

# HALL & ASSOCIATES

Suite 701  
1620 I Street, NW  
Washington, DC 20006-4033  
Telephone: (202) 463-1166 Web: <http://www.hall-associates.com> Fax: (202) 463-4207

Reply to E-mail:  
[prosenman@hall-associates.com](mailto:prosenman@hall-associates.com)

April 7, 2016

## **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 – Petitioner’s Motion to Supplement the Record with the Draft NPDES Permit for Nashua, New Hampshire**

Ms. Durr:

Attached please find for filing, the City of Taunton’s motion to supplement the record with the Draft NPDES permit for Nashua, New Hampshire 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	)	
	)	

**CITY OF TAUNTON’S MOTION TO SUPPLEMENT THE RECORD WITH  
THE DRAFT NPDES PERMIT FOR NASHUA, NEW HAMPSHIRE**

The City of Taunton (“Taunton” or “City”) hereby moves to the Board to supplement the record with the draft NPDES permit recently issued by EPA Region 1 for Nashua, New Hampshire. (Att. 1). This document was only recently made available to the public. This filing is in accordance with 40 C.F.R. § 124.19, which allows Board to “take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal.” Contained within this newly noticed, revised draft permit are the federally required limitations for pollutants of concern. Conspicuously lacking from this draft permit is a limitation for flow. The glaring absence of a limitation on flow, which is was included in Taunton’s Region 1 issued permit, is an admission against EPA’s interest regarding the Agency’s assertion of the need for and authority to regulate flow as a pollutant. This disparate action also 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 permits. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (equal protection clause requires “all persons similarly circumstanced shall be treated alike.”). Likewise, there are numerous APA cases saying it is improper to treat similarly situated

parties differently. “As a general matter, an agency cannot treat similarly situated entities differently unless it ‘support[s] th[e] disparate treatment with a reasoned explanation and substantial evidence in the record.’” *Lilliputian Sys. v. Pipeline & Hazardous Materials Safety Admin.*, 741 F.3d 1309, 1313 (D.C. Cir. 2014) (quoting *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777, 365 U.S. App. D.C. 287 (D.C. Cir. 2005) (alterations in original)). The issuance of the draft Nashua permit confirms that the Region understands that a flow limitation *is not required* by the Clean Water Act (“CWA”), 33 U.S.C. § 1251, *et. seq.*. Taunton may not be treated differently.

As noted in prior filings, EPA’s imposition of a flow limitation is not supported by any known agency regulatory guidance, (*see* EPA FOIA Response [Doc. 45, Att. 2]), and is beyond statutory authority. *See, District of Columbia v. DOL*, No. 14-5132, Slip Op. at 18 n.6 (D.C. Cir. 2016) (Agencies must follow the statute; overbroad regulations and interpretations will be stricken). “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*[]”; in this instance, it is evident, due to their inconsistency in permitting, that EPA has not. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (emphasis in original).

For the foregoing reasons, Petitioner seeks to supplement the record with the draft NPDES permit of Nashua, New Hampshire issued by Region 1 as an admission against interest and confirmation of clear regulatory error in seeking to regulate flow as a pollutant. Absent the inclusion of this draft permit demonstrating Region 1 permitting inconsistencies and overreach, the administrative record is incomplete, to the prejudice of the City.

Respectfully submitted,

//s// John C. Hall

John C. Hall

Hall & Associates

1620 I Street, N.W., Suite 701

Washington, D.C. 20006

Phone: 202.463.1166

Fax: 202.463.4207

**CERTIFICATE OF SERVICE**

Undersigned hereby certifies that on this day, April 7, 2016, a copy of the foregoing Motion to Supplement the Record was served on the individuals identified below by U.S. first-class mail, postage pre-paid:

Curt Spalding, Regional Administrator  
U.S. Environmental Protection Agency - Region 1  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

Samir Bukhari, Assistant Regional Counsel  
U.S. Environmental Protection Agency - Region 1  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

Dated on the 7<sup>th</sup> day of April, 2016.

//s// John C. Hall  
John C. Hall, Esq.  
jhall@hall-associates.com

//s// Philip D. Rosenman  
Philip D. Rosenman, Esq.  
prosenman@hall-associates.com

Hall & Associates  
1620 I St. (NW)  
Suite #701  
Washington, DC 20006  
Telephone: (202) 463-1166  
Facsimile: (202) 463-4207

*Counsel for the Petitioner*