

**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	)	
_____	)	

**CITY OF TAUNTON’S MOTION TO SUPPLEMENT  
THE ADMINISTRATIVE RECORD**

The City of Taunton, Massachusetts (the “Petitioner”, “Taunton”, or “City”) hereby moves to supplement the administrative record to include two letters that were not previously available to the City, and which have only now become available through the Freedom of Information Act. This filing is in accordance with 40 C.F.R. § 124.19, which allows Board to “take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal.” The two letters, not previously available to the City, are necessary to allow a complete review of the Environmental Protection Agency Region 1’s (“EPA”, “Region 1”, or the “Agency”) issuance of NPDES Permit No. MA0100897. Absent the inclusion of these letters, the administrative record is incomplete, to the prejudice of the City.

Missing documents include a letter to Mr. Sullivan of the City of Fall River, Massachusetts from EPA Region 1 concerning the effect of and comparative impact of the Fall River’s wastewater treatment facility (“WWTF”) discharge on the Mount Hope Bay. (Att. 1) The Fall River discharge is near the EPA selected sentinel site. As confirmed by EPA’s letter that discharge dwarfs the nitrogen loading discharged by the City of Taunton (almost 6 times

greater). This letter is vital to Taunton's appeal as the letter demonstrates the failure of Region 1 to consider other regional (and significant) nitrogen sources in assessing the need for nitrogen reduction by Taunton's WWTF. The letter further confirms, as argued by Taunton and repeatedly denied by EPA, the Region's failure to (1) accurately consider relevant contemporaneous pollutant loadings to Mount Hope Bay and (2) account for load reductions achieved by Rhode Island facilities since 2006 was clear error.

Taunton also seeks to include a FOIA response from EPA Headquarters demonstrating that EPA lacks any records demonstrating that flow from a WWTF should be regulated as a pollutant in an NPDES permit (Att. 2). This FOIA response to the Center for Regulatory Reasonableness independently confirms, by EPA's own words, a lack of published guidance or agency legal opinion that it is proper to regulate flow as a pollutant. This FOIA response supports that it was clear legal error for the Agency to place federal flow restrictions into the city's permit and that no reasonable prior notice of this legal determination was available to the public.

Accordingly, the Board should allow Petitioner to supplement the record with these letters for purposes of the Board's review. Taunton does not seek an extension for oral argument as counsel will be prepared to address the contents of these documents at oral argument.

### **ARGUMENT**

Courts have consistently allowed supplementation of the record when background information is needed to determine whether certain agency representations are accurate, or "when the agency failed to consider factors that are relevant to its final decision." *See, e.g., The Fund for Animals v. Williams*, 391 F. Supp. 2d 191 (D.D.C. 2005); *National Wilderness Institute v. U.S. Army Corps of Engineers*, 2002 U.S. Dist. Lexis 27743 at \*9-\*12 (D.D.C. 2002). This

Board has also found “special circumstances” to exist in cases where the permitting authority has made mistakes or provided misleading information that directly led to delays. *See e.g. In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n. 4 (EAB 2002); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997). Courts also allow for consideration of post-decisional documents under limited circumstances, such as when admission serves as the basis for “correcting erroneous assumptions, predictions, or facts forming the predicate for agency decision-making...” *Afghan Am. Army Servs. Corp. v. U.S.*, 106 Fed. Cl. 714, 724 (2012); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.D.C. 1989).

As it concerns this Motion, the documents the City is seeking to add to the Board’s administrative record seeks to correct clearly erroneous assumptions, predictions, and facts used by Region 1 in its determinations related to the issuance of the City’s NPDES permit. As this information could not be received earlier, and has been located only through the diligent efforts of the City and a separate regulatory organization, it is vital that the record be supplemented. Consequently, for the reasons discussed below, Petitioner requests that the Board supplement the record to include the following material for purposes of the Board’s review.

**1. Undated letter to Fall River, MA concerning its nitrogen discharge (Att. 1)**

Within EPA Region 1’s Response to the Petition, the Agency attempts to refute H&A’s contention that the effluent, comparative to other sources for total nitrogen (“TN”), is minimal and that strict TN discharge requirements are inappropriate. The Agency argues that consideration of other sources of TN discharge within Mount Hope Bay is irrelevant, stating that “[t]he references to *reductions by Rhode Island treatment plants are not relevant to this system as those treatment plants discharge to Narragansett Bay proper and not to Mount Hope Bay.*” Petition, Att. 15 (RTC) at 61-62 (emphasis added).

However, this letter from Region 1 Office of Ecosystem Protection Director Ken Moraff to Fall River demonstrates that the Agency was well aware that other major discharges significantly impacted Mount Hope Bay water quality, including discharges from Rhode Island. This letter contains a chart from EPA highlighting the comparative impacts of the facilities *within the broader Narragansett Bay region* during the permitting of Fall River, demonstrating a material inconsistency in permitting concerns for facilities within the same region. It also demonstrates that TN effluent from Fall River's WWTF, at the mouth of Mount Hope Bay, discharges *nearly six times the level of TN* than Taunton's WWTF. Incredibly, EPA's nutrient load assessment for the City of Taunton completely ignored the influence of the Fall River discharge on the sentinel station and lower Taunton estuary, although EPA's analyses included in the Response to Comments, relied on water quality data from both of these locations. As argued by the City, under 40 C.F.R. § 122.44(d) EPA was to account for all of the relevant load sources, not ignore the largest ones.

Therefore, admission of this letter is necessary as it showcases the inconsistency in Agency permitting concerns and consideration of other factors impacting TN within affected waterbodies.

## **2. EPA FOIA response on regulation of flow as a pollutant (Att. 2)**

Within the permitting process for NPDES Permit No. MA0100897, EPA Region 1 has acted to restrict the total effluent flow from Taunton's WWTF as a pollutant, without adequate justification or supporting documentation. The City seeks to admit a February 26, 2016 response from EPA Headquarters to a FOIA request submitted by the Center for Regulatory Reasonableness, dated January 19, 2016, as it demonstrates, from EPA's own words, that no internal records, guidance, or documents support the Agency's contention that flow may be

regulated in a similar manner as other pollutants are. Clearly, if flow, a common attribute measured at all municipal wastewater facilities were to be regulated under the CWA, some EPA Headquarters document would have established that position. There are no such documents, guidance, legal opinions or permitting directives. This confirms that the legal position claimed by EPA Region 1 requires Board review as it sets an unprecedented new CWA mandate and expands NPDES control beyond that intended by the Act. This letter demonstrates a willful negligence of applicable laws and regulations concerning in the imposition of flow controls within Taunton's NPDES permit.

### **CONCLUSION**

For the foregoing reasons, the Petitioner respectfully requests EPA Region 1 be directed to supplement the administrative record in this action with the documents referenced herein or, in the alternative, that the Petitioner be allowed to supplement the record with these documents for purposes of this appeal.

Respectfully submitted,

//s// John C. Hall  
John C. Hall  
Hall & Associates  
1620 I Street, N.W., Suite 701  
Washington, D.C. 20006  
Phone: 202.463.1166  
Fax: 202.463.4207

**CERTIFICATE OF SERVICE**

Undersigned hereby certifies that on this day, February 29, 2016, a copy of the foregoing Motion to Supplement the Administrative Record was served on the individuals identified below by U.S. first-class mail, postage pre-paid:

Curt Spalding, Regional Administrator  
U.S. Environmental Protection Agency - Region 1  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

Samir Bukhari, Assistant Regional Counsel  
U.S. Environmental Protection Agency - Region 1  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

Dated on the 29<sup>th</sup> day of February, 2016.

//s// John C. Hall  
John C. Hall, Esq.  
jhall@hall-associates.com

//s// Philip D. Rosenman  
Philip D. Rosenman, Esq.  
prosenman@hall-associates.com

Hall & Associates  
1620 I St. (NW)  
Suite #701  
Washington, DC 20001  
Telephone: (202) 463-1166  
Facsimile: (202) 463-4207

*Counsel for the Petitioner*