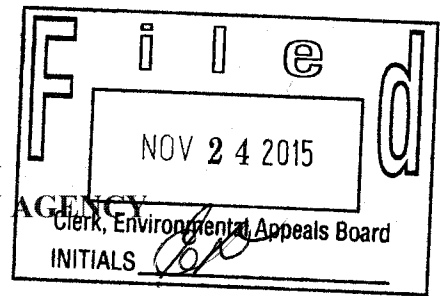


ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re: )

City of Taunton, )  
Department of Public Works )

Permit No. MA0100897 )

NPDES Appeal No. 15-08

**ORDER DENYING MOTION FOR RECONSIDERATION**

This matter involves a petition for review of a National Pollutant Discharge Elimination System (“NPDES”) permit that the U.S. Environmental Protection Agency Region 1 (“Region”) issued to the City of Taunton Department of Public Works (“City”) on April 10, 2015. On October 30, 2015, the Environmental Appeals Board (“Board”) issued an Order on Pending Motions and Setting Oral Argument (“Order on Pending Motions”), in which the Board granted the Region’s August 6, 2015, Motion to Strike Certain Attachments to the City’s Reply Brief. The City now asks the Board to reconsider that Order with respect to two of the stricken attachments -- Attachment 80 and Attachment 84 -- arguing that these two documents<sup>1</sup> “contain

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<sup>1</sup> The two documents were attached to the City’s Reply brief in support of its Petition for Review and are titled:

“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

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

virtually only quoted record material” and are thus permitted to be attached to its brief under 40 C.F.R. § 124.19(d)(2). See Motion for Partial Reconsideration of Board Order on Pending Motions and Setting Oral Argument (Nov. 4, 2015) (“Motion for Reconsideration”). For the reasons below, the City’s Motion for Reconsideration is denied.

Motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. 40 C.F.R. § 124.19(m). Reconsideration is generally reserved for cases in which the Board has made a demonstrable error, such as a mistake of law or fact, and the reconsideration process should not be regarded as “an opportunity to reargue the case in a more convincing fashion.” *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 2-3 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration) (quoting *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992)); see also *In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12 (EAB Apr. 23, 2008) (Order Denying Motion for Reconsideration) (explaining that while the permittee clearly disagreed with the Board’s conclusion, the permittee had not articulated any clear error in the Board’s legal or factual conclusions, but was simply rearguing assertions previously considered and rejected by the Board).

In its Motion for Reconsideration, the City again seeks to persuade the Board that Attachments 80 and 84 are essentially “parts of the record” that are permitted to be attached under 40 C.F.R. § 124.19(d)(2),<sup>2</sup> an issue previously considered and rejected in the Board’s prior

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<sup>2</sup> 40 C.F.R. §124.19(d)(2) provides:

*Attachments.* Parts of the record to which the parties wish to direct the Environmental Appeals Board’s attention may be appended to the brief submitted. If the brief includes attachments, a table must be included that

Order. *See* Order on Pending Motions at 4-5. As the Board previously explained, although the City characterized these Attachments as “already in the record,” City’s Opp. to Motion to Strike at 10, the Attachments are newly created documents intended to persuade the Board that an issue or argument justifiably was raised late by the City, or that a claim by the Region is unsupported. *Id.* As such, the Board concluded that these documents 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. Order on Pending Motions 5.<sup>3</sup>

Despite the City’s assertion in its Motion for Reconsideration, Attachment 80 does not consist solely of “quoted record material.” Motion for Reconsideration at 2. Rather, while the 5-page, single spaced document contains selected quotes from the Region’s Response to Comments document (with numerous omissions indicated by ellipses), the City introduces many of these quotes with the City’s own characterization of the quoted text. Additionally, the City follows each quote with labels such as “new and conclusory,” “contradictory,” “plainly in error,” or “complete fabrication.” As such, Attachment 80 appears intended to serve as a continuation of the City’s arguments in its Reply brief at 2, 13 and 16 n.17, which constitutes an inappropriate extension of that brief. To the extent that the City wished to refer the Board to specific portions

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provides the title of each appended document and assigns a label identifying where it may be found (e.g., Excerpts from the Response to Comments Document \* \* \* Attachment 1).

<sup>3</sup> As the Board previously stated, the length of a petitioner’s reply is limited, unless it can demonstrate a compelling and documented need to exceed the limit and receives leave of the Board to file a longer brief, which the City has not done here. 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). Although the regulations allow “[p]arts of the record” to be appended to the brief as an attachment, *see id.* § 124.19(d)(2), a party may not circumvent regulatory limits on form and content of briefs by summarizing additional arguments or support for arguments in appended lists or summaries. *See* Order on Pending Motions at 4-5.

of the Response to Comments document, it could and should have identified those specific portions, with page citations, in its brief. To the extent that the City wished to add additional argument regarding the Region's Response to Comments, the place to do so was again in the Reply brief. As presented, Attachment 80 is an unacceptable extension of the argument in its Reply brief and was appropriately stricken.

Attachment 84 similarly does not consist solely of "quoted record material" as the City describes. Motion for Reconsideration at 2. Rather, by its own description, Attachment 84 "identifies all EPA waiver defenses specified in the Agency's Response (*in red*) and provides the location in the comments submitted that [the City contends] demonstrate the issue was timely raised." The City was required to demonstrate, in the petition itself, that the issues raised in its petition for review were timely raised. *See* 40 C.F.R. § 124.19(a)(4)(ii).<sup>4</sup> Further, to the extent that rebuttal argument regarding waiver was permitted in the Reply, that argument belonged in the Reply brief itself, with citations to the specific page in its comments where the issue was raised, and not in an attachment to the Reply. Thus, as presented, Attachment 84 is not an appropriate attachment to its Reply brief and is therefore appropriately stricken.

The City has not set forth any demonstrable error in the Board's Order on Pending Motions. Attachments 80 and 84, appended to the City's Reply Brief constitute impermissible

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<sup>4</sup> Regulations governing the content of the petition for review provide that "[p]etitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required[.]" 40 C.F.R. § 124.19(a)(4)(ii). Additionally, "[f]or each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period[.]" *Id.*

extensions of the City's Reply brief. Accordingly, the City's Motion for Partial Reconsideration of the Board Order on Pending Motions is denied.

So ordered.

Dated: 11/24/2015

**ENVIRONMENTAL APPEALS BOARD**

By: Mary Beth Ward  
Mary Beth Ward  
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the forgoing *Order Denying Motion for Reconsideration* 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  
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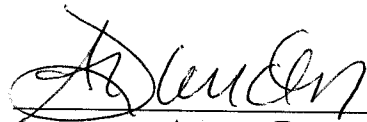
**By EPA Pouch Mail:**

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Dated: NOV 24 2015



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Annette Duncan  
Secretary