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

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 CITY OF TAUNTON'S MOTION FOR THE APPOINTMENT OF A TECHNICAL ADVISOR

Respectfully submitted,

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Dated: August 6, 2015

I. INTRODUCTION

"On information and belief," the City of Taunton ("Petitioner") wagers that: "EPA's objections [to the motion] will be based solely on the fear of having an impartial technical expert confirm that critical factual statements are irrational and violate the laws of physics/mathematics and/or that certain claimed demonstrations were never actually made." Motion for the Appointment of a Technical Advisor/Expert ("*Mot.*") at 9. Petitioner's prediction represents, if nothing else, a failure of the imagination, for the Region has many reasons indeed to object to this Motion. Petitioner's unsubstantiated presumption that the Board in deciding this case will depart from its own procedures, or fail to rationally discharge its obligations under law, either out of complicity with the Region or confusion over the record, does not justify the appointment of an outside advisor. Petitioner's anxieties over how the Board will eventually resolve the issues in the Petition—its apprehension that the Board will either be confounded by its factual complexity or beguiled into accepting the Region's allegedly conclusory claims—do not present good cause for the Board to depart from its default decision making procedures as set forth in 40 C.F.R. § 124.19(a)-(d), under which a petitioner seeking review bears the burden of demonstrating clear error or abuse of discretion in the first instance, that is, in its Petition for Review, and without after-the-fact supplementation, assistance or amendment by an unnamed third party. While it may be that Petitioner harbors doubts about the competence and impartiality with which the Board will evaluate the administrative record, that appraisal of the Board's capacity to decide the case efficiently, fairly and in accordance with the law amounts, in the end, to nothing more than Petitioner's opinion, and is not relevant to the disposition of this motion.

Petitioner spends much of its time arguing that the Board *could* seek outside assistance pursuant to authority reserved to it under 40 C.F.R. § 124.19(n) to resolve a particular case if its

ordinary decision making procedures somehow prove insufficient under the circumstances. Even if this were established, Petitioner has fallen far short of making any such case. Absent Petitioner's assumptions about the difficulties the Board will encounter when navigating the factual record, and dire predictions about the faulty conclusions the Board seems fated to draw, there is little left to the Motion. What is missing from the Motion is any factual or legal demonstration, as opposed to unsubstantiated insinuations of incompetence or bad faith, that would distinguish this case from the countless other technically complex matters the Board has successfully decided since its advent twenty-five years ago, through reliance on orderly briefing and argument by the parties, and the administrative record, and without recourse to the unprecedented and unnecessary relief sought by Petitioner here. For the reasons set forth below, the Board should deny the Motion.

II. ARGUMENT

A. Petitioner Has Failed to Demonstrate That the Board Requires Technical Assistance to Efficiently and Fairly Adjudicate the Issues Raised in this Appeal or That the Board's Existing Procedures Are Insufficient to Resolve the Dispute

In arguing for the appointment of an outside expert to assist the Board in evaluating the issues raised in this appeal, Petitioner proceeds on the assumption that the Board will passively accept the Region's permitting determinations merely because they are couched in technical terms, either failing to ascertain or ignoring their (purportedly) conclusory nature and substantive flaws. *Mot. passim*. Petitioner, in other words, presumes that EPA's longstanding procedures for adjudicating permitting appeals will be observed in the breach. Although Petitioner lacks confidence in the Board's adherence to its own procedures and ability to assess relatively complex administrative records, these allegations are wholly unsubstantiated and contrary to the

Board's demonstrated practice. They accordingly do not constitute grounds for granting Petitioner's Motion.

The Board's procedures for review are more than adequate to accommodate Petitioner's concerns, and obligate the Board to carry out the same searching, critical review of the Region's record explanations as it seeks from a technical advisor, rendering the Petitioner's request for such an appointment superfluous. When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised his or her "considered judgment." *See, e.g.*, *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *E.g.*, *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999). Critically, "Although [the Board] traditionally assign[s] a heavy burden to petitioners seeking review of issues that are essentially technical in nature, [it] nevertheless, do[es] look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all information in the record." *Gov't of D.C.*, 10 E.A.D. at 342 (internal citations omitted); *see also In re Envtl. Disposal Sys.*, 12 E.A.D. 254, 289 (EAB 2005). Moreover, the Board has emphasized that a permit issuer must "adequately

explain[] its rationale and support[] its reasons in the record." *Bear Lake Props., LLC*, UIC Appeal No. 11-03, slip. op. at 22 (EAB June 28, 2012). The Board "will not hesitate to order a remand when a Region's decision on a technical issue is illogical or inadequately supported by the record." *In re NE Hub*, 7 E.A.D. at 568. The Board's inquiry on a technical question focuses on whether the record provides a rational basis for the Region's conclusion.

The simple existence of technical complexity and scientific uncertainty is not sufficient to warrant departure from the procedures the Board routinely employs to resolve technical disputes. That the Board "takes a careful look at technical issues" as opposed to deferring out of hand, *id. re NE Hub*, 7 E.A.D. at 568, is not mere rhetoric, but an accurate description of the Board's actual practice. *See, e.g., In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-19 (EAB 1997) (remanding permit limits for mercury and thallium at cement kiln; holding that the administrative record must reflect the considered judgment necessary to support the Region's permit determination); *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) (remanding permit for permit issuer to reconsider whether to include action levels governing corrective action in light of concern regarding multiple-contaminant risks). Indeed, Region 1 has more than once been on the receiving end of the Board's exacting standard. *See In re Town of Concord*, NPDES Appeal No. 13-08 (EAB Aug. 28, 2014) (remanding permit for further explanation when unable to determine whether the new pH and aluminum limits reflect the Region's "considered judgment"); *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 245 (EAB 2005)) (same for phosphorus). Petitioner ignores this history, instead fighting a rear-guard action over the Board's denial of review of the Great Bay Municipal Coalition's petition for review in *In re Town of Newmarket*, NPDES Appeal No. 12-05 (EAB Dec. 2, 2013), and alleging that "[i]n many cases, the Board simply accepted EPA's conclusory

statements on their face." *Mot.* at 6 n.4. Although the Coalition could have attempted to demonstrate the truth of that claim by appealing the Agency's action to the First Circuit Court of Appeals, it declined to do so and instead determined to let that well-reasoned decision stand, depriving Petitioner's criticisms of any legal relevance or persuasive power.

The range of outcomes stemming from Board review—some favorable to the Region, some adverse—is not surprising. The Board is a permanent, impartial body that is independent of all Agency components outside the immediate Office of the Administrator, and by regulation, "shall decide each matter before it in accordance with applicable statutes and regulations." 40 C.F.R. § 1.25(e)(1) ; *see* 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992) ("Another virtue of the [newly created] Board is that it will make clear that the Administrator's enforcement authority (delegated to various Regional and Headquarters enforcement officers) and the Administrator's adjudicative authority are delegated to, and exercised by, separate and distinct components of the Agency, thus inspiring confidence in the fairness of Agency adjudications."). Petitioner has not identified any cause why, and has no basis to assume that, the Board will not follow its own procedures. Government officials are presumed to act conscientiously in the discharge of their duties. This "presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). "The standard for establishing bias and 'overcoming the presumption of honesty and integrity attaching to the actions of government decision makers' is thus very high." *In re Dominion Energy Brayton Point*, 12 E.A.D. 490, 532 (EAB 2006) (quoting *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 788-89 (EAB 1995)). Courts have always been "loath to find to the contrary," and to induce a court to abandon the presumption of good faith dealing "requires

'well-nigh irrefragable proof.'" *Kalvar Corp., Inc. v. United States*, 543 F.2d 1298, 1301-2 (Ct. Cl. 1976) (quoting *Knotts v. United States, 121 F. Supp. 630* (Ct. Cl. 1954)). Rather than a presuming, *ex ante*, that the Board will stumble through its obligations without outside assistance and inevitably leave the City aggrieved, the more efficient and predictable path to resolution of this permitting dispute is for the Board to evaluate this case in the ordinary course. If it should so happen that Petitioner's fears are for some inexplicable reason borne out, it will have the opportunity to seek judicial review of the final permit decision on those specific issues that it feels the Board has actually erred. *See* 33 U.S.C. § 1369(b)(1)(F).

Petitioner's assumption that the Board is for some reason poised to accept allegedly conclusory statements simply because they are couched in technical terms is entirely unconvincing in light of the foregoing. Similarly unfounded is the view that technical complexity and scientific uncertainty are sufficient to warrant departure from the procedures the Board routinely employs to resolve technical disputes. This is particularly true given the specific types of judgments Petitioner worries about the Board being able to make—which is to say, whether a particular statement is "conclusory," or "lack[s] objective support in the record." *Mot.* at 3, 6. Whether a statement or rationale in the administrative record is conclusory is a quintessentially legal judgment and one that the Board is perfectly capable of making even in exceedingly complex permitting matters. *See, e.g.*, *Dominion Energy*, 12 E.A.D. at 588-590 (remanding Region's determination regarding duration of temperature exceedance in the receiving water caused by discharge on grounds that Region's explanation was conclusory). Petitioner never explains why, for some reason, the Board would be prevented from deploying those same powers of analysis and judgment to discern between a conclusory statement and one supported by other facts in the record in the instant appeal. As Petitioner itself states, "There is

no 'special expertise' associated with conclusory statements." *Mot.* at 3 (citing *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984)). EPA fully concurs, which raises the obvious question of why the Board should require the assistance of a technical advisor to determine that fact rather than come to that conclusion on its own. If Petitioner is correct that the Region erred so spectacularly, and its record positions are "plainly unsupported in the record" and so extreme as to "defy established laws of physics," *Mot.* 1, then discerning error should prove to be straightforward—like watching an apple falling from a tree—a task obviously within the capability of the Board, without the interposition of an outside expert at this very late stage of the proceedings. Petitioner perhaps put it best: "EPA's Response to the City's objections was a conglomeration of baseless procedural objections, conclusory and dissembling responses, and blatant fabrications. In each case, EPA's arguments are easily dispatched." *Reply* at 16. If Petitioner truly believes that is true, then should not the Board simply remand the permit rather than prolong the process by waiting for a third party to state the obvious?

B. The Petitioner Bears the Burden of Demonstrating Reviewable Error or Abuse of Discretion in its Petition for Review and Cannot Satisfy That Burden by Relying on After-the-Fact Analysis by a Third Party

In addition to being unnecessary, Petitioner's request to appoint a technical expert would undermine the fairness and impartiality of the permit appeal process in two ways: first, by distorting the applicable burden for demonstrating grounds for review and, second, by inviting consideration of extra-record material, both of which are contrary to the Board's regulatory scheme for decision-making.

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment." *See, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191,

224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997). The burden of demonstrating that the Board should review a permit rests squarely with the petitioner. *See* 40 C.F.R. § 124.19(a)(4). The petitioner must specifically state its objections to the permit and explain why the permit issuer's previous responses to those comments were clearly erroneous or otherwise warrant review. *Id.* § 124.19(a)(4)(i)-(ii); *see, e.g.*, *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). Petitioner may *not* satisfy this burden by piggybacking on extra-record argumentation and analysis by a third party after its Petition for Review has been filed, yet that is precisely what Petitioner has proposed to do in this case.

While Petitioner states that "The key questions at issue are ones that an entity, not specifically trained in the highly technical and statistical field of water quality impact assessment and criteria development, would have great difficulty evaluating," *Mot.* at 3-4, Petitioner was obliged under the Board's rules to have clearly and persuasively articulated its positions on these matters during the public comment period and, to the extent appropriate, in its Petition. There was nothing preventing Petitioner from doing so, and if it failed in the attempt, it has not been for lack of trying. The 30-day public comment period called for by regulation was extended for 30 days, during which the City submitted a comment package exceeding 600 pages, and afterward submitted numerous sets of supplemental materials to the record. The City engaged at least three other "independent experts," including one with 42 years of experience in water quality modeling, either prior to the permit final issuance or during preparation of its Petition for Review.[1] *Mot.* at 8 n.6. The physical administrative record was compiled and available for

[1] In addition, the City's counsel, Hall & Associates, has expertise in various scientific specialties, including scientific modeling.

examination upon final permit issuance; a draft administrative record index and other documents were provided to counsel for Petitioner at its request. Attachment A. Nothing in the Motion explains why Petitioner itself would be unable to describe in its Petition the shortcomings of the permit with sufficient clarity to "prevent EPA from…pulling the wool over the Board's eyes in this appeal." *Mot*. at 6-7 n.4.

Implicit in Petitioner's proposal is a concession that it has not in fact demonstrated *clear* error—a showing that Petitioner was obliged to make, if at all, in its own filings with the Board. It is apparent that the role envisioned by Petitioner for the outside expert is designed to cure deficiencies in Petitioner's own argumentation. Petitioner explains that "A technical expert/advisor will be well-trained in deciphering the conclusions and recommendations" of scientific literature attached to the Petition and "detailing when and to what extent TN limitations are necessary." *Mot.* at 7 n.5. But it is *Petitioner's* job alone to clearly explain the content of these papers and their relevance to the appeal; to the extent "deciphering" is required, that represents a failing on Petitioner's part, not a problem with the Board's usual decision making procedures. Similarly, Petitioner believes a technical advisor is needed to "explain the critical relationship water temperature has on plant growth and DO levels," "elucidat[e] why EPA's failure to account for Narragansett Bay loadings was a critical oversight," "review the record to determine if there was any rational support for" a particular claim, and finally "explain with minimal difficulty why" the Region's imposition of an interim limit for TN was incorrect. *Mot.* at 7-8. These types of explanations and analyses are indistinguishable from those that would ordinarily be included a Petition. Why an outside expert should be permitted the opportunity to remake Petitioner's arguments more clearly and convincingly, or in some cases for the first time, or offer wholesale reevaluations of the parties' claims, after the Petition has been filed—even

where matters can be explained "with minimal difficulty"—is impossible to reconcile with the applicable burden under the Board's standard of review. As the preamble to the Board's recent rule changes explains:

> Under the current rule, a Petitioner is required to file a substantive petition for review demonstrating that review is warranted. The EAB considers that substantive petition, as well as any briefs filed in response to the petition, to determine whether to grant review. If the EAB grants review, the current rule contemplates that a second substantive round of briefing and substantive review occurs. In practice, however, the Board has determined that a second round of briefing generally is unnecessary because in nearly all cases, a decision on the merits can be made based on the substantive briefs already filed. The revised rule clarifies to practitioners that substantive briefing must be submitted at the outset of the appeal and that generally, only one substantive review will occur.

78 Fed. Reg. 5281, 5281 (Jan. 25, 2013). The notion of tertiary analysis beyond the briefs of the two parties simply runs counter to the Board's regulations.

C. The Appointment of an Technical Expert Would be Inconsistent with Principles of Administrative Law and Would Introduce Delay and Confusion into the Proceedings

Petitioner's attempt to have its case made for it more convincingly through the offices of a third party expert would unsettle other principles of administrative law that underlie the Board's adjudicative process.

First, this late-stage re-examination of the record and briefs could only function as late-filed argument, this time presented by a third party. To be clear, Petitioner contemplates the advisor will not only restate the parties' existing arguments more crisply and comprehensively, but will also develop new analyses to confirm the truth or falsehood of contested factual matters, as well as weigh in on disputed legal questions, such as the applicability of state and federal guidance documents to this permitting action. *Mot.* 7. Petitioner never squares this scheme of third party *de novo* review, based on extra-record evidence, with the Board's precedent. The Board has consistently held that new arguments filed after the Petition for Review "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 ; *In re Steel Dynamics*, 9 E.A.D. at 219-20 n.62 (declining to consider petitioners' rebuttal argument which could have been raised earlier in the petition); *see also In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying petitioner's request to file a supplementary brief where the supplementary brief was filed after the appeal period had run and raised a related but "distinct" new issue).

Second, Petitioner's proposed approach would also run afoul of the principle that the administrative record for a permitting decision is complete at the time of permit issuance by introducing new substantive issues after permit issuance. *See* 40 C.F.R. § 124.18; *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 516 (EAB 2006). Contrary to the position taken in the Motion, Petitioner's request is inconsistent with *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 50 (1983), which held that, "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *See also Population Inst. v. McPherson*, 797 F.2d 1062, 1072 (D.C. Cir. 1986) ("Judicial review of the propriety of administrative action properly encompasses…an examination of the reasoning and rationale actually offered for the particular action being reviewed."). Unlike a trial where a lay trier of fact must assess the expert testimony presented, a court must afford great deference to EPA decisions that involve technical analyses and scientific judgments within the Agency's expertise under the Act. *See Envtl. Def. Ctr., Inc.* v. *U.S. EPA*, 344 F.3d 832, 869 (9th Cir. 2003); *Am. Iron & Steel Inst.* v. *U.S. EPA*, 115 F.3d 979, 1006 (D.C. Cir. 1997) (per curiam). Potentially new and inconsistent technical and scientific analysis "would set up a 'battle of the experts,' requiring additional review and evaluation by the Region and the State…This could be a complex and time-consuming process, and its outcome is unpredictable." *In re Town of Newmarket*, NPDES Appeal No. 12-05, at 9 (EAB Sep. 24, 2013)

(Order Denying Motion to Dismiss). To ensnare this long-expired—and heavily scrutinized—permit in a layer of unnecessary review would be contrary to these goals and would decidedly not advance the efficiency aims of 40 C.F.R. § 124.19(n) or be fair to the many other interested parties in the permit who are anxious to see it come into effect. *See* Region 1's Response to the City of Taunton's Petition for Review, Ex. D (RTC) (containing supportive comments from Taunton River Watershed Association and Mass Audubon (joint comments), the Nature Conservancy, Save the Bay, the National Park Service, Mr. Tim Watts, and the Rhode Island Department of Environmental Management).

Against this backdrop, it is unsurprising that Petitioner can cite to no instance in which the Board has taken the extraordinary step of appointing an outside advisor to guide it through the appeals process, pursuant to 40 C.F.R. § 122.19(n) or any other provision. The many federal court cases cited to support the appointment of a technical advisor are primarily from outside the context of record review. *Comcast Cable Communications, LLC v. Sprint Communications Co., LP*, Dckt No. 2012-859, 2014 U.S. Dist. LEXIS 45953 (E.D. Pa. Apr. 1, 2014) and *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360 (Fed. Cir. 2002) are patent cases. *Reilly v. United States*, 682 F. Supp. 150 (D.R.I. 1988) is a medical malpractice case. *Ex parte Peterson*, 253 U.S. 300 (1920) addressed the appointment of an auditor to examine the books in a dispute about the sale of goods. *Conservation Law Foundation v. Evans*, 203 F. Supp. 2d 27 (D.D.C. 2002) allowed a court to appoint a technical expert during the remedial phase of a Sustainable Fisheries Act case, to "answer the Court's technical questions regarding the meaning of terms, phrases, theories and rationales included in or referred to in the briefs and exhibits of any of the parties" as the court worked to craft a remedial order. In *Brown v. American Home Products Corp.*, 2013 U.S. Dist. LEXIS 118868 (E.D. Pa. Aug. 13,2013), the Special Master appointed a technical advisor to review whether there was medical basis for a drug product liability claim based on a show cause

record. The single case from a pollution abatement context is *Valley Citizens for a Safe Environment v. Aldridge,* 886 F.2d 458 (1st Cir. 1989), which addresses additional expert *testimony* (not an advisor) and additional evidence, in the context of a reviewing court. *Valley Citizens* also acknowledged that "a typical case" focuses on the existing administrative record. *Id.* at 460.

While it may be that courts have the ability to appoint technical advisors when needed, "such appointments should be the exception and not the rule, and should be reserved for truly extraordinary cases," which are "hen's-teeth rare." *Reilly v. United States*, 863 F.2d 149, 156-57 (1st Cir. 1988).[2] Appointing a technical advisor should be a "near-to-last resort, to be engaged only . . . with problems of unusual difficulty, sophistication, and complexity, involving something well beyond the regular questions of fact and law[.]" *Id.* at 157. Even highly scientifically and technically complex cases do not necessarily require technical advisors if the court believes it has sufficient information in the briefs and information provided by the parties. *See Flexsys Am. LP v. Kumho Tire U.S.A., Inc*., 695 F. Supp. 2d 609, 627 (N.D. Ohio 2010)

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[2] See also *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 610-611 (9th Cir. 2000) (Tashima, J., dissenting) (internal citation omitted):

> The use of a technical advisor is not without risks. First, whenever a court appoints a technical advisor, there is a danger that the court will rely too heavily on the expert's advice, thus compromising its role as an independent decision maker and the requirement that its findings be based only on evidence in the record. This risk is especially salient if the contents of the communications between the trial judge and the advisor is hidden from the parties (and appellate review), and where the parties have no opportunity to respond to the advisor's statements. Second, experts in the relevant field, particularly if it is a narrow and highly-specialized one, may be aligned with one of the parties; therefore, the district court must make every effort to ensure the technical advisor's neutrality, lest the advisor develop into, or give the appearance of being, an advocate for one side. Without some safeguards, the parties' confidence in the fairness of the trial will erode.

(denying motion to appoint a technical advisor because the briefs and information provided by the parties were sufficient for the Court to understand how the relevant science related to the legal issues at hand). These concerns are only compounded in the context of review on the record by an administrative tribunal. This case is not unusually more complex than those frequently handled by the Board, and does not represent the type of "truly extraordinary" case that would justify needing a technical advisor.

Finally, in addition to its failure to conform to established principles of administrative law, the Petitioner's motion fails to address a number of issues crucial to implementing the proposed scheme. For example, the problems inherent in Petitioner's offer to assume the costs of the expert remain unaddressed by Petitioner. Petitioner's offer to pay for a technical advisor would appear to be an impermissible augmentation of appropriations. The Appropriations Clause of the Constitution requires that Congress retain control over spending. U.S. Const. art. I, § 9, cl. 7. The "miscellaneous receipt" statute 31 U.S.C. § 3302(b) requires that any money received by an agency be deposited into the general fund of the Treasury, and not retained by the agency without explicit statutory authority. This requirement ensures that agencies do not augment the funds appropriated by Congress, leaving the "power of the purse" with Congress and maintaining the balance and separation of powers. The EPA has no such statutory authority to accept gifts from private entities, and therefore may not receive funds from private entities as suggested by Petitioner. The prohibition on accepting funds applies to the "constructive" receipt of funds as well as an explicit transfer of funds to the government. Department of Justice, Office of Legal Counsel, 4 OLC 684, 688 (1980). Any situation in which the federal government could have received the money and retains the ability to direct the funds (for example, to a specific individual or organization such as a technical advisor) constitutes a prohibited constructive

receipt of funds. *Id.* Petitioner has also not grappled with how its proposal comports with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App., Pub. L. 92-463. Each of these issues, as well as many others, would need to be addressed, further delaying and complicating the entire process.

In all, Petitioner's scheme would undermine the efficiency, predictability, and finality of the permitting process, leaving the "permit system open-ended, frustrating the objective of repose and introducing intolerable delay." *See In re Sumas Energy 2 Generation Facility,* PSD Appeal No. 02-10 & 02-11, at 10 (EAB Mar. 25, 2003) (Order Remanding in Part and Denying Review in Part). This a problem for Petitioner, as the CWA disfavors unnecessary delay in progressing toward the achievement of applicable water quality standards. Under 33 U.S.C. §§ 1342(a)(3) and 1342(b)(1)(B), all NPDES permits are limited to terms of five years, ensuring reevaluation and, if necessary, tightening of permit limitations at regular intervals. In fact, in enacting the CWA, Congress stated that its goal was to eliminate the discharge of pollutants by 1985, 33 U.S.C. § 1251(a)(1), with limitations "necessary to meet water quality standards" to be achieved by July 1, 1977, *id*. § 1311(b)(1)(c). While these initial goals have not been entirely met, they must imbue EPA's regulatory efforts with a spirit of haste rather than hesitation. *Cf. Scott v. City of Hammond,* 741 F.2d 992, 998 (7th Cir. 1984) (criticizing continuing delay in implementing provision of the CWA designed to ensure achievement of water quality standards, given that "[t]he statutory time limits demonstrate that Congress anticipated that the entire process would take a relatively short time after the passage of the 1972 amendments").

III. CONCLUSION

The Region respectfully requests that the Board deny the motion.

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 City of Taunton's Motion for the Appointment of a Technical Advisor/Expert, 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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