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

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In the Matter of:	)
	)
City of Taunton	)
Wastewater Treatment Plant	)
	)
NPDES Appeal No. 15-08	)
NPDES Permit No. MA0100897	)
	)

EPA REGION 1'S OPPOSITION TO THE MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

I. BACKGROUND

As this Board has noted on numerous occasions, 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." *In re Dominion Energy Brayton Point Station, LLC (Dominion I)*, 12 E.A.D. 490, 519 (EAB 2006) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)) (emphasis added); *accord In re Town of Newmarket*, NPDES Appeal No, 12-05, slip op. at 77 (EAB Dec. 2, 2013); *In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 to 10-05, slip op. at 48 (EAB Nov. 18, 2010); *In re Dominion Energy Brayton Point Station, LLC (Dominion II)*, 13 E.A.D. 407, 417 (EAB 2007); *see also* 40 C.F.R. § 124.17(a). Consequently, once the permit has issued, the administrative record is "officially closed," *In re City of Caldwell*, NPDES Appeal No. 09-11, at 16 (EAB Feb.1, 2011) (Order Denying Review); *see also Town of Newmarket*, slip op. at 76-77 (citing 40 C.F.R.

§ 124.18(c)), and may only be supplemented in "exceptional circumstances." *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72 (D.D.C. 2008); *see also Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). "Were it otherwise . . . the permitting processes would potentially never come to an end." *City of Caldwell*, at 16 (citing *In re BP Cherry Point,* 12 E.A.D. 209, 219-20 (EAB 2005)); *see also Dominion II*, 13 E.A.D. at 418. Moreover, an agency is entitled to a strong presumption of regularity in the designation of its administrative record, "absent clear evidence to the contrary." *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). Taunton has failed to show that "exceptional circumstances" exists or to otherwise meet the "high threshold" required to demonstrate that the Region improperly excluded documents from 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).

II. ARGUMENT

The City of Taunton proposes to add several sets of documents to the administrative record that postdate the issuance of the permit on appeal in this proceeding. *See generally Taunton's Mot. to Suppl. the A.R.* ("Mot."). Nevertheless, Taunton argues that the documents are "vital to this case," *Mot.* at 1, and that they should be added to the administrative record because, in the City's view, they correct "erroneous assumptions, predictions, and facts" used by the Region in its permit decision; were "negligently excluded"; "represent[] the basis for EPA's position"; or were "in the Agency's possession prior to permit issuance," *Mot*. at 3. But in all

cases, Taunton has failed to meet its burden to demonstrate that exceptional circumstances exist that warrant supplementing the administrative record.

A. Howes Letter

Taunton asserts that a letter solicited from Dr. Brian Howes, the Massachusetts Estuary Project ("MEP") Leader, after the permit was issued should be added to the record, because it 1) "confirms" claims the City has made that the reference-based approach the Region employed in this permitting decision is inconsistent with an approach under the MEP and, thus, not "scientifically defensible," *see RTC* at 50, 55, and 2) "independently confirms" the opinions of the City's consultants in this matter, *Mot*. at 3-4.

Taunton admits that the Howes letter post-dates the final permit, but claims that the need for the letter did not arise until EPA issued the RTC. *Id*. at 4. Notably, Taunton also admits that, "[h]ad EPA made this claim initially, Taunton would have inquired with Dr. Howes earlier in the process." *Id*. The Region made clear *in the Fact Sheet*, however, that:

> To determine an appropriate threshold concentration, EPA applied the procedure developed by the Massachusetts Estuaries Project of identifying a target nitrogen concentration threshold based on a location within the estuary where water quality standards are not violated, in order to identify a nitrogen concentration consistent with unimpaired conditions. This approach is consistent with EPA guidance regarding the use of reference conditions for the purposes of developing nutrient water quality criteria.

FS at 29 (emphasis added); *see also Response to Pet.* at 26 n.9, 29. In other words, EPA *did* "ma[k]e this claim initially." The City is, of course, free to disagree with the Region's analysis, but, as Taunton correctly concedes, the time for contacting Dr. Howes to critique that analysis was "earlier in the process," *Mot*. at 4, not *after* the final permit decision was issued. *See also* 40 C.F.R. § 124.13 ("All persons . . . who believe any condition of a draft permit is inappropriate . .

. must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period.”). [1]

Moreover, Taunton acknowledges that the Howes letter is cumulative, alleging that it echoes the opinions expressed by Taunton’s consultants. *Mot.* at 4. In such case, there is even less justification to disregard the general rule that the administrative record should not be supplemented with materials that were not considered by the agency and only generated after final permit issuance. *Town of Newmarket*, slip op. at 75-81; *see also Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng’rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006).

B. FOIA Documents

Taunton wishes to have EPA’s May 7, 2015 FOIA response letter added to the record even though it postdates permit issuance and was not relied upon by the Region for the final permitting decision; it should not be included in the administrative record for this reason alone.[2] Nevertheless, the City believes that it should be added to the record as purported evidence of an alleged “gross disregard for public due process rights.” *Mot*. at 5-6. Taunton’s premise is simply false.[3]

Although the City believes that the FOIA response letter somehow represents evidence of a violation of NPDES permitting public participation requirements,[4] *Mot.* at 5-6, the FOIA response was demonstrably *not* the first opportunity Taunton had to review information developed by the Region in response to comments raised by Taunton on the draft permit. “If

[1] Taunton also declines yet again to share the letter sent *to* Howes, so it is still unclear what characterization, or mischaracterization, of EPA’s actions he is reacting to.

[2] To the extent that the City seeks to have the documents that the Region included in the May 7, 2015 letter added to the record, *see id.* at 5 and n.2, the motion should be denied, because they are already in the administrative record – a point Petitioner’s Attachment 2 makes abundantly clear. *See also Resp. to Pet.* at 26-27.

[3] Taunton also seems to view the instant motion as an opportunity to rehash arguments made in the Petition for Review, *compare Mot.* at 5-6 *with Pet.* at 26-27, in violation of word limitations, *see* 40 C.F.R. § 124.19(d)(3).

[4] This is obviously not the proper forum to litigate FOIA claims.

new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record." 40 C.F.R. § 124.17(b); *accord In re Cape Wind Assocs.*, NPDES OCS Appeal No. 11-01, slip op. at 8 (EAB May 20, 2011). In addition, "[t]he administrative record for any final permit shall consist of . . . [t]he response to comments required by § 124.17 and any new material placed in the record under that section." 40 C.F.R. § 124.18(b)(4). Taunton's protestations to the contrary, this Board has long held that a petitioner's first opportunity to comment on new information developed by a permitting authority in response to comments properly occurs *after* permit issuance and during the appeals period. *Cape Wind*, slip op. at 12. Thus, the Region's RTC appropriately provided the City with the required notice regarding the Region's analyses and evidence added to the administrative record. *Id.* Consequently, a later FOIA response is irrelevant for purposes of the permit appeal, since Taunton had already been notified via the RTC of any new information and materials addressing comments raised by the City during the comment period.

Furthermore, nothing prevented Taunton from reviewing the administrative record before or immediately after permit issuance. Indeed, the Region extended multiple invitations to Taunton to review the record in advance of permit issuance – invitations the City declined to accept. *See* Attachment A (Email from John Hall, Hall and Associates, to Susan Murphy, EPA Region 1, dated September 30, 2014 "Re: City of Taunton – Draft Permit #MA0100897 – Supplemental comment submission and request for new analyses/reopening permit comment period") (AR.H.15); Pet. Ex. 29, at 2 (12/29/14 Letter from Regional Administrator Spalding to Mayor Hoye) at 2. Finally, Taunton's assertion that it had just five days to review the documents in the administrative record before filing its Petition for Review is further belied by the attached

email chain in which counsel for the City were provided with an index to the administrative record on April 22, 2015. *See* Attachment B. All this can hardly be said to evince a "gross disregard" of public participation requirements on EPA's part.

C. NJDEP Response to Comments

As noted in the Region's Response to the Petition, Taunton has invited the Board to render a decision on the overall merits of "EPA's position with regard to blending" in light of the Eighth Circuit decision in *Iowa League of Cities*, 711 F.3d 844 (8th Cir. 2013). *Resp.* at 43-45. In support of such action, the City now asks the Board in the instant motion to supplement the administrative record for the permit at issue in this appeal with excerpts from a response to comment document developed by the State of New Jersey Department of Environmental Protection ("NJDEP") for a state permitting action over which this Board has no jurisdiction. *Mot*. at 6-7; *see also Resp.* at 43-44. There is no indication, however, (or even allegation) that Region 1 relied on comments submitted by EPA Region 2 on a state permit issued by the NJDEP on any aspect of the permitting decision that actually is the subject of this proceeding. The irrelevance of the document is even further underscored by the fact that Taunton still has never tied it to any particular permit condition challenge in this proceeding, *see In re Buena Vista Rancheria*, NPDES Appeal No. 10-05 to -07 & -13, slip op. at 27-28 (EAB Sept. 6, 2011) (Order Denying Review), but rather seems to view this as an opportunity to relitigate the merits of the *Iowa* decision.

D. Great Bay Op-Ed

Finally, Taunton asks the Board to supplement the administrative record with an April 29, 2015 Op-Ed article coauthored by the Region 1 Regional Administrator, Curt Spalding, because, in the City's view, the "article confirms that utilization of simplified assessment

methodologies, such as that ratified by the Board in *Newmarket v. U.S. EPA* [sic], 16 EAD __ (EAB Dec. 2, 2013), are not valid and EPA will not continue to impose stringent TN limitations based on such analyses." *Mot.* at 7-8. Taunton further asserts that the article "provides a clear demonstration that . . . documenting causation is, in fact, a key component to demonstrate prior to imposing limitations." *Mot*. at 8.

The article should not be added to the record, because it postdates permit issuance, not to mention refers to a different water body in another state under separate water quality standards. Taunton's interpretations notwithstanding, it self-evidently does not "provide information of such significance that [its] inclusion in the record is important to reasoned decisionmaking" on the Taunton permit. *Town of Newmarket*, slip op. at 78. As a jointly-authored opinion piece for a local newspaper, even Taunton evidently found the article of little importance to the arguments it presented in its Petition, making only a passing reference to it in the Petition. *See Pet*. at 37. It may not now present new arguments based on this article that it failed to present during the original appeals period. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999).

III. CONCLUSION

For the foregoing reasons, the City of Taunton's Motion to Supplement the Administrative Record should be denied.

Dated: August 6, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing EPA Region 1's Opposition to the Motion to Supplement the Administrative Record, in the matter of City of Taunton Wastewater Treatment Plant, NPDES Appeal No. 15-08, was served on the following persons in the manner indicated:

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Dated: August 6, 2015

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