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March 17, 2016

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
Opposed Motion to Strike False and Misleading Testimony on the Record and to Supplement the Administrative Record with Deposition Testimony on these Issues

Dear Ms. Durr:

Attached please find for filing, the opposed motion to strike false and misleading testimony on the record and to supplement the administrative record with deposition testimony on these issues 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	)	

CITY OF TAUNTON'S MOTION TO STRIKE FALSE AND MISLEADING TESTIMONY ON THE RECORD AND TO SUPPLEMENT THE ADMINISTRATIVE RECORD WITH DEPOSITION TESTIMONY ON THESE ISSUES

The City of Taunton ("Taunton", or "City") hereby moves to strike certain testimony of U.S. EPA counsel given at the March 1, 2016 oral argument (and related record document statements), from the administrative, and oral argument, record. Statements made by EPA counsel are false and misleading, as measured primarily by the unrefuted administrative record. Taunton makes this filing under 40 C.F.R. § 124.19(n), which authorizes the Board to "take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal," as well as to impose sanctions including record submissions. Given the material prejudice of counsel's statements and the related documents, and the unyielding requirement that federal administrative, including adjudicatory, actions may not be based on false, if not fraudulent, and misleading statements, this action is necessary to ensure that the City, and the public interest it represents, is provided with the full measure of due process to which it is entitled.[1] EPA counsel has been contacted and opposes this motion.

[1] Separate from this filing, Taunton anticipates also moving to strike advocacy statements, and the introduction of entirely new issues and conclusions raised, *sua sponte*, by one or more Board members at the oral argument as also in violation of due process and fundamental fairness principles.

Alternatively, given that the identified statements and claims are thoroughly unsupported by, or are directly in conflict with, the Agency's own administrative record, and that the truth of these issues goes to the validity of the NPDES permit action, depositions of the Regional office personnel with actual knowledge of the veracity of these matters must be provided. If not, the Board will be accepting, if not enabling, undocumented and conflicted testimony of EPA counsel and staff as fact, thereby permitting, as well, *post hoc* justifications for the EPA NPDES permit decision, actions which are impermissible under the Administrative Procedure Act (APA, 5 U.S.C. §551*, et seq*.), and due process principles.

A. Standard of Review

While the Board is a review arm of EPA, staffed by EPA employees, it must nonetheless act in a manner that is fair and unbiased, and its procedures are to comply with certain basic norms of behavior, applicable in all judicial and quasi-judicial settings. As stated in *In Re Norman C. Mayes*, 12 E.A.D. 54, 94 (E.A.B. March 3, 2005):

> [As a general matter, our procedural rules] "depend on the presiding officer to exercise discretion throughout an administrative penalty proceeding." *In re Lazarus, Inc*., 7 E.A.D. 318, 334 (EAB 1997). The presiding officer is authorized to "[r]ule upon motions, * * * [a]dmit or exclude evidence, * * * [h]ear and decide questions of facts, law, or discretion, * * * and * * * [d]o all other acts and *take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues* arising in proceedings governed by these Consolidated Rules of Practice." 40 C.F.R. § 22.4(c). This authority includes the power to grant motions to amend pleadings to conform to the evidence presented at the administrative hearing. *E.g., In re Carroll Oil Co.*, 10 E.A.D. 635, 646-52 (EAB 2002); *In re Richner*, 10 E.A.D. 617, 628 (EAB 2002); *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449-51 (EAB 1999) (emphasis added)

A counsel appearing before a tribunal "has a duty to assert facts only if, after a reasonably diligent inquiry, he believes those facts to be true." *United States v. Williams*, 952 F.2d 418, 421 (D.C. Cir. 1991). Such a duty is more than a mere procedural matter, as the

American Bar Association's Model Rules of Professional Conduct Rule 3.3(a)(1) mandates that a lawyer shall not "knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." And attorneys representing the government – such as EPA counsel – are held to an even heightened standard. *United States v. Williams*, 952 F.2d, at 421. ("That the Government made these misstatements renders the conduct here even *more egregious*.") (emphasis added). This is particularly relevant for government attorneys as there is an "unqualified duty of scrupulous candor that rests upon government counsel in all dealings with" the courts. *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 358 (1963). *See, also*, USEPA *Permit Writers' Guide* directing correction of erroneous statements contained in the permit decision making record. *U.S. Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual,* Ch. 11.4.1.2, at 11-17 (2010).

A fundamental rule of administrative agency practice requires that factual conclusions be documented by objective information in an administrative record and not be conclusory in nature. *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (Courts "do not defer to [an] agency's conclusory or unsupported suppositions."); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (Courts may not defer to *post hoc* rationalizations by agency appellate counsel). Likewise, conclusory statements of those challenging EPA action are also rejected as a basis for decision making. *In re Town of Ashland Wastewater Treatment Facility,* 9 E.A.D. 661, 665 n.8 (EAB 2001) (conclusory contention without more is insufficient to demonstrate review is warranted under 40 C.F.R. § 124.19); *see also In re Charles River Pollution Control Dist.,* Order Denying Review, 16 E.A.D. ___, 5 (EAB 2015); *In re Dist. of Columbia Water and Sewer Auth.,* 13 E.A.D. 714, 758-760

(EAB 2008). It is also axiomatic that the agency may not knowingly rely on a "flawed, inaccurate or misapplied study" in rendering regulatory decisions. *Texas Oil and Gas Association v. EPA*, 161 F.3rd 923,935 (5th Cir 1998) (citing to *Humana of Aurora, Inc. v. Heckler*, 753 F. 2d 1579, 1583 (10th Cir. 1985). See, also *Columbia Falls Aluminum v. EPA*, 139 F. 3d 914, 923 (D.C. Cir. 1998) striking EPA regulation of spent potliners because "the standard has no correlation to the actual fate of the toxic constituents…".

When there are questions regarding the accuracy of an agency's representations, or clear gaps in the basic information surrounding agency decision-making, such circumstances allowing for depositions or record supplementation may be available to the regulated party. *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) (allowing supplementation of the record "when the agency failed to consider factors that are relevant to its final decision.").[2] This Board has also found "special circumstances" to exist to allow late flings in cases where the permitting authority has made mistakes or provided misleading information that directly led to delays. *See, e.g., In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n. 4 (EAB 2002); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997).

Finally, where there is evidence of "bad faith," fraud on the court, or unexplained anomalies in an administrative record that precludes the determination of key facts, deposition of agency officials is allowed. *Esch v. Yeutter*, 876 F.2d 976, 991 (D.D.C. 1989). In this context, offensive acts of counsel include, but are not limited to, "egregious" conduct that "attempts to [] subvert the integrity of the court itself" so that the tribunal "cannot perform in the usual manner

[2] *See, e.g., EPA NPDES Permit Writers' Manual*, at 204. ("A permit writer may be required to give a deposition during which the appellant attorney conducts the questioning that would otherwise occur in the hearing".)

its impartial task of adjudging cases that are presented for adjudication…" *Synanon Church v. United States*, 579 F. Supp. 967, 974 (D.D.C. 1984) (internal quotations omitted). More specifically, this would include "positive averments" by a government attorney that are "intentionally false, willfully blind to the truth, or is in reckless disregard for the truth" and are used to "deceive[] the court." *Rodriguez v. Schwartz*, 465 F. App'x 504, 509 (6th Cir. 2012).

B. Argument

In this case, the City of Taunton has identified clear misrepresentations, intentional half-truths, and purposeful misdirection by EPA staff, assisted by and through its undersigned counsel. Taunton had hoped that EPA would acknowledge and correct these obvious errors at oral argument or separately, under the notice and comment process; however, the opposite has proven to be true. For the purposes of this motion, Taunton will focus on three serious factual misrepresentations made by EPA in the administrative record, filings with this tribunal and by counsel at oral argument. (These are in addition to the numerous record errors and misstatements of EPA, which have been raised by the City in its separate filings.) The misrepresentations pertain to the following issues:

- EPA claims regarding Taunton's access to the newly created analyses and data, not discussed in the Fact Sheet and subsequent misdirection regarding the existence and location of such information that prevented the City's timely submission of comments on those new analyses;

- EPA claims to possess data and analyses demonstrating a causal relationship between nutrients, algal growth, and dissolved oxygen in the Taunton Estuary and subsequent admissions that the available data cannot support such analyses and demonstrations; and,

- EPA claims as to alleged errors and deficiencies associated with the EPA-approved 303(d) listings for the Taunton Estuary.

On each of these key issues, EPA has supplied the Board with oral and written statements and documents that are unsupported by any objective evidence, demonstrably false, willfully blind to the truth, or is in reckless disregard for the truth. Accordingly, pursuant to 40 C.F.R. § 124.19, this Board has grounds to either strike the statements and related documents, or, in the alternative, order EPA to submit to discovery (in the form of depositions) to elicit sworn testimony on the issues. *Supra*, at 4. This motion should be granted as the record on the three issues demonstrates "clear and convincing evidence of fraud on the court" as well as a violation of the "duty of candor" in EPA's development and defense of the Taunton permit.

a. EPA repeatedly misrepresented that Taunton had timely access to the newly developed analyses and the location of the requested records

Few issues are more basic to a fair NPDES program than the public's timely access to the documents that are the basis of decision-making. 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. *See,* 40 C.F.R. § 124.9, 124.10(d)(1)(vi); *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 215-216 (1980). 40 C.F.R. Part 25 also mandates full public disclosure and access to such information in permit proceedings. 40 C.F.R. §25.2(a)(2). Without such disclosure, informed public comment cannot be provided. *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.").

Yet, EPA counsel insisted, notwithstanding his full knowledge of the true factual record, and advanced before this Board, the factually unsupportable, and discredited, story of EPA compliance with its own disclosure rules, and with Federal statutory requirements. The following

recounts what accurately happened, and what a Federal Court said about EPA's tawdry record of subverting mandatory access requirements. The City has dedicated more of its limited resources than should be required to obtain the simple truth about the bases for Agency technical decision-making. Agency counsel cannot simply use the oral argument as cover for the Agency's misdeeds (and for which a financial penalty has already been assessed).

As thoroughly documented in Taunton's prior filings, the EPA Fact Sheet was devoid of technical analyses related to EPA's claimed demonstrated causal relationships between DO, algal growth and nutrients for the Taunton Estuary system. Long after the issuance of the draft NPDES permit for public comment, on September 10, 2014, EPA met with the City and claimed *to have new analyses* confirming the relationships and refuting the basic legal/regulatory/scientific objections raised in the City's initial comments.[3] After EPA made this announcement, the City repeatedly requested copies of those new analyses so it could review such information and provide further public comments. *See*, September 16, 2014 supplemental comment (Admin. Record D.2); October 7, 2014 FOIA request (Admin. Record I.4); October 14, 2014 FOIA (Admin. Record I.3); November 19, 2014 letter from Mayor of Taunton (Admin. Record H.19); February 2015 meeting with EPA RA Spalding and March 2015 emails to EPA Regional Counsel Bukhari (Admin. Record 36, 41, 43, 45, and/or 46). After receiving the FOIA request, EPA claimed it could not identify the records being sought (Petition at Att. 48, Nov. 3, 2014 FOIA response) thereby refusing to release the new analyses. On March 6, 2015, EPA Counsel Bukhari directed the City to find the new analyses in the Brockton permit file. (*See* Admin.

[3] These new analyses were created in response to Taunton's repeated observations that (1) none of the scientific claims made in the Fact Sheet were supported by any form of objective reviewable analysis (*e.g*., analysis of data for system confirmed nutrients caused impacts on dissolved oxygen and algal growth in the system, the Taunton Estuary system was subject to widespread eutrophication), (2) EPA's analysis was based on dated information that failed to assess current conditions in the estuary prior to requiring stringent TN control, and (3) no information in the record confirmed that the sentinel site reasonably reflected TN control needs in the Taunton Estuary or that it was a scientifically-defensible approach (as applied by EPA Region I).

Record H.45).[4] The Brockton files, however, did not contain the requested documents. Due to EPA's repeated refusal to provide the requested information, the City filed suit under FOIA. On April 7, 2015, *sua sponte,* EPA subsequently released hundreds of pages of new technical analyses and staff memoranda addressing the City's issues *after the close of the comment period – 7 days before the petition was due to be filed with the Board*.[5]

On March 8, 2016 the D.C. Federal District Court ruled that EPA's refusal to provide the requested documents was "obdurate behavior" and awarded $41,446.54 in fees and costs for EPA's illegal actions. *Hall & Associates v. U.S. EPA*, C.A. No. 15-286 (D.D.C., Order of 3/7/2016), at 10. (Copy enclosed). The Court stated that the requested record disclosure "provided means for reviewing government decisions for impropriety and errors." (*Id*. at 7). The Court noted that EPA's offer to come look at the files was not the same as providing copies of the specific records requested. *Id*. The Court further confirmed that the request for information was "motivated by the City's September 2014 meeting with the defendant concerning the proposed NPDES permit." *Id*. at 8. Finally, after noting that "the Court is dubious regarding defendant's insinuation that it could not reasonably decipher what records were being sought…," it concluded that "the Defendant engaged in obdurate conduct." *Id*. at 10 (*i.e*., "stubbornly persistent wrongdoing" – *Merriam Webster's*). This Board's review is now bound by this judicial determination regarding EPA's illegal actions and "obdurate conduct" related to public access to key records in this matter.

Under FOIA, EPA expressly claimed that it could not identify the records that contained the new analyses mentioned by EPA in the September 10, 2014 meeting in Taunton, MA.

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[4] Admin. Record H. 44 stated "First, regarding an "updated" nutrient analysis, an updated explanation by the Region of the basis for total nitrogen effluent limits in this watershed has been included in the recently released fact sheet for the Brockton AWRF draft permit…")

[5] These new analyses were the focus of the Kirby Affidavit.

Petition at Att. 48, Nov. 3, 2014 FOIA response. It is also clearly documented that in March 2015, EPA counsel specifically told Taunton's counsel that the new analyses were in the Brockton permit file, *not in the Taunton administrative file*. Admin. Record H.45. However, in filings with the Board, EPA averred that the new analyses were in the permit file, all along, since September 2014. EPA Resp. at 26 ("[M]aterials that EPA considered or relied upon for the permitting decision were already in the administrative record." *See also*, Memorandum of S. Murphy, dated March 13, 2014 – Admin. Record. O. 25).

EPA's filing with the Board (as well as the Murphy memorandum) was an obvious falsehood. If EPA knew the requested documents were in the permit file, it would not have issued a letter under FOIA stating that they could not even identify the records the City was seeking. Taunton, assumes that the Agency's statement under FOIA was a true statement, since a *purposeful refusal* to provide available documents under FOIA is a *criminal violation*. *See* 5 U.S.C. § 552(a)(4)(G). Moreover, if EPA knew the new analyses were in the Taunton file on March 6, 2015, EPA Counsel would not have directed Taunton counsel to look for those analyses in the Brockton file. Admin. Record H.45. At oral argument, counsel for Taunton, reiterated, in both its opening argument and again on rebuttal, that EPA had *purposefully withheld* the documents from the public to prevent the ability to submit timely comments and *misrepresented* their location, adversely impacting the City's due process rights.[6] Taunton counsel even read aloud the email from EPA Counsel Bukhari misdirecting the City's search. EPA counsel never denied that the statements *but instead denied that a lack of access occurred, and repeated the Agency's offer to come look at the permit file in rebuttal as proof of this fact*.

[6] The dates on the various EPA memoranda confirm that such analyses did not actually exist in September 2014, since the only administrative record information addressing the issues raised by the City, post-dated the FOIA request (*See e.g*., Admin. Record O 25). Thus, it is apparent that Ms. Murphy's reference to an offer to come review the permit file was a sham, intended to imply the existence of records that EPA knew did not exist at that time.

(Oral argument transcript at page 52, lines 11-20: “First of all, we would reject the suggestion that the permittee did not have the opportunity to examine the record. In correspondence that we have provided to the Board we very clearly invite on multiple occasions the permittees to examine the record, and that was consistent -- that's consistent with our obligation under the regulations. We had the administrative record and it was available for anyone to look at.”).

EPA’s averments that the records (new data and analyses mentioned by EPA at the September 10, 2014 meeting) were in the permit file the whole time and available for public review, must be taken as a willful misrepresentation given the Agency’s contrary written responses and the dates specified on the memoranda. EPA’s actions have seriously compromised Taunton’s due process rights by withholding and disguising the location of key information until after the close of the public comment period and, thereafter, from preventing the public from submitting timely supplemental comments that were required to be considered. Accordingly, the following record filings should be struck as false and misleading:

1. Admin. Record O.25 - March 13, 2015 memorandum to file prepared by Susan Murphy asserting records addressing the FOIA issues had been made available in the public files months earlier;
2. EPA Response to Comments at 2, claiming the new analyses and data records were made available to the public previously and therefore denying the need to respond to later submitted comments;
3. EPA’s Response at 25-26 claiming the requested records were available for public review;

4. EPA Counsel's oral argument averments (Oral argument transcript at page 52, lines 11-20) that claimed Taunton had earlier access to the new, post-Fact Sheet analyses prior to the close of the public comment period and completion of the permit action.[7]

b. EPA affirmatively misrepresented the existence of causal relationships confirming that nutrients controls are necessary to address adverse impacts on the DO and algal growth in the Taunton Estuary

With regard to the claim that nutrients from the City were well documented to be causing significant adverse impacts on the Taunton Estuary (*i.e.*, violation of narrative criteria, confirmed impacts on algal growth and low DO) warranting the imposition of stringent nutrient reduction requirements, EPA has made a series of admissions, on the record, confirming that the claims are false and unsupported by reliable data. First, when EPA originally released its draft permit, its Fact Sheet said:

> "The basic *cause* of nutrient problems in estuaries and nearshore waters is the enrichment of freshwater with nitrogen (N) and phosphorus (P) on its way to the sea and by direct inputs within tidal systems. […] EPA defines nutrient overenrichment as the anthropogenic addition of nutrients…*causing adverse effects or impairments to beneficial uses of a waterbody*." Fact Sheet at 14 (emphasis added, internal citations omitted).
>
> "The analysis focuses on the Taunton River Estuary because that area shows the greatest eutrophication impacts and greatest nitrogen concentrations." Fact Sheet at 26 (emphasis supplied).
>
> As part of its Response to Comments the Agency reiterated:
>
> "[T]he *causal relationship* among nitrogen, chlorophyll-a and dissolved oxygen is in fact *well understood and is supported by data* in this system." (Petition, Att. 15 (RTC) at 72)
>
> EPA's Dec. 29, 2014 letter to the City confirmed that algal growth needed to be controlled as it was the cause of the low DO condition in the system. (Petition, Att 28)

[7] Alternatively, the Board could order the deposition of the permit writer to confirm precisely when the new analyses were developed and placed in the administrative record. *Supra* at 4.

However, contrary to these EPA claims, the RTC admitted that the SMAST data could *not* be used to make such demonstrations:

> "EPA notes that the data collected in the SMAST survey was intended for a MEP analysis and *was not designed for stressor-response analyses*. EPA therefore did not apply the data in that manner, and does not expect the dataset to support statistically significant analyses when used for that purpose." Admin. Record A.2. at 51 (emphasis added).

In the face of these irreconcilable positions, at oral argument, EPA's story once again changed. EPA acknowledged the data deficiencies:

> "We fully acknowledge that based on the available data set, we are not capable to run -- *we are not capable of running statistically robust or defensible analyses that will show relationships over time between these eutrophic indicators*." Transcript at 42, lines 8-13 (emphasis added).

EPA also claimed:

> "We looked at water quality data, nitrogen impacts, and responses to nitrogen in terms of Chlorophyll-a, in terms of DO at more than almost two dozen different points of the estuary…[W]e found that there was widespread and longstanding cultur[al] eutrophication based on the pattern of causal and response variables; that is to say, elevated nitrogen, elevated Chlorophyll a, and dissolved oxygen that's careening between supersaturated and even hypoxia at times. And given this pattern of observed in-stream conditions throughout the estuary, not only at MHB16, EPA would determine that the entire estuary was suffering from nitrogen-driven cultur[al] eutrophication." Transcript at 39, lines 17-21; page 40, lines 4-14.

These RTC and oral argument admissions confirm that all EPA claims regarding a documented need to control TN in the Taunton Estuary are fabrications as they are based on data that are incapable of supporting such determination. First, it is indisputable that the Fact Sheet did not contain a single document showing any type of "confirmed" relationships for the Taunton system.[8] Second, the EPA has made the startling admission that the data SMAST could not be

[8] The only Taunton Estuary data presented in the Fact Sheet are from the SMAST database (FS –Tables 4 and Table 5) and have absolutely no associated analysis. *See* Fact Sheet at 21.

used to show a meaningful relationship between nutrients, algal growth and DO (*i.e*., no "defensible analyses that will show relationships…between these eutrophication indicators…"). Third, contrary to Counsel's belated representations at oral argument, there are no analyses confirming "patterns" of nutrient impacts anywhere in the record. In fact, there are no data analyses (reliable or otherwise) confirming the impact by Taunton's nutrient discharge on the Upper Taunton Estuary.

It is now clear that EPA apparently knew that the SMAST data could not be used to make the claimed "nutrient impairment" demonstrations but withheld this critical fact from the public.[9] Consequently, all of EPA's conflicting and obviously unsupported statements made in the record documents and at oral argument regarding data analyses and demonstrations confirming the adverse impacts of nutrients on the Taunton Estuary must be struck, including the following:

1. Fact Sheet statements that EPA confirmed nitrogen was causing or contributing to excessive algal growth and violation of the state's narrative standards (FS at 14 and 26).
2. EPA statements and analyses using the SMAST data to confirm the required level of TN control to avoid violating narrative criteria using the sentinel method and claiming such data were acceptable for determining the "threshold" when TN (through excessive algal growth) adversely impacts the DO regime. (FS at 29-30).
3. Response to Comments statements that improperly claimed that the causal relationships are documented for this system and demonstrate that the proposed TN reduction is necessary:

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[9] It is noteworthy that EPA's "data deficiency" admission appeared, for the first time, in the response to comments.

a. RTC at Response A1 (page 2) and related Responses at C12 and C29 – "loading targets and permit limits […] will ensure the health of this system"; Response A2 (page 3) "Dissolved oxygen (DO) monitoring also indicates continued impacts of algal blooms on DO…and violations of the DO water quality standards. See responses C12 and C29";

b. Response A2 (page 4) "Nitrogen limits consistent with the Fact Sheet analysis are necessary to ensure that water quality standards are met…";

c. Response C1 (page 35) in its entirety including, "Using the full suite of data from this comprehensive monitoring program of the Taunton River Estuary/ Mount Hope Bay system, EPA was able to characterize the transition from unimpaired to impaired conditions associated with increasing TN concentrations…";

d. Response C4 (page 42-43) in its entirety and related response at C29 including claim "EPA has independently determined that nitrogen discharges 'cause or have a reasonable potential to cause' violations of water quality standards with respect to both dissolved oxygen and narrative nutrient criteria.";

e. Response C17 (page 71-72) in its entirety, including claims that: "In addition, EPA specifically found that nitrogen discharges are in fact causing cultural eutrophication in the Taunton River Estuary and Mount Hope Bay….The Fact Sheet goes on to describe the extensive evidence supporting EPA's conclusion that nitrogen is causing water quality standards violation……the causal relationship among nitrogen, chlorophyll-a and dissolved oxygen is in fact well understood and is supported by data in this system. See Response C29."

4. Response Brief statements that improperly claimed EPA could use the available data to identify the relationships between TN, DO, and algal growth:
    a. Response at 5 claiming that EPA has "evaluated the available data concerning the TE and MHB and determined that both the TE and MHB have reached their assimilative capacity for nitrogen and are suffering from the adverse water quality impacts of nutrient overenrichment, including cultural eutrophication.";
    b. EPA Response at 9 claiming that "To determine an appropriate threshold concentration in the TE/MHB system based on site-specific data, EPA applied a procedure developed by the MEP…";
    c. All of EPA Response at 10 describing how it relied on the SMAST data to choose the protective TN level;
    d. Response at 12 in its entirety as it claims extensive analyses of the data to confirm TN impacts in various parts of the system; Response at 21 "EPA carried out a site-specific analysis using data from the Taunton Estuary and determined that a permit limit was 'necessary'…";
    e. Response at 25: "Petitioner's implication that EPA failed to consider site-specific information assessing the relationship between nitrogen discharges and eutrophic impacts in the TE is belied by the record…".
    f. Response at 29: "The target nitrogen threshold was not based simply on MHB16 but on the continuum of conditions within MHB…".

g. Response at 32: "EPA concluded that the available data showed, consistent with its predictions, continued algae blooms in MHB after the TN load reductions from the Brockton facility in connection with the 2010 upgrade.";

h. Response at 34: "EPA did not say that the data were insufficient to evaluate the effects of TN on the TE…".

5. Oral argument statements asserting EPA's confirmation of "patterns" of eutrophication and impacts of nitrogen (Transcript at 39, lines 17-22; page 40, lines 1-14.).

c. EPA misstatements regarding the deficiencies in the approved MassDEP's 303(d) listings are fabrications

As the Board is aware, the record is uncontested that the federally-approved Section 303(d) lists *do not identify* the Taunton Estuary waters as nutrient impaired. *See also* receiving water description, FS at 19:

> "Section 303(d) of the CWA requires states to identify those waterbodies that are not expected to meet surface water quality standards after implementation of technology-based controls. The State of Massachusetts has identified Mount Hope Bay and the lower reach[es] of the Taunton River Estuary for impairments due to organic enrichment/low DO, *with Total Nitrogen specifically identified as a cause of impairments in Mount Hope Ba*y." Fact Sheet at 19 (emphasis added); accord, EPA Response at 7. (emphasis added)

At oral argument, EPA counsel indicated that the approved Section 303(d) list *was in error* and "speculated" that "the State w[as] unable to assess the information that we [EPA] had in front of us." Transcript at 46, lines 7-11. EPA counsel sought to *create the fiction* that MassDEP failed to review the SMAST data and that specific Taunton listing (but not the Mount Hope Bay listing) was in error. These statements represent willful and/or negligent misrepresentations of the record, and law, to the Board, which are materially prejudicial to the

City. These statements must be struck from the record to assure the City of a fair and impartial review, for at least the following reasons: First, EPA's present averments stand in stark contrast to its formal Section 303(d) approvals since 2008. Admin Record J.2, J.3 and J.4 (for the Board's convenience, a highlighted version of the May 2, 2013 Region I approval letter (AR J.2) is attached to this motion). EPA *expressly* approved these listings as properly conducted using "existing and readily available data and information" as required by 40 C.F.R. § 130.7. *See, e.g*., J.2 at 4-6. Such "existing and readily available data and information" would, of course have included the SMAST data which were in MassDEP's possession since 2007. It is clear that this listing specifically identified Mount Hope Bay as nutrient impaired but *not the adjacent Taunton Estuary.* Second, MassDEP is competent to review and evaluate data as it has authored numerous nutrient TMDLs that have been approved by EPA. *See* MassDEP website for Nutrient TMDLs, *available at* http://www.mass.gov/eea/agencies/massdep/water/watersheds/total-maximum-daily-loads-tmdls.html. EPA counsel's speculation regarding State misfeasance (not actually reviewing all "existing and readily available information" despite written averments to the contrary) insults not only the State, but also attempts to provide a *post hoc* rationalization for a record that is not going his way; a step that is widely seen as forbidden in reviews of federal administrative decision-making. *See, e.g*., *SEC v. Chenery Corp*., 332 U.S. 194, 196 (1947) (post-hoc rationale may not be used to support agency decisions).

Under the Clean Water Act, EPA was required to formally object to the listing submissions if it believed them to be in error. 33 U.S.C. § 1313(a)(3)(C). At no point were such objections raised by the Agency. Moreover, such a determination is subject to notice and comment by the affected communities (40 C.F.R. § 130.6) and amendment may not occur

unilaterally or, by ambush, under the NPDES program.[10] Further, EPA counsel, by making this argument, sought to enlist the Board to place an EPA *imprimatur* on the Region's speculation, as if such affirmation could, by its nature, carry with it some lasting authorization. Such hope is a fabrication, as was Counsel's entire line of testimony, and should be struck as impermissible on a host of grounds (reckless indifference to the truth, *post hoc* rationalization, illegal testimony of counsel, etc.). Therefore, the following records, claiming/implying deficiencies in the approved Section 303(d) lists should be struck;

1. EPA Response at 20, 21 indicating MassDEP had never considered the SMAST data in rendering its Section 303(d) lists.
2. Oral argument statements of EPA Counsel regarding MassDEP's alleged failure to consider the SMAST data. Transcript at 46, lines 7-11.

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[10] To a certainty, Taunton has no obligation to "prove the waters are not impaired" to avoid receiving a nutrient limit, as implied by Judge Ward. Transcript at 6-7. Under the CWA, EPA, not the City of Taunton, plainly carries the burden to prove that a water quality based limit is "necessary to meet applicable water quality standards". Section 301(b)(1)(C). Regarding this issue, the 303(d) primary means by which both the state and EPA identify whether a waterbody is impaired by a particular pollutant using "reliable data". *See* CWA § 303(d) and 40 C.F.R. § 130.7. In this process, EPA, as well all other municipal and environmental interests, are given every opportunity to disagree with the state's listing. CWA § 303(d)(1)(D)(2); 40 C.F.R. § 130.7(d)(2). EPA has no authority to amend an impairment listing as part of the permit process. 40 C.F.R.§ 130.12(a).

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Petitioner respectfully requests that the highly prejudicial and objectively false and misleading statements made by EPA in the record and at oral argument, identified in this motion be struck from the record. Alternatively, the Board should order depositions for the persons responsible for the inconsistent and unsupported statements, review the results of that inquiry, under sworn testimony, and then decide how to best proceed.

Respectfully submitted,

_//s// John C. Hall________

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CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, March 17, 2016, 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:

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Dated on the 17th day of March, 2016.

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