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April 6, 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 – Petitioner's Motion to Remedy Improper Board Member Introduction of New Permit Appeal Issues and Burden of Proof, and Request for Recusal of Presiding Judge Ward Due to Bias

Ms. Durr:

Attached please find for filing, the City of Taunton's motion to remedy improper Board member introduction of new permit appeal issues and burden of proof, and request for recusal of Presiding Judge Ward due to statements demonstrating bias in the above-captioned appeal. EPA has indicated that it opposes this Motion. 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	)	

PETITIONER'S MOTION TO REMEDY IMPROPER BOARD MEMBER INTRODUCTION OF NEW PERMIT APPEAL ISSUES AND BURDEN OF PROOF, AND REQUEST FOR RECUSAL OF PRESIDING JUDGE WARD DUE TO BIAS

City of Taunton ("Taunton" or "the City"), hereby requests the Board issue an order confirming that the Board's review will not consider any arguments/legal theories raised by any member judge made at the March 1, 2016 oral argument, which: (1) introduced new legal issues not previously part of EPA's NPDES permit decision-making, or raised as a valid defense to Petitioner's filings by EPA; or (2) created new burdens of proof not earlier raised by EPA as an issue in this matter. The City also raises, and reluctantly seeks relief from, the apparent bias and lack of objectivity of the Presiding Judge, Mary Beth Ward, whose statements and demeanor during the oral argument are contrary to Board rules and norms of jurisprudence. Open advocacy does not belong to a decision-making body that is self-described as "impartial" and "independent." To avoid the appearance of prejudice, the City respectfully requests that Judge Ward recuse herself and take no part in the writing of the final opinion. The City's present filing incorporates by reference its immediately prior filing, dated March 17, 2016, with the Board, *Opposed Motion to Strike False and Misleading Testimony on the Record and to Supplement the*

Administrative Record with Deposition Testimony on these Issues ("Taunton's Motion to Strike False Testimony").

The relief Taunton requests will reassure the City of fair and impartial proceedings. The Board, as well, will benefit by eliminating even the appearance of partiality from its proceedings. The public interest, the operation of the Agency (many employees of which viewed the oral argument), and the perceived authority of the Board will be enhanced.

AUTHORITY FOR MOTION

The City's filing, and request for relief, are made in accordance with 40 C.F.R. § 124.19(n), which allows the Board to "take all measures necessary for the efficient, *fair, and impartial adjudication* of issues arising in an appeal."[1] (Emphasis supplied). *See In Re San Jacinto River Authority*, 14 E.A.D. 688 (E.A.B. July 17, 2010). The Board's own *Practice Manual*, at 1, also refers to the Board in a similar way, "The [EAB] is a permanent, *impartial*, four-member body that is *independent of all Agency components* outside the immediate Office of the Administrator." (Emphasis supplied). The City also files this Motion consistent with well recognized considerations to affirm, and protect, due process guarantees for Federal boards. *See, e.g.*, *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process.") (internal citations omitted). Under 28 U.S.C. § 455(a), a federal judge is required to recuse themselves "in any proceeding in which [their] impartiality might reasonably be questioned." *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 84, 87 (D.D.C. 2009). In assessing such motions, "recusal is required when 'a reasonable and informed observer would question the judge's impartiality.'" *S.E.C. v. Loving Spirit Found, Inc*. 392 F. 3d 486, 493 (D.C. Cir 2004) (quoting *United States v. Microsoft Corp*.,

[1] The word, *Impartial*, is defined as, "The term used for something unbiased, fair and unprejudiced." *The Law Dictionary* (2 ed.), www.thelawdictionary.org.

253 F.3d 34, 114 (D.C. Cir. 2001)). Finally, removal for bias is appropriate "even though [the judge's opinion] springs from the facts adduced or the events occurring at trial" if "it is so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540 (1994); *Cobell v. Kempthorne*, 455 F.3d 317, 332 (D.C. Cir. 2006).

The Board, then, is expressly empowered to take necessary steps to guarantee a fair and impartial process to the City, including:

1. ***Avoiding Post-Hoc Rationalizations of Agency Decision-making***: The Board must avoid an advocate's role, as this will result in creation of a false record regarding review of the adequacy of Agency decisions. Courts uniformly reject *post hoc* rationalization by any reviewing tribunal as impermissible, as a Court may not substitute its reasoning for that of the Agency. *Burlington Truck Lines v. United States*, 371 U.S. 156, 169 (1962) (Courts may not substitute their own, or agency counsel's, discretion for that of the agency).

2. ***Not Creating New Agency Arguments After the Close of Briefing****:* Closely aligned with avoiding *post hoc* rationalizations is the parallel need for the Board to limit its review to the administrative record and issues briefed, and not create new, and unannounced, legal or factual issues for a party to address (or which it cannot ever address, given the absence of further briefing). *In re Smith Farm Enterprises*, EAB Appeal CWA 08-02, Order Denying Motion for Leave to Supplement Briefing (Sept. 28, 2010) ("[A] principal brief should contain all issues presented for review… the Board frequently declines to review issues not raised in the initial petition for review."); *see also In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 438 (EAB 2007) (rejecting as untimely certain issues raised in a post-remand appeal that could have been raised in initial petition). The Board's oral argument averments regarding the import of the State Section 401 certification, the effect of the separate State water quality permit, and the

City's potential burden of proof on waters not identified as impaired under Clean Water Act ("CWA") Section 303(d), 33 U.S.C. § 1313(d), among others, are all newly raised issues of the Board's creation. These "legal arguments" raised "*sua sponte*" by the Board at oral argument had no role in the development of the permit fact sheet or EPA's rationale for permit issuance and are akin to a party raising new arguments after the close of briefing – an action strictly proscribed by Board procedures and NPDES rules. *Id*. Because of the difficulty in determining an adjudicator's subjective state of mind associated with these newly raised legal theories, due process most concerns itself with *appearances of partiality*. *See United States v. Gipson*, 835 F.2d 1323, 1325 (10th Cir. 1988); *See also* Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 B.Y.U. L. REV. 943, 967. Thus, a Board's creation of new issues, unrelated to any statute, regulation or administrative record finding, as the basis for upholding EPA's action would raise serious bias and partiality concerns.

3. ***Not Violating the City's Due Process Rights****:* The Board rules promise a "fair and impartial process." Consequently, it cannot produce a process which effectively creates a new or skewed record, something that the City has never seen or responded fully to: "Integral to an agency's notice requirement is its duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules." *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (quotation omitted); see also, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1402-1404 (9th Cir. 1995) (Public release of a USGS survey was vital to the ability of FWS to assess the accuracy before making an agency decision relying on information contained in the report). "An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary." *Kern Cty. Farm Bureau*, 450 F.3d at 1076. Agencies accordingly are

not permitted "to use the rulemaking process to pull a surprise switcheroo." *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005). Consequently, the key information and analyses supporting regulation must be disclosed to the public in a timely fashion.

These issues and the need to remedy the improper Board averments and unsupported regulatory claims from the record are more fully discussed below.

COUNSEL NON-CONSENT

Taunton's legal counsel has contacted EPA counsel, by email communication, dated March 24, 2016, regarding the submission of this motion. We have been informed that the Agency will oppose this filing.

ARGUMENT

A. Board Action Violates Procedural Due Process

It is axiomatic that a Board judge (or the Board, collectively) is not to be an advocate for EPA's position. When a Board judge creates issues, or assumes a pro-EPA advocate's role, it not only shows bias, but also distorts the very administrative record it is its duty to review (and that an appellate court might also be asked to review). At oral argument, one or more Board judges in this matter took the unfortunate approach of veering away from the prescribed boundaries of balanced judicial inspection and fundamental fairness, in several key respects. First, Board judges *presented new issues* concerning CWA Section 401, 33 U.S.C. § 1341, as the bases for upholding EPA's permit action – issues which neither party had briefed or presented to the Board as the basis for the permit action. At least one judge's views regarding the State Certification requirement of CWA Section 401 [TR., at 21-22] serves to document this concern. Unfortunately, this example is not alone, as is discussed below.

At oral argument, Judge Mary Kay Lynch – out of the blue – raised entirely new, and irrelevant, issues, when she asked [TR., at 21-22], "So, Mr. Hall, did the State sign this permit in April of 2015?" and, "Did they issue an identical permit?" and, "Do you know if they issued the 401 certification certifying that these discharges . . . were in compliance with the State Water Quality Standards and with the Clean Water Act, including 303." To these interjections, Mr. Hall answered, "Your Honor, I'm not here to challenge or otherwise deal with any identical permit by the State of Massachusetts. I'm only concerned with the permit that EPA Region 1 has issued." *Id.* Further, Mr. Hall answered, "I have no idea, and nor do I - - nor does it matter for our legal challenge." *Id.*

An apparent purpose of this line of questioning by Judge Lynch was to set up a line of argument that a subsequent state 401 certification and identical state permit were evidence that EPA's independently issued permit was properly based and necessary to achieve applicable state standards. Such questions, however, open a door – even if unintended – to creation of a new record. First, the proposed permit Fact Sheet *nowhere claimed* that the Commonwealth of Massachusetts provided the basis for and requirements of this permit. Second, even EPA Region I itself never made such a *wild claim*, as it is plainly baseless under applicable NPDES rules (the NPDES permit rules *require* the state to provide the certification prior to permit issuance, not to establish the basis for federally issued draft permits – 40 C.F.R. § 122.4(b)).[2] EPA unquestionably had the burden of demonstrating and clearly documenting the need for the extremely restrictive limitations and conditions proposed in the permit – any concurrent state

[2] This irrelevant issue, however, was later seized upon by EPA counsel to further bolster the attempted justification of the EPA Region 1 permit action. After *speculating* that resource demands prevented the State from assessing all information on impaired waters, EPA counsel [TR., at 46] launched into a complete *non sequitur*: "Having said that, I think one important piece to bear in mind is that the State, when EPA issued its MPDES permit, the State not only certified that permit, the State also issued an identical State permit under Massachusetts Clean Waters Act that has similar language relating to culture eutrophication, nutrient impacts." EPA counsel, continuing the point, said that "[i]n Region 1 under the Memorandum of Agreement, we have a joint permitting process[.]" *Id.*, at 47.

action (*even if identical* to the federal action) is irrelevant and immaterial to this regulatory burden.[3]

Furthermore, Judge Ward separately interrogated Taunton's counsel as to whether the City "proved" the Estuary was not impacted by nutrients. [TR., at 6]. This Board questioning insinuated that a new, extra-statutory burden of proof (applicable to NPDES permittees and state agencies), existed *before the absence* of a water body on a CWA Section 303(d) list can be trusted (or given its intended and legal effect).[4] Taunton legal counsel pointed out, early in the oral argument, that the Taunton Estuary "is a designated wild and scenic river and [has] never been classified as impaired by the State of Massachusetts." [TR., at 6]. Acknowledging this, Judge Ward then suggested that an affirmative burden might well exist to "prove a negative"; "[b]ut did the State ever make an *affirmative finding that the river was not* nutrient impaired?" *Id.* (Emphasis supplied). And, further, Judge Ward asked: "But in this instance did the State make an affirmative finding? Is there any place in the record you can point us to where that finding has been made?" *Id.*, at 6-7.[5] Thus, out of whole cloth, Judge Ward created a new "guilty until proven innocent" standard for imposing more restrictive NPDES limitations that can only

[3] A cursory review of the state's 401 Certification letter (Admin. Record at Doc. E.1) dated April 8, 2015 shows that MassDEP did not claim the disputed limits are necessary under state law. Rather, the letter noted "As you are aware, the City had expressed significant concern that the draft permit… did not allow for site specific analysis of whether the total nitrogen limit was required to be as stringent as proposed… ." The letter further discussed that "new information the City is expecting to submit to demonstrate that the final limit should be modified." No one could objectively review this letter and conclude that MassDEP was the one mandating that the more restrictive limits be imposed.

[4] Please refer to Taunton Motion to Strike False Testimony, at 16-18, on the Section 303(d) listing issues. It is noted there, that "the record is uncontested that the federally-approved Section 303(d) lists *do not identify* the Taunton Estuary waters as nutrient impaired." *Id.*, at 16.

[5] Taunton's counsel correctly reminded the Board of (at least) two key errors in the nature of its questioning. First – the 303(d) list is the best evidence of non-impairment: "the very 303(d) list itself [is] the evidence that the State concluded that the river is not impaired." [TR., at 7]. Second – no burden exists to prove a negative: "[n]or are they [State, or any third party] required to issue a separate independent analysis claiming that it's not nutrient impaired. That's what the 303(d) list is supposed to encompass." *Id.* Mr. Hall also pointed out, in rebuttal, that "nothing in the record shows the State's 303(d) action was not current. [TR., at 56].

be satisfied by producing an express state agency finding of "no impairment". Of course such an express finding does not exist because there is no federal requirement under Section 303(d) to publish such negative impairment determinations, only the positive ones.

An administrative board cannot "salt" the record with new issues (*e.g.*, subsequent state 401 certification or claim that the permittee is required to prove the water body is unimpaired) to prevent an in-depth analysis of the appellant's appeal. *Burlington Truck Lines v. United States*, 371 U.S., at 169 (1962) ("For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review."); *see also*, *Interstate Commerce Com v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 290 (1987) ("[A]n agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself.") (internal citations omitted). Improperly attempting to switch burdens of proof or create new loopholes for sustaining administrative agency action clearly demonstrates bias. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 268 (1992) ("It is self-evident that, to the extent that the agencies use informal means to control the process and its substantive results, they detract from the impartiality of the presiding officer, the fairness of the proceeding, and the satisfaction of the public with the results.").

An apparent goal of these Board averments was to create new legal and factual theories to uphold EPA's action and *effectively reduce or reverse* statutory burdens previously established by Congress for EPA, or individual states, to meet (*e.g.*, demonstrating that a particular waterbody was *not* nutrient impaired and would *not* be affected by the City's permit). Putting aside that EPA always maintains the burden of demonstrating that the effluent limitation is necessary under 40 C.F.R. § 122.44(d), and the statute nowhere created any such burden for permittees, the issue of having an appellant to "prove a negative" in similar circumstances is

universally disfavored. *See, e.g.*, *Sissoko v. Rocha*, 412 F.3d 1021, 1036 (9th Cir. 2005) ("[F]airness and common sense often counsel against requiring a party to prove a negative fact…"). The Board's attempt to create new arguments to support the permit and new "burdens of proof" alien to the burdens established in the CWA NPDES issuance process and American jurisprudence, in general, demonstrated that one or more Board members are acting in the role of an advocate rather than of an impartial tribunal.

B. City Was Prejudiced by the Board's Action.

The potential prejudice to the City is palpable. The Board, in effect, inserted new issues – *never previously raised, and nowhere found in NPDES rules* – that the issuance of a parallel state permit and 401 certification – at the very end of the permitting process when the comment period was closed – proves EPA's actions were properly based.[6] *See*, *In re Smith Farm Enterprises*, EAB Appeal CWA 08-02, *supra* at 4. One would be hard pressed to find any APA jurisprudence that would countenance such a legal theory, and, of course, none has been provided. Such a view would eliminate the need for EPA to defend its permit action and establish the state as the entity creating the record for the federal permit action, which is justified by a single 401 certification letter – a rather absurd turn of events. Clearly, this is not the standard of review for administrative decision-making. *See, e.g., Chevron v. NRDC*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co*., 323 U.S. 134 (1944).

Nothing exists in Section 401 that provides a federally-issued NPDES permit with presumptive accuracy *due to a State certification or separate permit action*. All federally-issued NPDES permits require a Section 401 certification (unless waived). *See*, 40 C.F.R. § 124.53(a).

[6] The Taunton NPDES permit was jointly issued, as is evident from its face, a fact which proves absolutely no support to any EPA position regarding its permit issuance decisions, or the arguments its counsel has raised in the Agency's defense. In any event, even if, *arguendo*, EPA had some position to raise, it has long since been waived. Admin. Record at Doc. A.1.

The certification provides a vehicle to raise "more stringent" requirements of State law (which is not the case here). *Id*., at 124.53(e).[7] The Section 401 "issue," in addition to being wrongly introduced at the hearing, is not an issue at all in this matter as the conditions involved are federally-inspired, and there is no evidence of any "more stringent" State standard.[8]

With regard to Section 303(d) impairment listing assessments, EPA rules also mandate that data used in such decision-making by the state be "reliable" and that all available data be assessed. *See* 40 C.F.R. § 130.7(b). Here, the Board member's apparent reversal of the burden of proof is not only factually and legally wrong, but it serves to poison the record.[9] The Agency, of course, is bound to follow the requirements of the CWA and its own regulations regarding development, review, and effect of Section 303(d) lists. As the Supreme Court noted, "So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States. v. Nixon*, 418 U.S. 683, 696 (1974). Yet the misdirected statements of the Board judges, in addition to suggesting that there exists another "bite" at the Section 303(d) impairment listing allowing EPA to "trump" the approved listing *for an entire estuary* at permitting – *though none exists* – also had the effect of encouraging EPA legal counsel to offer *speculation* as to both why the State failed to include the Taunton Estuary as impaired, and that the State would most

[7] The State 401 certification letter was issued on April 8, 2015. Admin. Record at Doc. E.1. The Taunton NPDES permit, at 23, "also incorporates the state water quality certification issued by MassDEP under §401(a) of the [CWA and State law]." *See* Admin. Record at Doc. A.1.

[8] Of course, "A State may not condition, or deny a certification on the grounds that State law allows a less stringent permit condition." 40 C.F.R. §124.55(c).

[9] Under the CWA, EPA, *not the City of Taunton*, plainly carries the burden to prove that a water quality based limit is "necessary to meet applicable water quality standards". Section 301(b)(1)(C). Regarding this issue, the 303(d) list is the primary means by which both the state and EPA identify whether a waterbody is impaired by a particular pollutant using "reliable data". See CWA § 303(d) and 40 C.F.R. Part 130.7. In this process, EPA, as well all other municipal and environmental interests, are given every opportunity to disagree with the state's listing. CWA § 303(d)(1)(D)(2); 40 C.F.R. § 130.7(d)(2). EPA has no authority to amend an impairment listing as part of the permit process. 40 C.F.R. § 130.12(a).

likely change that decision – apparently when further resources permitted a more fulsome review – thereby justifying EPA's permit action. EPA counsel argued: "And one can *only speculate*, but *we presume* that they simply due to significant resource constraints at the State were not able to assess the information that we had in front of us. That will change going forward." (Emphasis supplied) [TR., at 46]. The Board's statements have moved into the dangerous waters of attempting to remake the administrative record, and to support ignoring EPA's applicable statutory requirements.

C. Board Member's Demeanor Suggests Bias and Lack of Objectivity

The manner and type of questions to Taunton's legal counsel certainly "set the stage" for the overt prejudicial questions to come, as well as interfering with counsel's time and ability to complete necessary argument. In particular, Judge Ward's biased statements and demeanor at oral argument demonstrate, objectively, the need for this motion to recuse in accordance with *S.E.C. v. Loving Spirit Found, Inc*., *United States v. Microsoft Corp*., and *Liteky v. United States. Supra* at 2-3. Those statements served to: 1) actively support, without merit, record fabrications of EPA, 2) create new legal burdens without reference to applicable rules or administrative record findings, and 3) aggressively attack all of the City's arguments, in a manner more akin to an Agency counsel defending EPA's actions, rather than as an impartial judge. The continuing bias of certain Board members can be seen in several ways.

First, evidence of member disrespect can be seen by the numerous interruptions of Taunton's legal counsel, Mr. Hall, as he attempted to make his presentation. The argument time, under the best of circumstances, is very limited; only 30-minutes in length. Notwithstanding the correct observation of Judge Kathie A. Stein that "this [Taunton NPDES] is a complicated permit with an extensive record[,]" [TR., at 8, lines 20-21], Mr. Hall was interrupted by Judges Ward

and Lynch *over 12 times* during his main argument which had the obvious effect of preventing Taunton counsel from highlighting the severe record inconsistencies in the PowerPoint provided to the Board prior to the oral argument. Oral argument at the EAB should focus on encouraging the appellant to present its best factual and legal argument, with questions limited to points of clarity.[10]

Moreover, most of Judge Ward's questioning was overtly argumentative, demonstrated pro-government advocacy and preconceived notions of what was legally or factually required, even where the record plainly contained no objectively reviewable information in support of the contention. For example, Judge Ward [TR., at 10], interrupting counsel Hall as he attempted to respond to Judge Stein, said, "Mr. Hall, *I think* in terms of the adequacy of the fact sheet, *I think* reviewing the fact sheet is fairly detailed and lengthy. . . . I'm not sure I take your point that it was a plainly deficient fact sheet."[11] (Emphasis supplied). Some further examples are helpful to give a fuller flavor of this Board member's bias:

- Judge Ward [TR., at 12]: "Mr. Hall, *I think* the Region identified the nutrient criteria guidance issued by the Agency that describes this kind of a reference-based approach as a permissible means of setting a water quality standard." (Emphasis supplied).

[10] The grant of a request for oral argument is discretionary under EAB rules. *See*, 40 C.F.R. §124.19(h), except where oral argument is sought on its own initiative. Taunton requested oral argument here and anticipated that Board inquiry would be based on key technical and procedural issues raised in the City's permit appeal. As it was, Taunton legal counsel was unable to complete a substantial part of his argument: ". . . I didn't get a chance to make the points *on any* of the administrative procedural problems that we encountered[.]" (Emphasis supplied) [TR., at 32]. Even though these vital issues were included in the City's briefing, the majority of the Board showed little interest in such things; contrasted with the sharp attention showed by Judge Ward to procedural issues that might cause the City's merits to be avoided.

[11] Taunton legal counsel pointed out the advocacy nature of Judge Ward's questioning: "Your Honor, you just issued a declaratory statement to me that the fact sheet contained detailed analysis and, obviously, you believe it must, so I'm asking you where is it?" [TR., at 11]. In effect, Judge Ward, at this and other times, acted as an opposing counsel giving cross-examination to Taunton's legal counsel, who proffered only record examples of missing, or erroneous, Agency technical analysis, not his own "expert" opinion.

(Taunton had noted no such analysis showing the guidance was properly applied exists anywhere in the record).

- Judge Ward [TR., at 15]: "*I think* that the Board's precedent *does require* the comments be filed during the public comment period, and that the *Region is under no obligation to consider* later submitted comments. So why are these properly before the Board at this time?" (Emphasis supplied). (Judge Ward ignored the fact that all subsequently submitted comments, based on previously unavailable EPA positions, (1) were in fact evaluated by EPA in the record and (2) could not be considered "late filed" since it was EPA's later claims based on analyses, nowhere contained in the Fact Sheet, that created the need to respond to the issue after the close of the formal comment period).
- Judge Ward [TR., at 18]: "Well, actually reading the emails themselves, *I don't think* that's reflected either. . . . *And I think* the other question I would have is, why wasn't the fact sheet, which at least refers to the MEP approach relating to TMDLs not sufficient *to put you on notice* that that was a question, that if you wanted to comment that was the time to comment on it and provide Dr. Howes views?" (Emphasis supplied). (Judge Ward ignored the unrefuted fact that EPA first claimed that the method applied was similar to the MEP process nutrient TMDL decisions only in the response to comments).
- Judge Ward [TR., at 23]: "Mr. Hall, . . it appears to me on the record you may be conflating two different things." (Judge Ward, a non-scientist, attempting to disagree with the unrefuted expert opinion of Dr. Brian Howes that EPA's selection of the

sentinel site to create the nitrogen target for the Taunton Estuary was technically incorrect).

- Judge Ward [TR., at 25]: "*I think* that I'm pointing out is that you're arguing that the Region failed to show cause and effect. And my question to you is, why were they required to given the regulatory standard?" (Emphasis supplied). (Judge Ward was informed that this issue had been extensively briefed and is a clear requirement of the statute and implementing regulations).
- Judge Ward [TR., 32]: "But, Mr. Hall, *you did have the opportunity* to go to the Region's offices and examine the record, as the regulations provide. And *I think that's all that's required*." (Emphasis supplied).[12] (Judge Ward ignored the fact EPA admitted it could not identify where their new analyses were, affirmatively misrepresented their location in March 2014, and no evidence shows the new analyses were actually placed in the permit record prior to comment period closure).

Contrast the advocacy attack style of Judge Ward's approach used with Taunton's counsel (replete with opening declaratory opening statements), the tone and approach completely reversed when dealing with EPA counsel. Following are some examples of this stark difference in questioning:

[12] Judge Ward's apparent support of the Region's dissembling record in responding to the City's repeated document requests is astonishing, given the ease by which Judge Walton recently rejected EPA's very arguments, stating "that the defendant engaged in obdurate conduct" when it failed to process H&A's FOIA request to release specific Taunton permit analyses *See H&A v. EPA*, Civil Action No. 15-286 (March 7, 2016), Slip op. at 10. (*See* Motion to Strike [Doc. 49, Att. 2]). As thoroughly documented by Taunton and unrefuted by EPA (*See* Motion to Strike, [Doc. 49] at 7 to 9), EPA never put the disputed records into the permit file for public review before issuing the final permit – effectively preventing the City from commenting in the full record. Moreover, merely pointing to an office somewhere where the records are is generally considered an insufficient response by an Agency. *See, e.g., Fitzgibbon v. Agency for Int'l Dev.*, 724 F. Supp. 1048, 1051 (D.D.C. 1989) ("The availability of FOIA material in an agency's pubic reading room does not thrust the material into the public domain."). Given that the City had plainly documented that EPA had denied knowing where the records were and then purposefully directed the City to another permit file that did not contain the records, Judge Ward's statement regarding the sufficiency of EPA's actions regarding public access to key records is jaw dropping.

- Judge Ward [TR., at 39]: "Counsel, what do you make of Mr. Hall's argument that the conditions at MHB 16 are so different that you couldn't use that as the reference for purposes of setting a limit further upstream?"
- Judge Ward [TR., at 41]: "Counsel, I actually want to ask you a question . . . . They [Taunton] make this presentation and from there argue that that chart shows there is no correlation between high algal levels and law dissolved oxygen levels. What's your take on that chart?"
- Judge Ward [TR., at 45]: "So counsel, could you address why the State hasn't yet included the Taunton River on its list as impaired for nitrogen?"
- Judge Ward [TR., at 50]: "I think counsel for the City also raised the issue of the Brayton Point thermal discharges. Would you like to address that argument?"
- Judge Ward [TR., at 52]: "Counsel, . . . I wanted to ask another question in terms of the process. Counsel for the City has raised some concerns with their [timely and complete access to information]. What's your response to that?"

The contentious, advocacy approach of Judge Ward continued even in the short-timed rebuttal. After Taunton's counsel pointed out that EPA counsel "dodged" responding to a prior Board question on record availability, Mr. Hall then discussed EPA ignoring its own prior NPDES program conclusion about improved DO in Mount Hope Bay from Brayton Point closure, when it issued the Taunton permit. Judge Ward then interjected, as an apparent advocate and now technical expert of the Agency, [TR., at 55]: "I think EPA's response to that was that the issue really is focused on the Taunton River estuary, not necessarily Mount Hope Bay."[13] This record objectively evidences that Judge Ward was more interested in advocacy in support of

[13] To which, Taunton counsel Hall replied [TR., at 55], "Actually not true[.]" explaining that the sentinel site which controls permit derivation is located in Mount Hope Bay.

EPA's permit action than understanding the major procedural and factual errors that pervaded this permit action. Therefore, Judge Ward should be recused and play no role in writing the final decision of the Board.[14]

RELIEF REQUESTED

The described Board member behavior acts to deny Petitioner of its due process rights, considers issues not contended by either party, fails to adequately address challenges, and serves to advance the interests of the Agency at the expense of fairness and impartiality. The demonstrated behavior of at least one member of the EAB at Taunton's hearing threatens bias, lack of objectivity, and pre-determination of the City's NPDES appeal in derogation of Board rules and accepted norms of due process. 40 C.F.R. § 124.19.

To correct the bias and procedural errors occurring at oral argument, Taunton requests that the EAB issue an order confirming that:

1. The State's 401 Certification does not play any role in this matter;
2. EPA has the burden of proof in demonstrating that a waterbody is nutrient impaired and that such determination and effluent limitation must be based on reliable data;
3. The City does not need to prove that waters are not nutrient impaired;
4. The state's § 303(d) listing conclusions for the Taunton Estuary, approved by EPA, are presumed valid and based on current/reliable data.

Furthermore, due to the repeated demonstrations of bias in favor of EPA through means discussed above, the City requests that Judge Ward recuse herself and be removed as the Presiding Judge in this matter and have no part in the decisional process and writing of the final

[14] Judge Ward even issued an acerbic decision regarding an uncontested motion to extend the hearing date chiding Taunton counsel for seeking to informally move the date as the Board itself had done for a snow storm that never materialized. (*See*, Ward order dated Feb. 12, 2016). Was such advocacy what the EPA Administrator had in mind when delegating NPDES permit appellate responsibilities to a separate Board?

Board decision. Given that the City's requested relief is well within the Board's authority and does not prejudice EPA in any manner, the Board should grant this Motion.

Respectfully submitted,

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April 6, 2016

CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, April 6, 2016, a copy of the City of Taunton's motion to remedy improper Board member introduction of new permit appeal issues, burden of proof, and request for recusal of Presiding Judge Ward due to bias was served on the individuals identified below by U.S. first-class mail, postage pre-paid, and e-mail:

Curt Spalding, Regional Administrator
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Samir Bukhari, Assistant Regional Counsel
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5 Post Office Square - Suite 100
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Dated on the 6th day of April, 2016.

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