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July 9, 2015

VIA EAB eFILING SYSTEM

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, N.W.
Mail Code 1103M
Washington, D.C. 20460-0001

Re: Appeal No. 15-08 - NPDES Permit No. MA0100897
City of Taunton's Motion for the Appointment of a Technical Advisor/Expert

Ms. Durr:

Attached please find for filing, the City of Taunton's Motion for the Appointment of a Technical Advisor/Expert in the above-captioned appeal. Thank you for your assistance with this filing.

Very truly yours,

Philip Rosenman

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

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

PETITIONER'S MOTION FOR THE APPOINTMENT OF A TECHNICAL ADVISOR/EXPERT

Petitioner, the City of Taunton, Massachusetts ("the City" or "Taunton") hereby submits the following Motion requesting the appointment of a technical advisor/expert to assist the Board in evaluating the complex technical/scientific claims presented in this case. As discussed below, a number of the key the "scientific and technical" conclusions rendered by the Environmental Protection Agency ("EPA" or "the Agency") in the National Pollutant Discharge Elimination System ("NPDES") Permit issued to Taunton (1) are based on factual statements that are plainly unsupported in the record (*i.e.*, claims are made without any credible scientific support), (2) are mathematically/statistically impossible, and/or (3) defy established laws of physics. Nevertheless, EPA is hoping that, by couching its statements in technical jargon, the Board will look past these latent errors in the name of agency deference and "expertise." However, simply accepting the Agency's claim because a "technical" issue is involved is inconsistent with the fair and objective review process EPA's rules intended. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983) (requiring the court to "engage in a searching and careful review" and "take a hard look at both the facts and the agency's reasoning.").

Therefore, consistent with this Board's discretionary authority under 40 C.F.R. § 124.19(n), and based on the ongoing need discussed below and the precedent in other tribunals, the Board should grant Taunton's motion and appoint a technical expert/advisor to evaluate the key technical statements made by EPA, which, if found to be untrue, irrational, or unsupported, would require the Board to remand EPA's permit decision.[1]

a. Courts and Tribunals have the discretion to rely on impartial technical advisors and experts where such expertise is needed to assist in the review of complex technical/scientific issues

As it currently stands, it will be up to the Board to determine whether EPA's issuance of the Taunton Permit, and the contested conditions therein, was a clear error of fact or law and otherwise complied with the tenants of administrative law. *See* 40 C.F.R. § 124.19(a)(4)(A)-(B); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (U.S. 1983) (An agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, *offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.*") (emphasis added). The last two inquiries espoused by *State Farm* require a tribunal to independently determine whether an Agency's factual claims (scientific or otherwise) are rational and adequately supported in the record. In other words, a court cannot simply defer to whatever response EPA provides. *See Defenders of Wildlife v. Babbitt***,** 958 F. Supp. 670, 685 (D.D.C. 1997) (An agency "basing its decision on unsupported conclusory statements as well as facts which are directly contradicted by undisputed evidence in the Administrative Record" is "arbitrary and capricious"). In exacting this standard of review, "the Environmental Appeals

[1] Consistent with 40 C.F.R. § 124.19(f)(2), Taunton contacted EPA counsel and has ascertained that EPA will oppose this Motion.

Board may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal…." 40 C.F.R. § 124.19(n).

As discussed in more detail below (*infra*, at 6-9), a properly conducted *State Farm* review will require the Board to evaluate a series of very specific scientific/technical issues and understand the numerous complex documents prepared by EPA/MassDEP and the City's experts on these issues. Moreover, the Court will need to decide whether (1) EPA's imposition of the TN limitation in Taunton's permit is consistent with these documents, (2) EPA, in fact, completed the requisite analyses as it claims to have done, and (3) certain EPA claims are irrational (*e.g.*, violate the laws of physics, conclusory, or simply implausible given the available site-specific information).

These issues of concern are objectively determinable, factual/technical issues that are not subject to judicial deference to EPA as an exercise of administrative expertise. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (in agency review cases "findings of fact" are not afforded the same level of deference as agency "predictions, within its area of special expertise, at the frontiers of science").[2] There is no "special expertise" associated with conclusory statements. *See American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984) ("The Court will reject conclusory assertions of agency 'expertise' where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation."). The key questions at issue are ones that an entity, not specifically trained in the highly technical

[2] *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (*abrogated on other grounds*) (the court's review of facts in agency review cases must be "searching and careful"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) ("The agency must explain the assumptions and methodology used in preparing the model and, if the methodology is challenged, *must provide a complete analytic defense*.") (internal quotations omitted) (emphasis added); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998) ("An agency's use of a model is arbitrary if that model bears no rational relationship to the reality it purports to represent.") (internal quotations omitted).

and statistical field of water quality impact assessment and criteria development, would have great difficulty evaluating given the claimed scientific underpinnings of the issues, the voluminous administrative record for this action, as well as the competing claims of the parties.

To check the veracity of a party's factual claims, numerous courts have noted the appropriateness in appointing a technical expert/advisor to assist the decision maker in deciphering specific factual claims made by the parties. *See Comcast Cable Communs., LLC v. Sprint Communs. Co., LP*, Dckt No. 2012-859, 2014 U.S. Dist. LEXIS 45953 (E.D. Pa. Apr. 1, 2014) (A decisionmaker has inherent authority to appoint a technical advisor "where the trial court is faced with problems of unusual difficulty, sophistication, and complexity"); *see Reilly v. United States*, 682 F. Supp. 150, 155 (D.R.I. 1988) ("It is a long standing principle of judicature that a court has the inherent authority to appoint an advisor."); *see also TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1377 (Fed. Cir. 2002) ("[T]he district court must have the authority to appoint a technical advisor … so that the court can better understand scientific and technical evidence."); *see also Ex parte Peterson*, 253 U.S. 300, 312 (1920) ("Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties"); *see also Conservation Law Found. v. Evans*, 203 F. Supp. 2d 27 (D.D.C. 2002) (appointing a technical advisor to help the Court with the case); *Brown v. Am. Home Prods. Corp.*, 2013 U.S. Dist. LEXIS 118868 (E.D. Pa. Aug. 13, 2013) (commenting favorably on the audit results of "an independent cardiologist appointed by the court").

The appointment of an advisor is particularly justified "where the trial court is faced with problems of unusual difficulty, sophistication, and complexity provided that the judge deems it desirable and necessary." *Comcast Cable Communs., LLC*, 2014 U.S. Dist. LEXIS 45953, at *6;

See, e.g., Valley Citizens for a Safe Environment v. Aldridge, 886 F.2d 458, 460 (1st Cir. 1989) (finding "a reviewing court might want additional testimony by experts, simply to help it understand matters in the agency record; indeed, it might ask for additional factual evidence as an aid to understanding."). EPA itself routinely relies on technical contractors and other consultants to justify nutrient-related regulatory decisions (*e.g.*, water quality standards, TMDLs). *See* Ex. 1, EPA's N-Steps Program Brochure, at 2 ("The N-STEPS program facilitates technical exchanges and collaboration between EPA, independent scientists, and state/tribal agencies."); *see* Ex. 2, TetraTech Nutrient Criteria Report (Wissahickon update). As EPA (including EPA Region 1) itself frequently relies on technical advisors, the need for the Board to appoint its own advisor is reinforced. This is particularly true when, as in the present case, inexperienced EPA staff were clearly responsible for preparing the initial Fact Sheet ("FS") analyses to justify the complex scientific conclusions. *See* Petition Reply, at 1-4, n.18.

Ultimately, "the advisor's role is to act as a sounding board for the judge - helping the jurist to educate himself in the jargon and theory disclosed by the testimony and to think through the critical technical problems." *Reilly v. United States*, 863 F.2d 149, 158 (1st Cir. 1988). The Ninth Circuit has noted that a trial court has the authority to appoint a technical advisor/expert, but must do the following to ensure that the appointment is not an abuse of discretion:

(1) utilize a fair and open procedure for appointing a neutral technical advisor;
(2) address any allegations of bias, partiality, or lack of qualification;
(3) clearly define and limit the technical advisor's duties;
(4) make clear to the technical advisor that any advice he or she gives to the court cannot be based on any extra-record information; and
(5) make explicit, either through an expert's report or a record of ex parte communications, the nature and content of the technical advisor's advice.

FTC v. Enforma Natural Prods., 362 F.3d 1204, 1215 (9th Cir. 2004) (*abrogated in part on other grounds*). As discussed below, the complex issues and scientific allegations germane to

this permit appeal demand the application of the Board's discretionary power to appoint a technical advisor/expert. Assuming that the Agency has nothing to hide, there is no reason for EPA to object to the appointment of a technical advisor/expert.

b. This case involves resolution of numerous complex technical and scientific issues

Similar to the precedent referenced above, this case also involves hotly contested technical issues that go to the heart of EPA's regulatory action and require this Board's factual resolution. By way of illustration, the City's recently filed Petition Reply attached a compilation of over 35 "new and conclusory" claims made by EPA in its Response to Comments ("RTC") document. *See* Ex. 3, Summary of EPA's New and Conclusory Claims; Petition, Att. 80.[3] An independent expert's confirmation of whether such EPA claims were, in fact, conclusory (*i.e.*, lacked objective support in the record) or violated the laws of physics, would be an instrumental means by which to ensure the Board's "impartial" review of the matter. As discussed above (*supra*, at 2-3), the Board cannot simply accept EPA's factual claims and conclusory statements as true (*i.e.*, Did the Agency actually conduct the analyses it claims to have conducted? Did, contrary to the expert opinions of Drs. Chapra, Swanson, and Howes, EPA rationally demonstrate that the chosen sentinel location would reasonably predict DO conditions in the upper Taunton Estuary?).[4]

[3] For the ease of reference, Taunton has color-coded this document again for this filing. EPA's conclusory statements are highlighted in yellow; EPA's misrepresentations and scientifically unsupported statements are highlighted in red.

[4] Previously, this Board considered and rejected various scientific/factual objections raised by the Great Bay Municipal Coalition in the Newmarket permit challenge. *Newmarket v. U.S. EPA*, 16 E.A.D. __ (EAB Dec. 2, 2013). In many cases, the Board simply accepted EPA's conclusory statements on their face. The Coalition's objections were reiterated in a "science misconduct" letter to EPA Headquarters detailing Region 1's actions in Great Bay. *See* Ex. 4, Science Misconduct Letter. A subsequent peer review of nationally respected experts (who worked on EPA's Chesapeake Bay program and Massachusetts estuary evaluations) confirmed that basically every scientific objection raised by the Coalition in the science misconduct letter (and to this Board), was, in fact, correct and EPA's conclusions were unsupported and inconsistent with the available data. *See* Petition, at Att. 62 (February 13, 2014 Peer Review). Since the peer review, (1) DES abandoned the 2009 Numeric Criteria (*See* Ex. 5, DES Letter to EPA and Settlement Agreement), (2) EPA staff admitted that phytoplankton growth is *not* a significant

Having a neutral expert explain the documentation and claims of each party would prove to be an invaluable resource to the Board to ensure that the goals of the Clean Water Act are being properly implemented. Importantly, this advisor would not substitute his or her judgment for the Agency or evaluate whether the approaches selected by EPA could have been improved upon. Rather, the advisor would assist the Court by (1) explaining how to determine whether certain statements made in EPA's FS, RTC, and recent filings are factually correct, and (2) discussing the type of analyses that are required under state and federal guidance documents to generate scientifically defensible nutrient criteria (*e.g.*, CALM document, MEP Guidance, SMAST study, Reference Waters approach, and Nutrient Criteria Guidance-Estuarine and Coastal Marine) and whether such analyses were ever conducted by EPA Region 1.[5]

For instance, the expert could assist the Court in evaluating each of the following EPA/Taunton positions that control the technical validity of the limitations in Taunton's permit:

- EPA's claim that dilution occurs within the fresh water component of Taunton Estuary (TE) but not the saltwater component. *See* Petition Att. 15 (RTC), at 118. Such a justification is physically impossible (violates the laws of physics) and would be confirmed by a Board-appointed expert.

- EPA's claim that the Brayton Point temperature reductions (both past and projected) have not and will not reduce algal growth and/or improve DO. *Id*. at 63, 65. Rather than accept EPA's assertion at its word, a technical advisor would explain the critical relationship water temperature has on plant growth and DO levels and determine whether EPA's position is rational.

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concern in the Estuary, and (3) EPA has expressed uncertainty over "what actions need to be taken" and deferred issuing the permits to the larger wastewater facilities in lieu of an "adaptive management approach." *See* Petition, at Att. 69 (EPA/DES April 29, 2015, Op-Ed Article); Ex. 6, EPA Letter Deferring Permit Issuance. Granting the present Motion and appointing a technical advisor/expert would prevent EPA from similarly pulling the wool over the Board's eyes in this appeal.

[5] In addition to the state and federal guidance documents listed above, Taunton has requested that the Board consider numerous scientific studies detailing when and to what extent TN limitations are necessary. *See, e.g.*, Petition Atts. 11, 12, 13, 56, 57 (Kincaid (2006), Swanson, Kim, and Sankaranarayanan (2006), Zhao, Chen, and Cowles (2006), Chen, Zhao, Cowles, and Rothschild (2008), Krahforst and Carullo (2008)). A technical expert/advisor will be well-trained in deciphering the conclusions and recommendations of this literature.

- EPA's claim that Narragansett Bay does not have any material effect on DO/algal regime in Mount Hope Bay. *Id.*, at 61-62. A technical advisor could highlight the substantial hydrodynamic connection between the two systems, thereby elucidating why EPA's failure to account for Narragansett Bay loadings was a critical oversight.

- EPA's claim that TN levels occurring at the mouth of the Sakonnet River sentinel site (regardless of the degree of algal growth occurring at that location) would reasonably predict DO levels occurring in the Upper Taunton Estuary (UTE). *See* Petition, Ex. 1 (FS), at 29-30. An expert could outline the hydrodynamic and chemical differences of the two sites to determine whether EPA's sentinel site choice was rational.

- EPA's claim that DO levels in the UTE have not materially improved since 2004/5 based on the minimum DO levels at the MHB Moor station in 2010. *See* Petition, at Ex. 15 (RTC), at 63. An expert would review the record to determine if there was any rational support for this claim.

- EPA's claim that reduced organic loadings to TE could not have materially improved the DO levels. *Id.*, at 107. A technical advisor could determine whether EPA's assertion, particularly in light of the well-known relationship between DO and organic loadings, was simply conclusory and not based on accepted scientific methods.

- EPA's claim that the 3 mg/l growing season "final" limitation is significantly more restrictive than a 5 mg/l monthly average interim limit. *Id.*, at 9-13. A technical advisor could explain with minimal difficulty why, based on well-accepted statistical methods, the "interim" limit imposed by EPA is the functional equivalent to the "final" limit.

Again, the expert would be used to confirm or deny whether and how the record documentation addresses these scientific issues and others raised by the parties. These are not issues that can be ascribed to Agency expertise or discretion; Taunton avers that are simply conclusory claims by EPA issued under the guise of Agency expertise and, therefore, should receive no "deference."[6] There is a major distinction between assisting the Court in evaluating an issue and telling the

[6] The need for a technical advisor/expert is further enhanced by the fact that EPA's conclusions in the Taunton permit have been soundly and uniformly criticized by all of the independent experts who reviewed it. Petition, at Att. 42, Chapra Assessment, at 5 (the worst analysis he has seen in his 42 year career); Petition, at Att. 43, Swanson Analysis, at 8 (the selected "sentinel site" is plainly inapplicable to the Taunton Estuary); Petition, at Att. 44, Howes' Letter, at 1-2 (EPA's sentinel site analyses are clearly misplaced).

Court what conclusion to make. To be clear, the purpose of Taunton's request is the former. Without such assistance, it is not apparent how the Court could possibly address the detailed bases for the claims raised by Taunton or the defenses raised by EPA in the thorough and fair manner required by *State Farm*.

In conclusion, given the rather complex nature of the issues raised in Taunton's Petition and EPA's rather conclusory responses regarding those issues, the Court should be equipped with some reasonable means to ascertain the truth of the matter. A technical advisor/expert/special master would provide the Court with such means to determine if, in fact, EPA actually did what it claims to have done and, thereby, ensure the "efficient, fair, and impartial adjudication of issues." 40 C.F.R. § 124.19(n).

c. Taunton would assume the costs of the advisor/expert

If the requested appointment hinged on financial responsibility, Taunton would be willing to assume the costs of a technical advisor/expert. However, it is not believed that EPA's objections to the advisor/expert have anything to do with the expected costs of such an appointment. Rather, on information and belief, EPA's objections will be based solely on the fear of having an impartial technical expert confirm that critical factual statements are irrational and violate the laws of physics/mathematics and/or that certain claimed demonstrations were never actually made. Surely, if EPA had no such concerns, it would not object to an independent expert verifying that its work is rationally supported and reflects accepted scientific principles. Put differently, the fact EPA doesn't want this Court to appoint an expert underscores the need for it.

WHEREFORE, for all of the aforementioned reasons, Petitioner respectfully requests that this Board grant the Motion and appoint a technical advisor/expert in conjunction with this Permit appeal.

Respectfully submitted,

_//s// John C. Hall_____
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July 10, 2015

INDEX OF EXHIBITS FOR CITY OF TAUNTON'S
MOTION FOR THE APPOINTMENT OF A TECHNICAL ADVISOR/EXPERT

1. EPA's N-Steps Program Brochure
2. TetraTech Nutrient Criteria Report (Wissahickon update)
3. Summary of EPA's New and Conclusory Claims (Highlighted)
4. May 4, 2012 Science Misconduct Letter
5. May 21, 2014, DES Letter to EPA on Inapplicability of 2009 Criteria document (attaching Settlement Agreement)
6. EPA February 16, 2015, Letter Deferring Rochester, NH Permit Issuance

CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, July 9, 2015, a copy of the City of Taunton's Motion for the Appointment of a Technical Advisor/Expert was served on the individuals identified below by U.S. first-class mail, postage pre-paid:

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Dated on the 9th day of July, 2015.

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