

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

In the Matter of:

City of Manchester

NPDES Permit No. NH0100447

NPDES Appeal No. 25-04

**EPA REGION 1's REPLY TO CLF's OBJECTION TO EPA REGION 1's MOTION TO
STRIKE**

Respectfully submitted,

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I. INTRODUCTION

EPA Region 1 (“the Region”) respectfully submits its reply to Petitioner’s Objection to the Region’s Motion to Strike (“Objection”) pursuant to 40 C.F.R. § 124.19(f)(4).

In objecting to the Region’s Motion to Strike, Petitioner concedes that Attachment 11 to the Petition for Review (“Attachment 11”) is not part of the administrative record and that *In re General Electric*, 18 E.A.D. 575 (EAB 2022), outlines three circumstances in which the Environmental Appeals Board (“EAB” or “Board”) may consider extra-record materials. Objection, 4, 5. Petitioner does not argue that Attachment 11 falls within one of the three recognized exceptions. Rather, Petitioner urges the Board to adopt a new, fourth exception: “the Board’s standard in *Russell City* leaves room for the Board to consider newly submitted extra-record evidence in response to new ‘*information*’ provided in an agency’s response to comments, not only ‘new materials.’” Objection, 6 (emphasis in original) (referencing *In Re Russell City Energy Ctr., L.L.C.*, 15 E.A.D. 1 (EAB 2010)). The purported “new information” here is “the Region’s position, despite its acknowledgment of potential *current* harm and despite having access to data that Petitioner provided, that it would delay action [on PFAS] until sometime in the future when monitoring data will ‘help EPA to better understand these risks.’” Objection, 7 (emphasis in original) (citation omitted.) The notion that this “information” is “new” is demonstrably false, but in any event should not be a basis for Petitioner to submit extra-record materials on appeal, as that basis would undermine longstanding principles guiding the Board’s permit reviews. The administrative record was complete as of final permit issuance, and that record is sufficient to explain and support the final permit decision.

II. ARGUMENT

A. The Region's description of its approach to PFAS in the response to comments was not "new information."

The Region's approach to PFAS was clearly explained and available for public notice concurrent with the issuance of the draft permit.¹ In the Fact Sheet, the Region recognized that "PFAS chemicals are persistent in the environment and may lead to adverse human health and environmental effects...." Fact Sheet,² 34; *see also id.* at 33 ("Exposure to some PFAS above certain levels may increase risk of adverse health effects."). The Fact Sheet also explained that: "EPA is collecting information to evaluate the potential impacts that discharges of PFAS from wastewater treatment plants may have on downstream drinking water, recreational and aquatic life uses"; the Draft Permit requires monitoring "consistent with recent EPA guidance;" "Reporting of all 40 PFAS analytes is necessary to address the emerging understanding and remaining uncertainties regarding sources and types of analytes of PFAS in wastewater and their impacts;" and "The purpose of this monitoring and reporting requirement is to better understand potential discharges of PFAS from this facility and to inform future permitting decisions...." Fact Sheet, 33, 34, 34-35, 34. It is therefore simply inaccurate for Petitioner to characterize as new information "the Region's position, despite its acknowledgment of potential current harm and despite having access to data that Petitioner provided, that it would delay action [on PFAS] until sometime in the future when monitoring data will 'help EPA to better understand these risks.'" Objection, 7 (citation omitted.) Petitioner was aware of the Region's approach to PFAS as early as the issuance of the draft permit, evidenced by its comments challenging that approach. *E.g.*, Response to Comments,³ 74 ("EPA must analyze the need for effluent limitations for PFAS and implement

¹ Available as Attachment G to the Region's Response to the Petition for Review.

² Available as Attachment F to the Region's Response to the Petition for Review.

³ Available as Attachment C to the Region's Response to the Petition for Review.

necessary effluent limitations.”). This appeal is therefore not, by any stretch, “[P]etitioner’s first opportunity to question the rationale” for the Region’s approach to PFAS. *General Electric*, 18 E.A.D. at 609 (citations omitted.)

B. The Board should not create a new exception to the rule that it will not consider extra-record materials on review.

Even if this “information” were truly “new,” that fact should not be a basis for the Board to consider extra-record materials on appeal, as such an exception would swallow the rule strictly delimiting the types of extra-record material appropriate for the Board’s consideration on appeal. The procedures for decisionmaking laid out in 40 C.F.R. Part 124 are designed so that the permit issuer’s understanding of the issues will expand via public participation. The permit issuer’s decisionmaking will therefore necessarily evolve as a result of considering and responding to public comments. But under Petitioner’s logic, such an evolution would be “new information” because it is not identical to the rationale expressed concurrent with the draft permit, rather than a reflection of the proper functioning of the administrative process. By extension, every response to comments would contain “new information” and parties in every appeal would be entitled to submit extra-record materials for the Board’s consideration, were Petitioner’s desired exception adopted.

Such a vast expansion of materials eligible for submission on appeal would be contrary to the longstanding principle that:

Scientific arguments and questions should first be presented to the Region, which has the technical expertise to address them. The Board’s role is not to evaluate scientific arguments in the first instance. Instead, the Board’s role is to review whether the Region’s permitting decision is based on clearly erroneous conclusions of fact or law.

General Electric, 18 E.A.D. at 618; *see also In re Peabody Western Coal Co.*, 12 E.A.D. 22, 33-34 (EAB 2005) (“[T]he locus of responsibility for important technical decisionmaking rests

primarily with the permitting authority, which has the relevant specialized expertise and experience.”) (citations omitted). It would also undermine the “basic principles of administrative record review and the limited instances in which an administrative record may be supplemented on appeal.” *In re Town of Newmarket Wastewater Treatment Plant*, 16 E.A.D. 182, 241 (EAB 2013).

Taken to its logical end, Petitioner’s seemingly modest proposition—which lacks any principled boundary—would theoretically justify submission on appeal of any *post hoc* information that might “contextualize[e] Petitioner’s arguments” or “rebut[] the Region’s conclusion[s].” Objection, 4. Indeed, voluminous extra-record materials—reams of data, technical papers, literature reviews—might very well dwarf the actual permit record. *See General Electric*, 18 E.A.D. at 608 (The Board’s “review is generally limited to th[e] certified administrative record, not a new record put before [it] in the first instance.”). Petitioner’s rule would therefore turn upside down the Part 124 procedures and the bedrock administrative law tenets on which they are based, confusing rather than clarifying the actual basis for the record decision under review with extra-record materials that the Region never actually considered.

The most damning feature of Petitioner’s position is that the Board has already considered and declined to create a general exception along the lines proposed by Petitioner. Petitioner attempts to submit Attachment 11 to demonstrate to the Board that “[t]he Region... relied on future data-gathering and delayed analysis, without independently analyzing any currently accessible data...,” Objection, 7, but “the Board does not recognize a general exception to the bar on consideration of extra-record documents for documents intended to support a claim that a permit issuer has not considered all relevant factors.” *General Electric*, 18 E.A.D. at 614. Petitioner cannot overcome this clear Board precedent by incorrectly characterizing as “new information”

the Region's reiteration in the Response to Comments of its position taken in the Fact Sheet, and then insufficiently explaining why Attachment 11 responds to such "new information." "In essence, the submission of [Attachment 11] is nothing more than an untimely attempt to bolster [Petitioner's] substantive comments on [PFAS.]" *Id.* at 615. The Board must decline to adopt Petitioner's proposed exception and decline to consider Attachment 11.

CONCLUSION

For the foregoing reasons, the Region reaffirms its request under 40 C.F.R. § 124.19(f) to strike Attachment 11 to the Petition.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the foregoing reply contains fewer than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5).

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CERTIFICATE OF SERVICE

By electronic filing, authorized by the Board's Sept. 29, 2025 standing order:

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Dated by electronic signature