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 REPLY IN SUPPORT OF ITS MOTION FOR THE APPOINTMENT OF A TECHNICAL ADVISOR/EXPERT

Petitioner, the City of Taunton, Massachusetts ("the City" or "Taunton"), submits the following Reply in support of its Motion requesting the appointment of a technical advisor/expert to assist the Board in evaluating the complex technical/scientific claims presented in this case. EPA's Response pervasively attempts to re-cast the City's Motion as one impugning the Board's legitimacy and ability to carry out its review responsibilities. The City's Motion, however, does nothing of the sort. Taunton's Motion simply requested that the Board use its authority to appoint an individual who, given the highly complex nature of nutrient estuarine impact evaluations, could assist the Board in evaluating the factual veracity of EPA's "responses." This assistance would allow the Board to more easily discern whether EPA's responses are rational in light of the record, as intended by the Board's rules. 40 C.F.R. § 124.19(n).

Lost in EPA's animated protests over the appointment of an independent technical advisor is the fact that (1) EPA concedes the Board has the authority to grant the requested relief, (2) the parties agree on the applicable standard of review, (3) EPA's claims and conclusions in

Newmarket were soundly rebuked by an independent peer review, and (4) the appointed advisor would assist the Board in evaluating the *existing* records and arguments and would, therefore, not constitute "late-filed" argument or "extra-record" material. Given the "scientific" house of cards EPA has built to justify Taunton's permit, it is understandable why EPA would so vehemently protest the appointment of an advisor in this instance. Such appointment would, to a certainty, reveal that rational documentation supporting EPA's key scientific conclusions is not found in the record.

Accordingly, the Court should grant Taunton's Motion as a means to ensure that the Board's review is "searching and careful" and takes "a hard look at both the facts and the agency's reasoning" as required by the Administrative Procedure Act. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520 (D.C. Cir. 1983); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (*abrogated on other grounds*); *see also* EPA Resp., at 5 *citing In re NE Hub* (emphasis added).

a. EPA concedes the Board has authority to appoint a technical expert/advisor

EPA's Response does not contest that the Board is authorized to take any measures it deems necessary to perform its responsibilities in reviewing the present Petition. 40 C.F.R. § 124.19(n) ("the Environmental Appeals Board may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal…."); *see* Motion, at 1, 2, 9. Such freedom would inherently encompass the appointment of the requested technical advisor/expert. Moreover, EPA does not cite to authority (*e.g.*, EAB regulation or jurisprudence) restricting the Board's ability to grant the requested relief. To the contrary, EPA's response acknowledges that the Board likely has the requisite authority. EPA Resp., at 14 ("While it may

be that courts have the ability to appoint technical advisors when needed…").[1] Therefore, while EPA's Response contests the "need" for such an advisor in this case, it does not and cannot dispute the Board's authority to appoint an advisor to ensure an "efficient, fair, and impartial adjudication."

b. There is no dispute over the applicable standard of review

EPA's Response endorses a standard whereby "the record must demonstrate that [EPA] … ultimately adopted an approach that 'is rational in light of all information in the record.'" EPA Resp., at 4 *citing In re Gov't of D.C. Mun. Separate Storm Sewer Sys., In re City of Moscow, In re NE Hub Partners, LP*. Similarly, EPA implores the Board to "'take[] a *careful look at technical issues*' as opposed to deferring out of hand." EPA Resp., at 5 *citing In re NE Hub* (emphasis added). Finally, EPA notes that "[t]he Board 'will not hesitate to order a remand when a Region's decision on a *technical issue is illogical or inadequately supported by the record'*" (EPA Resp., at 5 *citing In re NE Hub* (emphasis added)) and that EPA gets "[n]o 'special expertise' associated with conclusory statements." EPA Resp., at 8 *citing American Tunaboat Ass'n*. In each case, Taunton agrees with the position taken by EPA. Moreover, EPA did not dispute the fact that, in conducting its review, the Board need not afford EPA deference on findings of fact. *See* Taunton Motion, at 3 (citing *Balt. Gas & Elec. Co.*). Thus, it is clear that the parties do not materially dispute the applicable standard of review.

[1] Given this admission, as well as EPA's inability to cite to any authority precluding the appointment of an advisor, it is not clear why EPA repeatedly (and inconsistently) asserts that granting Taunton's Motion would be a "departure from procedures." *See, e.g.*, EPA Resp., at 2, 5, 6, *passim*. The only "procedures" referenced by EPA – 40 C.F.R. § 124.19(a)-(d) – spell out the form, manner, rules, and content of petitions before the Board; they do not – unlike 40 C.F.R. § 124.19(n) – speak to the Board's authority in reviewing such petitions.

EPA argues that the technical advisor should not be allowed because it would "distort[] the applicable burden for demonstrating grounds for review." EPA Resp., at 8. Nothing could be farther from the truth Contrary to EPA's characterizations, the City is seeking the appointment of the advisor to assist the Board in comprehensively performing the fact finding functions of the identified standard of review (*e.g.*, *In re NE Hub*). Thus, the only question is whether the technical advisor would be of assistance to the Board in fulfilling its review responsibilities. 40 C.F.R. § 124.19(n) (the Board may do anything necessary to ensure an "efficient, fair, and impartial adjudication"). Approving the City's Motion certainly does not increase EPA's burden in defending the permit, nor does it improperly delegate the Board's review authority to a third party. Rather, the technical advisor simply provides the Board with the insight needed to ensure the factual claims made by EPA and Taunton are accurate. As enumerated below, Taunton and EPA have made contentions that, as a factual matter, cannot be reconciled. It is only possible for one party to be factually correct on these technical issues and the advisor would simply assist the Board in discerning which party's factual claims are documented in the permit record. When used in such a manner, the requested technical expert would not be distorting the applicable standard of review; it would be aiding the Board in adhering to this standard of review, thus meeting the requirements of 40 C.F.R. § 124.19(n). Accordingly, EPA's arguments suggesting the City is attempting to modify the applicable standard of review are misplaced.

c. The City's Motion was not intended to question the Board's legitimacy

EPA's Response characterized the City's legitimate request under the Board's rules as tantamount to calling the Board incompetent. EPA Resp., at 3-7. EPA, however, has grossly mischaracterized Taunton's Motion. That is, the City's Motion was not a derision of the Board or its general competence to review a Petition. Rather, the Motion was a critique against EPA Region I actions before this Board that appear intended to confuse the issues, misdirect the Board

to irrelevant information, or, at worst, fabricate positions that have no support in the record. This litigation strategy is most effective when dealing with complex water quality issues – over which none of the Board members have any explicit training or expertise to divine when a scientifically invalid statement is being made.[2]

The subject matter of this appeal – dissolved oxygen and algal evaluations for estuarine systems – are among the most complex evaluations in the realm of nutrient regulation. If the Board's reviewing standard was simply to examine the record to see if EPA considered and responded to (*i.e.*, rejected) the City's comments, an expert would not be needed because any response would suffice. However, EPA admits that is not the standard of review. *Supra*, at 3. Rather, the Board is also to determine whether EPA's responses (1) actually responded to the issue of concern and (2) are rational and supported by the record. *Id.* In this regard, Taunton (both in its Motion and in its earlier merits briefs) identified EPA factual/technical positions that, in its opinion, simply are not true, have no rational support, and/or are contrary to the studies in the record. These absolute dichotomous factual issues include:

- Whether EPA followed the MEP process in identifying the sentinel site and conducted any analyses to confirm that the algal response to nitrogen in the Taunton Estuary would be similar to MHB 16;

[2] For example, when EPA cites to record documents as addressing a specific concern and Taunton observes that the documents simply don't address the matter, the Board must be capable of understanding what scientific information is capable of addressing what issues. For example, Taunton has repeatedly observed that the "sentinel location" (MHB16, located at the mouth of the Sakonnet River) should not be used due to the dramatically different physical, chemical and biological factors occurring at this location versus the Taunton Estuary. EPA's response to comments acknowledges the difference and then, simply dismisses them as inconsequential. The expert would be able to confirm that EPA (1) nowhere evaluated the significance of the differences, and (2) nowhere demonstrated that conditions occurring at MHB16 reasonably predict system responses to nitrogen in the Taunton Estuary. In short, the requested expert would confirm whether EPA's "technical" response is, in fact, a response at all and/or whether the response confirms that EPA's conclusion is rational in light of the entire administrative record.

- Whether EPA has any analysis in the record showing that algal growth is responsible for (or a significant contributor to) the periodic low DO occurring in the Upper Taunton Estuary;

- Whether the algal levels (EPA's asserted cause of the periodic low DO) in the Upper Taunton Estuary are, in fact, lower than those found acceptable to maintain a 5 mg/l DO level at the sentinel site;

- Whether there is a technical analysis in the record showing that year round TN reduction is necessary to achieve applicable standards during the growing season;

- Whether there is any technical analysis in the record showing that attaining a 0.45 mg/l TN level will ensure attainment of the 5 mg/l minimum DO criteria in the Upper Taunton Estuary;

- Whether EPA's analyses utilized current loading and water quality impacts information in deriving the permit requirements;

- Whether EPA's position that a decade of nutrient and organic pollutant reduction has not significantly improved conditions in the Upper Taunton Estuary is supported by the record;

- Whether EPA has any scientific analysis in the record confirming that the Brayton Point thermal reductions did not materially affect low DO in the system and did not reduce algal growth;

- Whether the sentinel approach utilized by EPA Region I is similar to EPA's published reference waters approaches used to generate preliminary criteria targets;

- Whether documents in the record confirm that nutrient reductions in Rhode Island waters had no influence on nutrient conditions in Mount Hope Bay, the Taunton Estuary, or the sentinel site (*i.e.*, the waters are hydraulically distinct);

- Whether a growing season limit of 3 ug/l is, from a statistical perspective, equivalent to a 5 mg/l monthly maximum limitation.

As the Board is not to presume EPA's version of the facts is correct (*supra*, at 3), the question becomes, who is correct? The two factual positions simply can't coexist: if EPA's statements on these issues are true, Taunton's must be false, and vice versa. In fulfilling its review obligations,

the Board must be able to discern whether EPA's convoluted responses, replete with technical jargon, actually address and refute the documented objections raised by Taunton. If the Board believes it is properly trained on these issues and capable of evaluating the factual veracity of EPA's claims, then fine. But if it does not, the requested technical expert would serve as invaluable resource to the Court in carrying out its review responsibilities in this appeal.[3]

d. EPA's Newmarket permit underscores need for advisor

As noted above, it was EPA's actions in this permit appeal (and past permits) that triggered the City's request to have this Board appoint an advisor. For instance, EPA's actions in *Newmarket* illustrate the great lengths the Agency will go to in order to defend the imposition of scientifically flawed nutrient limitations. Specifically, in reviewing the *Newmarket* decision, the Board properly concluded that, in each case, EPA "considered," "addressed," and/or "responded to" the Coalition's objections:

> In its Response to Comments, the Region explained that such alleged inconsistencies in the data must be viewed in light of the longterm trends. [*Newmarket*, at 37]
>
> The Region also disagreed with the Coalition's contention that decreasing transparency in the waters of the Great Bay is not causing or contributing to eelgrass loss. [*Newmarket*, at 38]
>
> The Region also addressed the Coalition's arguments that nitrate levels in the Great Bay are not at toxic levels and that naturally occurring color and turbidity in the tidal rivers (including the Lamprey River) will prevent reestablishment of healthy eelgrass habitat even if nitrogen is reduced. [*Newmarket*, at 39]
>
> In addition, the Region addressed the Coalition's argument that TN is the wrong form of nitrogen to control, and instead permit limits for nitrogen should focus exclusively on 'dissolved inorganic nitrogen'. [*Newmarket*, at 40]

[3] As noted in Taunton's Motion, the Agency itself relies on outside support to address complex nutrient issues (*e.g.*, TMDL endpoint developments, site-specific criteria, watershed modeling). *See* City Motion, at 5. However, an appointment outside of the Agency would not even be necessary. To the extent the Board wishes to grant this Motion, the City wouldn't even object to the appointment of EPA personnel from outside the Region, such as an expert from EPA's Chesapeake Bay Program with expertise on estuarine evaluations.

> Finally, the Region addressed the Coalition's comments that the Region improperly considered data from 'extreme wet weather periods' by explaining that. [*Newmarket*, at 41]

However, as noted above, simply evaluating whether EPA "considered" or "responded to" the objections raised is not the applicable review standard. The Board must also determine whether EPA's responses are rational and supported by the record. On this aspect of the analysis, the Board simply, without explanation, accepted EPA's position as rational and soundly based on the record:

> The Board concludes that the Region responded to the scientific arguments presented in the Petition and that the Region's responses to the Coalition's arguments on all these issues are rational, soundly based in the record, and persuasive. [*Newmarket*, at 41].

Given the Board's decision, which did not appear to carefully inspect EPA's technical claims, the coalition of petitioners in *Newmarket* pursued an independent peer review with the State of New Hampshire and a team of independent, nationally recognized experts. As previously noted by the City (Taunton Motion, at n.4), and undisputed by EPA in its Response, the peer review panel confirmed each of the scientific objections previously raised by the Coalition were, in fact, correct. *See* Petition, at Att. 62 (February 13, 2014 Peer Review).[4] In particular, the peer review panel affirmed a central factual issue appealed in that case – algal levels had not materially changed in 30 years, despite changing nitrogen levels. *Id.* at 24, 27, 28. Based on this fact, the panel concluded that TN had not caused reduced water column transparency in this system and the analyses suggesting otherwise, which were relied on by EPA in *Newmarket*, were not

[4] Similarly, EPA does not dispute the fact that, since the peer review panel, the Agency has held off on permits in lieu of additional studies and research to determine what needs to be done. *See* Petition, at Att. 69 (EPA/DES April 29, 2015, Op-Ed Article); *See also* Taunton Motion, at Ex. 6 (EPA Letter Deferring Permit Issuance).

scientifically defensible, precisely as was alleged in *Newmarket*. *See* Petition, at Att. 62, passim; *id.* at 35 ("The statistical methods used to devise the numeric thresholds were not based on acceptable scientific methods and the results of the analysis are not reliable…"); *id.* at 19 ("There is no basis for a scientifically defensible linkage between nitrogen impairment and eelgrass impairment presented in the report").

The fact that the Board deferred to EPA's "expertise" and "discretion" and accepted its "factual" representations on the algal growth and nutrient-induced eelgrass impairment in *Newmarket* is somewhat understandable given the Agency's efforts to misdirect and confuse. It just shouldn't happen again, particularly where the science and analyses relied on by the Agency in the present appeal are unprecedented.[5] The requested advisor would help the Board distinguish between those EPA's responses that might appear plausible on their face, but are nevertheless conclusory or irrational in light of the overall record.

e. EPA's arguments regarding "extra-record material" and "late-filed argument" entirely miss the point

In its Response, EPA also argues that "Petitioner's request to appoint a technical expert would undermine the fairness and impartiality of the permit appeal process… by inviting consideration of extra-record material."); *See* EPA Resp., at 8; *see also id.* at 11 (the appointment of a technical advisor "could only function as late-filed argument."). These EPA arguments, again, completely misconstrue the intent and purpose of the requested appointment. First, EPA's conclusory argument fails to explain how utilizing a technical advisor would necessarily result in extra-record material before the Board. Rather, the advisor would help the Board wade through

[5] Petition, at Att. 42, Chapra Assessment, at 5 (the most technically weak analysis Dr. Chapra has seen in his 42 year career).

EPA's *existing* administrative record. Similarly, the expert would not constitute late-filed argument. Taunton has already timely-filed its objections and detailed arguments during the original comment period and in its briefs to this Board. The advisor would assist the Board in (1) resolving those arguments *already* made by Taunton, (2) identifying the documents or analyses that, according to EPA, address Taunton's concerns, and (3) evaluating whether the factual components of EPA's responses are, in fact, rational. Consequently, EPA's objections related to "extra-record material" and "late-filed argument" are based on a faulty notion of the intent and role of the advisor and should, therefore, be rejected.

WHEREFORE, for all of the aforementioned reasons, and those set forth in its earlier motion, Petitioner respectfully requests that this Board appoint a technical advisor/expert in conjunction with this Permit appeal.

Respectfully submitted,

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