

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

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In the Matter of:))
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City of Taunton))
Wastewater Treatment Plant))
))
NPDES Appeal No. 15-08))
NPDES Permit No. MA0100897))
_____))

**EPA REGION 1’S RESPONSE TO THE CITY OF TAUNTON’S MOTION TO
SUPPLEMENT THE ADMINISTRATIVE RECORD**

For the reasons below, EPA Region 1 (the “Region”) opposes the City of Taunton, Massachusetts’ (“Petitioner’s”) motion to supplement the administrative record with a draft permit modification issued to the City of Nashua, New Hampshire. *See* Petitioner’s Motion to Supplement the Administrative Record (April 7, 2016) (“Mot.”).

The Motion does not set forth persuasive grounds for inclusion of these documents in the administrative record.¹ Petitioner states that the draft “was only recently made available to the public,” and contends that the absence of a flow limit both evidences “an admission against EPA’s interest regarding the Agency’s assertion of the need for and authority to regulate flow as a pollutant,” and “raises questions of equal protection as EPA is plainly treating similarly situated communities differently on the claim that flow is a pollutant that is to be regulated in NPDES

¹ Petitioner did not attempt to ascertain whether the Region would concur or object to the Motion prior to its filing, as required by 40 C.F.R. § 124.19(f)(2), and furthermore, did not “indicate in the motion the attempt made and the response obtained.” *Id.*

permits.” Mot. at 1. These arguments reflect “a flawed understanding of the basic principles of administrative record review and the limited instances in which an administrative record may be supplemented on appeal,” given that the “part 124 regulations governing this permit proceeding specify the documents that must be included in the administrative record [footnote omitted] and expressly provide that the ‘record shall be complete on the date the final permit is issued.’” *In re Town of Newmarket*, NPDES Appeal No, 12-05, slip op. at 76-77 (EAB Dec. 2, 2013) (quoting 40 C.F.R. § 124.18(c)). The recently released Nashua draft permit modification obviously could not have been relied upon directly or indirectly in preparation of Taunton’s permit; rather, Petitioner seeks its inclusion in an attempt to bolster its substantive arguments challenging the flow limit in Taunton’s permit. But this avenue has long since been closed to Petitioner, as EPA regulations provide that “[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate . . . must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period.” 40 C.F.R. § 124.13. As the Region has explained, Petitioner did not timely raise an objection to the flow limit in the Final Permit during the public comment period, although the issue was reasonably ascertainable. *See* EPA Region 1’s Response to Petition for Review at pp. 40-41; RTC at 13-14 (“Comment B3. Proposed Mass Limit Restricts the City’s Ability to Expand Sewer Service”). But even if it had timely objected to the flow limit in general, the two more specific arguments raised for the first time in the Motion would still be unpreserved, as a petitioner “must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period.” *In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 339(EAB 2002); *accord In re Mille Lacs Wastewater*

Treatment Facility, 11 E.A.D. 356, 376 (EAB 2004); *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 548 (EAB 1999). Nor does Petitioner explain why it was not required to raise them during the comment period. 40 C.F.R. § 124.19(a)(4)(ii). Surely, the Nashua draft permit modification was not required to alert Petitioner that not all Region 1 permits contain flow limitations, a fact that could have been ascertained by visiting Region 1’s NPDES website; Petitioner itself regards the absence of such limits in a permit as “glaring” and ‘conspicuous.’² Mot. at 1.

Additionally, Petitioner offers no support for its new (and unpreserved) assertion that the Taunton and Nashua wastewater treatment facilities are similarly situated and should be similarly permitted. In any event, a mere disparity in permit limits between facilities is “legally irrelevant...because permits are issued on an individual basis, taking into account individual differences where appropriate.” *In re City of Port St. Joe*, 7 E.A.D. 275, 304 n.44 (EAB 1997). Thus, the Nashua draft permit modification, the City’s conclusory contentions notwithstanding, does not “provide information of such significance that [its] inclusion in the record is important to reasoned decisionmaking” on the Taunton permit. *Newmarket*, slip op. at 78; *see also In re City of Attleboro Wastewater Treatment Plant*, 14 E.A.D. 398, 425 (EAB 2009). (“Only if a petitioner can establish that the circumstances for two facilities were essentially indistinguishable, which the City has failed to do here, would the permitting authority need to show a supportable basis for the disparity.”).

CONCLUSION

For the foregoing reasons, the City of Taunton’s Motion to Supplement the Administrative Record should be denied.

² See <https://www3.epa.gov/region1/npdes/> (last visited April 14, 2016).

Dated: April 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing EPA Region 1's Response to the City of Taunton's Motion to Supplement the Administrative Record, in the matter of City of Taunton Wastewater Treatment Plant, NPDES Appeal No. 15-08, was served on the following persons in the manner indicated:

By Electronic Filing:

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Dated: April 14, 2016

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