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February 22, 2013

VIA ELECTRONIC FILING

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

RE: ***Town of Newmarket Wastewater Treatment Plant***
NPDES Permit Number: NH0100196
NPDES Appeal Number: NPDES 12-05

Dear Ms. Durr,

Please find attached the Petitioners' Response to EPA's Objection to Petitioner's Motion to Suspend the Briefing Schedule, Strike Appendices, and Amend the Briefing Schedule and Page Limit and accompanying Certificate of Service regarding NPDES Appeal No. 12-05 for filing in the above referenced matter.

Sincerely,

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

In re:	)	
Town of Newmarket	)	
	)	NPDES APPEAL No. 12-05
NPDES Permit No. NH0100196	)	
	)	

REPLY TO EPA'S OBJECTION TO MOTION TO SUSPEND THE BRIEFING SCHEDULE, STRIKE APPENDICES A AND B OF RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR REVIEW, AND AMEND THE BRIEFING SCHEDULE AND PAGE LIMIT

By its response, EPA either acknowledges or never disputes that, in fact (1) it submitted a 300 page response after objecting to Petitioners' brief of 98 pages being too long (EPA Obj. at 9); (2) the format of the Agency's response was not consistent with Board procedures (never addressed); (3) the administrative record is not settled so Petitioners must now also respond to EPA's 18 pages of administrative record arguments in its reply brief of 25 pages. EPA however, indicates that the Board should be unconcerned about any prejudicial impact of its prior ruling because Petitioners have noted that other lesser documents may be referenced as the basis for challenging EPA's actions as "clear error". EPA Obj. at 4. EPA further argues that the basis for the Board's earlier decision to restrict Petitioners' brief should not apply to EPA's over length and non-conforming filings. Rather, a lesser standard of "verbose" and "redundant" should be the test for deciding whether EPA's 300 page brief should be allowed, while Petitioners were restricted to 98 pages under a different standard. *Id.* at 9. While EPA concedes that another ten pages should be allowed on Petitioners' reply since two new amicus briefs have been filed in this

matter, it does not appropriately address the significant inequities and due process concerns associated with having a double-standard for the EPA briefing and the Coalition briefing.

Petitioners' motion should be granted, as it is based on two universally accepted concepts of procedural due process: (1) the parties have the right to know what evidence will be considered by the court before addressing it through briefing and (2) a court may not create a condition that skews the hearing process to favor one party over another, without clear cause. In light of EPA's Response Brief, the continued application of the Board's prior decision violates both of these principles. Correcting these deficiencies does not require "indefinitely suspend[ing] the briefing schedule," as EPA alleges. *Id.* at 1. In any event, given the magnitude and effect of the administrative records still at issue and the Board's present restrictions on time for filing and page limitations, a fundamental due process and fairness problem has been created and must be addressed. For the reasons discussed below and those originally noted, the requested relief should be granted.

Major Administrative Record Issues are Always Resolved Prior to Briefing

As a result of EPA's Response brief, the Coalition identified a number of major administrative record issues that require resolution to allow the briefing to proceed in an orderly and fair fashion. *See* Mot. at 2-7. Contrary to EPA's averment, there are not simply "nine" "records at issue". EPA Obj. at 2. EPA is disputing the Board's consideration of well over a thousand pages of administrative record materials, including all of the depositions and all supplemental comments relying on the depositions.

In all other forums that are run in an orderly fashion to avoid procedural due process issues, the administrative record is identified and settled *before* the parties are required to complete briefing. (See any APA record review cases in Federal District or Circuit Court where

the need to supplement the administrative record is raised). For example, in *Citizen Advocates for Responsible Expansion v. Dole*, the court stated:

> We note parenthetically that the teaching of *Hiram Clarke* and *Asarco* is not a two-way street and does not apply to the agency that either knowingly or negligently failed to prepare an adequate and reviewable administrative record. We find three separate but related reasons supporting this conclusion. First, a plaintiff who demonstrates that the agency developed an inadequate record should be afforded an opportunity, in essence, to develop that record. Second, if this were not the rule, an agency would have little incentive to prepare an adequate and reviewable administrative record, despite the clear mandate of NEPA that the agency prepare the required record before deciding upon a particular course of conduct. Finally, if the agency knew that it could always "supplement" or "create" the administrative record in the reviewing court, it actually would have an incentive to prepare an inadequate administrative record, and benefit by the lack of obstacles (from its viewpoint) frequently created by informed public participation in the decisionmaking processes.

770 F.2d 423, 437 n.18 (5th Cir. 1985).

In this case, EPA identified a preliminary administrative record weeks *after* Petitioners' opening brief was filed and, then, only identified the *possible* record on review with its response brief. EPA now claims that the deposition records and related supplemental filing relied upon heavily by Petitioners should not be considered part of the review record. EPA Resp. Appx. B.[1] EPA also refused to include a series of documents, for reasons only first revealed in the Agency's response to this motion. EPA Obj. at 2,3. As the Board has not ruled on any record issues (unlike the sequence that routinely occurs in federal court record review cases), Petitioners at this time have no reasonable basis to know what records that the court will actually consider in its review of this matter.

[1] In EPA's Response Brief and in Appendix B, EPA essentially challenges all documents related to the depositions testimony including the deposition transcripts themselves and all the deposition exhibits as being "reasonably ascertainable" (Appx. B at 1-2) before the depositions were conducted, and therefore, should not be considered by the Board. Apparently, EPA's argument is that Petitioners should have known that EPA and NHDES were misrepresenting the applicable science before the depositions were taken. Therefore, depositions of key NHDES officials admitting that they had excluded critical records and analyses in their development of the 2009 Numeric Criteria were unnecessary.

In light of the Board's prior ruling that the reply brief may not exceed 25 pages, it is not now possible to address the extensive administrative record issues, as well as respond to EPA's 300 pages of additional argument.[2] EPA's assertion that suspending the hearing process under these conditions is an "extreme measure" is just puffery. Record review courts typically suspend the briefing process to first resolve administrative record content issues. *Supra*, at 3.

Moreover, the EAB case cited by EPA, *In re Dominion Energy,* allowed the record issues to be briefed separately from merits briefing:

> As we indicated above in Part III.B, Petitioner submitted two motions to supplement the administrative record, to which several participants subsequently filed various motions in response, including motions to strike, motions opposing supplementation, and oppositions to the motions to strike.

In re Dominion Energy Brayton Point Station, LLC, 12 E.A.D. 490, 511 (EAB 2006). At a minimum, separate briefing should also occur in this case.

Petitioners assert that, given the magnitude of the administrative record issues and their effect on how Petitioners' reply briefing is structured, the Board should not order such motions and briefing concurrently as occurred in *In re Dominion Energy*. Board rules do not require concurrent briefing and where, as here, the interests of justice dictate that sequential decision-making occur, the record issues should be decided first. *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) ("[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction

[2] EPA filed 18 pages of procedural and substantive arguments against consideration of the deposition testimony. Resp. Appx. B. Therefore, Petitioners must now address (1) the deposition testimony, (2) expansion of the records, including why such records could not be obtained earlier, (3) detail the significance of each record objected to by EPA, and (4) explain why EPA's actions constitute bad faith and therefore allow for expansion of the record via depositions. The record arguments alone will encompass at least 20-25 pages. Thus, by raising record issues, EPA has created a condition where, based upon the 25-page limitation, Petitioners must either forego their record arguments or forego the majority of the reply brief.

of business before it when in a given case the ends of justice require it.") (citing *Nat'l Labor Relations Bd. v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953)).[3]

In summary, EPA is simply playing a shell game with the record – the documents are included, but you cannot base arguments on them. That procedure turns the briefing process into a sham, since no one knows what will be considered until the end of the process, when it is too late. Once the administrative record is set, the parties could properly focus reply brief arguments to address the records allowed into evidence. As is the case in all other administrative record review cases, the full administrative record should be decided in advance of briefing and the Board should follow that approach in this matter, given the circumstances.

Evidentiary Standard and Related Issues

Petitioners have repeatedly alleged throughout the permit derivation process that the methods NHDES used and EPA relied upon to generate the 2009 Numeric Nutrient Criteria are not considered "scientifically defensible" by anyone, including EPA's own Science Advisory Board. *See* AR C.2. at 4-11. Moreover, these methods are directly at odds with EPA's published guidance on the proper application of stressor-response assessments to derive nutrient criteria endpoints. AR M.4.- EPA's 2010 Stressor Response Criteria Development Guidance.[4] That

[3] This is hardly a case where Petitioners are seeking a stay "for the purpose of haltingly resolving matters that are at most subsidiary to the dispute". EPA Obj. at 4. These are the central records of this case that should govern the Board's decision in this matter, if admitted. These depositions and supplemental filings play a critical role in proving that EPA knew the approach used in the 2009 Criteria document was unsupported and knew the peer reviewers were not shown records proving the approach was not applicable to Great Bay Estuary. Thus, EPA's assertion that no "harm" will occur if the depositions are excluded is completely disingenuous. *Id.* If these records are allowed in, it is virtually certain that EPA will, as a matter of law, be reversed for the reasons detailed in Petitioners' opening brief.

[4] EPA's Stressor-Response guidance document specified that the methods would only be considered sufficient if data are available on "causal variables, response variables and confounding factors." AR M.4. at 4. Absent such information, a "scientifically defensible' relationship generally cannot be developed: " The possible influences of confounding factors are the main determinants of whether a statistical relationship estimated between two variables is a sufficiently accurate representation of the true underlying relationship between the two variables. … Before finalizing candidate criteria based on stressor-response relationships, one should systematically evaluate the

EPA was able to dupe two noted scientists into supporting the approach (by withholding the information confirming the approach was not applicable to the Great Bay estuary), goes to the Agency's shame, not credit. *See* attachment 2 – excerpt of Mot. to Strike NHDES Amicus Brief at 7-8- detailing that NHDES (and EPA) knew that information was withheld from the peer review and the 2009 Criteria were not based on a cause and effect relationship. The point is simple. If unaccepted methods were used and critical data were withheld from the record and peer review, EPA's action is *per* se arbitrary and capricious. Mot. at 5; see, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54-55 (D.C. Cir. 1977).[5] Regarding the use of acceptable scientific methods, the Daubert standard is the lowest threshold for even allowing "scientific" data to be considered. First addressing whether acceptable scientific methods were used, in conjunction with the administrative record issues, would conserve the resources of all involved in this matter.

EPA's Brief was Inconsistent with the Board's January 11, 2013 Ruling

The following facts are clear: the Board precluded Petitioners from supplementing their opening brief upon EPA argument that the brief was already a "voluminous submission" and "runs counter to the Board's guidance governing length of filed documents". Mot. at 1,5.[6] EPA then proceeded to submit a brief three times as long as Petitioners, *six times the length of the*

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scientific defensibility of the estimated relationships and the criteria derived from those relationships. More specifically, one should consider whether estimated relationships accurately represent known relationships between stressors and responses and whether estimated relationships are precise enough to inform decisions." *Id.* at 65. Mr. Trowbridge admitted under oath that a confounding factors assessment was never conducted. *See* Attachment 1- Philip Trowbridge Excerpt; AR D.4.i.4 at 438:16-23, 439:1-10.

[5] EPA is correct that the word "Daubert" does not appear in the Coalition's comments; but again, this is another of the Agency's many distinctions without a difference. EPA does not dispute that the methods used to derive the 2009 criteria were not repeatedly attacked as unsupported and not consistent with accepted scientific methods. There is no NPDES appeal requirement to cite case law to ensure that an issue has been preserved for review when the underlying principle has clearly been communicated to EPA during the permit comment period.

[6] This is the only ruling Petitioners ever found that prevented a party from filing a supplemental brief and Petitioners have preserved that issue for Circuit Court appeal. It is inconceivable that refusal to grant that request harmed any party other than Petitioners.

Board's Guidance and not in conformance with the required format for presenting legal and scientific arguments.

Consistent with Petitioners' motion, EPA's response admits that in addition to its "main filing," the appendices "presented other detailed scientific arguments and information" that "provides EPA's position on numerous assertions made in the Coalition's Petition and before the Board." EPA Obj. at 8, 9. EPA acknowledges that, when counted with its "main brief," the total argument filed "extended beyond the number of pages in the Coalition's filing." *Id.* at 9. EPA never even attempts to argue that the filing was consistent with brief format requirements. However, EPA conveniently recommends that the Board not strike its excessive, non-conforming filing in accordance with the same cases EPA previously cited to, to prevent Petitioners' supplement. Rather, EPA asserts that the Board should ignore the "excessive page count" issue and use a new test of whether the filing is "verbose" and "redundant." *Id.*

EPA cannot have it both ways and must be treated with the same dispatch the Board applied to Petitioners' request. It would be a fundamental due process violation for this Board to allow EPA to file a non-conforming brief three times the length of Petitioners' because the additional length was needed to provide "clarification" and "substantive" information, when the Board refused to allow Petitioners to add the very same type of information to its opening brief. If EPA's response brief is not the textbook definition of playing games with the rules, it is hard to imagine what is. There is no excuse for EPA to have filed 200 additional pages of argument disguised as appendices. The solution recommended was to strike the Appendices, since EPA averred that the "main brief" was all that was needed to decide the matter, and that brief was already of equal length to the Petitioners' brief that EPA asserted was too long.[7] As EPA's

[7] At no time did Petitioners assert that all briefs should be limited to 50 pages, as EPA suggests. EPA Obj. at 8 n.1.

Objection again confirmed its "main brief" contained "the critical arguments necessary to dispose of the case" (EPA Obj. at 8), therefore, the requested relief should be granted.

Page Length and Time Increase is Well Supported

Despite the detailed basis provided by Petitioners for granting more time and space, EPA objects to providing more than 10 pages to address the amicus briefs. EPA Obj. at 9-11. Again, the facts are clear and undisputed:

1. Over a thousand pages of administrative record are in dispute. At this point, Petitioners must know the specific content of the administrative record to avoid undue prejudice in preparing their reply brief;
2. At the time the Board set a 25 page reply brief limit (a) the administrative record dispute was not perfected (that will take at least 20 pages to address), (b) the multiple amicus briefs had not been filed (at least 10 pages to address), and (c) the need to present the specific deposition quotes was not yet raised by EPA (another 30 pages to address).
3. As an issue of fairness, since the Board refused to allow Petitioners' to supplement their opening brief, Petitioners should be allowed additional length and time to address the specificity arguments EPA now raises.[8]

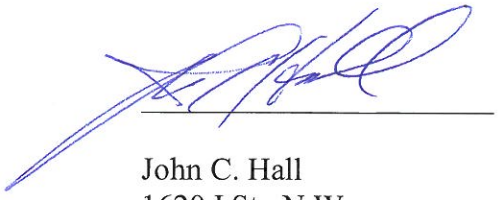
Plainly, the conditions under which the Board rendered its last decision on timing and brief length have changed. A 25 page reply brief would not even address the administrative record issues and the amicus briefs. EPA already has an uneven playing field in the burden of proof

[8] EPA's inference that Petitioners admitted "procedural deficiencies" is misplaced. EPA Obj. at 10. Petitioners certainly raised all arguments justifying review and documented its claims via reference to the records that provided the specific deposition citations. AR D.3.i.7. Nonetheless, EPA claims an inability to discern which deposition quotes were the precise words at issue, *even when highlighted deposition abstracts were provided.* Resp. Appx. B. Therefore, Petitioners should be given the opportunity to provide those specific quotes, in the reply brief, to avoid any "confusion" on the matter and make the Board's review easier.

needed to overturn their action at this level. The Board should not assist in making that burden any more difficult by limiting the reply brief to 25 pages.

The requested relief should be granted in full.

Respectfully submitted,



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Date: Feb 22, 2013

CERTIFICATION OF SERVICE

I hereby certify the copies the Petitioners' Response to EPA's Objection to Petitioner's Motion to Suspend the Briefing Schedule, Strike Appendices, and Amend the Briefing Schedule and Page Limit in connection with NPDES Appeal No. 12-05, were sent to the following persons in the manner indicated:

By Electronic Filing:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board 1103M
1200 Pennsylvania Avenue, N.W.
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By First Class U.S. Mail:

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Date: Feb 22, 2013

Attachment 1: Philip Trowbridge Deposition Excerpt

here.

Q. It's a pretty important statement, isn't it? It made your report.

Did you -- well, did you include any discussion about how the primary graphs that you were using to develop the transparency and nitrogen relationships were merely correlations and did not demonstrate causation?

A. I don't believe so.

Q. Actually, let me ask you a quick question on that. With regard to the low DO relationship to chlorophyll-a, and your transparency relationship to total nitrogen, both of those graphs are just correlations, right; they do not show causation?

A. That is correct.

Q. Is there anywhere in that document that you assessed the other factors, other confounding factors that impact the DO regime, such as sediment, oxygen demand, river flow, low DO coming in from swamp areas? Did you assess that anywhere in this analysis?

A. No.

Q. What about the factors that are controllable in tidal rivers; did you assess whether or not CDOM,

turbidity or any of the other factors that are significantly influencing the transparency level in the tidal rivers, is there any assessment of that anywhere in that document?

A. Uhm, can you clarify? Assessment of what?

Q. Of how those factors influence and control transparency in the tidal rivers?

A. So in the tidal rivers specifically.

Q. In the tidal rivers specifically.

A. No.

Q. Is there any assessment about how the change in rainfall patterns could have influenced the eelgrass losses or the transparency occurring in the system anywhere in that document?

A. Sorry. You said rainfall and what?

Q. Just how rainfall patterns influenced transparency in eelgrass populations in the system?

A. I don't believe so.

Q. Okay. Does that report include any of the case-specific analyses you did and evaluations that confirmed TN did not cause any excessive algal growth in the system or alter transparency in the system over time?

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February 8, 2013

Via Electronic Filing

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Washington, D.C. 20460-0001

Re: Town of Newmarket Wastewater Treatment Plant
Permit Number: NH0100196
Appeal Number: NPDES 12-05
Motion for Reconsideration and to Strike the Amicus Brief of New Hampshire Department of Environmental Services'

Dear Ms. Durr,

Please find attached the Petitioner's Motion for Reconsideration of the Order Granting New Hampshire Department of Environmental Services' Motion to File a Non-Party Amicus Brief issued by the Board on February 7, 2013 and Motion to Strike the Amicus Brief, and accompanying Certificate of Service.

Sincerely,

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A. Right.

***

Q. So let me see if I under this. You had specific data on Great Bay that said experts are telling you Great Bay's not a transparency issue, you have specific – the only data set you have for the entire system saying transparency didn't even change over time, you have other information confirming that the nitrogen loads did not even cause a significant change in phytoplankton growth, and you ignored all of that information and simply claimed you had a weight of evidence of something else unrelated to this system that said you needed to have these stringent numbers in place? Is that what you're telling me? I mean, I just need to understand because you've got specific data and analysis and you did it repeatedly –

A. Hmm.

Q. -- and it doesn't show up in that statement.

A. Uh-huh.

Exhibit 12B at 227, 230, and 232-233. Thus, the depositions confirmed that NHDES simply decided to ignore its own detailed assessments showing transparency was not the issue:

Q. Okay. Was this moored array report part of the studies that you considered in order to determine what was affecting transparency in the system and why?

A. Yes.

Q. Did you include this as a reference in that 2009 criteria document?

A. Yes.

Q. Okay. I'm going to read it. Are you an author on this study?

A. Yes.

Q. I'm going to read you a quote from the report, page 51.
The results of the – the results suggest that water clarity in Great Bay, Little Bay, and Lower Piscataqua River were sufficient for eelgrass growth. The virtual absence of eelgrass from all but Great Bay suggests that other processes apart from light restricted growth and are important for limiting eelgrass survival.
Is that a false statement in this report?

A. No.

Id. at 235-236.

All of these critical analyses and findings were (1) absent from the 2009 Numeric Criteria document and (2) withheld from the peer reviewers. These statements confirm nitrogen did not cause the alleged eelgrass decline. Nonetheless, NHDES also claims to this court that the "peer

reviewers" found the thresholds to be "reasonable and well-supported by the data presented." Amicus Brief at 3. This is purposefully misleading statement not in accordance with counsels "duty of candor." The peer review was based on the assumption that nitrogen had changed phytoplankton levels in Great Bay causing lower water column transparency, which both NHDES and EPA knew had not occurred in this system:

> Q. And where do you have data, in Great Bay, do you have data showing increased nitrogen levels caused phytoplankton blooms which reduced water clarity in Great Bay?
>
> ***
>
> A. ... We don't have that information related to nitrogen causing phytoplankton blooms in the Great Bay Estuary.

Exhibit 12B at 124-125. Thus, NHDES amicus brief claims that "underlying studies" were not excluded from the 2009 Numeric Criteria document and that the 2009 Numeric Criteria document was not "based on erroneous technical assumption" (Amicus Brief at 3) are demonstrably false, as its own scientist repeatedly admitted that actual data showed TN had not caused excessive algal growth or adverse changes in transparency in the system but that information was excluded from the 2009 Numeric Criteria document.

3. Impairments (Amicus Brief at 3-4)

NHDES does not provide a single citation to support its claim that "much of the Great Bay Estuary is suffering from cultural eutrophication manifested by low dissolved oxygen in the Estuary's tidal rivers, increased macroalgae, and declining eelgrass." Amicus Brief at 3-4. This is because such information does not exist. Philip Trowbridge confirmed the following, under oath, with respect to dissolved oxygen:

> Q. Can you tell me what kind of natural – what type of natural condition could cause low DO in the system?
>
> A. I think there are many, but I'm not sure exactly.
>
> ***