strahan v. Linnon,* 966 F. Supp. 111 (D. Mass. 1997). Opposition at 10. This comparison is misplaced. In *Strahan,* the trial court judge ruled the plaintiff would be allowed to supplement the administrative record with evidence concerning information that the government allegedly should have, but did not, consider and information to aid court's understanding of technical aspects. Here, the Region did have and did consider the subject matter contained in Attachment 6, *i.e.,* permeability of soil, but ultimately reached a different technical conclusion, namely that a landfill with a double bottom liner and leachate collection and other protections could be sited over permeable soil. Additionally, the information contained in Attachment 6 will not aid the Board's understanding of the technical aspects of this case as it does not "reveal any perspective not already in the record." *Id.* at 115. The Region's analysis of issues surrounding UDF siting, including the permeability of soils in that area, is already cogently and clearly explained in the record. Petitioners' late-arriving commentary does nothing to clarify these technical issues, and the Board's consideration of Attachment 6 would only risk confusion.

Fourth, Petitioners cite *Emhart Indus. v. New Eng. Container Co.,* 2016 U.S. Dist. LEXIS 13688, at *46-48 (D.R.I. Feb. 2, 2016) in support of their theories. That Order from a trial court was issued when that case was at a different procedural point than the instant matter: after the District Court had already "allowed Emhart to take discovery concerning

EPA's remedy selection." *Id.* at PDF p. 4. The Order denied (without prejudice) EPA's Motion to Limit Discovery, but importantly "reserve[d] ruling on the admissibility of any particular extra-record evidence until the time of trial." *Id.* at PDF pp. 5-6.

Fundamentally, the problem with Petitioners "relevant factors" and "technical matters" theories is that Petitioners never explain why they could not have brought Attachments 6, 9, 10, or 14 to the Region's attention in a timely fashion, while the record was open. Acceptance of either theory would create an open-ended exception that would eclipse the default rule that the Board determines the validity of the Region's decision based on the Administrative Record.

b) Attachment 6 does not respond to the "Weston Memorandum."

In their Opposition, Petitioners allege, for the very first time, that Attachment 6 "responds" to the Weston Memorandum and is therefore properly before the Board. Opposition at 7.[3] This *post hoc* theory of a purported relationship between the two documents is perplexing: Attachment 6 primarily concerns whether it is appropriate to site a landfill in the UDF area. The Weston Memo, in contrast, does not discuss landfill siting but rather confirms the expected direction of the groundwater and surface water flow in the UDF area. Furthermore, none of the Brief's three citations to Attachment 6 mention anything about the Weston Memorandum, much less allege Attachment 6 responds to it. *See* Petitioners' Brief at 9, 14, 22. Further casting doubt upon Petitioners' claim that Attachment 6 responds to the one-page Weston memorandum is the fact that the former neither cites nor mentions it once in its seven pages. *See* Attachment 6.

[3] Petitioners also allege Attachment 8 is proper because it responds to the Region's "late-filed Skeo Report." To the extent its content may be viewed as argument, the Region maintains its request that the Board strike it because its inclusion violates the word count.

Finally, to the extent Petitioners argue the Weston Memorandum and the Skeo Report are improper because they are "late," they are mistaken. *See, e.g.,* Opposition at 7 (describing the Weston Memorandum as "late-filed.") Those documents represent the Region's timely and diligent deliberations in responding to public comments before issuing the final permit and closing the administrative record. They offer explanation and support for the Region's ultimate decision, a decision that is not inappropriate by any means.

c) Attachments 5, 11, and 14 are inappropriate for official notice.

Petitioners urge the Board to take official notice of Attachments 5, 11, 13, 14, 15, and 17. The Region reaffirms the points on official notice made in its Motion to Strike and offers the following additional arguments in response to Petitioners' Opposition.

The Board considers several factors in determining whether a document is appropriate for its official notice: whether it is sufficiently public, whether it is reliable, and whether it is relevant. *See, e.g., See In re Donald Cutler,* 11 E.A.D. 622, 650-651 (EAB 2004) (documents in the "public domain" are "subject to official notice"); *see, e.g., In re City of Ruidoso Downs and Village of Ruidoso WWTP,* 17 E.A.D. 697, 716 n. 22 (EAB 2019) ("the Board generally will take 'official notice' of certain relevant extra-record information that is incontrovertible"); *see, e.g., See In re Russell City Energy Ctr., LLC*, 15 E.A.D. at 35 n.37 ("…the [party] did not explain the relevance of [the] documents to the current matter, which the Board has noted is an important consideration in deciding whether to take official notice of a document.") (citing an earlier order in that case.)

Attachment 5 (Scribner news article) is not sufficiently relevant for public notice. Petitioners explain that Attachment 5 helps prove GE's motives for its actions relative to this permit. *See* Opposition at 12. (Alleging that GE's past actions, described in the Attachment 5, "relate to [their] argument" that GE and the Region acted improperly with

regards to the remedy currently at issue). This document is not sufficiently relevant for official notice: even if the Board accepts its contents as true, it addresses GE's actions, *not* the Region's actions or motives. Attachment 5 is additionally inappropriate for official notice because it is proffered for an improper purpose. Official notice is not appropriate where a party submits a document to "bolster [their] affirmative case before the Board." *In re Penneco Envtl. Solutions, LLC,* 17 E.A.D. 604, 615 n. 7 (EAB 2018). The Board has suggested that official notice may be appropriate for "publications introduced to 'indicate what was in the public realm at the time, not whether the contents of [press] articles were in fact true.'" *Stonehaven Energy Mgmt.*, 15 E.A.D. 817, 832 n.11 (EAB 2013) (quoting 578 F.3d 1016); *see also In re Sierra Pacific Industries,* 16 E.A.D. 1, 35 (EAB 2013) (citing 578 F.3d 1016: "Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.'")[4] Petitioners submit Attachment 5 hoping the Board will accept the assertions of GE's past behavior contained in it as not only true, but also probative of GE's (and the Region's) current behavior. Because they submit it to "bolster" their argument, Attachment 5 is inappropriate for official notice.

Attachment 11 (Galligan letter) is not sufficiently public for official notice. Petitioners' assertion that Attachment 11 is "publicly available" is contradicted by its label in their Brief's Table of Attachments as "*Confidential* Hudson River Strategy report"

[4] Although not directly applicable because "the Federal Rules of Evidence [FRE] are not applicable in administrative hearings under the Consolidated Rules… and hearsay rules do not apply" (7 E.A.D. 77 at 101, n. 40), additional case law regarding *judicial* notice of news articles aligns with and supports the conclusions the Board reached in *Penneco* and *Stonehaven*: *See, e.g., Sandza v. Barclays Bank PLC,* 151 F.Supp.3d 94, 113 (D.D.C. 2015) ("Taking judicial notice of the *existence* of [news] articles is entirely proper," contrasted with the improper practice of "accepting [news] articles for the truth of their assertions.") (citing the FRE to reach this conclusion) (emphasis in original).

(emphasis added), and the Brief's description of it as a "*confidential* company report" (emphasis added). Brief at ix, 33. Additionally, Petitioners' apparent theory that the document is sufficiently public to be appropriate for official notice simply because it was released under FOIA ("[it] was made public through a [FOIA] request" (Opposition at 12.)) stretches the bounds of official notice too far. Simply because a document might be obtained by a member of the public through an information disclosure statute does not render it sufficiently public for the Board's official notice. This document is not as widely circulated as, for example, "statutes, regulations, judicial proceedings, public records, and Agency documents", documents which, unlike Attachment 11, are appropriate for official notice. *In re Russell City Energy Ctr., LLC*, 15 E.A.D. at 36 (citations omitted.)

In a similar manner to Attachment 5, Petitioners improperly proffer Attachment 14 (Carpenter scientific article) to bolster their arguments. They explain that "it demonstrates the health risks that may result from the Region's decision…", which bolsters their argument that "natural attenuation of PCBs [occuring] through volatilization… would endanger (and may already be endangering) local residents who are forced to inhale PCBs." Opposition at 12; Brief at 39. Attachment 14 is thus similarly inappropriate for official notice.

The Region concedes that Attachments 13, 15, and 17, all EPA guidance documents, are sufficiently public and incontrovertible for the Board's official notice. However, they are not relevant because the Region did not rely on them (because they do not describe issues directly relevant to the remedy at hand). If, despite their irrelevance, the Board takes official notice of these documents, it should not add them to the Administrative Record. *See In re Russell City Energy Ctr*. at 36 ("Significantly, taking official notice and supplementing the record are two different actions, which are not typically concurrent or

equivalent, because they involve different considerations.")

d) The equities do not favor consideration of extra-record materials.

Petitioners present several equitable factors for the Board's consideration: "a pandemic and severe storms that knocked out power for weeks immediately before the [comment] deadline," Petitioners' limited resources (related to their non-profit status), and "the prior conduct of the Region and GE and the history of the prior appeal, [from which] Petitioners reasonably understood that they would be permitted to submit expert testimony to support the points they timely raised in public comments." *See* Opposition at 2-3 n. 2, 5.

The Region recognizes the hardships facing Petitioners, including the Covid-19 pandemic which has tremendously impacted all parties and the Board itself. The Region disagrees, however, that the equities favor consideration of extra-record materials. An equitable accommodation to Petitioners that would allow them to submit extra-record materials would create confusion over the administrative record and an additional burden for the Board, who would be tasked with reviewing new materials in the first instance. To maintain the "efficient, fair, and impartial adjudication of issues arising in an appeal," the Board must strike the contested attachments. 40 C.F.R. § 124.19(o).

In response to Petitioners' argument that the Region "relied on materials outside the administrative record in the prior 2016 appeal to this Board," (Opposition at 3 n. 2) the Region notes that the current situation is distinguishable. Two of the referenced documents cited by the Region in the 2016 appeal – Attachments 12 and 14 – were not even in existence at the time of the 2016 Permit issuance, and thus could not possibly have been included in the Region's Administrative Record. The notification to which Attachment 14 is responding – the Region's identification of uncontested conditions in the 2016 Permit – is a document that is not issued until after a Permit is issued. *See* 40 C.F.R. § 124.16(a).

Similarly, the EPA Fact Sheet was an effort to inform the public about the recently issued 2016 Permit, so although it was within the Region's control, the Region had no reason to issue it until after the Permit was finalized. Attachments 15 and 16 – the United States' Complaint in *United States v. General Electric Company*, and the U.S. District Court's "Memorandum and Order Re Entry of Consent Decree" in *United States et al v General Electric Company* – are both documents from the judicial proceedings that resulted in the Consent Decree, and were cited by the Region in the EAB proceeding as legal support for responding to arguments on the 2016 Permit.

e) Petitioners have not alleged bad faith sufficiently to justify the Board's consideration of extra-record documents.

Petitioners also argue – in limited detail – that the contested attachments are proper because the Board may consider extra-record materials "where there is 'improper agency behavior'" or "bad faith" on the part of the agency. Opposition at 5, 12 (citations omitted).[5] Agency actions, however, are entitled to a "presumption of regularity." *See, e.g., In re Veolia Es Technical Solutions, LLC*, 18 E.A.D. 194, 227 (EAB 2020) ("Particularly given the presumption of regularity accorded to agencies, the [Petitioners'] belief, without more, is insufficient to demonstrate the Region clearly erred…") Additionally, the very cases cited by Petitioner make clear just how strong of a showing of impropriety a party must make to supplement an administrative record, a showing Petitioners have completely failed to make here. Petitioners cite, on pg. 5 of their Opposition, *Maine v. McCarthy*, 2016 U.S. Dist. LEXIS 159940, at *7-9 (D. Me. Nov. 18, 2016).[6] But they do not quote the portion of the decision where the court concludes that "supplementation of the record *may* be proper"

[5] *See also* Opposition at 11 (alluding to the agency's "improper actions" and "secret negotiations.")

[6] Also available, on Westlaw, at 2016 WL 6838221.

"[w]here a party makes a *prima facie* showing that the agency either *intentionally or negligently* excluded from the record evidence adverse to its position[.]" *Id.* (emphasis added). They also do not include the district court's conclusion that "the administrative record *may* also be supplemented where there is a 'failure to explain administrative action as to frustrate effective judicial review.'" *Id.* (emphasis added) (citations omitted.) Petitioners also quote, on pp. 11 and 12 of their Opposition, *Norfolk & Walpole*, 137 F.R.D. at 188 (D. Mass. 1991): "The reviewer also 'is justified in looking past the administrative record when bad faith is claimed.'" Petitioners omit the subsequent sentence, which reads: "Normally there must be a *strong* showing of bad faith or improper behavior before the court may inquire into the thought processes of administrative decisions." *Id.* (citations omitted) (emphasis added.)

Petitioners have not only failed to make the requisite strong showing that the Region acted in bad faith, they have failed to make *any* showing at all. The Region's decision to enter into confidential mediation with stakeholders – including HRI – falls squarely within the Region's discretion and is in no way evidence of bad faith. The Petitioners' Brief includes conclusory statements that the Region engaged in "secret settlement negotiations,"[7] but Petitioners offer no details or evidence to support these claims. At most, they offer Attachment 5. Not only is this Attachment improper for the reasons described previously in this Reply and in the Motion to Strike, it also simply does not prove bad faith by the Region because it focuses on actions by GE, not by the Region.

Because Petitioners have not come close to making a strong *prima facie* showing of bad faith by an agency, the Board must not consider any of the contested attachments on

[7] *See, e.g.,* Petitioners' Brief at 7.

that basis.

f) Petitioners' argument that the substance of the contested attachments was raised in comments undercuts their other arguments.

Petitioners conclude their affirmative arguments for inclusion of the contested attachments with a section explaining why, "[a]t a minimum, the EAB should consider the substance of the challenged Attachments, because the substance of the challenged Attachments was clearly raised in Petitioners' public comments." Opposition at 13. They go on to explain that the "Attachments present this same information in a different format (for example, by a statement of an expert)…." *Id.*

Because the Attachments present the same information as was submitted in the comments, Petitioners, by their own admission, concede that they were in a position to timely submit the contested attachments during the public comment period, but opted not to. For example, if "[i]ndeed, Petitioners consulted with Dr. De Simone in connection with preparing their public comments regarding site suitability," they were clearly able to generate and submit Dr. De Simone's report along with their comments. *Id.* at n. 13. Only those comments actually submitted become part of the administrative record. *In re Russell City Energy Ctr., LLC* 15 E.A.D. at 39 ("To allow supplementation of the administrative record with documents that were inadvertently not included in comment submissions – and that the permit issuer did not actually consider – would circumvent the administrative record process… The important consideration is what the commenter actually submitted, not what the commenter intended to submit.") (citations omitted.)

In *Russell,* despite finding that documents inadvertently not submitted to the agency during public comment were not part of the Administrative Record, the Board considered them anyway. *Id.* The current situation is distinguishable. The material at issue in *Russell*

was (likely) the back sides of two other pages properly submitted. *Id.* at 38 n. 41 ("It appears that the College District may have inadvertently submitted one side of a two-sided document or the first and last pages of a four-page document."). In other words, those two pages were critical material the Board did not otherwise have. Contrast Petitioners' documents, which Petitioners now allege are substantively identical to material already part of the Administrative Record.

If the contents of the contested attachments truly mirror the content of properly submitted public comments, Petitioners should have submitted them at that time. They may not now attempt to cure this failure by submitting them as attachments to the Petition.[8]

g) The contested attachments violate the word count.

In their short counterargument to the Region's word count argument, Petitioners offer that "the regulations expressly state that attachments do not count toward the word limitation" and claim that the Region "failed" to explain how the contested attachments "possibly constitute argument."

The Region reaffirms its arguments put forth in its Motion that the voluminous extra-record attachments violate the intent and spirit of 40 C.F.R. § 124.19(d)(3). The Region's theory that the attachments represent arguments is now even further supported: To the extent the contested attachments elaborate upon points raised in public comments – as Petitioner now alleges in their Opposition – the attachments could be viewed as arguments supporting those issues. As such, the Board has even more reason to consider them an impermissible violation of the word limit for Petitions.

[8] The Region also notes that the Board finds documents that "simply rehash arguments or offer additional opinions about scientific issues that are already covered at great length in the record… to be unnecessarily cumulative of an already exhaustive administrative record, argumentative, and unhelpful to the resolution of the issues…." In re Town of Newmarket… 16 E.A.D. at 243 (EAB 2013).

III. CONCLUSION

For the foregoing reasons, the Region respectfully reaffirms its request that the Board strike Attachments 5, 6, 8, 9, 10, 11, 13, 14, 15, and 17.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this Reply to Petitioners' Opposition to the Motion to Strike contains fewer than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5).

Dated: May 3, 2021

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CERTIFICATE OF SERVICE

I, John W. Kilborn, hereby certify that on May 3, 2021, true and correct copies of EPA Region 1's *Reply to Petitioners' Opposition to the Motion to Strike* were served as follows:

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