



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

VIA ELECTRONIC FILING

February 1, 2016

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

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

Dear Ms. Durr:

Please find EPA Region 1's Response to "Petitioner's Unopposed Motion to Allow Use of PowerPoint to Display Excerpts of the Record During Oral Argument," and accompanying Certificate of Service, in connection with the appeal referenced above.

Sincerely,

Samir Bukhari
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Enclosures

**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 RESPONSE TO “PETITIONER’S UNOPPOSED MOTION TO
ALLOW USE OF POWERPOINT TO DISPLAY EXCERPTS OF THE RECORD
DURING ORAL ARGUMENT”**

I. BACKGROUND

On January 22, 2016, the Region was made aware that the City of Taunton (“Petitioner”) had notified the Clerk of the Environmental Appeals Board of its intention to present oral argument in this matter through the use of PowerPoint slides.¹ The Clerk advised the City that it would be permitted to “present specific pages of hard copy documents from the administrative record for this permit” without leave from the Board, but “to the extent that you seek to present materials other than specific pages of documents from the administrative record for this permit, you must first obtain permission from the Board in advance of the argument via motion that includes a copy of the proposed materials.”²

¹ See Attachment 1 at 6 (Email from Eurika Durr to John Hall, Samir Bukhari, Michael Curley and Lee Schroer, January 22, 2016 (11:41 am) re Taunton Oral Argument on January 28, 2016 – Notification on use of Powerpoint).

² *Id.*

Petitioner informed the Board that it was “only planning to use specific charts or excerpts of documents already in the record to assist on Taunton’s oral argument.”³ It later reiterated that that it planned only to “present part of the *existing* [emphasis added] administrative record in visual form at oral argument.”⁴ Petitioner subsequently indicated that it would be “filing a motion to use excerpts of the record, since presenting a full page via PowerPoint, as presently required would be essentially unreadable.”⁵

Petitioner sought to ascertain the Region’s position on its contemplated motion to use excerpts of the existing administrative record in its argument and its proposal to provide the Board with a representative sample of the types of the documents that it would be using rather than the actual documents themselves.⁶ The Region informed the City that it “does not object to the City’s motion to use visual excerpts from the administrative record in your argument.”⁷

On January 27, 2016, the City filed what it styled “Petitioner’s Unopposed Motion to Allow Use of Powerpoint to Display Excerpts of the Record During Oral Argument” (“Mot.”).

II. ARGUMENT

The Region affirms its earlier concurrence with Petitioner’s original proposal to use visual excerpts from the existing administrative record of the permit. The Region cannot, however, ascertain from the Motion whether that original proposal continues to reflect

³ See Attachment 1 at 5 (Email from John Hall to Eurika Durr, Samir Bukhari, Michael Curley and Lee Schroer, January 22, 2016 (12:07 pm) re Taunton Oral Argument on January 28, 2016 – Notification on use of Powerpoint).

⁴ See Attachment 1 at 4 (Email from John Hall to Eurika Durr, Samir Bukhari, Michael Curley and Lee Schroer, January 22, 2016 (4:17 pm) re Taunton Oral Argument on January 28, 2016 – Notification on use of Powerpoint).

⁵ See Attachment 1 at 2-3 (Email from John Hall to Eurika Durr, Samir Bukhari, Michael Curley and Lee Schroer, January 25, 2016 (11:20 am) re Taunton Oral Argument on January 28, 2016 – Notification on use of Powerpoint).

⁶ See Attachment 1 at 1 (Email from John Hall to Eurika Durr, Samir Bukhari, Michael Curley and Lee Schroer, January 25, 2016 (1:29 pm) re Taunton Oral Argument on January 28, 2016 – Notification on use of Powerpoint).

⁷ See Attachment 1 at 1 (Email from Samir Bukhari to John Hall, Eurika Durr, Michael Curley and Lee Schroer, January 22, 2016 (2:39 pm) re Taunton Oral Argument on January 28, 2016 – Notification on use of Powerpoint).

Petitioner's intended course of action. The administrative record has been certified by the Region. *See* EAB NPDES Permit Appeal No. 15-08 Docket Filing Nos. 5 (Certified Index to the Administrative Record) and 18 (Amendment to the Certified Index to the Administrative Record). The Motion, however, appears to significantly expand the universe of materials that would be subject to excerpting and visual presentation, a proposal that is beyond the scope of the Region's concurrence. In its Motion, Petitioner appears to confuse the administrative record of the permit with the docket of the permit appeal. For example, the City states,

To be clear, Taunton would not be supplying the Board with any new content or argument. Rather, the information would consist of exact quotations of language and replications of charts/graphs (or excerpts thereof) already found in the governing administrative record *and/or* [emphasis added] filings in this appeal's docket.

Mot. at 3. This posture seems at odds with the counsel's earlier description of its contemplated motion and its representation that it was "only planning to use specific charts or excerpts of documents already in the record." *Supra* n. 3. The Motion, at 3, also states:

Taunton has been informed that – without leave from the Court – it may present specific pages of the administrative record *and previous filings* [emphasis added] using the Court's on-screen touch telestration system or personal laptops.

The Region has not been made aware of any communication between the Board and Petitioner that would sanction visual presentation of material drawn from any previous filings on the docket, whether or not they are in the administrative record; to the contrary, in email exchanges with Petitioner's counsel, the Clerk of the Board repeatedly limited the materials that could be presented in visual form to "specific pages of documents from the administrative record for this permit." *Supra* n. 1.

The City identifies two principal grounds for its Motion. First, the City contends that its presentation of excerpts from the administrative record and other material from the permit appeal docket will facilitate "the orderly presentation of its argument." Mot. at 2. The Region

disagrees. If Petitioner is really requesting to present a combination of record and extra-record material, this will only engender confusion and disputes at argument over what portion of this newly-configured, visually-manipulated material is within the administrative record and what is not, as well as whether such material is reprising late-filed or over-length argument; this is not an efficient use of the limited time allotted for argument by the Board. Further, under federal regulations, final NPDES permits must be based on the administrative record, which is “officially closed” when the final permit issues. *In re City of Caldwell*, NPDES Appeal No. 09-11, slip op. at 16 (EAB Feb.1, 2011) (Order Denying Review); *see also Town of Newmarket*, NPDES Appeal No. 12-05, slip op. at 76-77 (citing 40 C.F.R. § 124.18(c)). The Region’s decision will be upheld, if at all, on the basis of that record. It makes little sense, in light of this, to use whatever time is allowed for argument to magnify, or otherwise dwell upon, materials that post-date permit issuance, are outside the record and cannot dispositively influence the outcome of the appeal.

Second, the City asserts that its proposed presentation will not prejudice the Region. However, the permit appeal docket includes many filings and other materials that are outside the certified administrative record. These include documents that are subject to the Region’s Motion to Strike, which was granted in part, as well as those implicated by Petitioner’s pending Motion to Supplement the Record, which the Region has opposed. Petitioner’s proposed scheme would seem to allow further magnification, both literal and figurative, of materials that the Region does not believe are properly before the Board in the first place. Petitioner’s argument, as the Region’s will be, should be confined to the administrative record of the permit. It would not be fair for the Region to be held to one standard and the City to another.

III. CONCLUSION

The Region wishes to accommodate Petitioner's desire to rely on PowerPoint during its oral argument. However, Petitioner's Motion appears to materially depart from its earlier proposal, and in so doing raises issues that in the Region's view could detract from the efficiency, fairness and impartiality of the argument, whose "primary purpose...is for the Board to engage with the parties and to ask questions regarding the materials in the record and not to receive a presentation."⁸ The Region believes that it is necessary, therefore, to more precisely define the scope of the type of materials that are appropriate for inclusion in Petitioner's presentation and to limit those materials to the administrative record for the permit, consistent with Petitioner's earlier communications with the Clerk of the Board and the Region.

February 1, 2016

Respectfully submitted,

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⁸ See Attachment 1 at 6 (Email from Eurika Durr to John Hall, Samir Bukhari, Michael Curley and Lee Schroer, January 22, 2016 (11:41 am) re Taunton Oral Argument on January 28, 2016 – Notification on use of Powerpoint).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to “Petitioner’s Unopposed Motion to Allow Use of Powerpoint to Display Excerpts of the Record During Oral Argument,” in the matter of City of Taunton Wastewater Treatment Plant, NPDES Appeal No. 15-08, was served on the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

By Electronic Mail and U.S. Mail:

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Dated: February 1, 2016

Samir Bukhari