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

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

EPA REGION 1'S MOTION TO STRIKE

Respectfully submitted,

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I. INTRODUCTION

This Motion concerns ten attachments to the Petition for Review (Dkt #6) that are neither: (1) part of the administrative record, nor (2) proffered, but for one instance, in reaction to EPA Region 1's ("EPA") response to comments. Thus, they are improper under longstanding principles guiding the Environmental Appeals Board's ("Board's") permit reviews. For the reasons explained below, EPA respectfully requests the Board strike them.

Many courts have explained that the complete or official administrative record for an agency decision includes documents, materials, and information that the agency relied on directly or indirectly in making its decision. *See e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 738-739 (10th Cir. 1993); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). "Thus courts have been reluctant to include in an administrative record any materials that were not actually before the agency when it made its decision." *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 519 (EAB 2006) ("Dominion I"); *see also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review more than the information before the [agency] at the time [it] made [its] decision risks…requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations," *citing Am. Petroleum Inst. v. Costle*, 609 F.2d 20 (D.C. Cir. 1979)); *accord United States v. Amtreco, Inc*., 806 F. Supp. 1004, 1007 (M.D. Ga. 1992) ("Post-decisional information is not relevant to a judicial review of an agency decision.").

These axiomatic principles are reflected in the procedural regulations governing permit appeals that allow only one category of attachment to petitions: "[p]arts *of the record* to which the parties wish to direct the Environmental Appeals Board's attention." 40 C.F.R. § 124.19 (d)(2) (emphasis added). Without this limitation, parties would be free to submit for the Board's review documents that were not in front of the agency when it made its final

decision. But because the Board reviews whether a final agency decision rationally reflects the associated administrative record, such extra-record documents would be – at best – irrelevant to an appeal and – at worst – a distraction and source of confusion to reviewing bodies and the public. Thus, the limitation of attachments to administrative record materials is an important one, and one that accords with the bedrock principles of administrative record review.

Because Petitioner's attachments are not actually part of the record, and because Petitioner has made no move to supplement the record, these documents are more accurately construed as argument. Consequently, their inclusion violates, by a wide margin, the word limitation for petitions and inequitably hinders judicial efficiency and the fair adjudication of disputes before this Board. 40 C.F.R. §§ 124.19(d)(3), 124.19 (o).

For these reasons, more thoroughly described herein, EPA moves to strike attachments 5, 6, 8, 9, 10, 11, 13, 14, 15, and 17 (collectively, "contested attachments") from the Petition for Review. Dkt #6.

II. ARGUMENT

A. The contested attachments are not part of the administrative record.

As described above, it is well-settled that "the complete or official administrative record for an agency decision includes all documents, materials, and information *that the agency relied on directly or indirectly in making its decision*." (emphasis added) *Dominion I* at 519 (*citing, e.g.*, *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)); *accord In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 37 (EAB 2010); *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 417 (EAB 2007) ("*Dominion II"*). The regulatory requirement that the administrative record "shall be complete on the date the final permit is issued," 40 C.F.R. § 124.18(c), reinforces the idea that the administrative

record is limited to the documents relied upon by the agency. *See also* 45 Fed. Reg. 33412 (May 19, 1980) ("By requiring the record to be assembled before the permit is issued, EPA has ensured that the Regional Administrator can base final decisions on the administrative record as a whole."); *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 40 n.42 (EAB 2005) ("We interpret this to mean that the record is closed at the time of permit issuance and that documents submitted subsequent to permit issuance cannot be considered part of the administrative record.")

Extra-record attachments are improper and irrelevant because the Board's central task in a record review case is to determine whether the agency made a reasonable decision based on the information before it.

Attachments 5, 6, 8, 9, 10, 11, and 14 are not part of the administrative record because they were presented to EPA regarding this Permit for the first time as attachments to the Petition and thus could not possibly have been part of the agency's consideration of its final permitting decision. Attachments 13, 15, and 17 are EPA-authored guidance documents but were not part of the Region's decision-making process.[1] [2] The Region did not consider these EPA guidance documents because they pertain to the natural attenuation of groundwater contamination, which is not at issue for this Permit, rather than the monitored natural recovery of sediments, which is. As further described in the attachment to this Motion, each of the contested attachments (with the exception of attachment 8) could have been submitted to EPA during the public comment period.

[1] The administrative record for the 2020 Revised Final Permit is available at https://semspub.epa.gov/src/collection/01/AR66478.

[2] Although attachment 8 responds to new material (the 2020 Skeo Report) in EPA's response to comments, the Region is moving to strike attachment 8 because its inclusion violates the word count, as further described in subpart B below.

The Board considers extra-record documents only in very limited and specific circumstances: (1) when they are proffered to respond to new materials added to the record by the agency in response to comments, (2) when they are "public realm" documents worthy of the Board's official notice, or (3) when they are submitted to supplement the administrative record on the basis that they were before the agency when it made its decision. As described below, in turn, none of those circumstances apply to the facts at hand.

First, "the Board has been willing to consider new evidentiary proffers as part of a petition 'where a petitioner submits documents in response to new materials added to the record by the Region in response to comments.'" *In re Stonehaven Energy Management*, LLC, 15 E.A.D. 817, 832 (EAB 2013) (*quoting Dominion II*). Except for attachment 8, Petitioners have not even alleged - must less borne their burden of demonstrating – that the contested attachments were "properly submitted in response to new materials that the Region added to the record as part of its response to comments." *See In re Penneco Environmental Solutions, LLC*, 17 E.A.D. 604, 615, n. 7 (EAB 2018).

Second, the Board may take "official notice" of extra-record documents but only "to show what information is in the public realm." *Stonehaven* at 832, note 11. As a threshold matter, many of the attachments – attachments 6, 8, 9, 10, and 11– are not the kind of "public realm" documents that are appropriate for public notice. *See In re Russell City Energy Center*, LLC, 15 E.A.D. 1 at 36 (EAB 2010) ("the Board may take 'official notice' of certain relevant non-record information, generally public documents such as statutes, regulations, judicial proceedings, public records, and Agency documents.") Additionally, all of the contested attachments are inappropriate for the Board's official notice because the purpose for which Petitioners "seek[] to use the contents of [the documents is] to bolster

[their] affirmative case before the Board," rather than to "show what information is in the public realm."[3] *See Penneco* at 615, quoting *Stonehaven*. As just one example, Petitioner cites Attachment 6, a report by a scientific expert, to support its argument that "the UDF Site has geological characteristics that render it highly inappropriate for the placement of a landfill." Petition, pg. 9. Dkt #6.

Third, under exceptional circumstances, the Board will supplement an administrative record with documents that were before the agency when it made its decision. To the extent Petitioners seek to supplement the record via their inclusion of the contested attachments, they face an uphill, and ultimately losing, battle. "[B]ecause supplementation should not be required absent exceptional circumstances, a party seeking to supplement the record must establish that the additional information was known to the agency when it made its decision, the information directly relates to the decision, and it contains information adverse to the agency's decision." *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72 (D.D.C. 2008). With respect to each of the contested attachments, Petitioners have fallen well short establishing these criteria, failing indeed to even "contend that any of the documents it seeks to have added to the record were relied on either directly or indirectly by the Region." *Dominion II* at 417.

The ten contested attachments are not part of the administrative record, and thus are improper attachments to the Petition. 40 C.F.R. § 124.19(d)(2). Additionally, there is no compelling reason for the Board to either add them to the administrative record, take official notice of them, or otherwise consider them in this permit appeal. For all of these

[3] One 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, but the fact that they are being used to bolster Petitioner's affirmative case precludes such treatment.

reasons, the Board must strike them.

B. The Board's consideration of the voluminous contested attachments would violate the regulatory word limit and inequitably undermine both the administrative process and the Board's stated priority of judicial efficiency.

A petition is limited to 14,000 words. 40 C.F.R. § 124.19 (d)(3). Only with "advance leave of the [Board]" may a petitioner "file a longer brief," although "such requests are discouraged and will be granted only in unusual circumstances." *Id.* Furthermore, a petitioner may not evade the word limits for a petition by repurposing voluminous briefing material behind another label. *See In re: City of Taunton*, 17 E.A.D. 105, 129 (EAB 2016) ("By raising all of these issues via a thirty-four page declaration attached to its twenty-three page Reply, the City also contravenes Board regulations governing word limits for replies… For [this and other] reasons… the Board concludes that the… [d]eclaration is procedurally improper.") The strict word limit advances the Board's more universal objective to "provide greater clarity and efficiency to the appeals process." 78 Fed. Reg. 5281, 5283 (Jan. 25, 2013). Within this framework, it would defy logic to accept hundreds of pages of new argumentative material into this litigation.

Although it is true that "any attachments do not count toward the word limitation," this permissive formulation only makes sense – given principles of record review and the other limitations of section 124.19 – if those attachments are limited to "*[p]arts of the record* to which the parties wish to direct the Environmental Appeals Board's attention." 40 C.F.R. §§ 124.19 (d)(3), 124.19 (d)(2) (emphasis added.) In other words, attachments are limited to documents that have already been thoroughly considered by the agency – not, conversely, hundreds of pages of new documents for which a petitioner seeks the Board's first impression, review of which would be undeniably onerous.

Not only would review be onerous, it would also be improper. Because the Region,

not the Board, is considered to be the technical subject matter expert, "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). Except for attachment 8, the contested attachments could have – and should have – been submitted for the Region's consideration during the public comment period. For further details, see the attachment to this Motion. The mostly technical material contained in the contested attachments is precisely the type of information that the Region's technical experts should have had the opportunity to evaluate while the record was open and permit proceedings were ongoing. Instead, Petitioners have decided to ask the Board to review several hundred pages of new material in the first instance, by attaching it to their Petition. Dkt #6.

For the regulatory word limit to retain any meaning, and to protect both the administrative process and the Board's clear preference for judicial efficiency, Petitioner must not be allowed to bolster the arguments made in their 13,993-word Petition with an additional 562 pages[4] of improper attachments. *See* Petition, Statement of Compliance with Word Limitation. Dkt #6. The Board must strike the contested attachments.

III. CONCLUSION

For the foregoing reasons, the Region respectfully requests that the Board grant the motion.[5] [6] In the event the Board denies the Region's motion in whole or in part, the Region requests a reasonable further opportunity to respond to the substance of these documents/arguments to the extent of the Board's denial.

[4] The collective total of pages in the contested attachments.
[5] Pursuant to 40 C.F.R. § 124.19(f)(2), the Region has ascertained that Petitioner will oppose this Motion.
[6] To the extent that the Board strikes attachments 6 and 14, which are also attached to the amicus brief dated March 26, 2021 (Dkt# 11) as attachments 1 and 2, those amicus attachments should be stricken as well. EPA is not moving to strike Attachment 3 to the amicus brief as it is a public court filing.

CERTIFICATE OF SERVICE

I, John W. Kilborn, hereby certify that on April 7, 2021, true and correct copies of EPA Region 1's *Motion to Strike* were served as follows:

Via the EPA's E-Filing System to:

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