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 RESPONSE TO EPA'S OPPOSITION TO THE MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Petitioner, the City of Taunton, Massachusetts ("Taunton" or "the City"), hereby files this Reply in support of its Motion to supplement the administrative record. As discussed below, Respondent's, United States Environmental Protection Agency ("EPA," "the Agency," or "Region") Response in opposition does not dispute the applicable case law cited by Taunton, which describes the kind of circumstances that courts consider "exceptional" enough to warrant supplementing the administrative record with post-decisional records. Such situations include when the post-decisional documentation (1) was known to the agency when it made its decision, (2) directly relates to the decision, (3) demonstrates an agency's decision to be incorrect, and/or (4) is adverse to the agency's decision. Taunton Motion, at 2-3 *citing Cnty. of San Miguel, The Fund for Animals, National Wilderness Institute, Afghan Am. Army Servs. Corp., Esch, Seacoast Anti-Pollution League*. As each of the documents Taunton seeks to include in the administrative record qualify under at least one of these rationales, the Court should grant this Motion and admit the documents.

I. ARGUMENT

a. EPA does not dispute applicable record supplementation caselaw

As noted by EPA, the complete administrative record for a permitting decision is to contain "all documents, materials, and information that the agency relied on directly or indirectly in making its decision." EPA Opp., at 1. However, EPA's Response does not dispute that 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. *See* Taunton Motion, at 2 (*National Wilderness Institute*). Moreover, EPA does not refute Taunton's caselaw instructing courts to consider post-decisional documents when admission serves as the basis for "correcting erroneous assumptions, predictions, or facts forming the predicate for agency decision-making…" Taunton Motion, at 2 (*Afghan Am. Army Servs. Corp.*; *Esch v. Yeutter*). This is particularly true when such post-decisional information shows whether an agency "decision was correct or not." *Id.*, at 4 (*Nat'l Wilderness Inst.*). Finally, EPA does not contest that 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. *See Id.*, at 2 (*Seacoast Anti-Pollution League*). While EPA repeatedly espouses an "exceptional" standard for supplementing the administrative record, it fails to dispute any of Taunton's caselaw setting forth the circumstances that constitute "exceptional."

b. EPA cannot withhold information until after the close of the comment period and then seek to exclude the post-decisional documentation that was developed in response to such information

This Board has 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); *see also* 40 C.F.R. Part 25. The NPDES regulations themselves allow for the inclusion of objections based on information not available when the permit comment period closed. 40 C.F.R. § 122.18. This is particularly important, as it was EPA's introduction of extensive new information justifying its permit action in its Response to Comments document ("RTC"), never previously disclosed to the public, that created the need to confirm the veracity of certain critical agency claims. The fact that EPA's untimely release of critical documents brought about post-decisional documents from Taunton should not inure to EPA's benefit. Endorsing such an approach – developing permits via the creation of *post hoc* rationalizations – would eviscerate the purpose and intent of the comment period and prevents public review of the actual bases for final decision making. *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).

c. Exceptional circumstances exist to supplement the administrative record with the Howes letter

In its Opposition, EPA asserts that the City's effort to supplement the administrative record with the letter written by Dr. Brian Howes, the Massachusetts Estuary Project ("MEP") leader, is improper as the City should have been able to fully solicit comments from Dr. Howes after publication of the Agency's Fact Sheet. Opp. at 3. However, the Fact Sheet reference quoted by EPA merely noted that the Agency adhered to the procedures developed by the MEP. As part of its comments, Taunton noted that EPA failed to provide the data and analyses demonstrating EPA's adherence, or lack thereof, to such a process. It was not until EPA released the RTC that the City was presented with much more complex assertions and claims made by EPA regarding the Regions' consistency with the MEP process. Taunton Motion, at 3; *see* Pet., at 29-32, 34-35. EPA's Response does not dispute this fact. This admission is critical, as it was

these post-permit issuance EPA representations regarding specific MEP demonstrations about consistency with prior TMDL actions that prompted the City to seek input from Dr. Howes – who was involved in developing those TMDLs. In summary, EPA sought to bolster its record with new RTC claims and now seeks to exclude documentation submitted on the new information. As noted earlier (*supra*, at 2-3), EPA simply can't have it both ways.

Moreover, the Howes letter verifies that EPA's claims of consistency with the MEP process are blatant fabrication and cross the line to "fraud on the court." The letter quite clearly confirms that EPA fabricated the claim that its approach was the same as that found in other approved TMDLs for Massachusetts estuaries. This certainly qualifies as an "exceptional" reason for post-issuance inclusion in the record as the Board may supplement a record where post-decisional information shows that an agency's "decision was correct or not." Taunton Motion, at 4 (*Nat'l Wilderness Inst.*). It is, therefore, no surprise that EPA would seek to exclude this letter from the administrative record given the testimony and irrefutable conclusions from the key expert on the subject. However, under the standard for supplementing a record, this document clearly qualifies because its admission seeks to "correct[] 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). As the Howes letter provides clear evidence that EPA misrepresented itself to the EAB and showcases the Agency's failure to adhere to the MEP process, it clearly meet the "exceptional circumstances" requirement to supplement the record.

In summary, the Howes letter explicitly demonstrates that, contrary to EPA's claims, the Agency's approach in the Taunton permit has failed to follow the MEP process and EPA's own guidance materials. EPA requires some objective evidence within the record to maintain its

stance on proper application of MEP methods, but the Howes letter confirms that such evidence is lacking. As the need for the letter did not become apparent until EPA's RTC and the letter reveals a clear intent to mislead the Board on a key issue in the case, it should be otherwise allowed into the administrative record to avoid fraud upon the court. *Shepherd v. ABC*, 62 F.3d 1469, 1476 (1995), *citing Aoude v. Mobil Oil Corp*., 892 F.2d 1115, 1118 (1st Cir. 1989) (a "fraud on the court" occurs where it can be demonstrated, clearly and convincingly, that a party intends to interfere with a court's impartially by hampering the presentation of the opposing party's claim or defense).

d. The FOIA response should be included in the administrative record as evidence of EPA's efforts to prevent Taunton's access to critical data and information

EPA seeks to exclude EPA's May 7, 2015 FOIA response because of its post-permit creation, the fact that it was not relied upon by the Agency in drafting Taunton's permit, and because the responsive records to said response are already included in the administrative record. Opp. at 4, n. 2. These arguments, however, entirely miss the primary reason Taunton seeks to include the response in the record. That is, EPA's FOIA confirms how the Agency repeatedly refused the timely release of the records used in the drafting and justifying of Taunton's permit, despite repeated informal and formal requests to EPA. The letter in question represents the culmination of the repeated inquiries and requests for documents made during the permit development stage. Furthermore, this response letter and the accompanying records were not released until a Complaint was filed in the U.S. District Court for the District of Columbia over EPA's failure to comply with basic FOIA requirements. Petition at 10. The response also shows that EPA's release of the data and analyses used in formulating the City's permit did not occur until 5 days before the EAB appeal was due.

Inasmuch as the letter non-speculatively demonstrates that EPA's actions in the permit development process were abusive and secretory, the document qualifies as an "exceptional circumstance" to warrant supplementation of the record. *Town of Newmarket*, slip op. at 77 (*citing Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 155-56 (D.D.C. 2012)). Stated differently, because the letter memorializes EPA's purposeful obfuscation designed to cover up Agency shortcomings during the permit process, it should be admitted as "[t]he agency may not skew the record in its favor by excluding pertinent but unfavorable information." *Fund for Animals*, 391 F. Supp. 2d. at 197 (D.D.C. 2005), *citing Envtl. Def. Fund v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978).

In an effort to downplay the abusiveness of its untimely production of documents, EPA claims that it invited Taunton to view "records" in Boston in September 2014 and/or that the records were, otherwise, available for Taunton's review. Opp. at 5. However, EPA's argument in this regard is a pure smoke screen for numerous reasons. First, nowhere does EPA demonstrate that the records released on May 7, 2015, were actually contained in the permit file in September 2014. In fact, a number of the released documents were not even in existence when EPA extended its "invitation." *See,e.g.*, Exs. 5, 6, 7 (documents produced in May 7, 2015, FOIA response that were authored after September 2014). Second, even if some of the documents were in existence, extending an invitation to review records or preparing an index of the record is not equivalent to identifying the records supporting specific EPA claims made in permit meetings. The May 7, 2015, FOIA response is the only document within EPA's compendium that fully describes which records were applied to what issue. Nothing in the RTC, or post-RTC communications with EPA demonstrated what data were used by the Agency to formulate specific conclusions. EPA's invitation did not meet the public participation requirements under

40 C.F.R. § 25.4. It was simply another illegal case of "hide the ball." *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals*, 297 F.3d 14, 21 (1st Cir. 2002).

It is clear that EPA has been untruthful about what was placed in the record and when, presumably to cover up the fact that they purposefully withheld critical records from Taunton during the permit review process, only to spring them on the City at the last minute before its EAB filing deadline. The EAB should not countenance such record hijinks. Accordingly, the Board should admit the May 7, 2015 FOIA response as it evidences EPA's "exceptional" efforts to purposefully withhold documents from Taunton.

e. The NJDEP Response to Comments should be admitted as it reflects EPA's existing interpretation of a permit condition challenged by Taunton

In its original Motion, Taunton sought to supplement the record with the New Jersey Department of Environmental Protection's ("NJDEP") response to comments because (1) the information was previously unavailable, (2) it demonstrates the working law of EPA Headquarters regarding the precedential scope of *Iowa League of Cities v. EPA*, 711 F. 3d 844 (8th Cir. 2013) and the blending prohibition that was vacated therein, and (3) the City is seeking to employ blending but has a bypass condition in its permit that would be subject to EPA Headquarters' working law. EPA seeks to prevent NJDEP's RTC into the administrative record because, according to the Agency, there is no proof Region 1 relied upon this document and the admission of such information would improperly allow EAB to render a decision as to the legality of blending. Opp. at 6.

EPA's arguments are entirely off base and, in a word, disingenuous. The NJDEP document is important as it represents EPA Headquarters' "working law" on the viability of blending peak CSO flows across the Agency as a whole. NJDEP was just reporting what EPA told them that they must do on CSO-related permits. Though NJDEP might have received the

instructions from Region 2, the position stated represents the policy of EPA in all non-Eighth Circuit jurisdictions. Notably, EPA's Response does not dispute that this is, in fact, the "working law" or that Region 1 is now enforcing the vacated blending prohibition on municipalities. Similarly, EPA's Response does not dispute its awareness of Taunton's wishes to utilize blending to comply with CSO flow reduction mandates. EPA Opp., at 6.

Thus, as the NJDEP response to comments document was just recently made available and directly relates to this Region's interpretation of a condition in Taunton's permit, it should be admitted into the administrative record that frames this Board's review.

f. The op-ed article belongs in the administrative record because it confirms EPA rendered erroneous assumptions in the Taunton permit

EPA's opposition argues that admission of an April 29, 2015 opinion editorial article coauthored by the Region 1 Regional Administrator, Curt Spalding, should be precluded as it was released after permit issuance and refers to a different body of water. Opp., at 7. While this op-ed was published after permit issuance, it should still be admitted due to "exceptional circumstances" and as evidence correcting "erroneous assumptions" by the Agency. Specifically, the article provides independent corroboration – from the head of EPA Region 1 no less – of Taunton's claim that EPA is continuing to apply methods that are not scientifically defensible in developing nutrient limitation. *See* Pet., at Atts. 22 and 75.

While the article does reference Great Bay, it vividly depicts the process used to determine the need for (or to calculate) nutrient limits generally, a process that is *not* being applied in this permit appeal. Moreover, an EPA document admitting that the conclusions and conditions within a recent hotly contested permit appealed to the EAB – *Newmarket* – really aren't as justified as EPA originally claimed, is material to this case. Not only does this article confirm that EPA misrepresented the reasonableness of its position to the EAB in the *Newmarket*

appeal, it shows the Agency's abandonment of a far more rigorous and complex approach to permit drafting and acknowledges the Agency's need for more data. While this conclusion, again, pertains to Great Bay, it demonstrates that, if the more rigorously employed standards of the Great Bay project were deficient in their implementation, then Taunton's approach is certainly deficient.

In summary, the op-ed article provides "clear evidence to the contrary" of EPA's defense of the permit conditions in this case – straight from the mouth of EPA's own Regional Administrator. *Bar MK*, 994 F.2d at 740*; see also In re Port Auth. of NY & NJ*, 10 E.A.D. 61, 97-98 (EAB 2001); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010); *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 157 (D.D.C. 2012); *Franks v. Salazar*, 751 F. Supp. 2d 62, 67 (D.D.C. 2010); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005). Accordingly, this opinion piece written by Regional Administrator Spalding should be admitted into the administrative record.

II. CONCLUSION

For the aforementioned reasons, the documents referenced above should be included in the administrative record because they demonstrate (1) improper application of the MEP process, (2) "hide the ball" tactics with FOIA records, (3) continued use of *ultra vires* blending prohibitions, and (4) EPA's own admissions to the shortcomings of the process employed in the Taunton permit. Accordingly, Taunton requests a special hearing to see that these records are admitted to the administrative record and 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 Taunton be allowed to supplement the record with these documents for purposes of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, August 19, 2015, a copy of the foregoing Motion to Supplement the Administrative Record was served on the individuals identified below via electronic mail:

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Dated on the 19th day of August, 2015.

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