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

In re:	)	
GENERAL ELECTRIC COMPANY	)	RCRA Appeal No. 21-01
Modification of RCRA Corrective Action Permit No. MAD002084093	)	

GENERAL ELECTRIC COMPANY'S REPLY TO PETITIONERS' OPPOSITION TO EPA REGION I'S MOTION TO STRIKE

On April 7, 2021, EPA Region I ("EPA") filed a motion to strike ten attachments to the brief filed by petitioners, the Housatonic River Initiative ("HRI") and the Housatonic Environmental Action League ("HEAL"), that are not part of the Administrative Record for the Revised Permit challenged in this proceeding.[1] On April 8, 2020, General Electric Company ("GE"), the permittee, submitted a memorandum in support of that motion. On April 22, 2021, HRI and HEAL filed a memorandum in opposition to EPA's motion ("HRI/HEAL Opp."). GE is filing this reply to that opposition.

In opposing EPA's motion, HRI and HEAL do not even mention the Board's holding in its 2018 decision on the 2016 version of the Revised Permit that the Board "will not consider" documents that are not in the administrative record and are "presented for the first time on appeal." *In re General Electric Co*., 17 E.A.D. 434, 582 n.62 (EAB 2018). Instead, HRI and

[1] The Revised Permit, issued by EPA in December 2020 and included in the Administrative Record ("A.R.") as Doc. #650440, specifies a remedial action for the area of the Housatonic River and its floodplain known as the Rest of River. A prior version of that permit, issued in 2016, was reviewed by this Board in *In re General Electric Co*., 17 E.A.D. 434 (EAB 2018), which remanded the permit to EPA for reconsideration on a couple of issues.

HEAL assert several reasons why the challenged attachments should nevertheless be considered by the Board as exceptions to the general rule as applied in that case. Their arguments are addressed below.[2]

A. Petitioners' Attachments 6 and 8 Should Not be Considered as Responses to New Information.

HRI and HEAL argue that two of their attachments – Attachments 6 and 8 – should be considered because they respond to documents and information presented by EPA for the first time in its Response to Comments. HRI/HEAL Opp. at 6-8. While the Board has "on occasion," recognized a limited exception to the rule against considering documents outside the administrative record for situations "where a petitioner submits documents in response to new materials the permit issuer added to the record in response to comments," *In re Russell City Energy Center, LLC*, 15 E.A.D. 1, 39 (EAB 2010), that limited exception clearly does not apply to HRI and HEAL's Attachments 6 and 8.

HRI and HEAL's Attachment 6 is a statement by a geologist attempting to show that the site of the Upland Disposal Facility (UDF) specified in the Revised Permit for the disposal of certain sediments and soils from the Rest of River is geologically unsuitable for such a disposal facility. HRI and HEAL claim that this report was submitted in response to a memorandum (the "Weston Memorandum") referenced in EPA's Response to Comments ("RTC"). HRI/HEAL Opp. at 7. In fact, however, the one-page Weston Memorandum (A.R. 650451) relates only to the direction of groundwater and surface water flows in the area of the UDF, not the underlying geology, and was discussed in EPA's Response to Comments solely in connection with groundwater flow. See RTC (A.R. 650441) at 20. The geologist's report attached by HRI and

[2] This Reply also applies to Attachments 1 and 2 to the brief filed on March 26, 2021 by certain groups as *amici curiae* in support of the petitioners.

HEAL, which addresses the underlying geology of the UDF site generally, does not even mention the Weston Memorandum, let alone respond to it. EPA identified the location of the UDF and described that site in the draft Revised Permit and the accompanying Statement of Basis.[3] Any comment that HRI or HEAL had regarding that specific location or its geological suitability for disposal of sediments and soils, including their geologist's report, could have been provided in their comments on the draft Revised Permit. The Weston Memorandum did not affect those issues. Thus, HRI and HEAL cannot do now – through attaching the geologist's report to their brief – what they should have done in their comments on the draft Revised Permit.

HRI and HEAL's Attachment 8 is a statement by a real estate broker that addresses whether the UDF would affect local property values. That statement includes a response to a report by an EPA consultant, the Skeo report, that EPA commissioned and used in its Response to Comments to discuss the impact of a *different* local landfill on property values in that area. See RTC at 35-35. This attachment also does not qualify for the limited exception to the rule against the Board's consideration of documents that are not in the Administrative Record. The Skeo Report did not affect any aspect of the Revised Permit or the Statement of Basis. Again, HRI and HEAL knew the location of the UDF and could have commented on the alleged effect of the UDF on property values in the area in their comments on the draft Revised Permit. In any event, a potential impact on property values is not one of the criteria for evaluating remedial action alternatives under the governing legal authority here (the 2000 Consent Decree and

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[3] See EPA's Draft Revised Permit (A.R. 647214) at Figure 6; Statement of Basis for EPA's Proposed 2020 Revisions to the Remedial Action for the Housatonic River "Rest of River" (A.R. 647211) at 7 & 14.

associated permit that govern the selection of the Rest of River Remedial Action),[4] and thus any dispute about that potential impact has no relevance to EPA's decision.

B. Petitioners' Attachments Other than EPA Guidance Documents Are Not Subject to Official Notice by the Board.

HRI and HEAL argue that the Board may take official notice of their Attachments 5, 11, 13, 14, 15, and 17. That is not true of the three of those documents that are not EPA guidance documents (i.e., Attachments 5, 11, and 14).

The Board has stated that it may take official notice of public documents that are "incontrovertible," such as "statutes, regulations, judicial proceedings, public records, and Agency documents." *In re City of Ruidoso Downs & Village of Ruidoso Wastewater Treatment Plant,* 17 E.A.D. 697, 716 n.22 (EAB 2019); *In re Russell City Energy Center, LLC*, 15 E.A.D. at 36 (and cases cited therein).[5] In addition, EPA's regulations on hearings in administrative adjudicatory hearings, although not directly applicable to EAB proceedings, provide that "official notice can be taken of any matter that can be judicially noticed in the federal courts." 40 C.F.R. § 22.22(f). See also *In re Donald Cutler*, 11 E.A.D. 622, 650-51 (EAB 2004) (citing that regulation to support taking official notice of a *Federal Register* notice). For judicial notice, the Federal Rules of Evidence provide that a court may take judicial notice of "a fact that is *not subject to reasonable dispute* because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from *sources whose accuracy cannot reasonably be questioned*." Fed. R. Evid. 201(b) (emphases added). See also *In re Peace*

[4] Those criteria were listed by the Board in its prior decision. *In re General Electric*, 17 E.A.D. at 460.

[5] GE concedes that HRI and HEAL's Attachments 13, 15, and 17, which are EPA guidance documents, may be subject to official notice, although, as EPA has shown in its motion (at 4), those documents are not relevant to the issues involved in the Revised Permit.

Industry Group, 17 E.A.D. 348, 366 n.13 (EAB 2016) (quoting that rule to support official notice by the Board).

The extra-record documents cited by HRI and HEAL as having been submitted by GE and EPA to the Board in the 2016 appeal (HRI/HEAL Opp. at 5) all met the Board's criteria for official notice. Attachment 13 to GE's Petition for Review consisted of EPA documents containing its approval of certain landfills. Attachments 12 and 14-16 to EPA's Response consisted of EPA documents or documents from judicial proceedings.[6]

By contrast, HRI and HEAL's Attachments 5, 11, and 14 clearly do not meet the Board's criteria for official notice. They are not official EPA documents, are not "incontrovertible," do not present facts that are "not subject to reasonable dispute," and are not "sources whose accuracy cannot reasonably be questioned." To the contrary, those documents have been submitted by HRI and HEAL as purported support for certain factual allegations in their brief that controvert EPA's conclusions. As such, these are the very sorts of extra-record documents that fall *outside* the doctrine of official notice and *within* the rule against submitting factual documents for the first time on appeal.

C. Petitioners' Attachments Should Not be Considered to Evaluate Whether EPA Failed to Consider Relevant Factors.

HRI and HEAL also claim that several of their attachments other than EPA guidance documents (namely, Attachments 6, 9, 10, and 14) may be considered in evaluating whether EPA's Revised Permit decision was arbitrary and capricious because, according to HRI and HEAL, those documents are evidence of EPA's failure to consider relevant factors and because

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[6] HRI and HEAL also assert that, in the hearing on the 2016 appeal, "HRI was permitted to submit testimony from expert Peter deFur." HRI/HEAL Opp. at 5. In fact, what the Board permitted from Dr. deFur was not "testimony," but oral argument, as HRI was unrepresented by legal counsel. See *In re General Electric*, 17 E.A.D. at 447.

they assertedly provide expert testimony on "technical matters." HRI/HEAL Opp. at 8-9. HRI and HEAL cite no Board decisions to support this point, and they provide no justifiable basis for the Board to consider those attachments here.[7]

The attachments in question were submitted in support of HRI and HEAL's factual allegations. They do not show that EPA failed to consider any relevant factors; that can be ascertained by reviewing EPA's Response to Comments and other documents supporting its draft and final permits. Indeed, HRI and HEAL's argument on this score would swallow the rule against considering extra-record materials because nearly any such materials submitted by a petitioner could be said to be submitted to show that EPA acted arbitrarily by failing to consider relevant factors. Further, the non-guidance attachments to HRI and HEAL's brief do not provide technical explications that would assist the Board in understanding technical issues; rather, they present one-sided views by proponents of particular positions.

D. Petitioners' Attachments Should Not Be Considered on the Purported Basis that Their "Substance" Was Raised in Comments.

Finally, HRI and HEAL contend that the challenged attachments should be considered because the "substance" of those attachments was raised in their comments. HRI/HEAL Opp. at 13. There is no basis for this novel contention. The specific arguments made by the petitioners in their comments in the Administrative Record, as well as EPA's responses to those comments, are properly subject to consideration by the Board. However, HRI and HEAL cannot use those

[7] The few court decisions that they cite indicate that, in some cases, courts have exercised their discretion (or noted that they have discretion) to consider certain extra-record materials for such reasons. Those decisions, however, do not undercut the Board's general rule against considering documents not in the Administrative Record, as stated in *In re General Electric*, or expand the Board's limited exceptions described above. In any case, as shown in the text, those decisions certainly do not support the Board's consideration of the subject attachments here.

comments to bootstrap extra-record attachments into consideration by the Board. Such an effort would allow a petitioner to submit virtually any extra-record materials that could be said to support their comments.

Conclusion

For the foregoing reasons, EPA's motion to strike should be granted, at least as to HRI and HEAL's Attachments 5, 6, 8, 9, 10, 11, and 14.

Statement of Compliance with Word Limitation

Undersigned counsel certifies that the foregoing General Electric Company's Reply to Petitioners' Opposition to EPA Region's Motion to Strike contains 1,954 words, as counted by a word processing system, including headings, footnotes, quotations, and citations in the count, and thus this Reply meets the 7,000-word limitation specified in 40 C.F.R. § 124.19(f)(5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April 2021, I served one copy of the foregoing General Electric Company's Reply to Petitioners' Opposition to EPA Region I's Motion to Strike on each of the following by electronic mail:

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