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

In the Matter of:	
Town of Newmarket Wastewater Treatment Plant	
NPDES Permit No. NH0100196	NPDES Appeal No. 12-05

RESPONDENT REGION 1'S OPPOSITION TO THE MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD AND DEPOSE EXPERTS

Upon review of the Coalition's Motion to Supplement the Administrative Record and Depose the Experts Relied on by EPA ("Motion"), EPA has determined that two of the twenty two records identified by the Coalition were inadvertently left off EPA's Certified Index of the Administrative Record due to ministerial error. *See* S. Ex. 2 (Briefing Sheets) and S. Ex 22 ("Incidence and Timing of Low Dissolved Oxygen Events in the Squamscott River: 2005-07").[1] These items were considered by EPA during the

[1] EPA disagrees, however, with the Coalition's characterizations of this 2008 Squamscott River study, Mot. at 21. The paper does not "reach an opposite conclusion" from the earlier study. The cited study compiled sonde data from the Squamscott River for 2005-2007 "to provide information that would help predict when conditions for low DO are most likely to occur." Data from 2003 and 2004 were also analyzed. Data included date, time, DO % saturation, DO concentration, and height of the sonde as an indication of tidal amplitude. Low DO saturation (i.e., less than 75% saturation for a daily average) occurred 27 times in 2007, 39 times in 2006, and 14 times in 2005. While chlorophyll-a data was not collected, the data in the report showed significant periods (*i.e.*, monthly means) of DO supersaturation, which is an indication of significant algal growth and consistent with excessive levels of nutrients in the system. The earlier Jones study stated: "The Exeter WWTF was a consistently significant source of nutrients to the river, but DO conditions at the outfall pipe were never below target levels. This is not surprising because the oxygen demanding processes that are stimulated by nutrients may not take place immediately at the outfall pipe." The 2008 Jones study supports this statement. While DO conditions in the area of the discharge pipe were not below target levels, downstream areas (*i.e.*, around the data sonde) did experience low DO violations after the oxygen demanding processes that are stimulated by nutrients had time to take place. While the study states that low DO conditions were most likely to occur during neap tide conditions, it nowhere indicates or implies that nutrients are not causing or contributing to this problem. In addition to the study indicating that low DO conditions were most likely to occur during neap tides, the study also states: "The most frequent observed time of day when either a low DO event was initiated or the lowest DO reading was

permit issuance proceedings and are, as a consequence, properly part of the record. EPA has filed herewith a corrected index of the administrative record, and certification thereof.

As for the remaining items, the Coalition has failed to meet the "high threshold for the admission of supplemental documents to permitting records." *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 2 (EAB June 12, 2009) (Order Denying Stay and Establishing Further Briefing Schedule). Although the Coalition more than once accuses EPA of 'skewing the administrative record,' that formulation better describes the extraordinary relief sought by this motion: that is, to supplement the administrative record that was in fact relied on by EPA prior to final permit issuance with documents that were not relied on by EPA, including documents created after issuance of the final permit, and therefore by definition were not considered by the Agency. Indeed, the Coalition goes so far as to request inclusion of documents created after, and in apparent response to, EPA's February 8, 2013, Opposition to the Petition for Review. [2] The Coalition's speculative, and unfounded, allegations of bad faith are insufficient to overcome the presumption of regularity attached to an agency's compilation of the administrative record. EPA thus opposes the Coalition's motion to supplement the administrative record.

BACKGROUND

recorded in the morning, especially before 8:00 AM." This is also consistent with the effects of eutrophication and excessive nutrients in the system.

[2] Through nominally styled as a motion to supplement the record with additional documents, the Coalition's filing is in truth an effort to supplement its briefing with yet more argument. The motion, and the attendant affidavits and correspondence, are so laden with advocacy regarding the technical and scientific issues in this case as to run counter to the Board's Orders dated January 11, 2013 (denying the Coalition's extension of time to file a supplemental petition for review) and February 27, 2013 (prohibiting further briefing). EPA respectfully submits that S. Ex. 10-11 and 19-21 should be stricken from the proceedings before the Board.

Pursuant to 40 C.F.R. § 124.17(a), the administrative record in a permit proceeding must contain certain items, including, as relevant here, all comments received during the public comment period; the tape or transcript of any hearings held; any written materials submitted at such hearings; EPA's response to comments and any new material placed in the record therein; the final permit itself; and other documents in the supporting file for the permit. It is well settled that "the complete or official administrative record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision." *In re Dominion Energy Brayton Point Station, LLC (Dominion I)*, 12 E.A.D. 490, 519 (EAB 2006) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)); *accord In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 to 10-05, slip op. at 48 (EAB Nov. 18, 2010); *In re Dominion Energy Brayton Point Station, LLC (Dominion II)*, 13 E.A.D. 407, 417 (EAB 2007). EPA is required to base its final permit decision on the administrative record, 40 C.F.R. § 124.18(a), which "shall be complete on the date the final permit is issued," *id.* § 124.18(c). The Board has interpreted this latter provision to mean that the administrative record in an NPDES permit proceeding closes at the time the permit is issued and that documents submitted thereafter "cannot be considered part of the administrative record." *Dominion I*, 12 E.A.D. at 518, 519 n.44 (citing 40 C.F.R. § 124.18(c)); *see also In re City of Caldwell*, NPDES Appeal No. 09-11, at 16 (EAB Feb.1, 2011) (Order Denying Review); *In re W. Peabody Coal Co.*, 12 E.A.D. 22, 40 n.42 (EAB 2005); *In re BP Cherry Point*, 12 E.A.D. 210, 221 n.27 (EAB 2005). Thus, as a general rule, it is inappropriate to supplement the administrative record with materials that were not considered by the agency, including those generated after final permit issuance. *City of*

Caldwell, slip op. at 115 n.106; *see also Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006).

The very few and limited exceptions to the general rule are to be "narrowly construed," *In re Port Auth. of NY & NJ*, 10 E.A.D. 61, 97-98 (EAB 1996), and applied only in "unusual circumstances," *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).[3] Moreover, an agency is entitled to a strong presumption of regularity in the designation of its administrative record, "absent clear evidence to the contrary." *Bar MK*, 994 F.2d at 740; *see also Port Auth.*, 10 E.A.D. at 98; *Theodore Roosevelt*

[3] The D.C. Circuit has limited these exceptions to: "(1) if the agency deliberately or negligently excluded documents that may have been adverse to its decision, (2) if background information was needed to determine whether the agency considered all the relevant factors, or (3) if the agency failed to explain administrative action so as to frustrate judicial review." *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (internal quotation marks and citation omitted). Although the Coalition relies on *Esch v. Yuetter*, 876 F.2d 976 (D.C. Cir. 1989) to suggest the existence of numerous additional (and broad) exceptions, *see* Pet'rs' Mot. at 6 n.6, 7 (citing *Nat'l Wilderness Inst. v. Army Corps*, 2002 US Dist. LEXIS 27743, *9-10 (D.D.C. 2002) which relied exclusively on *Esch*), 19, 21, it should be noted that "*Esch's* discussion of eight exceptions to the general rule regarding consideration of extra-record evidence was dicta." *Oceana, Inc. v. Locke*, 674 F. Supp. 2d 39, 44-45 (D.D.C. 2009). Moreover, *Dania Beach* and other federal court decisions make clear that the exceptions discussed in *Esch* were only applicable under the separate standard of whether a court may consider extra-record evidence, as opposed to whether a court should order supplementation of the record, *see e.g.*, *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 156-57 (D.D.C. 2012); *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012), *Earthworks v US Dep't of the Interior*, 279 F.R.D. 180, 185-86 (D.D.C. 2012); *Franks v. Salazar*, 751 F. Supp. 2d 62, 67-68 (D.D.C. 2010); *Oceana*, 674 F. Supp. 2d at 44-45; *The Cape Hatteras Access Pres. Alliance v. U.S. Dept. of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009); *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 79 (D.D.C. 2008); *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006). Furthermore, numerous courts have either rejected or questioned the continuing vitality of many of the exceptions identified in *Esch*. *See e.g.*, *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1380-81 (Fed. Cir. 2009); *Nat'l Mining*, 856 F. Supp. 2d at 157; *Styrene*, 851 F. Supp. 2d at 63; *Earthworks*, 279 F.R.D. at 185-86 ; *Oceana*, 674 F. Supp. 2d at 44-45; *Cape Hatteras*, 667 F. Supp. 2d at 115; *Beverly Enters., Inc. v. Herman*, 130 F. Supp. 2d 1, 7 and n.2 (D.D.C. 2000). Similarly, federal courts in many other circuits have never adopted the entire list contained in *Esch*, applying instead much more limited exceptions – in number and breadth – to the general rule against consideration of extra-record materials. *See, e.g.*, *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006); *State of Delaware Dep't of Natural Res. & Envtl. Control v. U.S. Army Corp of Eng'rs*, 722 F. Supp. 2d 535, 543 (D. Del. 2010); *Hickey v. Chadick*, 2009 WL 3064445, *3 (S.D. Ohio Sept. 18, 2009) (citing *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir.1997)). Finally, the *Esch* Court focused on *procedural* deficiencies, but cautioned that "the familiar rule that judicial review of agency action is normally to be confined to the administrative record . . . exerts its maximum force when the *substantive* soundness of the agency's decision is under scrutiny." 876 F.2d at 991-92 (emphasis added); *see also Nat'l Mining Ass'n v. Jackson*, 2011 WL 9977235, *3 (D.D.C. Sept. 14, 2011); *Murakami v. United States*, 46 Fed. Cl. 731, 735 n.3 (Fed. Cl. 2000). In contrast, the Coalition's main complaints in this motion bear on EPA's substantive determinations, *i.e.*, the scientific bases for the permit's N effluent limitation, not that there were procedural errors in the development of this limit.

Conservation P'ship v. Salazar, 616 F.3d 497, 514 (D.C. Cir. 2010); *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 157 (D.D.C. 2012); *Franks v. Salazar*, 751 F. Supp. 2d 62, 67 (D.D.C. 2010); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005). As such, a party may not rebut the presumption with mere speculation, but rather, must adduce concrete evidence that the materials it wishes to add to the administrative record were actually before the agency. *Am. Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33, 42 (D.D.C. 2012); *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 156 (D.D.C. 2012); *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 63 (D.D.C. 2012); *Earthworks v. U.S. Dept. of the Interior*, 279 F.R.D. 180, 185 (D.D.C. 2012); *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72 (D.D.C. 2008) ("[B]ecause supplementation should not be required absent exceptional circumstances, a party seeking to supplement the record must establish that the additional information was known to the agency when it made its decision, the information directly relates to the decision, and it contains information adverse to the agency's decision.").

ARGUMENT

1. The Coalition Has Not Demonstrated Any Grounds for Supplementing the Administrative Record and Considering Extra-Record Materials

The Coalition contends that a number of documents attached to its Motion should be added to the administrative record because, *inter alia*,[4] they constitute evidence of bad

[4] The Coalition also contends that a number of documents attached to its Motion should be added to the administrative record because they show that the permit decision is incorrect; are necessary to determine whether EPA considered all the relevant factors; "and/or" will assist the Board in understanding complex technical issues. Mot. at 1-2. The Coalition inappropriately conflates the distinct concepts of supplementation of the administrative record and judicial consideration of extra-record materials. *See In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 to 10-05, slip op. at 51 (EAB Nov. 18, 2010); *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 156 (D.D.C. 2012). To the extent that the motion may be read to include a request that the Board consider certain extra-record materials without adding them to the administrative record, the Coalition has failed to meet its burden to demonstrate that such action is

faith on EPA's part. Mot. at 1-2. The motion should be denied for the reasons set forth below.[5]

A. The Coalition's Allegations of Bad Faith are Either Unsupported or Mere Differences of Technical Opinion, and Accordingly Do Not Support Any Claim to Supplement the Administrative Record

The Coalition alleges that several documents already a part of the administrative record provide evidence that EPA acted in bad faith in the course of these permit proceedings, and therefore justify inclusion of certain extra-record materials. *See* Mot. at 22. To support its claim of bad faith, however, the Coalition must provide much more than speculative arguments, mischaracterizations and evidence of honest technical disagreement between it and EPA. *See* Mot. at 9-10. While the Coalition's seven "examples" of alleged bad faith set forth in numbered paragraphs on pages 9-11 of the Motion provide the Coalition with yet another forum to provide further substantive explanation of its theories about this case, they supply no basis at all for supplementing the administrative record. EPA responds to each below:

---

warranted. Although a document may not properly be added to the administrative record, the Board may, in certain limited instances, consider it nonetheless. *Russell City*, slip op. at 51-52; *Dominion II*, 13 E.A.D. at 418; *see also In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, slip op. at 26 (EAB Nov. 16, 2011). Such extra-record consideration has occurred, for instance, where a petitioner offers the document in response to new items added to the administrative record by the permit issuer in its response to comments *and* where the document supports the petitioner's "assertion that the Region's conclusions are erroneous or that the Region erred in failing to take into account such materials." *Dominion II*, 13 E.A.D. at 418. Similarly, the Board has considered extra-record evidence "where the appeal process is the logical and/or first opportunity to present such documentation." *In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, slip op. at 26 (EAB Nov. 16, 2011); *see also In re Cape Wind Assocs., LLC*, OCS Appeal No. 11-01, slip op. at 14-15 (EAB May 20, 2011) ("[T]he Board does not ordinarily consider new evidence offered for the first time on appeal where the relevant issue was ascertainable during the public comment period, [although] in appropriate circumstances, the Board has considered new evidence submitted on appeal demonstrating apparently changed circumstances such that the permit applicant no longer intends to construct the facility described in the permit application.") (internal citations omitted). The time for presentation of any such information has, however, long since passed; these materials should have appeared, if at all, as argument in the Coalition's petition for review. *See* January 11, 2013, Order (denying the Coalition's motion for extension of time to file a supplemental petition for review). The Coalition failed to provide this argumentation and may not now do so through the back door of a motion to supplement.

[5] EPA has summarized its position on each record item Petitioner wishes to add to the record in Exhibit A.

(1) As evidence of bad faith, the Coalition claims that Mr. Trowbridge "testified of independent results, that repeatedly informed both DES and EPA that nitrogen had not caused any material change in algal growth or system transparency, [and] were excluded" from the Great Bay Nutrient Report. This claim is demonstrably false, as EPA has previously explained, *see* Opp'n to Pet., Appendix A at 19-20 (specifically discussing the "Morrison study"), 43; *id.*, Appendix B at 11-12; AR B.1 (RTC) at 65-67; Sur-Reply at 16-18. It does not support the Coalition's claim of bad faith by the Agency.[6]

(2) This contention has been refuted on technical grounds by EPA at Opp'n to Pet. for Rev., Appendix A at 48; Sur-Reply at 20-21. It is, moreover, unsupported by the document cited by the Coalition. *See* Mot. at 9 (citing AR H.72).

(3) As EPA has previously explained, this point is apparently premised on a technical disagreement between EPA and the Coalition regarding certain methodologies employed in the Morrison study, AR K.11. *See* Opp'n to Pet. for Rev., Appendix A, at 19-20. As such, it does not provide the support necessary to demonstrate a claim of bad faith. Moreover, the additional citation given here by the Coalition, *see* Mot. at 10 (citing AR H.41), provides no support for the assertions it has raised. *See* Pet'rs' Ex. 2, Sub-Ex. 6.

[6] Moreover, even if the second sentence in the Coalition's first point were true, these alleged admissions *by an NHDES employee* would not demonstrate bad faith *by EPA*.

(4) This flawed claim is based on a misunderstanding of the relationship between transparency and the growth of various forms of algae, and has been previously refuted by EPA. *See* Opp'n to Pet. for Rev., Appendix A at 10, 43.

(5) This assertion by the Coalition is contradicted by the record, AR B.1 at10-13, as further explained in the Region's Opposition to the Petition for Review, at 26-27, 64-65 and Appendix A at 7.

(6) The Coalition claims that "EPA thoroughly misrepresented the results of the prior research conducted for Great Bay, as confirmed by Drs. Jones and Langan." Mot. at 10. However, a single letter from two researchers, Pet'rs' S. Ex. 11, responding the Coalition's highly subjective characterizations (taken by the researchers at face value) of the bases for EPA's permit decision, Pet'rs' S. Ex. 10, hardly supports a claim of bad faith where numerous researchers and experts in the field generally supported EPA's decision to impose a 3.0 mg/l nitrogen limit (*e.g.*, Frederick T. Short, Ph.D, William H. McDowell, Ph.D and Michelle L. Daley, all of Department of Natural Resources and the Environment, University of New Hampshire; Ivan Valiela, Ph.D and Erin Kinney, Ph.D). *See also* AR B.1 at 74-75, 131-39, 165-66.

(7) This is merely a repetition of the Coalition's flawed demand for proof of cause-and-effect relationships and is also a misrepresentation of an e-mail from Matt Liebmann of EPA Region 1. This represents, at most, a differing legal interpretation of Section 301 of the Act, and the scientific

interpretation of water quality data and highly complex technical information, not bad faith. *See* AR B.1 (RTC) at 16, 97; Opp'n to Pet. for Rev. at 54-55; *id.*, Appendix A at 48.

As is evident, the Coalition's allegations of bad faith amount to no more than differences of opinion between it and EPA. But a petitioner must make a "strong showing" of bad faith in order to justify supplementation of the record. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010); *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997). And just as a petitioner does not establish clear error merely by "document[ing] a difference of opinion or an alternative theory regarding a technical matter," *Dominion I*, 12 EAD at 510, the Coalition's allegations of bad faith should fail because they amount to no more than differences of opinion between it and EPA. The Board, accordingly, should reject bad faith as a rationale for supplementation of the record in this case. *See In re Port Auth. of NY & NJ*, 10 E.A.D. 61, 97-98 (EAB 1996).

B. The Coalition Has Not Identified Any Valid Grounds for Including Items That Post-Date Permit Issuance

Nine of the items the Coalition wishes to have added to the administrative record post-date the issuance of the permit (specifically, Items 10-11, 14-17, 19-21) and, thus, are not properly part of the administrative record, because they could not have been considered or relied upon by the Agency in arriving at the permit decision. *See Dominion I*, 12 E.A.D. at 518-20.

For example, the Coalition asserts that a letter written by its members to University of New Hampshire researchers and the response (Items 10 & 11), both of which post-date the permit by months, should be added to the administrative record, because they "confirm" that EPA's permit limit is in error. Mot. at 17-19. Similarly, the

Coalition asserts that the administrative record must be supplemented with recent affidavits (Items 19-21) from two of its consultants and a Tufts University professor. Mot. at 14-17. Recognizing these items as "post-decision document[s]," the Coalition contends that they should be added because they will allegedly "show" whether EPA's decision was correct and will "undoubtedly" help the Board understand matters in the record. Mot. at 15. These affidavits, however, are not mere recitations of "fact," but, rather, constitute attempts by the Coalition (executed weeks after the filing of the Region's Opposition to the Petition) to reargue the issues and expand page limits in contravention of the Board's previous order. *See* February 27, 2013 Order at 3, 6. Indeed, the Coalition itself recognizes item 19 as a re-argument of issues already presented by the Coalition. *See* Mot. at 15 (The "affidavit simplifies all of the[] existing comments [in AR H.4] into a more streamlined assessment . . . ."). Inasmuch as all five items merely represent technical disagreements with EPA, which could, at most, be described as bona fide differences of opinion not falling within any recognized exception to administrative record supplementation, they should not be considered. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *cf. Dominion I*, 12 E.A.D. at 510.

Petitioners also argue, in effect, that, based on single sentence culled from the preamble of a rulemaking and reproduced out of context that it is entitled under existing NPDES permitting procedures to present new evidence to contradict the EPA's experts on appeal. *See* Mot. at 5. To adopt this view, the Board must discard years of precedent regarding issue preservation, deference to EPA on technical matters, and a petitioner's burden to demonstrate that the Region's decision was "clearly erroneous," *see Dominion I*, 12 E.A.D. at 509 & n.28, as well as federal case law cautioning against never-ending

comment, *see, e.g.*, *Rybachek v. U.S. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990). In keeping with the basic principles of Board review of NPDES permits, a petitioner may generally only raise issues on appeal that were raised before the close of public comment. *See In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 727 (EAB 2008). Petitioners have provided no reason why the "facts" and opinions adduced in the affidavits and letters it now wishes to add to the administrative record, *see* Pet'rs' S.Ex. 10, 11, 19-21, were not reasonably ascertainable prior to close of the comment period. Thus, the motion should be denied as to these items.[7]

The Coalition also contends that the administrative record must be supplemented with a 2013 PREP report (Item 17), which was not before the agency prior to permit issuance because it was published after permit issuance. Mot. at 5 n.5 (citing Pet. for Rev. at 25-26). And although the Coalition asserts that the final report "does not support the need for stringent TN restrictions at this time," the conclusions drawn by the Coalition from, and purportedly supported by, the report, constitute mischaracterizations of the

[7] The Coalition, has not argued, nor can it, that it was not reasonably ascertainable that EPA would use, among other things, the Great Bay Nutrient Report to derive the nitrogen limit in the final permit. In other words, the Coalition has provided no explanation why it could not seek out the opinions of these very individuals prior to the close of the comment period or, at the very least, submit them to EPA prior to issuance of the final permit. A petitioner must not be allowed to submit extra-record evidence long after the close of the comment period if the information was previously available and the petitioner failed to bring it to the Region's attention prior to the close of public comment. *See In re Cape Wind Assocs., LLC*, OCS Appeal No. 11-01, slip op. at 14-15 (EAB May 20, 2011) ("[T]he Board does not ordinarily consider new evidence offered for the first time on appeal where the relevant issue was ascertainable during the public comment period."). Such a procedure conflicts with longstanding policies favoring finality and that the Region should have the "first . . . opportunity to address permit objections." *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 395-96 (EAB 2007); *accord In re Conocophillips Co.*, 13 E.A.D. 768, 800-01 (EAB 2008). It is further at odds with a permittee's interest in the swift resolution of a permit appeal, *see In re Carlota Copper Co.*, 11 E.A.D. 692, 735-36 (EAB 2004), and contradicts long-accepted Board practice. The Board does not undertake *de novo* review of a permit decision, *Dominion I*, 12 E.A.D. at 509 n.28, rather, the issue on appeal is whether the permit is based on a "clearly erroneous finding of fact or conclusion of law." *Id.* at 509. Careful determinations regarding the consideration of extra-record evidence are appropriate so as to avoid converting the applicable standard of review into effectively *de novo* review. *Cf. Murakami v. United States*, 46 Fed. Cl. 731, 735 (Fed. Cl. 2000), *aff'd* 398 F.3d 1342 (Fed. Cir. 2005) (noting that exceptions to the rule against extra-record consideration should be "extremely limited," lest the "arbitrary and capricious" standard be effectively converted to *de novo* review).

report's findings, including incomplete and misleading quotes pulled from the report and stripped of their context.[8] Moreover, many of these claims have been previously discredited by the Region. *See, e.g.*, Opp'n to Pet. for Rev., Appendix A, at 1, 31. The best the Coalition can muster is that the document must be added to the administrative record because EPA cites to an earlier draft in the Response to Comments. S. Ex. 1 at 3. But the test is not whether a document is merely related to one in existence prior to permit issuance; the relevant question is whether it was considered by the agency. *See Dominion I*, 12 E.A.D. at 523. In this case, it was not. The motion should be denied as to this item.

C. The Coalition Has Not Identified Any Valid Basis for Including Records That Were Never Before EPA or Relied on, Directly or Indirectly, During the Permit Issuance Process

Similarly, seven items pre-dating permit issuance (namely, Items 3-5, 12, 13, 18, 23) are also not properly made a part of the administrative record because they were not "actually before the [Region] when it made its decision" and the Coalition has failed to

[8] For example, the Coalition asserts that the final report does not support the nitrogen limit in the permit because it allegedly indicates that "[t]he effect of nitrogen loads on the system is not 'fully determined' and requires 'additional research.'" Pet. at 26. The full language in the report is:

> At this time the Great Bay Estuary exhibits many of the classic symptoms of too much nitrogen: low dissolved oxygen in tidal rivers, increased macroalgae growth, and declining eelgrass. Although the specific causal links between nitrogen load and these concerning symptoms have not yet been fully determined for Great Bay, global, national and local trends all point to the need to reduce nitrogen loads to the estuary. [footnote omitted] Additional data collection and research is critical to a better understanding of these links and where the most effective reductions can be targeted.

Pet'rs' Ex. 24, at 14. The Coalition also contends that the final report does not support the nitrogen limit in the permit because it contains the following individual statement: "DIN levels are comparable to those measured in the 1970s." Pet. at 26. What the Coalition neglects to quote, however, is the sentence immediately preceding it: "The long-term trend for all of the data collected between 1974 and 2011 shows an average increase of 68% for DIN." Pet'rs' Ex. 24, at 14. The report also provides possible explanations for this "apparent conflict" and concludes by noting that "[t]otal nitrogen concentrations are a better measure of overall nitrogen availability in the estuary [than DIN]." *Id.*

present evidence that they were submitted to EPA prior to permit issuance. *Dominion* I, 12 E.A.D. at 519, 521 & n.48.

The Coalition argues that two e-mails exchanged between its counsel and NHDES regarding the MOA should be added to the administrative record. *See* Mot. at 19-21.[9] There is no indication – nor indeed any claim by the Coalition–that EPA received these documents. Rather, the Coalition reasons that supplementation is required because: 1) the e-mails document discussions between the Coalition and NHDES about the MOA; 2) EPA was aware of the MOA prior to its execution; and 3) EPA included the MOA itself in the administrative record. *See* Mot. at 19-21. The Coalition concludes that the e-mails were, therefore, "'directly or indirectly considered' by EPA." Mot. at 20. This argument is extreme and would potentially bring within the administrative record any and all communications between the Coalition and another party on any subject touching on the permit of which EPA was aware, regardless of whether they were ever actually before the agency. No such rule exists in Board precedent or the case law. And although the Coalition hopes to convince the Board that *Thompson v. United States Department of Labor*, 885 F.2d 551 (9th Cir. 1989) supports its assertion that the e-mails must be added to the administrative record, the Coalition conveniently ignores that court's instruction that "the *critical inquiry* is whether the[items] were before the [agency] at the time of the decision." *Id.* at 556 (emphasis added).

The Coalition also asserts that survey data and aerial photos referenced in a September 2012 memorandum from Dr. Short to Dan Arsenault of EPA Region 1 – in

[9] The Coalition makes confusing reference to "Exhibit 4" as identifying certain "MOA documents" which it asserts must be added to the administrative record. See Mot. at 20. Because Petitioners' Exhibit 4 is unrelated to the MOA, the Region presumes that the Coalition meant instead to reference its Supplemental Exhibit 4.

which Dr. Short relates his observations from an August 2012 eelgrass survey he conducted in the estuary – must be added to the administrative record. Mot. at 12 n. 13; AR K.29. No such records accompanied the memorandum sent to Mr. Arsenault and the Coalition offers no concrete evidence to the contrary. Thus, the motion should be denied as to these materials. *See Am. Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33, 42 (D.D.C. 2012). To the extent that the Coalition's filing, *see* Mot. at 12 n.13, could be read to encompass an argument that the materials should be added because the agency indirectly considered them, it must do more than merely assert this; the Coalition "must show that the [underlying data and photographs were] so heavily relied on in the recommendations that the decision maker constructively considered [them]." *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1276 (D. Colo. 2010) (emphasis added) (citing *WildEarth Guardians v. Salazar*, 2009 U.S. Dist. LEXIS 110588, *11 (D. Ariz. 2009)); *accord Wildearth Guardians v. U.S. Forest Serv.*, 713 F. Supp. 2d 1243, 1256 (D. Colo. 2010). [10]

2. The Coalition Request to Depose Experts Is Unfounded and Unnecessary

[10] The Coalition also argues that "certain deposition testimony" must be added to the administrative record, while incongruously referring to that testimony with a citation to the certified index of the administrative record. *See* Mot. at 11-14. Because the deposition testimony is, of course, already included in the administrative record, *see* Region's Opp'n to Pet'rs' Mot. to Sus. Br. at 4; February 27, 2013 Order at 3, the motion should be denied as to these items. *Dominion I*, 12 E.A.D. at 517.

The Coalition also asserts that "deposition-related documents" must likewise be added to the administrative record. *See* Mot. at 11-14. Inasmuch as the motion fails, however, to point to any specific documents the Coalition considers to be "related" to the deposition testimony, *see id*., the Board should deny it, *cf. In re Russell City Energy Ctr., LLC*, slip op. at 46-47 n.37 (EAB) ("Nor does the Board think it appropriate that the burden should be shifted to the *Board* to search a party's filings to determine which of the party's documents might fall within "a non-specific, open-ended category."). To the extent that Items 6-8 – which appear to have deposition exhibit labels affixed to them – are the referenced deposition-related documents, the Board should deny the motion as to them because the Coalition has failed to explain the relevance of the documents, *cf. Russell City*, slip op. at 46 n.37, and because they were not provided to EPA prior to permit issuance, *Dominion I*, 12 E.A.D. at 519. It is petitioner's burden, not the Board's, to demonstrate that consideration of these documents is warranted.

The Coalition asserts that the Board should order depositions of certain researchers and EPA staff, based on alleged proof of bad faith. Mot. at 21-24. Despite the Coalition's assertion, it has not shown that "EPA skewed the administrative record to support its conclusions and ignored information showing that nutrients were not causing eelgrass impairment," Mot at 22-23, but, EPA submits, merely identified an area of scientific and technical disagreement. Those disagreements are evident, having been developed over a period of several years, on the existing record before this Board. The Coalition's request to depose witnesses would be nothing more than a fishing expedition, and is moreover nowhere contemplated by the regulations, practice, precedent or guidance pertaining to NPDES permit adjudications before this Board. *See* 40 C.F.R. Part 124; EAB Practice Manual (June 2012). On the contrary, similar trial-like procedures were *eliminated* from NPDES regulations by the Agency in 2000. *In re USGen New England, Inc.*, 11 E.A.D. 525, 528-29 (EAB 2004) (discussing the removal from Part 124 of the regulations regarding evidentiary hearings), *aff'd sub nom Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886 (May 15, 2000). The Board has noted that such procedures are unnecessary in part because the factual issues likely to arise in an NPDES permit hearing will be technical, complex and wide-ranging and are therefore more properly resolved through examination of the record than through the examination and cross-examination of witnesses. *In re Beeland Group, LLC*, UIC Appeal No. 08-02 (EAB Oct. 3, 2008) (citing 61 Fed. Reg. 65,268, 65,277 (Dec. 11, 1996). The Coalition's

request, if granted, will materially impede, not advance, this Board's interests of administrative and judicial efficiency and, accordingly, should be denied. *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 to 08-06, slip op. at 19 (EAB 2009).

III. CONCLUSION

Since it is a petitioner's burden to demonstrate that extra-record materials must be added or considered, *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006), and the Coalition has demonstrably failed to carry that burden, the Motion should be denied.

Respectfully submitted,

Samir Bukhari, Assistant Regional Counsel
US Environmental Protection Agency
Office of Regional Counsel, Region I
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

Of Counsel:
Lee Schroer
Heidi Nalven
Water Law Office
Office of General Counsel
Dated: March 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Petitioner's Motion to Supplement the Administrative Record and Depose Experts, in connection with NPDES Appeal No. 12-05, was sent to 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 First Class U.S. Mail:

Mr. John C. Hall
Hall & Associates
1620 I Street, NW, Suite 701
Washington, DC 20006-4033

Evan Mulholland, Assistant Attorney General
Environmental Protection Bureau
Department of Justice
33 Capitol Street
Concord, NH 03301

Thomas F. Irwin, Esq.
Vice President & CLF New Hampshire Director
Conservation Law Foundation
27 North Main Street
Concord, NH 03301

Michael T. Racine, Esq.
PO Box 644
Hillsborough, NH 03244

Dated: March 15, 2013

_____
Samir Bukhari
Assistant Regional Counsel
US Environmental Protection Agency
Office of Regional Counsel, Region I

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

EXHIBIT A

Item # /S.Ex. #	Brief Description	In Admin. Rec.?	Basis for Denying
2	Coalition June 2012 briefing sheet	Y	Part of AR (H.77); moot
3	E-mail: Hall to Currier	N	Not provided to EPA prior to permit issuance
4	E-mails b//n Diers and Hall	N	Not provided to EPA prior to permit issuance
5	E-mails b//n Hall and Diers	N	Not provided to EPA prior to permit issuance; no reason provided by Coalition for inclusion
6	E-mail: McDowell to Trowbridge	N	Significance not specifically explained by the Coalition in its Motion; not relied upon by EPA in permit proceeding
7	E-mail: Basile to Edwardson	N	Significance not specifically explained by the Coalition in its Motion; not relied upon by EPA in permit proceeding
8	E-mail: Short to Latimer	N	Significance not specifically explained by the Coalition in its Motion; not relied upon by EPA in permit proceeding
9	E-mail: Basile to Larimer	Y	Part of AR (I.38.i); moot
10	Letter: Mayors to UNH	N	Post-dates permit issuance; contrary to Feb. 27, 2013 Order
11	Letter: UNH to Mayors	N	Post-dates permit issuance; contrary to Feb. 27, 2013 Order
12	Letter: Mayors to Burack	N	Not provided to EPA prior to permit issuance
13	Letter: Mayors to Burack	N	Not provided to EPA prior to permit issuance
14	Letter: EPA FOIA response	N	Post-dates permit issuance

15	Letter: Coalition FOIA request	N	Post-dates permit issuance
16	Letter: EPA FOIA response	N	Post-dates permit issuance
17	2013 PREP Report	N	Post-dates permit issuance
18	Short memo data and photos	N	Not provided to EPA prior to permit issuance
19	Chapra Affidavit	N	Post-dates permit issuance; contrary to Feb. 27, 2013 Order and Board precedent
20	Peschel Affidavit	N	Post-dates permit issuance; contrary to Feb. 27, 2013 Order and Board precedent
21	Gallagher Affidavit	N	Post-dates permit issuance; contrary to Feb. 27, 2013 Order and Board precedent
22, attach. "a"	2008 Jones Study	Y	Part of AR (K.40); moot
23	E-mails b//n Hall and Diers	N	Not provided to EPA
N/A	Deposition testimony	Y	Part of AR (D.1.i.1-4); moot