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 ADMINISTRATIVE RECORD

The City of Taunton, Massachusetts (the "Petitioner", "Taunton", or "City") hereby moves to supplement the administrative record to include a number of important documents that are necessary to allow a complete review of the Environmental Protection Agency Region 1's ("EPA", "Region 1", or the "Agency") issuance of NPDES Permit No. MA0100897. The missing documents include correspondence with the Director of the Massachusetts Estuary Project ("MEP"), a Freedom of Information Act ("FOIA") response from EPA Region 1 concerning the City's NPDES permit, EPA guidance and reports, and an opinion editorial written in part by EPA Region 1's Regional Administrator. These materials are vital to this case as they provide documentation of EPA Region 1's (1) decision making process, (2) failure to accurately perform adequate scientific analyses, (3) failure to consider relevant issues, and (4) hesitancy in releasing documents to the public concerning the validity of Taunton's permit.

Accordingly, the Board should direct EPA Region 1 to supplement the record to include all such documents or, in the alternative, should allow Petitioner to supplement the record with these materials for purposes of the Board's review.[1]

ARGUMENT

Courts have consistently allowed supplementation of the record when background information is needed to determine whether certain agency representations are accurate, or "when the agency failed to consider factors that are relevant to its final decision." *See, e.g., The Fund for Animals v. Williams*, 391 F. Supp. 2d 191 (D.D.C. 2005); *National Wilderness Institute v. U.S. Army Corps of Engineers*, 2002 U.S. Dist. Lexis 27743 at *9-*12 (D.D.C. 2002). A court may also look beyond the record if it appears that the agency deliberately or negligently excluded documents that may have been adverse to its decision. *Id.* This Board has also repeatedly recognized the importance of making the bases for a permit or permit condition available for public review and comment. *See, e.g., Hawaii Electric Light Co., Inc.*, 8 E.A.D. 66, 102-103 (EAB, Nov. 25, 1998); *In re Knauf Fiber Glass*, 8 E.A.D. 121, 175-176 (EAB, Feb. 4, 1999).

Courts also allow for consideration of post-decisional documents under limited circumstances, such as when admission serves as the basis for "correcting erroneous assumptions, predictions, or facts forming the predicate for agency decision-making..." *Afghan Am. Army Servs. Corp. v. U.S.*, 106 Fed. Cl. 714, 724 (2012); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.D.C. 1989). Similarly, it is well within this Board's authority to consider material that was available (and in EPA's possession) but not considered by the Regional Administrator when developing their decisions for agency action. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d

[1] Based upon communications with EPA counsel pursuant to 40 C.F.R. § 124.19(f)(2), it has been ascertained that EPA will oppose this motion.

872, 879 n.13 (1st Cir. 1978), *citing* 5 U.S.C. § 556 (The Administrative Procedure Act "does not limit the time frame during which any papers must be received.").

As it concerns this Motion, each record the City is seeking to add to EPA's administrative record (1) corrects clearly erroneous assumptions, predictions, and facts used by Region 1 in its determinations related to the issuance of the City's NPDES permit, (2) was negligently excluded, (3) represents the basis for EPA's position, or (4) was in the Agency's possession prior to permit issuance. Consequently, for the reasons discussed below, Petitioner requests that the Board supplement the record to include the following materials for purposes of the Board's review.

1. **May 1, 2015 Letter from the Director of the MEP Program. *See* Exhibit 1, *see also* Petition at Att. 44.**

EPA's application of the MEP "sentinel method" is the lynchpin upon which the entire permit derivation process hinges. The City filed multiple comments and objections that key aspects of the methodology were never addressed in selecting MHB16 to define the "protective" TN level that must be achieved in the Upper Taunton Estuary (UTE). *See* Pet. at Atts. 14, 17, 23, 26. Even EPA Headquarters agreed that there was no information in EPA's possession to show that the method, as applied by Region 1, was scientifically defensible. *See* Pet. at Atts. 51, 52. Despite these observations, EPA's Response to Comments "doubled down" and claimed that, not only did EPA carefully follow the "MEP Process," but EPA's approach was the same as that employed in multiple TMDLs developed under the MEP process. *See* Pet. at 29-32, 34-35. Knowing the Board's penchant for simply agreeing with EPA "technical" claims, the City contacted the MEP director (Dr. Brian Howes) to inquire whether or EPA's statements were accurate.

The May 1, 2015 letter from Dr. Howes, director of the Massachusetts Estuaries Project ("MEP") and creator of the MEP approach used in TMDL development approved by MassDEP,

unequivocally confirms that EPA's claim to have followed the MEP process is a conclusory fabrication. *See id.* It also independently confirms, consistent with the opinions of Dr. Swanson, Dr. Chapra, and the City's consultants, that there is no rational basis to believe that TN/DO conditions at MHB16 have anything to do with how nutrient dynamics and DO occur in the UTE. Although this document is not part of the initial administrative record, it should be part of the Court's review for several reasons.

First, the need for Dr. Howes' letter did not become apparent until EPA's response to comments document was issued. That is, EPA did not claim consistency with the MEP process during the public comment period. Had EPA made this claim initially, Taunton would have inquired with Dr. Howes earlier in the process. Given the City's comments, EPA could have and should have contacted the creator of the MEP and the reports EPA was relying upon to issue the permit, before continuing to claim that it properly utilized that methodology and the data from such reports. *Kent Cnty., Del. Levy Court v. United States EPA*, 963 F.2d 391, 397 (D.C. Cir. 1992) (Court held agency action that ignores expert recommendations without justification as arbitrary and capricious). Of course, EPA had made no such prior inquiry – for obvious reasons.

Second, when a post-decisional document corrects "erroneous assumptions, predictions, or facts forming the predicate for agency decision-making" it is appropriate to have it included in the record. *Afghan Am. Army Servs. Corp. v. U.S.*, 106 Fed. Cl. 714, 724 (2012). As Dr. Howes' letter directly refutes EPA's claims that it followed a scientifically defensible approach in creating the TN target, it should be in the record. *Nat'l Wilderness Inst.*, 2002 U.S. Dist. LEXIS at *10 (Courts may review post-decisional documents in "cases where evidence arising after the agency action shows whether the decision was correct or not").

Third, consideration of this letter will also assist in preventing "fraud on the court" as EPA's factual averment (it followed the MEP process) is a blatant fabrication. In the alternative, the City seeks to strike Region 1's claim of consistency with the MEP process since EPA knows the statement to be false. *See Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (A "fraud on the court" occurs where a party has clearly and knowingly interferes with the court's ability to impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim).

Accordingly, for each of these reasons, the Dr. Howes Letter should be added to EPA's record.

2. EPA's Long Withheld FOIA Response. *See* Exhibit 2; *see also* Petition at Att. 66.[2]

The record before the Board confirms that, for months, the City was seeking access to the "new analyses and information" that EPA claimed demonstrated that the City's objections to the permit were misplaced. *See* Pet. at 8-11; *see also* Pet. at Atts. 45-53. Nonetheless, EPA refused to allow the public to see the information, which led to a FOIA appeal. *Id.* As noted in the City's opening petition, it was not until five days before the City was required to file its opening brief that EPA granted access to this information – information that, in fact, formed the basis of EPA's final permit decision. *Id.*

EPA's May 7, 2015 FOIA response (with responsive records) belongs in the record for two primary reasons. First, this record is *prima facie* evidence of EPA violating public due process procedures in issuing this permit.[3] Second, the responsive documents ultimately

---

[2] Due to its voluminous nature, the City did not attach the numerous responsive records and thousands of pages of data that were provided on the FOIA response. This information, however, belongs in the administrative record.

[3] The FOIA documents pertain to a series of requests made to EPA Region 1 starting in September of 2014. *See* Exhibit 2; *see also* Pet. at Atts. 45-53. Specifically, the requests sought:

(1) analyses showing money spent on wastewater improvements in the TE since 2004/2005,

provided to the City represent the basis for EPA's permit action. In both cases, these documents belong in the administrative record. EPA's NPDES public participation rules unequivocally mandate that the public is to have access to the information that forms the basis of EPA's permitting action. 40 C.F.R. § 124.8(b); *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 215-216 (1980).[4] EPA's repeated refusal to provide public access to the information requested and its 11th hour release of the documentation, when it could not be reasonably analyzed in advance of filing the City's brief, evidences a gross disregard for public due process rights. EPA unquestionably planned it this way. As this final document release was part of EPA's permitting strategy to prevent further public input, it must be included in the record.

3. **NJDEP's Response to Comments Confirming EPA's Prohibition of Blending.** ***See*** **Exhibit 3;** ***see also*** **Petition at Att. 64.**

NJDEP's response to comments on its recent CSO permit actions addresses the ability for wastewater treatment facilities ("WWTF") to utilize blending and mixing zones following the Eighth Circuit Court of Appeals decision in *Iowa League of Cities*, 711 F.3d 844 (8th Cir. 2013), which declared such prohibitions outside the scope of EPA authority. NJDEP's Response, which

---

(2) analyses showing Brayton Point temperature reductions since 2004/2005 did/will not have an impact on DO in the TE,
(3) EPA's guidance and technical methods for nutrient criteria development and estuary DO assessments specify a "sentinel approach" as a valid method for setting applicable nutrient criteria and nutrient reduction targets in estuarine systems,
(4) EPA's previous peer-review of the "sentinel approach",
(5) data sonde information that EPA referred to as demonstrating Taunton nutrients are still causing problems with minimal water quality improvements since 2004,
(6) confirmation from EPA HQ that Region 1's "sentinel approach" was scientifically defensible, and
(7) EPA's claim that other entities may sue the agency if a 3 mg/L TN permit is not imposed and the data supplied by these entities for a 3 mg/L TN limitation is necessary for this system.

[4] As President Johnson said when he signed it into law in 1966, FOIA "legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit." Congress enacted FOIA to promote transparency across the government. *See* 5 U.S.C. § 552; *Quick v. U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech.*, 775 F. Supp. 2d 174, 179 (D.D.C. 2011) (citing *Stern v. FBI,* 737 F.2d 84, 88 (D.C. Cir. 1984). The Supreme Court has explained that FOIA is "a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 171-72 (2004). The actions taken by the U.S. EPA undermine the basic intent of the FOIA legislation.

was issued after discussions with EPA on similar CSO flow processing concerns, confirms that EPA is still prohibiting blending outside of the Eighth Circuit. EPA does not dispute that this is the "working law" of the Agency that is being enforced on municipalities. EPA's response brief does not dispute that EPA was well aware that Taunton wishes to utilize blending to comply with CSO flow reduction mandates. EPA Resp. at 13-14.

As Taunton had no prior notice of EPA's position and most certainly would have filed objections during the opening public comment period if this position had been known, the Board's consideration of this issue is clearly allowable. *See* 40 C.F.R. § 124.13. As evidenced by the continued prohibition of blending techniques in New Jersey CSO communities, the Agency continues to purposefully engage in the implementation of an approach held to be *ultra vires*. By withholding documents pertaining to that policy that are within the public interest, EPA is purposefully obfuscating their action, acting in bad faith, and creating secret law. EPA cannot claim that a comment or objection is late or waived based on information that it has been withholding from the public. *New York v. Heckler*, 742 F.2d 729, 738 (2d Cir. 1984). Consequently, as this record confirms EPA's ongoing imposition of the illegal blending prohibition, it must be included in the administrative record.

4. NHDES/ USEPA Great Bay Op-Ed Submission – Together, We Can All Help Restore Great Bay (04/29/15). *See* Exhibit 4; *see also* Petition at Att. 69

This Op-Ed article, co-authored by Regional Administrator Curt Spalding and NHDES Commissioner Thomas Burack, addressed the nutrient reduction issues faced within the Great Bay (similar to Narragansett Bay) and the current efforts utilized to improve water quality. Ex. 4; *see also* Pet. at Att. 69. The article admits the complicated task of water authorities in establishing causation of regional impairments and illustrates the current efforts by WWTFs to reduce nutrient loading within the waterway. *Id.*, at 1. It confirms that "causation" is an

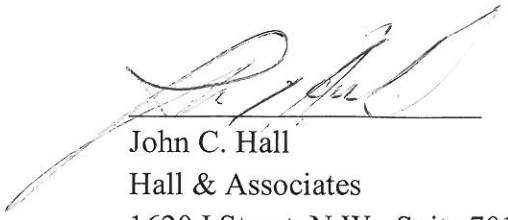
important requirement to be demonstrated in mandating more restrictive limitations. *Id.*, at 2. It acknowledges, through the EPA Regional Administrator's own words, that local communities and WWTFs have been diligent in nutrient effluent reduction over the past decade. *Id.*, at 1. In short, this article confirms that utilization of simplified assessment methodologies, such as that ratified by the Board in *Newmarket v. U.S. EPA*, 16 E.A.D. __ (EAB Dec. 2, 2013), are not valid and EPA will not continue to impose stringent TN limitations based on such analyses. Consistent with this stated course of action, EPA has abandoned the "limits of technology" permit approach used in *Newmarket* because it knows the analyses it had presented to the Board were seriously flawed.

However, the analyses used for Taunton, in contrast to the expectations in the article, are even less robust, though similar "limits of technology" TN reductions are being mandated. Thus, this op-ed article by EPA provides a clear demonstration that (1) NPDES rules do not allow imposition of stringent requirements based on flimsy analyses; (2) documenting causation is, in fact, a key component to demonstrate prior to imposing limitations; and (3) EPA's ongoing reliance on the *Newmarket* decision should no longer occur. Accordingly, the article should be included in the record since it proves a number of EPA's legal and factual claims are erroneous. *Afghan Am. Army Servs. Corp.,* 106 Fed. Cl. at 724 (2012).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests EPA Region 1 be directed to supplement the administrative record in this action with the documents referenced herein or, in the alternative, that the Petitioner be allowed to supplement the record with these documents for purposes of this appeal.

Respectfully submitted,



John C. Hall
Hall & Associates
1620 I Street, N.W., Suite 701
Washington, D.C. 20006
Phone: 202.463.1166
Fax: 202.463.4207

INDEX OF EXHIBITS FOR CITY OF TAUNTON'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

1. May 1, 2015 Letter from Brian Howes to Joe Federico – Re: Use of Sentinel Site Approach Based on Massachusetts Estuary Project Data for Setting Nutrient Objectives for the Taunton Estuary.
2. EPA's May 7, 2015 FOIA Response – Quoc Nguyen (USEPA) to Philip Rosenman - Re: Freedom of Information Request EPA-R1-2015-000252. (Responsive documents not included).
3. March 2015 NJDEP Response to Comments on NJ CSO NJPDES Permits.
4. April 29, 2015 NHDES/ USEPA Great Bay Op-Ed Submission – Together, We Can All Help Restore Great Bay.

CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, July 8, 2015, a copy of the foregoing Motion to Supplement the Administrative 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 8th day of July, 2015.

//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 20001
Telephone: (202) 463-1166
Facsimile: (202) 463-4207

Counsel for the Petitioner