HALL & ASSOCIATES

Suite 701
1620 I Street, NW
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: http://www.hall-associates.com Fax: (202) 463-4207

Reply to E-mail:
prosenman@hall-associates.com

March 8, 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 - City of Taunton's Reply to EPA's Response to City's Motion to Supplement the Administrative Record

Ms. Durr:

Attached please find for filing, the City of Taunton's Reply to EPA's Response to City's Motion to Supplement the Administrative Record 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 REPLY TO EPA REGION 1'S RESPONSE TO CITY'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

The response, dated March 4, 2016, of EPA Region 1 to the City of Taunton's Motion to Supplement the Administrative Record ("Taunton Motion") is disappointing, but not surprising. The Region has tried, throughout this proceeding, to convince the Board that it is somehow acceptable for the Agency to treat the National Pollutant Discharge Elimination System ("NPDES") permit-writing process as an adversarial one, instead of a collaborative effort to arrive at a scientifically, and technically, defensible permit. The Region, at least for Massachusetts communities, issues the NPDES permit (and houses the vital EPA Permit Writer). Consequently, EPA has all the records upon which the permit is based, and, importantly, fashions all publications that attend the NPDES permit, such as the Fact Sheet, and all elements of making the record available for public review, consistent with 40 C.F.R. Part 25 mandatory responsibilities. In addition, and critically important to its "closed shop" approach to fashion the record and control the information needed by the public to make important decisions about their respective NPDES permit, the Agency – here the Region – tightly controls the Federal response process under the Freedom of Information Act ("FOIA") .

A community, such as Taunton, to be faithful to the public it directly represents, and which will be called upon to pay the bill for environmental infrastructure demanded – *rightly or wrongly* – by EPA to comply with NPDES permit terms, is forced to critically analyze what the City is spoon-fed by the Region. Where the Region misstates facts, or omits them, the City must call the Agency to account, and demand appropriate correction. The Agency-created game of "connect the dots," however, is overtly unfair, where all the game pieces are controlled by an often hostile agency which issues threats, or simply ignores its statutory responsibilities, waiting to see what a permittee might do. Recall that Taunton was forced – *forced* – by EPA's "sluggish response" to the City's administrative appeal to file a lawsuit in Federal court to require Region 1 to simply observe what Congress said it must observe under the FOIA in providing documents that only EPA possessed.

On March 8, 2016 the Court ruled that EPA's refusal to provide the requested documents was "obdurate behavior" and awarded a $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. (*"H&A")* (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.

Sadly, EPA's Response to this administrative record supplement request continues the attempt to withhold critical records from the public and this Board's review. The critical record confirming (a) that the Fall River plant (and loads from other non-Taunton estuary contributors) dominates the nutrient loadings to Mount Hope Bay (where the sentinel site is located) and (b) that EPA has informed Fall River that nitrogen reductions must occur in the future, is integral to any nutrient reduction decision regarding Taunton.[1] The letter was issued on September 8, 2014, *two days before* EPA met with the City and claimed no other system loads were important and needed to be considered. (*See*, Admin. Record D.2, September 16, 2014 Supplemental Comment letter at 3-4 detailing claims EPA made at the meeting). EPA carried this falsehood into the Response to comments:

> "The references to *reductions by Rhode Island treatment plants are not relevant to this system* as those treatment plants discharge to Narragansett Bay proper and not to Mount Hope Bay.[23]" Footnote 23: "While Narragansett Bay proper and Mount Hope Bay are connected and part of a larger system, *research indicates that Mount Hope Bay is a net transporter of nitrogen to Narragansett Bay proper, rather than vice versa*, so that reductions to loads in Narragansett Bay proper are not expect to result in discernible improvement in Mount Hope Bay." Admin. Record A.2, Response to Comments at 61-62. (Emphasis added)

The excluded document proves that the EPA representations at the September 2014 meeting with the City of Taunton (Admin. Record D.2) and response to comments were knowing misrepresentations. As confirmed by the letter to Fall River, EPA knew that the nutrient loads coming into the Bay from Rhode Island waters and other sources affected MHB water quality and that Fall River was now the major source to the system. Nonetheless, EPA conducted the loading and effluent limitation analysis for the Taunton contributions as if none of this existed and the response to comments claimed controls on the sources to MHB were "not relevant". In

[1] EPA's acknowledgement that the Fact Sheet noted the importance of the Fall River discharge (Response n. 2) only confirms why it was improper to have this document excluded from the original administrative record. It also confirms why EPA's loading analyses, which denied the importance of all downstream discharges, was clear error.

short, the Agency permit writer, and others, knew that they were fabricating an effluent limitation analysis that would not bear scrutiny, if the additional loads to MHB and the load reductions occurring since 2004 and planned thereafter were part of the assessment. Needless to say, it is apparent why EPA excluded this critical record from the permit file and administrative record under review.

It is axiomatic that EPA is to provide the "whole record" for review and that EPA is not permitted to "skew" the record to eliminate documents unfavorable to its position (*See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("That review is to be based on the full administrative record that was before the Secretary at the time he made his decision."); *Environmental Defense Fund v. Blum,* 458 F. Supp. 650, 661 (D.D.C. 1978) (finding the agency "may not, however, skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question."). The "whole record" is to include 'all documents and materials that the agency "directly or indirectly considered" . . . [and nothing] more nor less.'" *City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 287 (D.D.C. 2013) (quoting *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006)); *see also Thompson v. DOL*, 885 F.2d 551, 555 (9th Cir. 1989) (same); *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)(same).) It is incomprehensible that EPA would have hidden this record from the affected cities, given the timing of its issuance (days before the meeting in Taunton) and its direct relevance to proper implementation of 40 C.F.R. 122.44(d).[2]

[2] Given the repeated, purposeful improper actions of the Regional office permitting staff and ongoing fabrication of positions in federally generated documents, the City suggests that the Board review whether the elements of 18 U.S.C. § 1001, *et seq*. are met here, warranting a referral for further action. The city reserves its rights to seek appropriate relief.

Rather than correct the error, the Region's response seeks to perpetuate its illegal administrative record actions and the position it knows to be false (*i.e.*, the claim that major nutrient loads to Mount Hope Bay from multiple sources have not improved the water quality of that system). This is continuing to occur, in derogation for EPA's *Permit Writer's Manual* directive: "A permit writer should not attempt to support technically indefensible conditions. Contested permit conditions that are not technically defensible and are not based on any legal requirement should be brought to counsel's attention, with advice that EPA or the state withdraw those conditions." *U.S. Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual,* Ch. 11.4.1.2, at 11-17 (2010). The Board should note that the question "was it timely?" does not appear to qualify this overarching EPA duty.

Looking at the three objections raised in EPA's Response, it is evident that the Region's positions are badly misplaced. No one argues that process and attendant procedural rules are unimportant; however, such "requirements" must be subservient to recognizing factual truth. This general observation is amplified where, as here, the Federal agency is so recalcitrant, so disrespectful of mandatory Federal statutory responsibilities that it is fined as the result of its "obdurate conduct." The Board, it is respectfully suggested, must direct the Region to do what is scientifically and technically correct regarding the City's NPDES permit. This admonition would result, here, in granting the City's Motion to Supplement the Administrative Record. Following are further responses of the City to EPA's Responsive arguments:

1. Failure to Confer With EPA Counsel Was Inadvertent and Harmless Error

The City, through inadvertence, did not contact EPA counsel prior to the filing of the Motion to Supplement. (Please note that the appropriate EAB rule on this is Section 124.19(f)(2), mis-cited by EPA.) The City's record throughout the permit process is precisely to involve EPA in all aspects of factual and technical record development and argument, and this circumstance of omission was not intended. In any event, as is seen by the remainder of EPA's Response, Region 1 would hardly have concurred in the City's filing, as EPA is generally hostile to any uncovering of the true factual records at issue. Further, the Board must note that much of what the City discovers is through accretion; as it finds out new things, it seeks to bring them to EPA's and to the Board's attention. For example, the FOIA response on flow controls was received on Friday, January 26, 2016 and the Motion to Supplement was filed on Monday, January 29, 2016, in an effort to provide important information to the Board. The City regrets its inadvertent omission in failing to contact EPA counsel, but this non-material omission should have no bearing on whether the two items are admitted into the administrative record as informing opposing counsel of intent to file a motion is typically an act of courtesy before the bar, not a rigid procedural requirement.

2. City Timely Connected the Dots to Locate Absence of EPA Flow Basis

The Region's second responsive argument is like the first: the Board can ignore the truth in pursuit of a procedural cover. To this, the Region seeks to supply a further dodge: first speculate as to what might have been included in a prior FOIA, then impute to the City what the Region thinks should have been included in that prior FOIA (that was filed almost three years ago), then argue that, with this "would-a, could-a, should-a" speculation, everything must be rejected as "untimely." First, remember that it was EPA's responsibility to include the Fall River

letter in the permit file for this matter and to ensure that it was proper to regulate flow as a pollutant. Second, Judge Walton just rejected the Region document-availability argument, as in "come to Boston to find out" what is there. Instead, the Court said that the City was right to insist that more was required under FOIA:

> The mere availability of the requested information to the plaintiff [City], however, does not mean that the value of the requested information has been fully realized and available to the public. . . . Nor is making that information available for inspection and review to the plaintiff [City] sufficient to inject that information into the public domain. . . . Therefore, the information sought and obtained by the plaintiff [City] can be said to 'add to the fund of information that citizens may use in making vital political choices.'

H&A, Slip Op., at 7-8. The Board should not accept EPA counsel's attempted re-definition of FOIA to permit a Federal Agency to "impute" new meaning, particularly for exclusionary purposes, to a FOIA request.

Happily, the Region is incorrect on the factual merits of its position, as well. As the City has shown in its Motion to Supplement, the Sept. 8, 2014 letter to Fall River, MA, shows "that the Agency was well aware that other major discharges significantly impacted Mount Hope Bay water quality, including discharges from Rhode Island." Taunton Motion to Supplement, at 4. Necessarily, this means that load reductions from such facilities, attained over time, would also significantly benefit water quality. (The original copy of this letter received through FOIA lacked EPA letterhead and a date; however, a subsequent official copy on EPA letterhead was received indicating the date of this letter). The letter is further needed evidence, "as it showcases the inconsistency in Agency permitting concerns and consideration of other factors impacting TN within affected waterbodies." *Id.* Similarly, the February 26, 2016, FOIA response is materially important in that the conclusion of the letter – no internal documents to support flow regulation as a pollutant – "confirms that the legal position claimed by EPA Region 1 requires

Board review as it sets an unprecedented new CWA mandate and expands NPDES control beyond that intended by the Act. This letter demonstrates a willful negligence of applicable laws and regulations concerning . . . imposition of flow controls within Taunton's NPDES permit." *Id.*, at 5. This letters are timely, and, given their importance, require the Board's attention. (*Supra*, n.1)

3. EPA's Pretext Argument Is Nonsensical

Given the sorry history of EPA Region 1 abuse of its FOIA and administrative record responsibilities concerning Taunton, the fact that the City tries to bring forward bits of important new information should be a cause for celebration, not attack. The Region's supercilious comment – "If Petitioner was curious about… the City's intent" should be rejected by the Board. The EPA's suggestion that there is "no reason" that the City should not have sought out this information earlier ignores the glaring record of the Agency's recklessly aggressive attitude toward full disclosure of its decision-making, going back years into the permit's development, and ultimately requiring litigation to obtain disclosure. EPA even offers the *non sequitur* of not appealing "the identical state permit" as a reason for this Board to not accept clearly pertinent evidence that goes to the failures of the regional permit writer – now "retired" – to consider the full record in issuing the City's NPDES permit.[3] As the City's Motion to Supplement states:

> As it concerns this Motion, the documents the City is seeking to add to the Board's administrative record seeks to correct clearly erroneous assumptions, predictions, and facts used by Region 1 in its determination related to the issuance of the City's NPDES permit. As this information could not be received earlier, and has been located only through the diligent efforts of the City and a separate regulatory organization, it is vital that the record be supplemented.

Id., at 3.

[3] The City reserves the right to file a subsequent motion seeking to strike these new claims as created by EPA and some Board members.

4. Conclusion

As James Madison famously observed, "[i]f angels were to govern men, neither external nor internal controls on government would be necessary." *Federalist No. 51*, at 322 (James Madison) (Clinton Rossiter ed., 1961.) The City's Motion to Supplement should be gladly granted by the Board, as the letters sought to be added provide more necessary light on the irrational nature of EPA's decision-making. EPA Region 1 seeks only to invoke questionable procedural dodges to excluded needed information from the Board's review, contrary to APA administrative record mandates, EPA Permit derivation procedures and federal statutory restrictions governing false statements in federal documents. The only legitimate goal here, and the only reasons for the Board's involvement at all in the NPDES process, is the issuance of a factually accurate and legally mandated NPDES permit for the City of Taunton. The EPA Region 1 positions, already rebuked by a Federal Judge, simply must be controlled by this Board to advance the public interest and belief in the EPA NPDES permit process.

For the reasons provided, the City's Motion to Supplement should be granted in all respects.

Respectfully submitted,

_//s// John C. Hall_____
John C. Hall, Esq.
jhall@hall-associates.com

Hall & Associates
1620 I St. (NW)
Suite #701
Washington, DC 20006
Telephone: (202) 463-1166
Facsimile: (202) 463-4207

March 8, 2016

CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, March 8, 2016, a copy of the City of Taunton's Reply to EPA's Response to City's Motion to Supplement the Administrative Record was served on the individuals identified below by U.S. first-class mail, postage pre-paid, and e-mail:

Curt Spalding, Regional Administrator
U.S. Environmental Protection Agency - Region 1
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Samir Bukhari, Assistant Regional Counsel
U.S. Environmental Protection Agency - Region 1
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Dated on the 8th day of March, 2016.

//s// P. Rosenman
Philip D. Rosenman, Esq.
prosenman@hall-associates.com

Hall & Associates
1620 I St. (NW)
Suite #701
Washington, DC 20006
Telephone: (202) 463-1166
Facsimile: (202) 463-4207

Counsel for the Petitioner