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

In re:	)	
GENERAL ELECTRIC COMPANY	)	RCRA Appeal No. 16-01
Modification of RCRA Corrective Action Permit No. MAD002084093	)	

GENERAL ELECTRIC COMPANY'S OPPOSITION TO MASSACHUSETTS' MOTION TO STRIKE AND RESPONSE TO MASSACHUSETTS' MOTION TO FILE SURREPLY

The General Electric Company ("GE") opposes the Commonwealth of Massachusetts' April 14, 2017 motion to strike certain portions of, and attachments to, GE's March 24, 2017 Reply to Massachusetts' Response to GE's Petition for Review ("GE.Reply-to-MA"). The supposedly "new arguments" that the Commonwealth contends GE made in its Reply either (1) were not new at all or (2) were responses to arguments or assertions made by the Commonwealth for the first time in its Response ("MA.Resp."). The attachments in question – whose authenticity is not in dispute – support these arguments, and the Board can and should take official notice of those documents. Although a surreply is not appropriate in this circumstance, GE does not oppose the Commonwealth's April 14, 2017 motion for leave to file a surreply.

A. GE's Reply Did Not Improperly Introduce New Issues or Arguments.

The Commonwealth contends that GE's Reply improperly raised three new issues or arguments. Massachusetts's Motion to Strike ("MA.Motion") at 4-7. That claim is groundless. GE's Petition identified the defects in the contested provisions of the Modified Permit and, as required by the Board's rules, demonstrated that EPA's justification for those contested

provisions in its Response to Comments was "clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii). GE, in its Petition, was not required to anticipate and respond to arguments that might later be made by the Commonwealth. The Commonwealth's arguments were presented for the first time in its Response to GE's Petition, and GE's first opportunity to respond to them was in its Reply to the Commonwealth's Response. Of the three allegedly "new issues or arguments" in GE's Reply, one was not new at all and the other two replied to arguments or assertions made by Massachusetts in its Response.

This is appropriate and uncontroversial. A "reply may respond to issues and arguments raised in a response brief." *Dyson, Inc. v. SharkNinja Operating LLC*, 2016 U.S.Dist.LEXIS 121880 at *3 (N.D.Ill. Sept. 9, 2016). *See also Central States, Southeast and Southwest Areas Pension Fund v. White*, 258 F.3d 636, 639 n.2 (7th Cir. 2001) (appellant's reply brief could make new argument that was "prompted by" appellee's arguments). Indeed, whenever an appellee raises even a "potentially material issue or argument" in its brief, "fundamental fairness requires that the appellant be permitted to respond…." *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1356 (Fed.Cir. 2001). Thus, GE properly included those discussions in its Reply to Massachusetts' Response.

1. GE's discussion of Massachusetts' submittals under CERCLA § 104(c)(9) provided context for the arguments regarding state opposition to on-site disposal.

Contrary to the Commonwealth's assertion, MA.Motion at 5, GE's assertions regarding Section 104(c)(9) of CERCLA are ***not*** new. As the Commonwealth itself concedes, *id*., GE cited this provision of CERCLA in its Petition. GE.Pet. at 13 n.8. GE there explained that EPA's insistence on out-of-state disposal was inconsistent with the spirit and purpose of Section

104(c)(9), which was designed to ensure that a state in which a remedial action will occur has adequate capacity for the treatment and disposal of the hazardous wastes so generated.

The Commonwealth did not respond directly to GE's assertion in its Response. Instead, it argued, contrary to GE's position, that EPA had properly considered state opposition to on-site disposal, emphasizing that the Commonwealth "vigorously opposed the creation of ***any new landfills***," MA.Resp. at 13 n.2 (emphasis added), observing that there was a "long history of persistent and vigorous state … opposition to an on-site disposal facility," *id*. at 23, and admitting that "there are currently no off-site hazardous waste or PCB disposal facilities in Massachusetts." *Id*. at 15 n.5.

These admissions by the Commonwealth effectively proved the point in GE's Petition – *i.e.*, that EPA's choice of out-of-state disposal, in deference to Massachusetts' "vigorous" opposition to the creation of new in-state landfill capacity, was inconsistent with EPA's statutory mandate under Section 104(c)(9). GE said this in its Reply, pointing out that it was "arbitrary for EPA to allow Massachusetts to avoid" its statutory obligation. GE.Reply-to-MA at 2. GE then put the Commonwealth's assertions in its Response to GE's Petition into context by demonstrating that the Commonwealth's policy, as stated in its own official publications, was in fact to oppose the creation of any new in-state landfill capacity. *Id*. at 2-3. This material, then, did not raise a "new," separate issue as to whether the Commonwealth complied with CERCLA, but simply addressed a point that the Commonwealth itself had made about its "vigorous" opposition to on-site disposal.

2. GE's discussion of the limits of the Nation's landfill capacity appropriately responded to an argument raised in Massachusetts' Response to GE's Petition.

The Commonwealth next claims that GE's Reply raised a new issue about nationwide landfill capacity. MA.Motion at 6. However, GE properly discussed national landfill capacity in its Reply because the Commonwealth made it relevant in its Response to GE's Petition.

GE's Petition showed that, as EPA had admitted, on-site disposal is as protective and effective as out-of-state disposal. GE.Pet. at 12-17. In its Response to GE's Petition, the Commonwealth disputed that showing, arguing that out-of-state disposal is more protective of human health and the environment than on-site disposal because an on-site disposal facility would be located in an area that is not "known to be contaminated," whereas existing out-of-state disposal facilities already contain hazardous substances. MA.Resp. at 17.

In reply, GE pointed out, *inter alia*, that the Commonwealth's argument, presented for the first time in its Response to GE's Petition, rested on the unsubstantiated assumption that there exists unlimited out-of-state landfill capacity in areas of "known contamination." GE.Reply-to-MA at 6. Using an EPA report, GE demonstrated what common sense dictates: that nationwide landfill capacity is ***not*** infinite. *Id.* at n.7. Consequently, GE explained, the disposal of one million cubic yards of sediment and soil from the Rest of River will bring that capacity closer to the point where a new landfill or landfill cell will eventually have to be constructed ***somewhere*** in an area with no known contamination. *Id*. at 6. The supposedly "new argument" here, then, was actually GE's refutation of a factual assumption embedded in the Commonwealth's Response; and since it was prompted by that Response, it was properly included in GE's Reply. *Central States, Southeast and Southwest Areas Pension Fund*, 258 F.3d at 639 n.2 (reply brief may include arguments that are "prompted by" a respondent's brief).

3. GE's discussion of the Commonwealth's apparent regulatory intentions in amending its hazardous waste regulation to include an ACEC prohibition addressed an argument made in Massachusetts' Response.

Finally, Massachusetts asserts that GE's Reply improperly discussed the Commonwealth's intentions in amending its hazardous waste regulations to prohibit a disposal facility in an Area of Critical Environmental Concern ("ACEC"). MA.Motion at 6-7. This argument also was properly presented as a response to an argument raised by the Commonwealth in its Response.

When GE identified the Woods Pond Site as a potential location for a disposal facility in its Revised Corrective Measures Study Report, that site was within the boundaries of the Upper Housatonic ACEC, but was not subject to any state regulations that would prohibit the placement of a hazardous waste disposal facility within it. In 2013, however, the Commonwealth amended its hazardous waste regulations to add a prohibition on locating a hazardous waste disposal facility in an ACEC. 310 CMR 30.708.

GE argued in its Petition that this new regulatory prohibition should not be applied to, or should be waived for, the Woods Pond Site because the facility at that site would occupy a sand and gravel quarry and would not affect any of the resources of the ACEC. GE.Pet. at 18-19. The Commonwealth responded with various justifications for applying the regulatory prohibition to the Woods Pond Site. MA.Resp. at 20.

Insofar as it discussed the Commonwealth's "regulatory intentions," GE's Reply had only one purpose – to answer the Commonwealth's Response to GE's Petition by presenting the chronology of the Commonwealth's actions and illustrating how they were contemporaneously perceived, and thus providing additional support and context for GE's position in its Petition that that ACEC prohibition should not be applied to the Woods Pond Site. *See* GE.Reply-to-MA at

8-9. GE then went on to further support its position by describing the assurances that the Commonwealth had given, contrary to its position in its Response, that the ACEC designation would not impede the redevelopment of an existing industrial parcel in the ACEC (*e.g.*, the Woods Pond Site). *Id*. at 9-10. Again, there was nothing improper about including this material in GE's Reply because the purpose of a reply brief is to "respond to issues and arguments raised in a response brief." *Dyson, Inc.*, 2016 U.S.Dist.LEXIS 121880 at *3.

B. The Attachments to GE's Reply and an EPA Report Cited by GE Are Subject to Official Notice by the Board.

The Commonwealth also claims that the Board should strike the documents attached to GE's Reply, as well as an EPA report cited therein, because they are not in the Administrative Record. MA.Motion at 3-4. Those documents provide support for the three arguments discussed above, all of which address the Commonwealth's contentions in its Response; and they all came from sources whose authenticity cannot reasonably be questioned, including the Commonwealth itself.

The Board thus can and should take official notice of these documents for the limited purposes for which they were submitted, even if they are not in the Administrative Record. The doctrine of official notice (or "administrative notice") "is the proper method by which agency decisionmakers may apply knowledge not included in the record." *Zubeda v. Ashcroft*, 333 F.3d 463, 479 (3d Cir. 2003) (citation omitted). The official notice doctrine is in general a "close parallel" to judicial notice. *Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994). In particular, both doctrines "permit a court or agency to take notice of an adjudicative fact '***not subject to reasonable dispute*** in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to ***sources whose accuracy cannot reasonably be questioned***.' Fed. R. Evid. 201(b)." *Id.*

(emphases added). *See also In re City of Denison*, 4 E.A.D. 414, 419 n.8 (1992), where the Board took notice of an order that was not in the administrative record, stating that "an official government record [is] subject to official notice."

1. The state documents relating to in-state landfill capacity should not be stricken.

As discussed in Section A.1, GE's discussion of the Commonwealth's general policy on in-state waste disposal provides context about the Commonwealth's opposition to on-site disposal here. Attachments 1 and 2 to GE's Reply, which are reports by the Massachusetts Department of Environmental Protection ("MassDEP") on in-state waste disposal capacity, were submitted to illustrate the Commonwealth's policy. These documents are subject to official notice by the Board for that contextual purpose, regardless of whether they are in the Administrative Record, since there is no "reasonable dispute" that MassDEP in fact issued them given that they came from a source "whose accuracy cannot reasonably be questioned."

2. The footnote citing EPA's 2015 National Capacity Assessment Report should not be stricken.

Massachusetts contends that footnote 7 of GE's Reply to Massachusetts should be stricken because it cites an EPA National Capacity Assessment Report that is not in the Administrative Record. MA.Motion at 4. As discussed in Section A.2, GE included this reference to support the uncontroversial factual proposition that nationwide landfill capacity is not infinite. Again, since this report came from an official source (EPA) "whose accuracy cannot reasonably be questioned," it is subject to official notice by the Board for the purpose cited, just like other EPA documents.

3. The comments on the proposed ACEC designation and the proposed amendment to the state hazardous waste regulations should not be stricken.

As discussed in Section A.3, the Commonwealth's "regulatory intentions" in designating the ACEC and amending its hazardous waste regulations are relevant to the Commonwealth's arguments that the regulatory ACEC prohibition should be applied to the Woods Pond Site. The comments provided as Attachments 3, 4, and 5 to GE's Reply were submitted not to prove the factual statements made by the commenters, but simply to support GE's reply to the Commonwealth's argument by showing contemporaneous understandings of the Commonwealth's intentions.[*] Since those documents came from the official state dockets on the ACEC designation and on the amendment to the hazardous waste regulations, which are "sources whose accuracy cannot reasonably be questioned," there is no "reasonable dispute" that these comments were in fact submitted (as opposed to the truth of their statements). Thus, the Board may take official notice of these comments for that purpose, even though they are not included in the Administrative Record.

C. GE Does Not Oppose the Commonwealth's Motion for Leave to File a Surreply.

A surreply "is not permitted" where, as here, "the reply merely responds to an issue raised in the opposition…." *Steward v. Jayco, Inc.*, 2017 U.S.Dist.LEXIS 6785 at *6 (D.Md. 2017). Nevertheless, GE has no objection to a full discussion of the parties' positions, and does not oppose the Commonwealth's motion for leave to file a surreply.

[*] Attachments 3 and 4 consist of public comments on the Commonwealth proposed designation of the Upper Housatonic ACEC in 2009, and Attachment 5 consists of GE's comments on MassDEP's proposed amendment of its hazardous waste regulations in 2009 to add the ACEC prohibition.

Conclusion

For the foregoing reasons, the Board should deny Massachusetts' motion to strike. As noted, GE does not object to Massachusetts' filing of a Surreply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2017, I served one copy of the foregoing General Electric Company's Opposition to Massachusetts' Motion to Strike and Response to Massachusetts' Motion to File Surreply on each of the following:

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