



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**Region 1**  
**5 Post Office Square, Suite 100**  
**Boston, MA 02109-3912**

**VIA ELECTRONIC FILING**

March 4, 2016

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

**RE: City of Taunton Wastewater Treatment Plant  
NPDES Permit Appeal No. 15-08; NPDES Permit No. MA0100897**

Dear Ms. Durr:

Please find EPA Region 1's Response to the City of Taunton's Motion to Supplement the Administrative Record and accompanying Certificate of Service, in connection with the appeal referenced above.

Sincerely,

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Enclosures

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

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In the Matter of: )  
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City of Taunton )  
Wastewater Treatment Plant )  
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NPDES Appeal No. 15-08 )  
NPDES Permit No. MA0100897 )  
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**EPA REGION 1’S RESPONSE TO THE CITY OF TAUNTON’S MOTION TO  
SUPPLEMENT THE ADMINISTRATIVE RECORD**

For the reasons below, EPA Region 1 (the “Region”) opposes the City of Taunton, Massachusetts’ (“Petitioner’s”) motion to supplement the administrative record with (1) draft correspondence from the Region to the City of Fall River, Massachusetts, concerning nitrogen discharges from its wastewater treatment facility (“Fall River WWTF”) <sup>1</sup> and (2) a letter from EPA Headquarters to the Center for Regulatory Reasonableness regarding the inclusion of flow limits in NPDES permits. *See* Petitioner’s Motion to Supplement the Administrative Record (February 29, 2016) (“Mot.”).

First, the Motion is procedurally unsound. Petitioner filed the Motion at 5 p.m. on the eve of oral argument without attempting to ascertain whether the Region would concur or object to it, as required by 40 C.F.R. § 124.19(f)(1), and furthermore, did not “indicate in the motion the

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<sup>1</sup> EPA transmitted the final, executed version of the undated letter attached to the Motion to the City of Fall River on September 8, 2014. Attachment 1.

attempt made and the response obtained.” *Id.* Petitioner has offered no explanation for this departure from the regulations governing Board procedures.

Second, the Motion does not set forth persuasive grounds for inclusion of these documents into the administrative record. Petitioner contends that the records will “correct clearly erroneous assumptions, predictions, and facts used by Region 1 in its determinations related to the issuance of the City’s NPDES permit.” *Mot.* at 3. This argument reflects “a flawed understanding of the basic principles of administrative record review and the limited instances in which an administrative record may be supplemented on appeal,” given that the “part 124 regulations governing this permit proceeding specify the documents that must be included in the administrative record [footnote omitted] and expressly provide that the ‘record shall be complete on the date the final permit is issued.’” *In re Town of Newmarket*, NPDES Appeal No, 12-05, slip op. at 76-77 (EAB Dec. 2, 2013) (quoting 40 C.F.R. § 124.18(c)). Moreover, those same regulations provide that “[a]ll persons, including applicants, 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.” 40 C.F.R. § 124.13. In this case, Petitioner asserts that the new information “could not be received earlier, and has been located only through the diligent efforts of the City and a separate regulatory organization[.]” *Mot.* at 3. The difficulty for Petitioner is that these “efforts,” however “diligent,” only commenced on January 15, 2016—or approximately two and a half years after the close of the public comment period for the permit and almost a year after the close of the permit record. In the case of the Fall River letter, Petitioner’s efforts were comprised of filing the following 42-word FOIA request:

This request seeks any and all records at EPA Region 1 concerning:

- 1) All correspondence between EPA Region 1 and the City of Fall River, Massachusetts concerning nitrogen limits or total nitrogen (“TN”) impacts of the discharge from Fall River’s wastewater treatment facility.

Mot., Att. 1 at 1. The new flow information was obtained through another FOIA request filed four days later, on January 19, 2016. There is simply no reason why these same straightforward requests could not have been put to EPA in 2013, to ensure timely inclusion of any responses in the administrative record.<sup>2</sup>

This leads to yet a third reason to both deny the Motion to supplement the administrative record, as well as the alternative relief sought by Petitioner of “supplement[ing] the record with these documents for the purposes of this appeal.” Mot. at 5. This motion serves as a mere pretext for introducing additional, late-filed argument. *See* 40 C.F.R. § 124.13. In one case, Petitioner seeks to supplement a legal argument improperly raised for the first time in its Petition for Review—that is, its claim that the Region lacked legal authority under the Clean Water Act to impose conditions on wastewater effluent flow. In the other, Petitioner attempts to introduce an entirely new line of argument concerning nitrogen loading from the Fall River wastewater treatment facility. In both cases, the City is attempting to persuade the Board of the merits of its legal positions. Petitioner has already run afoul of the Board’s regulations by attempting to advance late-filed and extra-length argument, and the same outcome should obtain here. *See* Order on Pending Motions and Setting Oral Argument (October 30, 2015); Order Denying Motion for Partial Reconsideration (November 24, 2015).

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<sup>2</sup> City argues that the FOIA response re Fall River demonstrates that the Region failed to consider the impact of other discharges to the Taunton Estuary, MHB, and Narragansett Bay in assessing the need for Taunton to reduce its nitrogen discharge. This claim is directly contradicted by statements in the Fact Sheet in which EPA recognizes that discharges from the Fall River POTW will need to be addressed. “While other loads to Mount Hope Bay (*particularly the Fall River WWTP*) will need to be addressed as well, the reduction in nitrogen loadings from the Taunton River will ensure that those discharges do not cause or contribute to nitrogen-related impairments in Mount Hope Bay.” FS at 34 (emphasis added).

The 30.9 MGD Fall River WWTF and its attendant nitrogen load did not suddenly materialize on the banks of Mount Hope Bay after the close of the public comment period. If Petitioner was curious about the Fall River WWTF's contribution to adverse nitrogen impacts on water quality in the Mount Hope Bay Taunton River estuary system and the impact any such contribution might have on the Region's overall permitting approach, it should have pursued that specific concern in a timely fashion and brought any appropriate issues to the attention of the permitting authority during the public comment period, rather than pointing an accusatory finger at the City of Fall River years after the fact. There is no reason why the City could not have otherwise obtained information about Fall River WWTF discharges in order to timely comment, apart from the fact that the new Fall River theory only recently occurred to the City, in January 2016.<sup>3</sup> Indeed, in Petitioner's comments on the draft permit, Petitioner cited reductions in nitrogen loading from Fall River CSOs as a reason to relax the City's permit limit. *See, e.g.*, EPA Region 1 Response to the Petition for Review, Ex. D (RTC) at Comment A2 and C13.

Finally, granting Petitioner's motion would not be a "measure[] necessary for the efficient, fair and impartial adjudication of issues arising in an appeal," under 40 C.F.R. § 124.19. Having been fully briefed and argued, the dispute over this permit is past ready for decision; ironically, the identical state permit, having *not* been appealed by the City of Taunton to the Commonwealth's Office of Administrative Appeals and Dispute Resolution, is already in effect. "Allowing a petitioner to raise for the first time on appeal concerns that could have been brought to the attention of the permitting authority, would leave the [] permit system open-ended, frustrating the objective of repose and introducing intolerable delay." *In re Sumas Energy 2 Generation Facility*, PSD Appeal No. 02-10 & 02-11, slip op. at 10 (EAB, March 25, 2003).

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<sup>3</sup> For example, nitrogen loading data for the Fall River WWTF and other POTWs is available on a publicly available web site. *See* <https://echo.epa.gov/?redirect=echo> (last visited March 3, 2016).

Petitioner has ignored this procedural prerequisite, a necessary step designed “to ensure that the permitting authority first has the opportunity to address permit objections, and to give some finality to the permitting process.” *In re City of Marlborough*, 12 E.A.D. 235, 244 n.13 (EAB 2005).

### **CONCLUSION**

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

Dated: March 4, 2016

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing EPA Region 1's Response to the City of Taunton's 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:

By Electronic Filing and Overnight Mail:

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 Overnight Mail:

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Dated: March 4, 2016

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Samir Bukhari