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

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

**EPA REGION 1'S MOTION TO STRIKE**
**CERTAIN ATTACHMENTS TO PETITIONER CITY OF TAUNTON'S REPLY**

Respectfully submitted,

Samir Bukhari
Michael Curley
Assistant Regional Counsels
EPA Region 1
5 Post Office Square
MC: ORA 18-1
Boston, MA 02109-3912
Tel: (617) 918-1095
Fax: (617) 918-0095
Email: bukhari.samir@epa.gov

Of Counsel:

Pooja Parikh
Water Law Office
Office of General Counsel

Dated: August 6, 2015

## I. INTRODUCTION

Petitioner City of Taunton appends various documents to its June 30, 2015, "Reply in Support of its Petition for Review of NPDES Permit Issued by Region 1" ("Reply"), representing the following to be "attachments" under the Board's regulations:

> 1. Attachment ("Att") 79, styled "Factual and Legal Arguments Never Addressed by EPA Region 1 in Response to the Petition for Review";
>
> 2. Attachment 80, styled "List of New Claims Raised in RTC and Conclusory Statements Unsupported by Analysis in the Record (Including Obviously Incorrect Technical" Statements)";
>
> 3. Attachment 82, styled "Declaration of Benjamin M. Kirby" (the "Kirby Declaration"); and
>
> 4. Attachment 84, styled "EPA's Inaccurate Claims of Waiver" (collectively, the "Attachments").

Despite Petitioner's awkward attempt to pose these documents as attachments, they are in fact pure, if misguided, argument. As such, they impermissibly extend and supplement the argument contained in the Reply, at once violating the Board's unambiguous regulations governing the content of attachments, and equally crystalline requirements limiting the length of reply briefs. Compounding its already substantial procedural breach, Petitioner uses these documents to introduce late-filed argument, either ignoring, or unaware of, the Board's express prohibition against that practice in 40 C.F.R. § 124.19(c). In order to maintain the "efficient, fair, and impartial adjudication of issues arising in an appeal," 40 C.F.R. § 124.19(n), the Board should exercise its authority to strike these materials from the proceedings.

## II. ARGUMENT

### A. The Attachments Exceed the Page Limitations for Reply

Under the Board's rules governing the length of reply briefs, a party is limited to 7,000 words. 40 C.F.R. § 124.19(d)(3). In accordance with this regulation, Taunton certified that its Reply contained 6,998 words. *See* Reply, Statement of Compliance with Word Limitations. Although Taunton might have left a word or two unsaid in its Reply, it more than made up for that reticence in its attachments, which expand the Reply by dozens of pages and thousands of words of additional argument. Petitioner cannot evade the Board's procedural rules governing the length of replies by merely depositing large swathes of argument outside the brief and labeling them "attachments."[1] Petitioner's approach flouts the Board's regulations, under which attachments are expressly limited to the administrative record. 40 C.F.R. § 124.19(d)(2) ("Parts *of the record* to which the parties wish to direct the Environmental Appeals Board's attention may be appended to the brief submitted.") (emphasis added).

Petitioner's attempt to sidestep the Board's procedural rules by a drafting trick was, among other things, unnecessary, for the Board has established clear procedures for expanding the length of briefs. 40 C.F.R. § 124.19(d)(3). Under this provision, a party may file a brief longer than 7,000 words by seeking "advance leave" from the Board. It is true that obtaining such leave would have been difficult, as "such requests are discouraged and will be granted only in unusual circumstances," but that does not excuse Petitioner's failure to actually make the request, much less its failure, or inability, to "demonstrate a compelling and documented need to exceed such limitations," as required by 40 C.F.R. § 124.19(d)(3). "[M]ere complexity of issues or background" does not constitute such "'compelling and documented' need to exceed the word

[1] That Attachments 79, 80, 82 and 84 *are* argument is beyond dispute, a fact immediately obvious not only from their content, but also their titles ("conclusory statements unsupported by analysis in the record"; "obviously incorrect statements"), their subject matter (*e.g.*, legal waiver), Petitioner's own characterization (*e.g.*, Reply at 1, note 3, stating that attachment is comprised of Petitioner's "unrebutted legal and factual claims"), and sometimes all four.

and page limits." *In re Christian Cnty. Generation, LLC*, PSD Appeal No. 12-01, at 3 (EAB June 14, 2012) (Order Establishing Filing Deadlines for Amended Petition and Responses to Amended Petition, and Order Denying Motion to Exclude and Denying in Part Motion for Leave to Exceed Page Limit)

Having failed to ask permission from the Board to exceed the length limitation indisputably applicable to its Reply, Petitioner has no cause to ask for forgiveness. The Board's rules should uniformly govern the behavior of all parties to this permit proceeding. The procedures governing the length of replies were specifically added to the Board's regulations to provide "guidance on the form and content of submissions to the Board," with the objective of "improv[ing] the quality and consistency of filings before the Board, which will also contribute to greater efficiency." 78 Fed. Reg. 5281, 5283 (Jan. 25, 2013). Petitioner's unexplained departure from the procedures carefully crafted by the Board to manage its docket in an orderly fashion undermines the stated objectives behind the rule changes, which is to "provide greater clarity and efficiency to the appeals process." *Id.* Petitioner's sleight of hand is transparent, and its failure to adhere to the Board's procedures is corrosive to the "efficient, fair, and impartial adjudication of issues arising in an appeal." 40 C.F.R. § 124.19(n).

Based on the foregoing, the Region respectfully requests that the Board strike the Attachments.

### B. Attachments 80 and 82 Are Comprised of Late-Filed Argument

The Board has consistently held that new arguments "raised for the first time at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). A petitioner may not, moreover, "attempt to use [its] Reply Brief to substantiate [its] claim with new

arguments . . . . Petitioners should have raised all their claims and supporting arguments in their petitions." *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005).

The Board should strike Attachments 80 and 82 as late-filed argument. Even in assigning a title to Attachment 80—"List of New Claims Raised in RTC and Conclusory Statements Unsupported by Analysis in the Record (Including Obviously Incorrect 'Technical Statements')"—Petitioner concedes that these arguments could have been made in the Petition, if only Petitioner had more closely examined the Region's Response to Comments. Petitioner has not provided any cogent explanation for this lapse, only alleging that the information in the Response to Comments to which it now objects should have been included in the Fact Sheet, where it would have been subject to comment by Petitioner. The fact that the Region added information to the administrative record in the course of responding to comments does not present any infirmity in the permitting process—that is, after all, the very purpose of a response to comments—and does not provide a justification for failing to object in a timely manner to an issue in the Petition for Review. As the Board has explained:

> The suggestion that the permitting authority must include in the fact sheet of a permit decision all of the information used in informing its final permit determinations is mistaken.[2] While a fact sheet must include certain information, *see* 40 C.F.R. § 124.8, [footnote omitted] the permitting authority is not required to provide comprehensive details in a fact sheet. [footnote omitted] The rules governing permit proceedings specifically allow the permitting authority to add materials to the administrative record during its review of comments on the draft permit to address new points or new material. [footnote omitted] We have stated that the appeals process affords petitioners the opportunity to question the validity of documents included after the closing of the comment period. *See In re Caribe Gen. Elec. Prod., Inc.*, 8 E.A.D. 696, 705 n.19 (EAB 2000), appeal dismissed per stip., No. 00-1580 (1st Cir. 2001). We have also stated that

[2] "The permitting authority is only required to '*briefly* set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit,' and, when applicable, include '*[a] brief summary* of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record.'" 40 C.F.R. § 124.8(a), (b)(4) (emphases added)."

> the response to comments, not the fact sheet, provides the Agency's final rationale for its decision. *See Dominion Energy*, 12 E.A.D. at 533.

*In re City of Attleboro*, 14 E.A.D. 398, 462-63 (EPA 2009). Petitioner's claim that it lacked meaningful notice of the issues because the Region allegedly "withheld information" and failed to disclose analyses is immediately belied when Petitioner attempts to substantiate that claim: Petitioner provides pinpoint citations to the Response to Comments and, by its own characterization, lists assertions made by the Region as "obviously incorrect." If that is indeed true, then there is no reason those alleged missteps could not have been brought to the Board's attention at the time the Petition for Review was filed.

Attachment 82, the "Declaration of Benjamin M. Kirby," likewise constitutes untimely argument. Petitioner claims that the Declaration "document[s] major errors and anomalies in EPA's latest analyses, which would have be[en] submitted to EPA had the new information been provided in a timely fashion." Reply at 2 n.3. Specifically, Petitioner complains that "merely days before the appeal deadline, EPA released thousands of new pages of data and analyses that were directly relevant to the conclusions in Taunton's permit[,]" including "six memoranda—many of which were authored well before the issuance of the final permit—that outline EPA's revised positions." Reply at 2 (emphasis omitted). All of these materials, which were released in response to a FOIA request and associated litigation over the form of the FOIA requests, were part of the administrative record for the Final Permit, and were included in that record "before the issuance of the final permit," Reply at 2, as Petitioner rightly points out. Petitioner's own exhibits indicate that the Region made the administrative record available to Petitioner:

> The City's characterization of EPA being 'unable or unwilling to share with the public the data and analysis upon which it is relying' is unfair and unfounded. The City's representatives have declined the Region's invitation to review the Administrative Record. We renew this offer and will make the record available for your review when you visit our offices for the proposed meeting or any other time.

Pet. Ex. 29, at 2 (12/29/14 EPA Region 1 letter to Mayor Hoye); *see also*, 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.56). So long as an administrative record is physically available for review, the permit issuer has met the availability requirements of 40 C.F.R. §§ 124.9, .18. *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 to 10-05, slip op. at 130 (EAB Nov. 18, 2010). Additional requirements, such as the exact method of display of the physical record, electronic availability or the record, or an electronic index of the record, are not contained in the regulations, and the Board has previously refused to require permit issuers to go beyond the regulations. *See id.*; *see also In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 530 (EAB Feb. 1, 2006); *In re Energy Answers Arecibo, LLC*, PSD Appeal Nos. 13-05 to 13-09, slip op. at 61-62 (EAB Mar. 25, 2014). Even so, at Petitioner's request, counsel for the Region provided an interim index of the administrative record on April 22, 2015, which included, *inter alia*, entries for the six supplemental memoranda identified above. *Att*. B (Email chain from Samir Bukhari, EPA Region 1, to John Hall et al, Hall and Associates, dated April 22, 2015, "RE: Final Record for Taunton permit action.") On Friday, May 8, 2015, at 4:00 pm, several days before the appeal deadline, counsel for Petitioner contacted the Region, stating:

> In reviewing the interim admin record index you provided us, we noticed several 'memo to file' documents in the 'OTHER' category. Specifically, we are interested in documents 22 through 27 authored by David Pincumbe and Susan Murphy, as we have never seen these documents before. Could you please provide us a copy of these memos as soon as possible?

*Att.* B . On Monday, May 11, at 12:03 pm, counsel for the Region provided the requested documents to Petitioner. *Id*. Petitioner has not identified any valid reason why the arguments made in the Declaration could not have been made at the Petition for Review stage.

The Kirby Declaration, in fact, does not disguise the fact that it is trying to rebut analysis contained in the Region's Response to Comments, *see* Kirby Declaration at 1 ("EPA included a host of new graphs and regression analyses in its Response to Comments (at 88, 91-95, 99, 109-111, 114)," but it is far less forthcoming in its attempts to justify why, given that fact, it is only now providing this analysis for the Board's consideration. Petitioner only requested data underlying the SMAST Report upon which the Kirby Declaration is based more than a month after filing its Petition for Review, even though it expressly acknowledged in that correspondence to the Region that those data were utilized in the Response to Comments.

> In EPA's final response to comments, as you know, numerous new graphs were created by EPA using Appendix D of the 2007 SMAST Report. That appendix is not part of the published SMAST report – please provide us with a copy of that document that the Response utilized to create the charts.

Kirby Declaration at Attachment 1 (Email from John Hall, Hall and Associates, to Samir Bukhari, EPA Region 1, dated June 17, 2015, "RE: We need a document please."). Two hours later, the Region provided Petitioner with the requested information. *Id.* Petitioner also implies that the Certified Index to the Administrative Record ("Certified Index") did not include these data, but that is misleading. The Certified Index included the 2007 SMAST Report. *See* Certified Index at K.17. That Report, which was attached by Petitioner (Att. 10) as an exhibit to its Petition for Review (Att. 10), includes an "Appendix D," which states "NUTRIENT WATER QUALITY DATA (Data Transmitted Electronically as Excel Files)." These data were incorporated into the SMAST Report; a permit issuer is not under any obligation to individually list out the appendices of documents it includes in its Certified Index. Petitioner, on the other

hand, was under a duty to request or otherwise obtain and review these data if it wished to make timely arguments based on them before this Board. The fact that it never examined these data, and only endeavored to "duplicate data plots" created by the Region in the Response to Comments at the Reply-stage is no one's responsibility but Petitioner's.[3] Kirby Declaration at 2. Petitioner alone should accept the consequences of that decision; it should not be permitted to manufacture new technical controversies and differences of opinion between the Region and Petitioner at this very advanced stage of the proceedings, and then expect to thrust them upon the Board for resolution. To ensure the "the timely resolution of the permitting process," Petitioner should not be permitted to use its late filing to substantiate its claims with new arguments and supplement its deficient appeal. *In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005).

## III. CONCLUSION

For the foregoing reasons, the Region respectfully requests that the Board grant the motion.[4]

Dated: August 6, 2015

Respectfully submitted,

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Samir Bukhari

[3] Petitioner's lapse is even more pronounced in light of the fact that all of the data utilized in Petitioner's late-filed "Declaration" were in the administrative record and available to Petitioner prior to the close of the draft permit's *comment period*. Petitioner's purported inability to obtain these data prior to filing its Petition for Review is also inexplicable, given its contacts and correspondence with Dr. Brian Howes, the author of the 2007 SMAST Report, prior to the May 13, 2015 filing deadline.

[4] Pursuant to 40 C.F.R. § 124.19(f)(2), the Region has ascertained that Petitioner will object to this motion and intends to respond in accordance with the filing schedule established by the Board's July 17, 2015, "Order Granting Joint Unopposed Motion to Modify and Set Filing Deadlines."

Michael Curley
Assistant Regional Counsels
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 Motion to Strike, in the matter of City of Taunton Wastewater Treatment Plant, NPDES Appeal No. 15-08, were served on the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

By Electronic Mail and U.S. Mail:

John C. Hall, Esq.
Philip D. Rosenman, Esq.
Hall & Associates
1620 I Street (NW)
Suite #701
Washington, DC 20001

Dated: August 6, 2015

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Samir Bukhari