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

In the Matter of:	)	
Town of Newmarket Wastewater Treatment Plant	)	NPDES Appeal No. 12-05
NPDES Permit No. NH0100196	)	

REGION 1'S OPPOSITION TO PETITIONER'S MOTION TO SUSPEND THE BRIEFING SCHEDULE, STRIKE APPENDICES, AND AMEND THE BRIEFING SCHEDULE AND PAGE LIMIT

The Great Bay Municipal Coalition's latest motion seeks to introduce more delay and more paper into these proceedings. The Coalition specifically requests the Board to: (1) indefinitely suspend the briefing schedule pending resolution of "evidentiary and administrative record issues;" (2) strike portions of EPA's Memorandum in Opposition to the Petition for Review due to a purported departure from the Board's Order Denying Motion to File Supplemental Brief and Allowing Reply Briefs; and (3) further extend the briefing schedule and enlarge the size of the Coalition's reply brief. Mot. to Sus. Br. at 2. Although the Coalition claims that a decision by the Board to deny this relief would functionally 'prevent' it from filing a reply, the grounds set out by the Coalition in support of that provocative assertion are both factually incorrect and legally without merit. Taken as a whole, the Coalition's request will materially impede, not advance, this Board's interests of administrative and judicial efficiency and, accordingly, should be denied. *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 to 08-06, slip op. at 19 (EAB 2009)

I. ARGUMENT

A. The Coalition Has Not Identified Any Basis to Suspend the Briefing Schedule

1. Any Remaining Issues Concerning the Content of the Administrative Record Are Immaterial to the Scheduling of These Proceedings and Do Not Warrant Suspension of the Briefing Schedule

The Coalition contends that disputes between EPA and the Coalition over the content of the administrative record counsel in favor of suspending the current briefing schedule, claiming that "EPA has chosen to exclude many" documents sought to be included by the Coalition. Mot. to Sus. Br. at 3. To underscore its point, the Coalition includes as Attachments 1 and 2 correspondence from the Coalition to EPA listing dozens of record items that the Coalition requested to be included in the final certified index. *Id.* This list was generated based on the Coalition's review of a working draft administrative record index that had been compiled by EPA prior to the filing of the final certified record on February 8, 2013.

In reality, the remaining differences over the content of the administrative record are insubstantial, in number and in importance, and provide no basis for a stay. Through the provision of Attachments 1 and 2, the Coalition leaves the impression that the parties diverge on dozens of material record issues, but this is illusory. The Coalition inexplicably fails to provide the Board with later correspondence, stemming from the Coalition's review of the final Certified Index to the Administrative Record, in which the Coalition confirms the number of documents actually at issue: nine. *See* Exhibit 1 ("Documents Missing from the Newmarket Administrative Record"). Of these nine documents, four were not included because they post-date permit issuance (consistent with Board precedent and EPA administrative record guidance), and the remainder were left out because they were not were not relied on by EPA, directly or indirectly (these

include correspondence solely between the Coalition and NHDES on which EPA was not copied).

The Coalition states that it intends to argue in a motion yet to be filed why these materials should be included in the record, but it never provides any explanation of the importance of these documents and why, as grounds for *this* motion, they would necessitate the extreme measure of suspending merits briefing. Even in cases where administrative record issues are far more prominent, the Board has not adopted the course proposed by the Coalition, and the Coalition provides no reason why it should do so here and why any dispute regarding appropriate items to be included in the administrative record cannot instead be resolved at the same time as the petition itself. *See, e.g.*, *In re Dominion Energy Brayton Point Station, LLC*, 12 E.A.D. 490, 511-32 (EAB 2006). Moreover, the Coalition would face the "high threshold" of proving that any newly produced documents should be part of the administrative record in this proceeding. *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 1-2 (EAB June 12, 2009) (Order Denying Stay and Establishing Further Briefing Schedule). These ill-supported and speculative grounds regarding administrative record issues thus provide no basis for holding the Board's decision making process in abeyance.

The Coalition also claims that EPA has requested that the Board "strike" deposition testimony from the record and that the uncertainty over whether the testimony "will be allowed in the final administrative record" necessitates delay in these proceedings to allow the Board to the rule on this issue. Mot. to Sus. Br. at 5. Once more, this is factually incorrect, and cannot serve as grounds for granting the Coalition's motion. The Coalition erroneously conflates the issue of whether the arguments based on

the deposition material were properly preserved for review—EPA argued that they were not—with whether these deposition materials were part of the administrative record. The deposition testimony is in fact included in the administrative record. *See* Certified Index to the Administrative Record at D.4. If the Coalition believes that EPA's legal argument is unconvincing, then it is free to offer counter arguments in its Reply for why the deposition-based arguments meet the Board's threshold procedural requirements. Whether and to what extent to rely on certain materials in light of background legal uncertainty is a commonplace decision faced by litigants; if this Board is to conduct its business with efficiency, predictability and finality, mere litigation uncertainty cannot justify a suspension of the main proceedings, especially not for the purpose of haltingly resolving matters that are at most subsidiary to this dispute, which is the Coalition's proposed course. Ultimately, the Board should take note that the Coalition has itself pointed to resolution of this artificial dilemma, acknowledging that there are (apparently) "other agency documents contained in the record supporting [its] arguments," that can be relied on in lieu of deposition testimony, Mot. to Sus. Br. at 4, so it is difficult to see how any harm will result if the Coalition must file a Reply prior to the Board resolving administrative record issues.

2. Issues Concerning the Applicable Evidentiary Standard Fail to Justify Suspension of the Briefing Schedule

The Coalition also claims that "a critical evidentiary issue"—the applicability of *Daubert* to determinations under 40 C.F.R. § 122.44(d)(1)(vi)(A)—must be resolved by the Board prior to the submission of any further briefing by the Coalition. Mot. to Sus. Br. at 8. The Coalition requests the opportunity to make additional written submissions on this specific issue.

While every litigant would prefer to have the legal issues it deems critical decided prior to filing its reply, this sort of stop-and-go adjudication is not designed to further the Board's interest in resolving this dispute with efficiency and expedition. The Coalition provides no persuasive justification for why, in this case, the Board should agreed to such an unprecedented departure from the Board's established practice and precedent. The Coalition's *Daubert* claim seems a particularly undeserving candidate for such piecemeal treatment. First, petitioner failed to preserve this issue by never raising it during the comment period. If it were so important and critical to the disposition of this permit proceeding—enough to the take the extraordinary step of suspending briefing in the case—it is a mystery why the Coalition failed to mention *Daubert* anywhere in its comments below. *See* Mem. Opp. at 66-67.

Second, the Coalition's request to submit standalone briefing on the applicability of *Daubert* cannot be reconciled with this Board's Order Denying the Supplemental Petition for Review, or with Board precedent. The Coalition makes no attempt to square its request for additional briefing on *Daubert*, an issue that was encompassed by the Board's denying supplemental briefing and limiting the number of pages on reply; while the Coalition may disagree with the Board's decision to deny a supplemental petition, the Coalition may not simply ignore that determination in asking for supplemental briefing on this issue outside the reply. Furthermore, it is axiomatic that a petitioner must raise all claims *and supporting arguments* in its petition and that an attempt to substantiate a claim with new arguments or otherwise supplement a deficient appeal through later filings must be rejected as tardy. *In re Aceribo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005). The Petition for Review was the

forum for the Coalition to make arguments about *Daubert*, and it should have availed itself fully of that opportunity—nothing in EPA's Memorandum in Opposition to the Petition for Review changes that fact. However, despite the purported importance of *Daubert*, the Coalition only offered a series of conclusory assertions about the case, unadorned by citation to relevant legal authority. Thus, even had the *Daubert* issue been preserved, the proper place for the Coalition to have offered supporting arguments to advance its legal theory was in the Petition, and the issue cannot now justify a stay of proceedings and additional briefing.

B. EPA's Memorandum Was Consistent With the Board's January 11, 2013 Order and Should Not be Stricken

The Coalition also asserts, without foundation, that EPA's responsive filing was inconsistent with the Board's Order Denying Supplemental Briefing and Allowing Reply Briefs, leading it to conclude that Appendices A and B should be stricken on fairness grounds. Specifically, the Coalition contends that "the Board has prevented" it from providing documents to meet specificity requirements by denying its request to file a supplemental petition for review, and that is has been unjustifiably "limited" to filing papers less lengthy than those submitted by EPA. Mot. to Sus. at 8-12.

The Coalition essentially argues that the inadequacies of its Petition—the Coalition's failure to set forth its arguments with specificity and to demonstrate how EPA failed to respond to comments—have now actually become the responsibility of the Region, because it opposed the Coalition's motion to file a supplemental brief, and of the Board because it denied that motion. This is a wholly misguided theory, and flies in the face of Board guidance and precedent governing petitions for review, and does not provide any basis for striking portions of EPA's Opposition. Although it was perfectly

capable of doing so, the Coalition simply neglected to adhere to basic procedural requirements in its Petition, and nothing about the length or nature of EPA's response or the Board's Order can alter this failing. The Coalition alone is accountable for the decisions it has made in crafting its Petition, and its attempts to now strike portions of EPA's response are unpersuasive.

The principal reason for denying the Coalition's motion was that the very length and detail contained in its filing belied any claim that it was not able to timely petition for review:

> [T]his is not a case in which a petitioner seeks permission to submit a bare-bones, summary petition identifying all of the issues to be raised by the filing deadline, followed by a substantive brief. On the contrary, the Coalition has submitted a one hundred and one page petition for review (including the table of contents), accompanied by fifty-three exhibits, detailing its objections to the Region's permit determination and the Coalition's rationale for Board review. As reflected in the table of contents, twenty-seven pages of the petition are devoted to detailing the Coalition's legal and procedural objections. Another thirty-nine pages are devoted to what the Coalition labels as "scientific" arguments supporting Board review. The Board is not persuaded that the Coalition has not had sufficient time to identify the issues and to substantively support its arguments or that additional time is warranted based on the circumstances presented.

Order, at 4-5. The Coalition's claim that it was "limited" in its ability to file a petition that met the threshold procedural requirements of the Board, Mot. to Sus. Br. at 11, and now requires additional pages and time to do so, is simply an effort to reargue matters already resolved by the Board and must be rejected. Although the Coalition has attempted to characterize the Board's denial of its earlier motion to file a supplemental brief as a *page* limit restriction, *see* Mot. to Sus. Br. at 9, 11, what the Board actually stated was that it was denying the Coalition's request for an extension of the *time* limit to file its appeal, *see* Order Denying Motion to File Supplemental Brief and Allowing Reply Briefs, at 1-2, 5 ("The Board is not persuaded that the Coalition has not *had sufficient time* to identify the issues and to substantively support its arguments or that *additional*

time is warranted based on the circumstances presented.") (emphasis added). If the Coalition was able to assemble 98 pages of argument and 2,200 pages of exhibits, it surely could have marshaled those considerable resources toward preparing a brief that actually complied with this Board's unambiguous procedural requirements.

The Coalition must accept the consequences of the filing it has made, and should not be heard to complain when EPA takes necessary and appropriate steps to respond to it, including carrying out its obligation to point out where a petitioner has failed to meet threshold procedural requirements.[1] EPA's responsive filing was purely a function of the Coalition's complex and extensive submission, which was comprised of myriad legal, technical and scientific claims, combined with over 2,000-pages of technically-oriented exhibits; this complexity was then compounded by lack of citation or specificity. EPA's responsive filing was in no way inconsistent with the rationale underlying the Board's Order, but was directly designed to advance the aims of judicial economy and efficiency by providing the Board (as the Coalition did not) with references to where in the record the Coalition's claims were addressed both in the Coalition's exhibits and in the record, so that the Board could make sufficient sense of them to render a decision. EPA constructed its response to clearly and without distraction provide the Board with the critical arguments necessary to dispose of the case in its main filing, and presented other detailed scientific argument and information in the Appendices. EPA did not characterize the Appendices as unnecessary or superfluous, but merely indicated that they were not *dispositive* of the case. *See* Mem. Opp. at 40 n. 26. This material, to be

[1] The Coalition seems to suggest that the 50-page length recommendation should be used as a rationale for striking portions of EPA's brief, but if that is true, it should apply with equal force to its Petition for Review. Having been ignored in the first place by the Coalition, this clearly is not a productive benchmark for deciding the issues presented in the Coalition's motion.

sure, is still relevant and highly useful to the Board as it provides EPA's position on numerous assertions made in the Coalition's Petition and before this Board. The mere fact that EPA's main brief when combined with the Appendices extended beyond the number of pages in the Coalition's filing is an arbitrary distinction, and it should not be the fulcrum for deciding this motion. What matters is whether EPA's responsive filing is substantive and, given the confusing and thinly-cited nature of the Coalition's Petition, whether that filing will facilitate an orderly and efficient navigation by the Board through a record that all parties have acknowledged is expansive and complex.

EPA's responsive filing is a far cry from the only case the Coalition cites as a basis to strike Appendices A and B. The Board rejected a 221-page long brief in *In re Rocky Well Service, Inc.*, SDWA Appeal Nos. 08-03 & 08-04, at 1 (EAB Dec. 15, 2008) (Order Rejecting Brief Because of Excessive Length and Requiring Revised Brief), not because of its length *per se*, but on the grounds that it was "verbose" and "redundant"; these characteristics of the filing resulted "in a lack of clarity and an excessive page count." The Coalition has not alleged that EPA's filing is unclear or will be unhelpful to the Board given, for example, the lack of citation in the petition, but to the contrary it is replete with "excessive substantive arguments." Mot. at 12. EPA agrees that the material in Appendices A and B is indeed "substantive," not superfluous, and will assist the Board in its consideration of the highly specialized technical pending before it matters.

C. The Coalition Does Not Provide Adequate Justification for the Additional Time and Page Length Increases

The Coalition contends that it requires an additional 50 to 90 pages for its reply brief, and an additional 28 days to file its brief, depending on whether the Board decides

to strike Appendices A and B, given the length of EPA's filing, as well as subsequent amicus filings in support of the permit by NHDES and CLF, the Town of Newington and New Hampshire Audubon.

The Coalition has not provided any persuasive basis for extending the briefing schedule, which would rival the timeframe for filing a petition for review itself. This outcome does not stand to reason; the function of a reply is to narrow and focus relevant issues for the Board, and the Coalition will not be addressing new issues in its reply. Similarly, the Coalition does not provide any substantive basis for its request to expand page limits. While the Coalition states that it is based on its intention to reproduce deposition testimony verbatim, this merely represents the Coalition's preference in terms of presenting its argument; pinpoint citation to exhibits already provided to the Board will do.

More fundamentally, the Coalition appears to be suggesting that it requires additional pages in order to address procedural deficiencies in its Petition. It is certainly not the purpose of a reply to engage in that task. A petition for review is not a wind up:

> The petition should contain all supporting argumentation. Petitioners should be aware that "[a] petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing. Although additional briefing may occur in the event formal review is granted, the discretion to grant review is to be sparingly exercised, and therefore, . . . a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted.

EAB Practice Manual, at 42 (June 2012) (quoting *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993)); s*ee In re Carlota Copper Co.*, 11 E.A.D. 692, 735 (EAB 2004) ("The part 124 regulations governing permit appeals only contemplate the filing of one document, that is, the petition for review, and the Board has repeatedly emphasized that a petition must be thorough, detailed, and well-supported."). Moreover, a

demonstration that a petitioner has satisfied procedural thresholds (*i.e.*, issue preservation) must be made in its petition; petitioner cannot rely on a reply to make such showings. *In re Aceribo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005). Moreover, a petitioner should not even count on a right of reply, much less one of length or nature now sought under this motion. EAB Practice Manual, at 49 ("After the permitting authority's response has been filed, the EAB normally does not require further briefing before issuing a decision whether to grant review"); *see, e.g.*, *In re City of Keene Wastewater Treatment Facility*, NPDES Appeal No. 07-18 (EAB Jan. 13, 2008) (Order Granting Motion for Leave to File a Reply) (A petitioner is not entitled as of right to file a reply brief).

Nevertheless, the amicus filings of CLF and NHDES represent independent and distinct points of view on these permitting matters, and may be difficult to address, along with EPA's Opposition, in a single consolidated reply. Accordingly, EPA would not object to an expansion of page limits to deal solely with these two separate filings. However, EPA respectfully requests that the Board consider any necessary page limit adjustment in light of the Coalition's Motion for Reconsideration of the Board's February 7, 2013, Order Granting Motion to File Amicus Brief. That Order, at p. 2, specified that the Coalition could "comment" on the NHDES' amicus filing, but only within the parameters of its existing 25-page reply. Notwithstanding that very clear instruction from the Board, the Coalition went on to submit an additional *15 pages* of detailed, substantive argument in its Motion to Reconsider.

REQUESTED RELIEF

The Coalition has failed to demonstrate good cause to strike portions of EPA's responsive brief, and doing so will impede the orderly, accurate and expeditious disposition of this matter. Neither has the Coalition stated adequate grounds to suspend the briefing schedule based on administrative record or evidentiary issues, nor to justify the dramatic expansion of page limits and extension of time to file its reply brief it seeks in its motion. While EPA would not oppose a limited expansion of page limits in light of filings made by CLF and NHDES, the Coalition's motion should be denied in all other respects.

Dated: February 20, 2013

_____

Samir Bukhari
US Environmental Protection Agency
Office of Regional Counsel, Region 1
5 Post Office Square - Suite 100
Mail Code: ORA 18-1
Boston, MA 02109-3912
Tel: (617) 918-1095
Fax: (617) 918-0095
Email: bukhari.samir@epa.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Petitioner's Motion to Suspend the Briefing Schedule, Strike Appendices 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
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460-0001

By First Class U.S. Mail:

Mr. John C. Hall
Hall & Associates
1620 I Street, NW, Suite 701
Washington, DC 20006-4033

Evan Mulholland, Assistant Attorney General
Environmental Protection Bureau
Department of Justice
33 Capitol Street
Concord, NH 03301

Thomas F. Irwin, Esq.
Vice President & CLF New Hampshire Director
Conservation Law Foundation
27 North Main Street
Concord, NH 03301

Michael T. Racine, Esq.
PO Box 644
Hillsborough, NH 03244

Dated: February 20, 2013

_____
Samir Bukhari
US Environmental Protection Agency
Office of Regional Counsel, Region 1

5 Post Office Square - Suite 100
Mail Code: ORA 18-1
Boston, MA 02109-3912
Tel: (617) 918-1095
Fax: (617) 918-0095
Email: bukhari.samir@epa.gov