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

In re:	)	
2020 REVISED PERMIT MODIFICATION TO 2016 REISSUED PERMIT ISSUED TO GENERAL ELECTRIC COMPANY, UNDER THE RESOURCE RECOVERY AND CONSERVATION ACT, FOR THE HOUSATONIC RIVER "REST OF THE RIVER,"	)	RCRA 21-01 D002084093
Permit Recipient:	)	
General Electric Co., 1 Plastics Avenue, Pittsfield, MA 01201	)	

PETITIONERS' OPPOSITION TO MOTION TO STRIKE

Petitioners Housatonic River Initiative ("HRI") and Housatonic Environmental Action League ("HEAL") (collectively, "Petitioners") hereby oppose the Motion to Strike filed by EPA Region 1 (the "Region") and supported by General Electric Company ("GE"). Petitioners are citizens groups from Massachusetts and Connecticut that have spent decades marshalling their limited resources to advocate for an actual cleanup of the Housatonic River after it was extensively polluted by GE. Petitioners care deeply about the well-being of their community and local environment and have made a diligent effort to raise their serious concerns with the Region's remedy selection in the manner contemplated by the governing regulations. Notably, despite the serious challenges presented by the pandemic and severe storms that knocked out power to western Massachusetts and Connecticut immediately before the public comment period

deadline, Petitioners submitted detailed written comments to the Region by the deadline,[1] in which Petitioners alleged, among other things, that the Region failed to consider the geological characteristics of the proposed disposal site, failed to adequately consider alternative remediation technologies, and failed to comply with its own guidance concerning monitored natural recovery.

The Region had ample opportunity to respond to each of these points in its Response to Comments. Indeed, for certain issues, such as the potential of the proposed Upland Disposal Facility ("UDF") to diminish property values and the direction of groundwater and surface water flow from the proposed UDF, the Region's Response to Comments relied on *new* expert reports. Accordingly, in their Petition to this Board, Petitioners have, appropriately, submitted their own expert reports to rebut the Region's new findings. Petitioners have also supported their Petition with publicly available documents, such as EPA's own policy guidance documents, and with documentation of information previously brought before the Region that the Region should have, but failed to, consider in selecting a remedy for the Rest of the River. As more fully set forth below, the EAB is <u>not</u> constrained to consider only documents in the administrative record. To the contrary, the EAB may properly consider all of the attachments to the Petition in assessing the Region's remedy selection.[2]

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[1] The public comment period closed on September 18, 2020. On September 15, 2020, two U.S. Senators and one Member of Congress sent the Region's counsel the attached letter requesting an extension of the public comment period to November 20, 2020 in light of the pandemic and the impact of severe weather in western Massachusetts and Connecticut. The Region did not grant that request.

[2] At its essence, the Region's Motion to Strike boils down to a complaint that Petitioners' exhibits were not attached to their public comments filed by the September deadline. On some level, it is unseemly that the Region, whose staff and attorneys are paid salaries by the government, and GE, whose staff and attorneys are paid richly by the hour, would make this argument against two citizens' groups, who are paid absolutely nothing to argue for the protection of the environment in their communities, and who made herculean efforts to submit their written comments by the deadline, despite a pandemic and severe storms that knocked out

ARGUMENT

I. The Region Presents an Overly-Narrow Description of the Scope of Documents that May Be Considered by the EAB in Connection with a Petition.

The regulations governing the filing of petitions, 40 C.F.R. § 124.19, do not delineate the scope of information that the EAB may consider in connection with reviewing a final permit decision. See In re Russell City Energy Center, LLC, 15 E.A.D. 1, 39 (E.A.B. 2010) ("part 124 does not specify if and when the Board, in the course of its review of final permit decision, may consider materials not included in the administrative record at the time of permit issuance"). There is nothing in those regulations that prevents the EAB from considering information outside the administrative record.

Indeed, case law is clear that appellate reviewers may look beyond the administrative record and consider "extra-record" documents when evaluating agency decision-making. These circumstances include, among others, where there is a need for expert testimony in a technical matter and/or where the agency failed to consider all relevant factors in rendering its final decision. See Emhart Indus. v. New Eng. Container Co., 2016 U.S. Dist. LEXIS 13688, at *46-48 (D.R.I. Feb. 2, 2016) (explaining, in case involving challenge to EPA remedy selection, that information outside the administrative record may be considered where there is a need for the testimony of experts in a highly technical matter, a record that is incomplete, and/or a showing that an agency failed to consider all relevant factors); Ruskai v. Pistole, 775 F.3d 61, 66 (1st Cir. 2014) (citing 9th Circuit decision for proposition that a court may consider extra-record materials when necessary to determine whether the agency considered all relevant factors in making its decision or when necessary to explain technical terms or complex subject matter); Strahan v.

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power for weeks immediately before the deadline. Indeed, both the Region and GE themselves relied on materials outside the administrative record in the prior 2016 appeal to this Board.

Linnon, 966 F. Supp. 111, 114 & 117 (D. Mass. 1997) (considering biologist affidavit because it showed facts agency should have, but did not, consider and explained technical, scientific procedures); see also City of Waltham v. United States Postal Service, 786 F. Supp. 105, 117 (D. Mass. 1992) (a reviewing court should review evidence outside of the administrative record when the plaintiff presents previously available evidence that the agency should have considered but did not).

The EAB may also consider certain extra-record documents under the doctrine of "official notice," which is similar to, but broader than, the doctrine of judicial notice in the federal courts. See 40 C.F.R § 22.22(f) ("official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency"); Sykes v. Apfel, 228 F.3d 259, 272 (3d Cir. 2000) ("Official notice is the proper method for agency decisionmakers to apply knowledge not included in the record. Both judicial notice and official notice allow adjudicators to take notice of commonly acknowledged facts, but official notice is broader than judicial notice insofar as it also allows an administrative agency to take notice of technical or scientific facts that are within the agency's area of expertise"); see also In re City of Ruidoso Downs & Village of Ruidoso Wastewater Treatment Plant, 17 E.A.D. 697, 712, 716 n.18 & 22 (E.A.B. 2019) (taking official notice of public information outside the administrative record); In re Donald Cutler, 11 E.A.D. 622, 650-51 (E.A.B. 2004).

Documents as to which the EAB may take official notice include, without limitation, public documents such as statutes, regulations, judicial proceedings, public records, and agency documents, including internal agency guidance and memoranda. See Russell, 15 E.A.D. at 36 &

81 n.99. The EAB may also consider facts from sources whose accuracy cannot reasonably be questioned. See In re Peace Industry Group, 17 E.A.D. 348, 366 n.13 (E.A.B. 2016).

It is also permissible for the EAB to consider documents not part of the administrative record where those documents are submitted in order to respond to material the permit issuer added to the record in its response to comments. See Russell, 15 E.A.D. at 39. Petitioners are also entitled to question the validity of material in the record, including whether certain documents that should have been included in the record are missing. See In re Dominion Energy Brayton Point, LLC (formerly USGen New England, Inc.) Brayton Point Station, 12 E.A.D. 490, 516-17 (E.A.B. 2006). Other recognized bases for considering materials outside the administrative record are where there is "improper agency behavior, failure to adequately explain administrative action, and exclusion of documents adverse to the agency's position." Maine v. McCarthy, 2016 U.S. Dist. LEXIS 159940, at *7-9 (D. Me. Nov. 18, 2016).

The EAB's ability and willingness to consider information outside of the administrative record is demonstrated by the proceedings in the prior appeal in this matter. During the 2016 appeal, both GE and the Region attached documents outside of the administrative record to their briefs. See GE Petition, Attachment 13, and EPA Response, Attachments 12, 14-16. In addition, at the hearing on the 2016 appeal, HRI was permitted to submit testimony from expert Peter deFur. Given the prior conduct of the Region and GE and the history of the prior appeal, Petitioners reasonably understood that they would be permitted to submit expert testimony to support the points they timely raised in public comments. Indeed, the EAB should be loath to validate the position of two parties (the Region and GE) who felt free in the prior appeal to rely on materials outside the administrative record, but now insist that Petitioners may not do so.

II. Petitioners' Attachments May All Be Considered by the EAB in Connection with Their Petition.

The Region seeks to strike ten of Petitioners' eighteen Attachments (Attachments 5, 6, 8, 9, 10, 11, 13, 14, 15, and 17). In assessing the Region's Motion, the proper inquiry is not which documents may properly be appended to the end of a petition; rather, the question is which documents may properly be considered by the EAB, whether or not attached to a petition, in connection with its review of the Region's remedy selection.

Here, the EAB may properly consider all of the challenged attachments because they all fall within one or more of the exceptions for consideration of extra-record materials. Specifically, the Attachments: (i) were submitted in response to information added to the record for the first time with the Region's Response to Comments; (ii) provide evidence of information the Region had before it and should have, but did not, consider; (iii) provide explanation of highly technical matters; and/or (iv) may be considered under the doctrine of official notice. Indeed, if nothing else, the challenged Attachments should be considered part of the record because their substance, if not their form, was contained in Petitioners' public comments.

a. The Challenged Attachments are Appropriate Evidence for Consideration in Evaluating the Region's Arbitrary and Capricious Decision-Making.

All of the Attachments to the Petition fall into a category of documents that may be considered by the EAB on this appeal, whether or not selected by the Region for inclusion in its Administrative Record.

i. Attachments 6 and 8 Respond to Documents and Information Supplied by the Region for the First Time with its Response to Comments.

After the close of public comments, the Region engaged two consultants to offer expert opinions upon which it relied in its Response to Comments: one pertaining to expected groundwater and surface water flow from the UDF site, and the other pertaining to the impact of

the UDF on nearby property values. See Response to Comments pp. 20, 35-36, 38 (citing December 3, 2020 Memorandum from Weston Solutions, Inc., Doc. ID 650451, and November 2020 Memorandum on Property Data Analysis from Skeo, Doc. ID 650436).

Attachment 6 to the Petition contains a report from Petitioners' expert, Dr. David De Simone, that responds to the Region's late-filed "Weston Memorandum" by explaining why the subsurface geology of the proposed UDF site renders groundwater flow difficult to predict. See Attachment 6, p. 2 (geologic properties of the site "makes prediction of hydraulic properties in these sediments especially difficult to incorporate into ground water flow models . . . [t]hus, modeled ground water flow must be viewed cautiously, at best"). Attachment 8 to the Petition contains a report from Audrey A. Cole, a real estate broker, appraiser, and an attorney, that directly analyzes the late-filed "Skeo report" and identifies its deficiencies. The public had no notice of the Weston Memorandum or Skeo report during the public comment period.

As the Region acknowledges in its Motion, it is entirely proper for the EAB to consider extra-record documents that respond to new material submitted by an agency in its response to comments. Indeed, the Region seems to effectively agree that Attachment 8 was properly submitted pursuant to this rule.[3] It would be patently unfair and contrary to the governing statutory and regulatory framework for the Region to be able, after the close of public comments, to retain its own geological and property valuation experts to generate new reports, in response to issues

[3] The Region's sole alleged basis for including Attachment 8 in its Motion to Strike is that it "violates the word count." Attachment 8 is an expert report. It is not a legal argument by counsel. Where the Region has acknowledged that the Attachment is a proper response to newly submitted material, it has failed to explain why that attachment should be stricken. The regulations are clear that attachments are not considered as part of the word count. See 40 C.F.R. § 124.19(d)(3). To the extent that the Region is making the formalistic argument that documents properly considered by the EAB may only be attached to a petition if they are a part of the administrative record, that position accomplishes nothing other than making it harder for the EAB to locate a document properly within the scope of its review.

and information raised by public comments, while simultaneously barring Petitioners from correcting the record or otherwise responding through their own experts. Attachments 6 and 8 are, therefore, properly before the EAB.

ii. Attachments 6, 9, 10, 13-15, and 17 Are Evidence of the Region's Failure to Consider All Relevant Factors and Provide Expert Testimony as to Technical Matters.

Case law is clear that extra-record information may be considered where it is used to support a petitioner's argument that an agency – including the EPA in making a remedy selection – failed to consider all relevant factors. Ruskai v. Pistole, 775 F.3d 61, 66 (1st Cir. 2014); Emhart Indus. v. New Eng. Container Co., 2016 U.S. Dist. LEXIS 13688, at *46-48 (D.R.I. Feb. 2, 2016); Strahan v. Linnon, 966 F. Supp. 111, 114 & 117 (D. Mass. 1997). Extra-record information may also be considered where there is a need for expert testimony on a technical matter. Id. Many of Petitioners' Attachments fall into these categories.

One of Petitioners' principal arguments in this appeal is that the Region's remedy selection decision was arbitrary and capricious because the Region failed to consider certain critical information, including the availability of alternative remediation technologies. The Region is well aware that Petitioners have long identified this failure in the Region's remedy selection approach. See Attachment 1, pp. 7-10. Indeed, in the prior appeal, the Region previously complained that Petitioners raised the issue too early; now, the Region complains that evidence of failure to consider alternative technologies has been raised too late. It is clear that the Region simply wants to keep this evidence out of the EAB's view.

Attachments 9 and 10 demonstrate that the Region, despite claiming to have considered bioremediation technology, actually failed to do so. In Attachment 9, Christopher W. Young explains that he conducted a successful bench test of bioremediation on PCB sediments from the

Housatonic, then developed a quality assurance plan for a pilot study on additional sediments from the River, but the Region first lost his quality assurance plan and then totally ignored it. See Attachment 9. Attachment 10 demonstrates that the Region's attempt to avoid its obligation to consider alternative technologies based on the size of the site is unsupportable, as thermal desorption can be, and has been, used on large sites to destroy PCBs.[4] See Attachment 10. Furthermore, Attachments 9 and 10 provide information regarding the highly technical concept of the use of alternative technologies to remediate PCBs. Therefore, these Attachments are properly before the EAB.

Petitioners also argue that the Region failed to consider several critical factors before selecting monitored natural recovery ("MNR") for large portions of the River. In support of this argument, Petitioners rely on several of the Agency's own guidance documents concerning MNR (Attachments 13, 15 and 17). It seems almost silly for the Region to suggest that the EAB should not have before it relevant Agency guidance concerning MNR. Petitioners cited these guidance documents as legal authority, akin to citing case law, statutes, or regulations. Taken to its logical conclusion, the Region's position that a petitioner cannot cite to the standards that govern the analysis would mean citations to cases, statutes, and regulations are also forbidden. As noted

[4] Attachments 9 and 10 are also offered to demonstrate that statements in the Region's Response to Comments are incorrect, including the Region's representation that it has explored the use of alternative treatment technologies. See Response to Comments, p. 23. The Region should not be able to immunize itself against dispute with respect to inaccurate statements simply by asserting that the record is closed. See Maine v. McCarthy, 2016 U.S. Dist. LEXIS 159940, at *5-6 (D. Me. Nov. 18, 2016) ("An agency 'may not skew the [administrative record] in its favor by excluding pertinent but unfavorable information[,]' and may not exclude information on the grounds that it did not rely on that information for its final decision"); Geer v. FHA, 975 F. Supp. 39, 41 (D. Mass. 1997) (same).

below, the EAB may certainly rely on the Agency's own guidance documents, whether or not those documents were attached to the Petition.[5]

Moreover, the Agency's guidance documents, along with a scholarly article by Dr. David Carpenter (Attachment 14), directly support Petitioners' argument that there was critical information that the Region should have, but failed to, consider. Specifically, Petitioners argue that the Region failed to: (i) include performance criteria for vast areas of the River (Attachment 13); (ii) consider the adverse consequences of natural attenuation of PCBs, including the potential risk of volatilization (Attachment 14); (iii) perform an analysis of the timeframe by which MNR is expected to be effective (Attachment 15); and (iv) include a plan for a contingent response if it is discovered that MNR is not working (Attachment 17). In short, these Attachments are all properly before the EAB.

Finally, Petitioners argue that, in connection with the 2020 Permit, the Region ignored and effectively failed to consider the geological properties of the Site that render it inappropriate for a disposal facility. The Region was clearly put on notice by Petitioners' public comments that they were challenging this deficiency. In Attachment 6, Dr. De Simone provides a detailed, and highly technical, description of the properties of the Site and concludes that it is a "textbook example of where not to locate a landfill." Attachment 6, p. 4. His report is akin to the affidavit of the biologist that was properly submitted in Strahan (supra), which set forth facts that the agency should have, but did not, consider and explained technical, scientific matters. Therefore, in addition to being

[5] To the extent that the Region is arguing that the cited agency guidance documents on MNR do not apply to the remediation at issue in this case, the Region is certainly able to make that argument in its brief in this appeal, without having the guidance documents stricken from the record.

responsive to new material inserted into the record in the Region's Response to Comments, Attachment 6 may also be considered by the EAB on these grounds.

iii. The EAB May Take Official Notice of Attachments 5, 11, 13, 14, 15, and 17.

Attachments 5, 11, 13, 14, 15, and 17 may all be considered by the EAB pursuant to the doctrine of official notice. As noted above, Attachments 13, 15, and 17 are the Region's own guidance documents. Prior EAB decisions make clear that an agency's internal guidance documents are subject to official notice. See, e.g., Russell, 15 E.A.D. at 36 & 81 n.99. It is absurd that the Region is contending that the EAB may not consider the agency's own policies in determining whether the agency acted in an arbitrary and capricious manner.

Attachments 5, 11, and 14 are publicly available documents, and the Region concedes in its motion that publicly available sources may be properly considered. See Mot. at n.3 ("[o]ne could argue that Attachments 5, 13, 14, 15 and 17 are the type of public realm documents that could fall into the general categories identified by the Board for the purposes of official notice . . . ."). This is especially true when the documents are offered to explain the agency's improper actions in selecting a remedy – i.e., that they were not based on application of legal standards to evidence but rather resulted from secret negotiations between the agency and the polluter.

The Region takes the position that a petitioner may only submit extra-record public documents for the purpose of establishing that certain information was publicly available and may not rely on the content of those documents. However, these are not the only reasons why historical documents such as new articles are relevant to evaluating agency decisions. In reviewing agency decision-making, it is appropriate to "consider evidence outside the administrative record as necessary to explain agency action." Norfolk & Walpole v. United States Army Corps of Eng'rs, 137 F.R.D. 183, 187 (D. Mass. 1991), quoting Friends of Earth v. Hintz, 800 F.2d 822, 829 (9th

Cir. 1986). The reviewer also "is justified in looking past the administrative record when bad faith is claimed." Norfolk & Walpole, 137 F.R.D. at 188, citing Public Power Council v. Johnson, 674 F.2d 791, 795 (9th Cir. 1982).

Attachment 5 is a publicly available news article providing relevant background information on GE's practice of using monetary payments, as it did in this case, to influence support for its preferred approach to remediation. This relates to Petitioners' argument that the Region agreed to a remedy, without notice and comment, during a secret settlement discussion with GE, and that certain municipal entities and organizations were given compensation by GE not to oppose the chosen remedy.

Attachment 11 is a 1991 Strategy Report by GE that was made public through a Freedom of Information Act request. That Attachment provides relevant background information demonstrating that GE's strategy regarding PCBs has long been to essentially do nothing and to lull regulators and the public into believing that doing nothing is better for the environment – the very remediation strategy which Petitioners challenge in this appeal.

Attachment 14 is an article from the international peer-reviewed journal, Reviews on Environmental Health, and is relevant because it demonstrates the health risks that may result from the Region's decision to select MNR for much of the Site. This article also falls into the category of documents offered to explain technical or scientific principles. It also is an example of evidence concerning risks to the communities that the Region failed to consider. Concerns about volatilization of PCBs were raised during the public comment period. The Region cannot simply ignore the comments and skew the record by trying to suppress evidence of the very real risks posed to the community from PCB exposure.

Thus, EAB may properly consider Attachments 5, 11, 13, 14, 15, and 17.

b. The Substance of the Attachments was Raised in Petitioners' Comments.

At 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. See Attachment 1 to the Petition. Specifically, Petitioners' public comments described the geologic conditions of the site that render it unsuitable for a disposal facility[6]; described the Region's failure to adequately consider alternative remediation technologies and Petitioners' decades-long effort to have the Region consider certain viable technologies; and described the Region's failure to adhere to the standards for MNR, including verbatim language from the agency's MNR guidance documents. Id. The fact that Petitioners' Attachments present this same information in a different format (for example, by a statement of an expert) does not mean that such information is new or beyond the scope of issues and facts raised in a timely manner during the public comment period.

This is simply not a situation where the Region has been confronted with new information that it did not have an opportunity to address in its Response to Comments. Indeed, the Region responded to the public comments regarding geological concerns, the failure to consider alternative remediation technologies, and the deficiencies in application of MNR. See Response to Comments, pp. 13, 24-27, 80. The Region certainly had the opportunity to have its own experts counter the information presented in Petitioners' arguments at that juncture, and on certain topics it in fact did so. The fact that the Region rejected Petitioners' arguments in its Response to Comments does not make the information contained in those arguments any less a part of the administrative record.

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[6] Indeed, Petitioners consulted with Dr. De Simone in connection with preparing their public comments regarding site suitability.

III. Petitioners' Attachments Do Not Violate the Word Limit.

The regulations expressly state that attachments do not count toward the word limitation. See 40 C.F.R. § 124.19(d)(3). Because all of the Attachments are properly before the EAB, their inclusion does not violate the word limit. To hold otherwise would eviscerate the language of § 124.19(d)(3). Moreover, the Region fails to explain how documents such as its own guidance, GE's internal documents, expert testimony, and newspaper and journal articles possibly constitute "argument" by Petitioners and their counsel for purposes of this appeal. The Region's argument on this point is meritless and must be rejected.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully request that the EAB denies the Region's Motion to Strike in its entirety.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(f)(5), undersigned counsel certifies that the foregoing Opposition contains 4,240 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, and, thus, this Opposition meets the 7,000 word limitation contained in 40 C.F.R. § 124.19.

Respectfully submitted,

HOUSATONIC RIVER INITIATIVE

and

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CERTIFICATE OF SERVICE

I, Stephanie R. Parker, hereby certify that on this 22nd day of April, 2021, I served the foregoing Opposition by electronic mail to:

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