

1. Defendants' Reply makes new arguments based on two electronic mails from an Assistant Regional Counsel in the U.S. Environmental Protection Agency's Region 1 office. Reply at 1-2, 7.
2. Defendant's Reply introduces three new exhibits, which are unauthenticated, hearsay, and of limited relevance. Reply at 1-2, 4 n. 4, 7; Exhibits A-C.
3. Defendant's Reply relies upon events that occurred after Plaintiffs' filed their Opposition making further briefing desirable. Reply at 1 n. 1 (referencing Exhibit B, an electronic email from U.S. EPA Assistant Regional Counsel dated August 10, 2011).

Plaintiff's also object to Defendants' introduction of these new arguments and exhibits on the grounds that they are not confined to replying to new matters raised in Plaintiff's opposing memorandum as required by Local Rule 7(c), and present matters outside the pleadings that should be excluded from consideration by the court pursuant to Fed. R. Civ. P. 12(d).

Alternatively, with the introduction of these new matters, pursuant to Fed. R. Civ. P. 12(d) Defendants' Motion to Dismiss should be treated as one for summary judgment under Rule 56, and judgment should be entered for Plaintiffs.

Plaintiffs' surreply will assist the Court in its analysis of these issues raised in Defendant's Reply, and the instant motion is not interposed for delay or improper purpose. No party will be prejudiced if this motion is allowed as no hearing date has been set and the parties have not engaged in discovery. On August 18, 2011, counsel for Plaintiffs conferred Defendants counsel who indicated they do not assent to this motion.

The proposed surreply is attached hereto as Exhibit A. Should the Court grant Plaintiffs leave to file, Plaintiff propose to file its surreply within five days of the Court's grant.

WHEREFORE, Plaintiff's respectfully seek leave to file this surreply to Defendants

Reply of no more than 4 pages.

Respectfully submitted this 18th day of August, 2011

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Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this, the 18th day of August, 2011, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to attorneys of record in this matter. To my knowledge, there are no non-registered parties or attorneys participating in this case.

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