

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

_____))
In the Matter of:)

GENERAL ELECTRIC COMPANY,)

RCRA Appeal No. 16-01

Modification of RCRA Corrective Action)
Permit No. MAD002084093)
_____)

COMMONWEALTH OF MASSACHUSETTS' MOTION TO STRIKE

The Commonwealth of Massachusetts (Commonwealth) respectfully submits this Motion to Strike (Motion) in connection with the General Electric Company's (GE) Reply to the Commonwealth's Response to GE's Petition for Review. Pursuant to this Motion, the Commonwealth requests that the Board: 1) order GE to identify the location in the Administrative Record of the five Attachments to its Reply; 2) strike any Attachment(s) from GE's Reply that is not part of the Administrative Record; and 3) order that GE not refer to or quote from any Attachment(s) that is not part of the Administrative Record. The Commonwealth requests the same relief with respect to the National Capacity Assessment Report, March 25, 2015, a document that GE relies upon and quotes from in its Reply but which also does not appear to part of the Administrative Record. In addition, the Commonwealth requests that the Board strike and not consider issues and arguments raised by GE for the first in its Reply.

The Commonwealth has consulted with GE regarding this Motion, and GE, through

its counsel, Jeffrey Porter, has indicated that GE will oppose this Motion. The Commonwealth has consulted with Connecticut regarding this Motion, and Connecticut, through its counsel, Lori D. DiBella, has assented to the Motion. The Commonwealth has consulted with EPA regarding this Motion, and EPA, through its counsel, Timothy Conway, has assented to the Motion.

Introduction

On March 24, 2017, General Electric Company (GE) filed its Reply to the Commonwealth of Massachusetts's (Commonwealth) Response to GE's Petition for Review. In its Reply, GE attempts to supplement the administrative record in this matter (Administrative Record) by including five Attachments, none of which appear to be part of the Administrative Record, in violation of 40 C.F.R. 124.18(c) and 124.19(d)(2). GE then proceeds to reference and quote from these improper Attachments to support arguments set forth in its Reply. In addition, on page 6, footnote 7 of its Reply, GE relies upon and quotes from the National Capacity Assessment Report, March 25, 2015 (Assessment Report), a document that also does not appear to be part of the Administrative Record. Accordingly, the Commonwealth files this Motion to Strike and respectfully requests that the Board: 1) order GE to identify the location of the Attachments in the Administrative Record; 2) strike any Attachment(s) from GE's Reply that is not part of the Administrative Record; and 3) order GE not refer to or quote from any Attachment(s) that is not part of the Administrative Record during oral argument. The Commonwealth requests the same relief with regard to the Assessment Report.

In addition, GE introduces new issues or arguments in its Reply in violation of 40 C.F.R. 124.19(c)(2). Accordingly, the Commonwealth files this Motion to Strike and respectfully

requests that the Board strike these issues and arguments and that the Board not consider them in this matter.

Argument

I. GE's Reply is an Attempt to Supplement the Administrative Record in Violation of C.F.R. 124.18(c) and 124.19(d)(2).

Pursuant to 40 C.F.R. 124.18(a), EPA is required to base its final permit decision on the administrative record, which "... shall be complete on the date the final permit is issued." *Id.* at 124.18(c). The Board has interpreted this to mean that the administrative record closes at the time the permit is issued and that documents submitted thereafter "... cannot be considered part of the administrative record." *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 518 (EAB 2006). In addition, 40 C.F.R. 124.19(d), which governs the content and forms of briefs filed with the Board, states that "[p]arts of the record to which the parties wish to direct the [Board's] attention may be appended to the brief submitted." *Id.* at 124.19(d)(2). Accordingly, to be properly considered, documents attached to a reply brief filed pursuant 40 C.M.R. 124.19(c) must be part of the administrative record at the time the permit is issued.

Notwithstanding the foregoing, in its Reply, and attached thereto, GE relies upon and quotes from five documents that do not appear to be part of the Administrative Record. Those Attachments are: Attachment 1: Excerpt from a 1993 Hazardous Waste Capacity Assurance Plan for the Commonwealth of Massachusetts, Phase I; Attachment 2: Excerpts from Massachusetts 2010-2020 Solid Waste Master Plan, April 2013; Attachment 3: Letter from Lee Community Development Corporation to Ian A. Bowles, Secretary, Massachusetts Executive Office of Energy and Environmental Affairs, February 6, 2009; Attachment 4: Letter from Congressman

John W. Olver to Ian Bowles, Secretary, Massachusetts Executive Office of Energy and Environmental Affairs, March 6, 2009; and Attachment 5: Letter from GE to John Fischer, Massachusetts Department of Environmental Protection, August 23, 2013. All of these documents were publicly available at the time EPA issued the Final Modification of RCRA Corrective Action Permit in this matter (Modified Permit), and GE had ample opportunity to include them in the Administrative Record before it closed.¹ Also, on page 6, footnote 7 of its Reply, GE relies upon and quotes from the National Capacity Assessment Report, March 25, 2015. Unless GE can demonstrate that these documents were part of the Administrative Record at the time the Modified Permit was issued, GE's backdoor attempt to supplement the Administrative Record should be rejected by the Board, and the Board should strike any Attachment that is not part of the Administrative Record and order GE not to refer to or quote from any such Attachment during oral argument. The Commonwealth seeks the same relief with regard to the Assessment Report.

II. GE's Reply Introduces New Issues or Arguments in Violation of 40 C.F.R. 124.19(c)(2).

40 C.F.R. 124.19(c)(2) and prior Board decisions clearly prohibit GE from raising new issues or arguments in its Reply. 40 C.F.R. 124.19(c)(2) states that the "Petitioner may not raise new issues or arguments in the reply." This is consistent with the Board's long held position that new issues may not be raised in reply briefs and that "[n]ew issues raised for the first time at the reply stage ... are equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). In its Reply, GE improperly raises three new issues or arguments as discussed below.

¹ Even if these documents were not available at the time the record closed, GE must follow appropriate procedures and meet applicable standards to supplement the Administrative Record.

A. GE Cannot Raise the Issue of the Commonwealth's Compliance with CERCLA § 104(c)(9) for the First Time in its Reply.

In its Reply, GE argues for the first time that the Commonwealth has a “controlling statutory duty [under CERCLA § 104(c)(9)] to assure that sufficient room exists for the disposal of hazardous wastes generated in-state,” Reply at 3, and that “[i]t is arbitrary for EPA to allow Massachusetts to avoid this obligation.”² Reply at 2. GE relies upon the Commonwealth’s 2010-2020 Solid Waste Master Plan (Master Plan) in an attempt to buttress its argument.³

GE will likely argue that it raised this issue in its Petition where it stated in a footnote that “EPA’s preference for out-of-state disposal also flies in the face of the rationale behind Section 104(c)(9) of CERCLA. That provision requires a state in which a remedial action will occur to assure that it has ‘adequate capacity’ for the treatment and disposal of hazardous wastes that are generated.” Petition at 13, n.8. However, the clear focus of GE’s argument on pages 12 through 17 of its Petition is whether on-site disposal is as protective as off-site disposal, and not whether the Commonwealth has violated a “controlling Statutory duty” under CERCLA § 104(c)(9). In fact, this footnote is the only reference in GE’s Petition to this section of CERCLA, and the Master Plan is included as an Attachment by GE for the first time in its Reply. It would be contrary to the purpose of the Board’s briefing rules, including page limitations and the proper scope of a reply, to allow GE to include as a placeholder a statutory reference in a footnote unrelated to its key argument, and then argue that it has preserved the issue for its Reply. GE could have argued this issue in its Petition but failed to do so.

² The Commonwealth will address the merits of GE’s argument concerning the Commonwealth’s compliance with this section of CERCLA in the event the Board denies this Motion to Strike and allows the Commonwealth’s Motion for Leave to File Surreply.

³ GE refers to Attachments 1 and 2 in support of this argument.

B. GE Cannot Raise the Issue of the National Capacity of Existing Hazardous Waste Landfills for the first time in its Reply.

In its Reply, GE raises for the first time the issue of the national disposal capacity of existing hazardous waste landfills, and asserts that EPA's requirement to dispose of all contaminated sediment and soil at existing landfills will use up "shrinking nationwide capacity." Reply at 6.⁴ On page 6 of its Reply, GE refers to page 17 of the Commonwealth's Response in a strained attempt to claim that the Commonwealth raised this issue by stating in its Response that "... while an existing off-site disposal facility will already contain hazardous substances, none of the disposal facilities proposed by GE are known to be contaminated." However, the Commonwealth made this statement in the context of its argument that off-site disposal at existing licensed facilities provides more overall protection of human health and the environment; it was not intended, and cannot be fairly construed as, a discussion by the Commonwealth concerning the disposal capacity of existing hazardous waste landfills.⁵ Accordingly, GE should not be permitted to raise this new issue for the first time in its Reply.

C. GE Cannot, for the First Time in its Reply, Raise the Issue of the Commonwealth's "Regulatory Intentions" in Promulgating 310 CMR 30.708.

Massachusetts Hazardous Waste regulations at 310 CMR 7.08 prohibit a hazardous waste facility within an ACEC. In its Reply, GE raises for the first the Commonwealth's intentions in promulgating 310 CMR 30.708, and asserts that promulgation of the regulation "... seems calculated to interfere with EPA's imminent selection of the Rest of River Remedial Action, and

⁴ The Commonwealth will address the merits of GE's argument concerning the disposal capacity of existing hazardous waste landfills in the event the Board denies this Motion to Strike and allows the Commonwealth's Motion for Leave to File Surreply.

⁵ GE refers to the National Capacity Assessment Report, March 25, 2015 in support of this issue.

specifically to seek to circumvent the remedy selection criteria” Reply at 9.⁶ The Commonwealth acknowledges that GE, in its Petition, and the Commonwealth, in its Response, each discuss this regulation. However, those discussions occurred in the context of whether the requirements of this ARAR will or need to be met at GE’s proposed disposal locations; they did not concern the Commonwealth’s regulatory intentions.⁷ GE cannot raise this new issue for the first time in its Reply.

D. Conclusion

40 C.F.R. 124.19(c)(2) and prior Board decisions prohibit GE from raising issues or arguments in its Reply that could have been raised in its Petition and that were not raised by the Commonwealth in its Response. Despite this prohibition, GE raises the three issues discussed above for the first time in its Reply. Accordingly, GE’s Reply as it relates to these issues should be treated as an untimely appeal. The Board should strike the discussion of these issues from GE’s Reply and order GE not to include them in oral argument. Further, the Board should strike all documents attached to or referenced in GE’s Reply in support of these issues (i.e., Attachments 1 through 5, and the National Capacity Assessment Report referenced in footnote 7 on page 6 of GE’s Reply).

⁶ The Commonwealth will address the merits of GE’s argument concerning the Commonwealth’s regulatory intentions in promulgating 310 CMR 30.708 in the event the Board denies this Motion to Strike and allows the Commonwealth’s Motion for Leave to File Surreply.

⁷ GE refers to Attachments 3, 4 and 5 in support of this issue.

Date: 4/14/17

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2017, true and correct copies of the
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