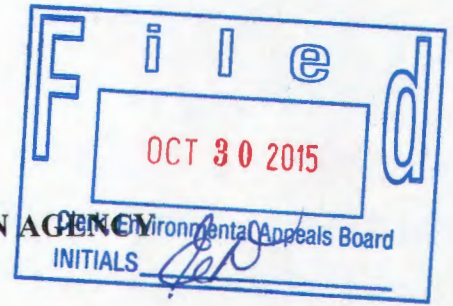


**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



_____)
In re:) NPDES Appeal No. 15-08
City of Taunton,)
Department of Public Works)
)
Permit No. MA0100897)
_____)

ORDER ON PENDING MOTIONS AND SETTING ORAL ARGUMENT

On May 13, 2015, the City of Taunton Department of Public Works (“City”) petitioned the Environmental Appeals Board (“Board”) to review a National Pollutant Discharge Elimination System (“NPDES”) permit that the U.S. Environmental Protection Agency Region 1 (“Region”) issued to the City on April 10, 2015. Following completion of briefing for this appeal, the City filed two motions – a Motion to Supplement the Administrative Record (filed July 8, 2015) (“Motion to Supplement Record”) and a Motion for the Appointment of a Technical Advisor/Expert (filed July 9, 2015) (“Motion to Appoint a Technical Advisor”). The Region opposed both motions and filed its own Motion to Strike Certain Attachments to the City’s Reply (August 6, 2015) (“Motion to Strike”). Additionally, the City requested that the Board hear oral argument on this matter. Petition at 44. For the reasons stated below, the Board denies the City’s Motion to Appoint a Technical Advisor and grants in part the Region’s Motion to Strike. The Board reserves judgment on the City’s Motion to Supplement the Record, as well as the Region’s Motion to Strike with respect to the Declaration of Benjamin M. Kirby. Finally, the Board grants the City’s request for oral argument, and will hold oral argument on this matter on January 28, 2016.

A. *Motion to Appoint a Technical Advisor*

The City urges the Board to appoint a technical advisor or expert to “assist the Board in evaluating the complex technical [and] scientific claims presented in this case.” Motion to Appoint a Technical Advisor at 1. In support of its Motion, the City cites 40 C.F.R. § 124.19(n), which authorizes the Board to “do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal.”

In further support of its Motion, the City argues that: (1) other courts and tribunals have exercised the discretion to appoint a technical advisor to assist the decision maker; and (2) appointing a technical advisor is appropriate in this case because it involves the resolution of numerous complex technical and scientific issues. Motion to Appoint a Technical Advisor at 2, 6. For the following reasons, the Board does not require and will not appoint a technical advisor to assist it in deciding this matter.

Assuming, without deciding, that the Board has discretion under 40 C.F.R. § 124.19(n) to appoint a technical advisor to assist the Board in its decision-making, this case is no more complex than many other cases that have come before the Board. As a permanent adjudicative body composed of four Board members designated by the EPA Administrator, whose primary functions include review of appeals from Agency permitting decisions, the Board is accustomed to and capable of handling complex permit cases without resorting to independent outside technical assistance. 40 C.F.R. §§ 1.25, 124.19. Thus, permitting disputes involving the scientific and technical concepts at issue in this matter are precisely the type this Board routinely handles, and the issues are not so unique as to warrant an independent technical advisor. *Cf. Comcast Cable Commc'ns, LLC v. Sprint Commc'ns Co. LP*, No. 12-859, 2014 U.S. Dist. LEXIS 45953, *8, *10 (E.D. Pa. Apr. 1, 2014) (explaining that the appointment of a technical

advisor to assist a federal district court “should only be used sparingly” and in “extraordinary” cases such as to assist with “scientific and mathematical concepts well beyond the regular questions of fact and law with which judges must routinely grapple” (quoting *Reilly v. United States*, 682 F. Supp. 150, 158 (D.R.I. 1988)); see also *TechSearch LLC v. Intel Corp.*, 286 F.3d 1360, 1378-79 (Fed. Cir. 2002).

Moreover, a petition for review of a permitting decision before the Board is largely a matter of record review. See *In re Charles River Pollution Control Dist.*, NPDES Appeal 14-01, slip op. at 3-5 (EAB Feb. 4, 2015), 16 E.A.D. at ___ (summarizing the legal principles governing Board review of a permit decision). If the Board cannot ascertain from the record the basis for the Region’s decision, and the Region’s rationale in support, then the Board will remand the case to the Region for further explanation and consideration. *Id.* Similarly, if the City has not met its burden to explain why the Region’s rationale is clearly wrong or is based on some clear error, then the Board will deny the petition for review. *Id.*

In sum, it is not necessary to appoint a technical advisor to fully, fairly and efficiently consider this matter. The City’s Motion to Appoint a Technical Advisor is denied.¹

B. *The Region’s Motion to Strike*

The Region seeks to strike four documents that the City attached to its Reply Brief, arguing that these documents do not comply with the regulations governing reply brief length and content. The City opposes the Motion, arguing that the documents are consistent with the regulations and should be allowed.

¹ Because the Board determines that it does not require and will not appoint a technical advisor in this matter, the Board need not address issues related to the payment of the costs of such an advisor.

Under regulations governing petitions for review of permit decisions, a party may not file a reply brief exceeding 7,000 words (or, alternatively, 15 pages), unless it can demonstrate a compelling and documented need to exceed the limit and receives leave of the Board to file a longer brief. 40 C.F.R. § 124.19(d)(3). Additionally, no new issues or arguments may be raised in the reply brief. *Id.* § 124.19(c)(2). The regulations also allow “[p]arts of the record” to be appended to the brief as an attachment, but a table of attachments must be included and must “identif[y] where [the appended document] may be found” in the record. *Id.* § 124.19(d)(2). In 2013, EPA added these procedures governing the content and form of briefs to “improve the quality and consistency of filings before the Board,” and “to provide greater clarity and efficiency to the appeals process.” 78 Fed. Reg. 5281, 5283 (Jan. 25, 2013).

Three of the documents that the City appended to its Reply comprise lists created by the City to “efficiently summarize exhibits and filings in the record,” presumably in support of the City’s arguments.² *See* City’s Opp. to Motion to Strike at 9-10. Although the City argues otherwise, a document summarizing or otherwise characterizing documents in the record is not the equivalent of a document “already in the record.” *Id.* at 10. Additionally, notwithstanding the City’s statements to the contrary, these lists are intended to persuade the Board either that a

² These three documents are titled:

(1) “Factual and Legal Arguments Never Addressed by EPA Region 1 in Response to Petition for Review” (Att. 79 to Taunton’s Reply in Support of Petition);

(2) “List of New Claims Raised in [the Response to Comments Document] and Conclusory Statements Unsupported by Analysis in the Record (Including Obviously Incorrect ‘Technical’ Statements)” (Att. 80 to Taunton’s Reply in Support of Petition); and

(3) “EPA’s Inaccurate Claims of Waiver” (Att. 84 to Taunton’s Reply in Support of Petition)

particular argument was conceded by the Region (“Factual and Legal Arguments Never Addressed by EPA Region 1,”), that an issue or argument justifiably was raised late by the City (“List of New Claims Raised in [the Response to Comments Document]”), or that a claim by the Region is unsupported or inaccurate (“Conclusory Statements Unsupported by Analysis in the Record (Including Obviously Incorrect ‘Technical’ Statements)” and “EPA’s Inaccurate Claims of Waiver”). As such, these lists contain arguments regarding issues that should have been included in the Petition in the first instance (or in the Reply – if appropriate) and were not properly submitted as an attachment to the Reply. Parties may not circumvent regulatory limits on form and content of briefs by summarizing additional arguments or support for arguments in appended lists or summaries.³ Accordingly, the Region’s Motion to Strike Attachments 79, 80 and 84 (Attachments 1, 2 and 6 to City’s reply brief) is granted.

Finally, the Region also moves to strike the Declaration of Benjamin M. Kirby that the City attached to its Reply in support the Petition for Review. Reply Br. at 2 (& Att. 82). The Board is not making any determination at this time with respect to this portion of the Region’s Motion to Strike.

³ The Board recognizes that it denied a motion to strike similar summaries of issues and arguments attached to a response brief in *In re Town of Newmarket, New Hampshire*, NPDES Appeal No. 12-05 (EAB Feb. 27, 2013) (Order denying motion to strike appendices attached to EPA Region 1’s Feb. 9, 2013 Memorandum in Opposition to the Petition for Review). That decision, however, pre-dated the revisions to 40 C.F.R. § 124.19 that imposed specific limits on the form and content of briefs. *See* Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Board, 78 Fed Reg. 5281, 5288 (Jan. 25, 2013) (effective Mar. 26, 2013). Additionally, the Petitioner in that case submitted a 100-page Petition and had the opportunity to reply to the Region’s response. Such is not the case here and, thus, the Board’s decision in that matter is inapposite.

C. Taunton's Motion to Supplement the Administrative Record

The Board also is not making any determination at this time with respect to the City's Motion to Supplement the Administrative Record. One of the four documents the City seeks to add to the administrative record is a letter to the City, from Brian Howes, Ph.D., Director of the Massachusetts Estuary Project at the School for Marine Science and Technology at UMASS – Dartmouth. Petition for Review, Att. 44; Motion to Supplement, Ex. 1 (May 1, 2015) (“Dr. Howes’ Letter”). In this letter, Dr. Howes states that he is responding to recent inquiries by the City. *See* Dr. Howes’ Letter at 1. The City, however, did not include in its Motion to Supplement the inquiries to which Dr. Howes’ Letter responds. *See* Region’s Opposition to Motion to Supplement at 4, n.1. For the purposes of evaluating the merits of the Motion to Supplement, the Board orders the City to file with the Board, **no later than November 10, 2015**, the records of communication to which Dr. Howes’ Letter responds.

D. Oral Argument

In their petition for review, the City requested the opportunity to present oral argument in this matter. The Board grants the request for oral argument. Accordingly, the Board requests that the parties present oral argument in this matter beginning at 10:00 am Eastern Standard Time on Thursday, January 28, 2016, in the Administrative Courtroom located at the U.S. Environmental Protection Agency, William Jefferson Clinton East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, DC. The Board has allocated sixty minutes for oral argument, divided as follows and in the following order: (1) thirty minutes for Petitioner, City; (2) thirty minutes for Respondent, EPA Region 1. At the outset of the proceedings, each side may reserve up to five minutes of their allocated time for rebuttal. The parties must notify the

Clerk of the Board in writing by Thursday, January 14, 2016, of the names of counsel who will present argument.⁴

Counsel or other duly authorized representatives of the parties may also present their arguments by video-conference. Those who wish to do so must contact the Clerk of the Board, at 202-233-0122, no later than Thursday, January 14, 2016, to make arrangements for use of the video-conference equipment.

So ordered.

Dated: Oct. 30, 2015

ENVIRONMENTAL APPEALS BOARD

By: Mary Beth Ward
Mary Beth Ward
Environmental Appeals Judge

⁴ Oral arguments before the Board are open to the public. For security purposes, advance notice is required to gain entry into the EPA building where the Courtroom is located. Members of the public wishing to attend oral argument must contact the Clerk of the Board (Eurika Durr, 202-233-0122, durr.eurika@epa.gov) sufficiently in advance of the oral argument to allow the Clerk reasonable opportunity to notify appropriate security personnel (i.e., one week prior to the scheduled oral argument).

CERTIFICATE OF SERVICE

I certify that copies of the forgoing *Order on Pending Motions and Setting Oral Argument* in the matter of City of Taunton Department of Public Works, NPDES Appeal No. 15-08, were sent to the following persons in the manner indicated:

By First Class Mail:

John C. Hall
Hall & Associates
1620 I Ste. NW, Suite 701
Washington, DC 20001

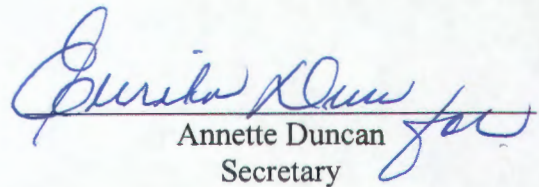
By EPA Pouch Mail:

Samir Bukhari
Michael Curley
Assistant Regional Counsels
U.S. EPA Region 1
5 Post Office Square (Mail Code: ORA 18-1)
Boston, MA 02109-3912

By Interoffice Mail:

Lee Schroer
Office of General Counsel, Water Law Office
U.S. EPA
1200 Pennsylvania Ave., NW (Mailcode: 2355A)
Washington, DC 20460

Dated: October 30, 2015


Annette Duncan
Secretary