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September 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 Response in Opposition to EPA's Motion to Strike Motion Certain Attachments

Ms. Durr:

Attached please find for filing, the City of Taunton's Response in Opposition to EPA's Motion to Strike Certain Attachments 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 RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE CERTAIN ATTACHMENTS

Petitioner, the City of Taunton, Massachusetts ("the City" or "Taunton"), hereby submits the following Response in Opposition to Respondent's, United States Environmental Protection Agency, ("EPA," "the Agency," "Region 1"), Motion to Strike Certain Attachments in Taunton's Petition Reply. Specifically, EPA seeks to strike the Affidavit of Benjamin M. Kirby (Pet. Reply Att. 82) ("Kirby Affidavit"), an engineer who, on behalf of Taunton, reviewed and analyzed the new information, charts, analyses, and underlying data that were just recently released by EPA. Additionally, EPA seeks to strike three similarly-styled documents ("Summary Documents") (Pet. Reply Atts. 79, 80, 84) that compile quotes and excerpts from the record and the parties' filings in this appeal.

Despite EPA's efforts to portray them as such, none of these attachments are a product of wistful regret over arguments the City could have, but did not make earlier. Rather, the Kirby Affidavit was included as a direct response to (1) a series of charts and graphs first released by EPA when it issued the final permit and the accompanying 165-page Response to Comments ("RTC") and (2) the dataset that EPA claims was used to produce the new charts and graphs, which wasn't provided to Taunton until well after the Petition deadline. Similarly, the Summary

Documents do not constitute impermissible *argument* (*i.e.*, late, over-length, or extra-record) because they aren't argument at all. The Summary Documents are just that … summaries of record materials and filings *already before the Board*, which are expressly allowed by Board rules. 40 C.F.R. § 124.19(d). For these reasons, more fully explained below, EPA's Motion must be denied.

a. EPA's rope-a-dope approach to permitting is highly prejudicial and, therefore, the attachments submitted by Taunton to respond to the new EPA analyses cannot be considered "late-filed"

As a general point, EPA argues that the documents at issue should be struck to ensure the "efficient, fair, and impartial adjudication of issues arising in an appeal." EPA Motion to Strike, at 2 (citing 40 C.F.R. § 124.19(n)). However, contrary to EPA's assertions and misplaced legal analysis, the attachments in question do not "impermissibly extend and supplement arguments…violating unambiguous regulations … governing the length of reply briefs." *Id.* First, it is beyond debate that EPA created extensive, new analyses, first revealed in its RTC (over 50 pages of new technical assessments and detailed stressor-response analyses regarding the justification for the TN limitations). *See infra*, at n.4. Second, it is clear that EPA had the new analyses in its possession for months, but purposefully withheld the assessment from the City – despite repeated requests for its release.[1] EPA's refusal to produce the information forced Taunton to seek the information through FOIA.[2] EPA went so far as to purposefully mislead the City with respect to the content of its new analyses.[3]

[1] Following the initial comment submission comments, the City repeatedly sought meetings with the Region and EPA Headquarters to discuss the omitted technical information, only to be rebuffed at each request. *See* Pet. Atts. 27-29. EPA finally agreed to meet in person in September 2014. At the meeting, Taunton reiterated the deficiencies of the Fact Sheet and sought explanations for the unsupported scientific conclusions made in the draft permit. Though EPA claimed to have created answers to the City's observations, EPA continued to withhold the backup documentation from Taunton.

[2] On October 7, 2014, the City submitted a FOIA request to obtain the new assessments and data referenced by EPA at the September 2014 meeting. *See* Pet. Atts. 46-47. However, the Region refused to grant Taunton access to that

Third, EPA's new analyses and justifications for the TN limitations in the RTC were not a defense of prior analyses of the data. Rather, the new information addressed issues nowhere previously presented in the original Fact Sheet or the accompanying background documents (*i.e.*, Brayton Point closure impacts affecting DO regime, hydrodynamic factors influencing the DO regime confirmed by prior studies, impact of changing TN levels and algal levels on the DO regime, relationship between algal levels and low DO in stratified areas, etc.).[4] That is, the original Fact Sheet and record were devoid of analyses on these issues known to affect system DO, even though the information was readily available to EPA at that time. Thus, there was no possible opportunity for Taunton to address EPA's new claims or the 50+ single-spaced pages of new technical analyses presented for the first time in the RTC.

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information. *See* Pet. Atts. 51-52. The City appealed this adverse FOIA determination and was forced to sue the Agency for improper handling of FOIA requests. *See H&A v. EPA*, Docket No.15-cv-00286 (D.D.C.). Ultimately, on May 7, 2015, just days before the permit appeal deadline, EPA voluntarily produced the withheld FOIA documents – approximately 300 MB of (compressed and uncompressed) data, an estimated 12,000 pages of PDF, Word, and .txt files and 5,000 pages of Excel files (printed in portrait, scaled to fit all columns on page). Pet. Att. 66. To date, EPA has not provided any explanation as to why it withheld the responsive documentation for over 7 months and/or suddenly released the information just days before the permit appeal deadline.

[3] On February 18, 2015, Taunton had another joint meeting with MassDEP and EPA. During this meeting, the City again presented the results of the various published analyses on the system and expert assessments of EPA's Fact Sheet assessments. *See* Pet. Att. 38. At this meeting, EPA verbally agreed to provide Taunton access to the new information and work cooperatively with the City. However, when EPA's March 3, 2015 letter arrived, the information was again missing. *See* Pet. Att. 54. On March 6, 2015, EPA informed the City's representatives that the new information was contained in the Brockton fact sheet. *See* Pet. Att. 55, Email S. Bukhari to J. Hall. However, no new significant information or analyses were presented in Brockton's Fact Sheet and none of the City's major objections were addressed in that document.

[4] It was not until April 13, 2015, when Taunton received the final permit and accompanying RTC that EPA's new analyses and studies, which, in EPA's opinion, justified the TN limit in Taunton's permit, were released to the public. *See* Pet. Att.15. Among the host of new graphs and analyses in the RTC, EPA unveiled (1) its analysis of the impact of the Brayton Point power plant closure on the DO regime (*See* Pet. Att. 15, at 64-65), (2) ambient data from the Taunton Estuary ("TE") and Mount Hope Bay ("MHB") (*See* Pet. Att. 15, at 88-114), and (3) an array of new statistical plots and data analyses relating to the sufficiency and reliability of the sentinel site (now also using data from 2006) (*See* Pet. Att. 15, at 92, 93, 95, 110). EPA also made new (conclusory) claims that (1) nutrient reductions occurring in Narragansett Bay do not affect MHB, and (2) it had conducted a Massachusetts Estuary Project ("MEP") style analysis and (3) that the available SMAST data were not sufficient for any type of "stressor-response" relationships between TN, DO and algal levels in MHB or the TE. *See* Pet. Att. 15, at 48, 50, 92-93, respectively. EPA does not dispute its after-the-fact production of the significant new information and analyses. *See, e.g.*, EPA Motion to Strike, at 5 ("The fact that the Region added information to the administrative record in the course of responding to comments does not present any infirmity in the permitting process…").

Despite the purposeful withholding of critical information from the public, EPA now argues that Taunton's attempt to rebut the new analyses must be struck for various procedural reasons (*e.g.*, word count, late-filed, extra-record). *See* EPA Motion to Strike, *passim*. In short, EPA's "rope-a-dope" strategy seeks to introduce new substantive defenses for its permit action without allowing the City a reasonable way to respond to such arguments. Both EPA's opposition to Taunton's Motion to Supplement the Record and EPA's Motion to Strike claim this approach is acceptable. *See, e.g.*, EPA Motion to Strike, at 5 ("The fact that the Region added information to the administrative record in the course of responding to comments does not present any infirmity in the permitting process.").

EPA's approach, however, is not true under applicable Board rules, which require an "efficient, fair, and impartial adjudication of issues arising in an appeal…" 40 C.F.R. § 124.19. Moreover, it is widely understood that EPA must provide the public an opportunity to provide informed comment on new analyses and assessments and that late disclosure of such bases should result in a remand of the permit. *In re Amoco Oil Co.*, 4 E.A.D. 954, 980-981 (EAB 1993) (EPA excluded analyses necessary for commenters to make informed comment); *In re GSX Servs. of SC. Inc.*, 4 E.A.D. 451, 467 (EAB 1992) (failure to discuss location standards required remand); *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 84 (D.C. Cir. 1976) ("To the contrary, we only submit that a responsible Administrator would not materially rely on recently acquired, uncommented upon studies - especially when the results of previous studies had been undermined severely by the unanimous criticism of other independent government agencies.") (emphasis added). EPA's regulations mirror this case law. *See* 40 C.F.R. § 124.8(b) (public is to have access to the information that forms the basis of EPA's permitting action); 40 C.F.R. §

25.4(b) (mandating early public access to such information); 33 U.S.C. § 1251(e) (identifying public participation as one of the goals of the Clean Water Act).

It is thoroughly improper for EPA to publish a Fact Sheet with essentially no technical analyses in support of the effluent limits, create far more detailed analyses over the subsequent two year period, purposefully withhold the updated information from the public, and then release it with a 30-day clock running to file a Petition. This is particularly true when EPA knows that simply analyzing the new assessment will take weeks – assuming, incorrectly in this case, that the underlying database is actually in the administrative record.[5] The *City of Attleboro* decision referenced by EPA (Motion to Strike, at 5) certainly does not condone such tactics. Rather, the case holds that it is acceptable for a final permit action to "add material to the administrative record…to address new points and new materials." Such a conclusion, however, does not sanction the issuance of a draft permit without any relevant analysis of existing data, disclosure of the missing analyses at the time of permit issuance, and preclusion of a permittee's evaluation of the missing analyses. *Connecticut Light & Power Co. v. Nuclear Regulatory Com.*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.").

[5] The new analyses disclosed in EPA's RTC were purportedly based on the 2004-2006 SMAST data. However, this database was not identified or provided in either EPA's draft or final certified index. *See* Att. 1, EPA's April 22, 2015 Draft Administrative Record Index; EPA Final Certified Index, Doc No. 5. Similarly, the underlying data set was not available on the public website that hosted the report. Accordingly, counsel for Taunton requested a copy of these data from EPA such that it could be analyzed, compared, and cross-checked to the new charts EPA created. On June 16, 2015, Mr. Bukhari emailed the data for the SMAST report, which was purportedly used in the derivation of the new charts and analyses set forth in EPA's RTC. After reviewing the underlying dataset, however, it became clear that EPA's new data plots (1) contained serious anomalies, (2) were not, despite EPA's claims, reproducible from the SMAST dataset provided by EPA, and (3) misrepresented the actual data in TE/MHB. *See* Kirby Affidavit, at ¶3, *passim*. Accordingly, Taunton submitted the Kirby Affidavit as a means to point out that EPA's new charts (1) were in error, and (2) were not developed from the database EPA alleged.

EPA might as well have handed Taunton the Fact Sheet for another permittee on a different waterbody and then substituted the correct one in the final permit action. Such a bait and switch approach to permitting clearly deviates from the "efficient, fair, and impartial adjudication of issues" required by 40 C.F.R. § 124.19. Any Taunton attachments responding to EPA's new charts, analyses, and data would have been in the final permit record if EPA had done a proper job in the first place. Accordingly, for both legal and equitable reasons, EPA must either re-publish the permit such that the public has an opportunity to comment on all of the new information and analyses or the Kirby Affidavit must be allowed in the record as it reflects the City's first opportunity to demonstrate that EPA's latest scientific creation has severe and unexplainable errors.[6] In either case, EPA's Motion must be denied.

b. The Kirby Affidavit does not count towards Taunton's page allotment

EPA also argues that allowing the Kirby Affidavit impermissibly expands the word count associated with Taunton's Petition Reply. *See* EPA Motion to Strike, at 2-4. This argument is easily dismissed, as the page limit allotted to filings before the Board – requirements Taunton does not dispute – has no bearing on whether technical analyses, reports, and opinions such as the Kirby Affidavit may be referenced in a filing and/or included in the administrative record. Although technical reports/analyses undoubtedly render a conclusion about an EPA course of action, parties routinely cite to such documents in their filings without having to worry about the referenced documents themselves counting toward page limitations. If EPA's arguments regarding word count were true, every technical report or professional opinion letter (which are often quite lengthy and detailed) would be subjected to the page limit. The Board's rules,

[6] In its opening petition, the City unquestionably raised all of its procedural objections and noted serious technical discrepancies in EPA's claimed scientific bases for the limits. However, until all records (and databases) were made available, it was simply impossible for a detailed assessment of EPA's graphs to occur. To date, it is still not apparent what database EPA used, since the graphs cannot be recreated from the database provided to Taunton.

however, contain no such requirements. Moreover, under EPA's view, the Agency could "sandbag" on the true technical basis for a proposed permit, only to release it after the public comment period closes, thus forcing a community to use most of its Petition page allotment addressing the new technical claims. Clearly, administrative law edicts were not designed to promote such chicanery.

c. The Kirby Affidavit should be included in the administrative record

Finally, EPA argues that the Kirby Affidavit should be struck because the document was not part of the administrative record. *See* EPA Motion to Strike, at 3. For reasons similar to the first two arguments, EPA's "extra-record" material argument should be dismissed. While it is generally true that a party before the Board is limited to the record assembled by the Agency, there are several notable exceptions. For instance, a court may look beyond the record where "the completeness of the record or the good faith of the agency are at issue." *National Wilderness Institute v. U.S. Army Corps of Engineers*, 2002 U.S. Dist. Lexis 27743 at *9-*12 (D.D.C. 2002). Moreover, courts may consider post-decisional documents 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). This is particularly true when such post-decisional information shows whether an agency "decision was correct or not." *Nat'l Wilderness Inst.*, 2002 U.S. Dist. LEXIS at *10. Given that EPA "deliberately or negligently" prevented Taunton's review and consideration of critical permit documents and the Kirby Affidavit shows numerous EPA conclusions to be based on erroneous data analyses or, worse, artful fabrications, these cases addressing supplementation of the record are directly

applicable to the circumstances in this appeal. In short, EPA's game of "hunt the peanut" should not be countenanced. *Supra*, at 5 (*Connecticut Light & Power Co.*).

Beyond the pertinent and settled grounds for supplementing the administrative record, EPA's Motion misconstrues the scope of the Kirby Affidavit. In alleging that the Kirby Affidavit constitutes "untimely argument," EPA references irrelevant documents ("six memoranda" and "FOIA request documents") not addressed by the Kirby Affidavit. *See* EPA Motion to Strike, at 6-7. The Kirby Affidavit focused specifically on attempts to reproduce EPA's new charts with the database EPA claims it used to develop the evaluations. That is, the Kirby Affidavit could only be developed after the underlying database was provided to Taunton. As noted earlier (*supra*, at n.5), this did not occur until after the original Petition was filed. Consequently, the Reply brief was, in fact, Taunton's first opportunity to comment on the flaws in EPA's new technical assessments. Accordingly, the Kirby Affidavit should be considered by the Board in conjunction with its review of Taunton's permit.

d. The Summary Documents are simply summaries of material already in the record and should, therefore, not be stricken

EPA recycles many of the same arguments it used against the Kirby Affidavit (*e.g.,* over-length Reply, not in the administrative record, late-filed argument) in an effort to preclude the Board's consideration of Taunton's Summary Documents. However, these objections are all premised on the same fallacy – the Summary Documents contain argument.[7] Accordingly, as explained in more detail below, EPA's Motion must be denied.

The Summary Documents are not argument; rather, they are summaries or compendiums of excerpts and citations from both the administrative record and the parties' prior filings to this

[7] *See, e.g.,* EPA Motion to Strike, at 2 (Attachments "are in fact pure… argument."); *id.*, at 2 ("As such impermissibly extend and supplement the argument contained in the Reply…"); *id.*, at 3 ("expand the Reply by dozens of pages and thousands of words of additional argument.").

Board. While these summaries could certainly be helpful in evaluating claims made by the parties, they are not themselves arguments. For instance, in its Response Brief, EPA claimed that Taunton waived arguments at least seven times. Accordingly, Taunton prepared a Summary Document (Pet. Reply Att. 84) that, for each EPA claim of waiver, provided citations and excerpts of where Taunton previously raised the issue/argument. The excerpts and quoted language in this document were already in the record and were simply assembled in the Summary Document for the Board's consideration.[8] Under the applicable Board regulations, parties are expressly allowed to create and append such summary documents to their briefs without them counting against the word/page limitations. *See* 40 C.F.R. § 124.19(d)(2) ("Parts of the record to which the parties wish to direct the Environmental Appeals Board's attention may be appended to the brief submitted"); 40 C.F.R. § 124.19(d)(3) ("The … table of attachments (if any), … and any attachments do not count toward the word limitation."). Accordingly, EPA's argument that the Summary Documents impermissibly expand the page/word limitation must be rejected.[9]

Moreover, the Summary Documents submitted by Taunton did not introduce new issues into the proceeding. All of the Summary Documents – on their face – pertained to issues raised in Taunton's original Petition or EPA's Response Brief. For instance, the Summary Document citing the new and conclusory claims raised by EPA in its RTC (Pet. Reply Att. 80) followed up on arguments made by Taunton in its Petition (Pet. at 25-27), which were denied by EPA in its Response Brief. *See* EPA Resp. Brief, at n.9 ("Petitioner's assertion that the Region 'made new

[8] As evidenced by the length of Att. 84, if Taunton were forced to respond to each inaccurate EPA claim of waiver in its Reply Brief, it would have had to spend 9 pages of a 22-page filing simply citing previous record material.

[9] To the extent EPA takes issue with the titles of the Summary Documents (*see* EPA Motion to Strike, at n.1), the Court should strike the titles of the document. However, the content of these Summary Documents – excerpts of record material and previous filings – should stand.

(conclusory) claims,' *Pet.* at 25, is contradicted by the record."). Accordingly, EPA's claim that these documents – specifically Att. 80 – represent late-filed argument cannot be supported. Finally, EPA's claim that these Summary Documents are impermissible extra-record material misconstrues the intent and purpose of the attachments. As mentioned earlier, Taunton did not assemble and reference these Summary Documents for the purpose of having the documents added to the administrative record. Rather, Taunton included these attachments to efficiently summarize the exhibits and filings already in the record.

Therefore, because the Summary Documents simply recite material and language already properly before this Board, they do not constitute argument. For this reason, EPA's objections to the Summary Documents, which are premised on this inaccurate characterization – extra-record material, late-filed argument, and over length filings – hold no merit. Accordingly, EPA's motion to strike the Summary Documents must be denied.

WHEREFORE, for all of the aforementioned reasons, Respondent's Motion to Strike Certain Attachments to Petitioner's Reply must be denied.

Respectfully submitted,

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September 9, 2015

Counsel for the Petitioner

CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, September 9, 2015, a copy of the City of Taunton's Response in Opposition to EPA's Motion to Strike Certain Attachments was served on the individuals identified below by U.S. first-class mail, postage pre-paid, and e-mail:

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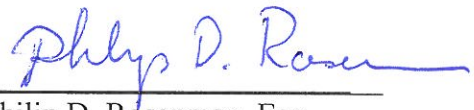
Dated on the 9th day of September, 2015.



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