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

VIA ELECTRONIC FILING

September 30, 2015

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 Reply to Petitioner's Response to the Motion to Strike and accompanying Certificate of Service in connection with NPDES Appeal No. 15-08.

Sincerely,

_____

Samir Bukhari
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

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 REPLY TO PETITIONER'S RESPONSE TO THE MOTION TO STRIKE

Respectfully submitted,

Samir Bukhari
Michael Curley
Assistant Regional Counsels
EPA Region 1
5 Post Office Square
MC: ORA 18-1
Boston, MA 02109-3912
Tel: (617) 918-1095
Fax: (617) 918-0095
Email: bukhari.samir@epa.gov

Of Counsel:

Pooja Parikh
Water Law Office
Office of General Counsel

Dated: September 30, 2015

I. ARGUMENT

A. The Kirby Declaration is Over Length and Out of Time

1. In Its Response, Petitioner Concedes that the Kirby Declaration is Argument

In contending that the Kirby Declaration should not count toward Taunton's page allotment, Petitioner maintains, "Although technical reports/analyses undoubtedly render a conclusion about an EPA course of action, parties routinely cite to such documents in their filings without having to worry about the referenced documents themselves counting toward page limitations." *Response* at 6. But if such analyses are authored *after* a petition has been filed—indeed after a Region's *response to petition* has been filed—and if such attachments consist of new "technical analysis, reports, and opinions," *id.*, that are a "direct response," *id.* at 1, to material that was readily available at the time the administrative record closed, then there would be every reason for a petitioner to be worried. Although Petitioner guilelessly passes off the Kirby Declaration as an ordinary attachment, it is in fact a late-arriving and substantive challenge to the Region's Response to Comments and, as such, departs from the Board's explicit regulations governing the timeliness of argument and word limitations. 40 C.F.R. §§ 124.19(c)(2)("Petitioner may not raise new issues or arguments in the reply."), (d)(3)(establishing word limitations for replies). The Kirby Declaration, if fact, ventures so far into the territory of argument that it would not even meet Petitioner's overly lax test for when to characterize material filed with the Board as an attachment rather than argument—that is, when it consists of "summaries of record materials and filings already before the Board," *Response* at 2, which the Kirby Declaration obviously does not.

Although Petitioner makes no real effort to hide the fact that the Kirby Declaration is argument—how could it?—Petitioner persists in asking that the Declaration be treated like any

other excerpt from the Administrative Record that might be attached to a filing with the Board. This, of course, would have the Board ignore the fact that the Kirby Declaration consists of a supplemental analysis was only authored by Petitioner at the Reply stage of these proceedings. This analysis is not only entirely new, but was expressly carried out to determine whether the Region committed reviewable error in its RTC. Kirby Declaration at 4 ("When attempting to duplicate data plots presented by EPA in Taunton's permit and the Response to Comments, I noticed discrepancies between the data supplied by Mr. Bukhari and the data presented by EPA in the Taunton permit documents.").[1] That sort of demonstration is by definition relegated to the Petition. Section 124.19(a)(4), captioned "Petition contents," states that "a *petition for review* [emphasis added] must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." For good reason, Board regulations draw a clear distinction between the petition, which is subject to word counts, and attachments, which are not. 40 C.F.R. §§ 124.19(a)(4) and (d)(3)(describing the substantive content that must be included in the Petition, and establishing word limitations, respectively), (d)(2) (describing requirements for attachments). For the word limitations and deadlines applicable to petitions and replies to have *any* meaning, the Kirby Declaration must be struck, and Petitioner's attempt to gain advantage by conflating the boundaries of petitions and attachments rejected.

2. In Its Response, Petitioner Confirms that Arguments in the Kirby Declaration Could Have Been Made in the Petition

[1] Of course, the Kirby Declaration has other hallmarks of argument, for example, tendentiously describing, at 2, the 2004-2006 SMAST data sent to it by the Region in response to Petitioner's request for the data underlying the data plots as "purportedly used in the derivation of Taunton's TN effluent limit[,]" and concluding, at 4, that "Something clearly is amiss with this analysis."

Inexplicably, Petitioner contends that, "[T]he Kirby Affidavit must be allowed in the record as it reflects the City's first opportunity to demonstrate that EPA's latest scientific creation has severe and unexplainable errors." *Response* at 6. The City, to the contrary, had ample opportunity to demonstrate any errors in data plots contained in the RTC in its Petition for Review. But the City did not even request the data until June 17, 2015, more than two months after it received the RTC and more than a month after it filed its Petition. (EPA provided the data to the City just hours after the request.) Kirby Declaration at Att. 1. Yet the extensive, if misguided, analysis in the Kirby Declaration, which was executed on June 30, 2015, took at most thirteen days to prepare.

Petitioner still has not justified why the arguments made in the Kirby Declaration could not have been developed over the course of the 30-day period allotted to the City to prepare its Petition. Petitioner belatedly, and unconvincingly, suggests that it did not have sufficient time to analyze the Response to Comments and prepare the Petition. *Response* at 5-6. This, however, does not square with the timeline set forth above; again, Petitioner's actual assessment of the SMAST dataset was carried out in less than two weeks. Moreover, Petitioner lodged no objections regarding its ability to adequately process record information at the time it filed its Petition. Quite the opposite, Petitioner is sanguine on that count, asserting, "In its opening petition, the City unquestionably raised all of its procedural objections and noted serious technical discrepancies in EPA's claimed scientific bases for the limits." *Response* at 6 n.6. Petitioner also did not ask the Board to relax any procedural requirements related to the Petition's filing deadline or length. *See, e.g., In re Invensys Sys., Inc.*, NPDES Appeal No. 15-10 (EAB Aug. 6, 2015) (Order Granting Extension of Time to File Petition for Review) (granting

15-day extension); *see also* 40 C.F.R. § 124.l 9(n) ("[F]or good cause, the Board may relax or suspend the filing requirements prescribed by these rules or Board order.").

Petitioner tries to rationalize its late filing by arguing that "[U]ntil all records (and databases) were made available, it was simply impossible for a detailed assessment of EPA's graphs to occur[,]" *Response* at 6 n.6, but this line of reasoning makes no sense given that the request for the SMAST data underlying the data plots in the RTC only came from Petitioner after the deadline for the Petition had already passed—in fact, Petitioner only made the request five days after the Region filed its Response to Petition. Once Petitioner finally decided to avail itself of available record materials, the SMAST data took at most thirteen days to re-analyze, so its analysis obviously could have been timely provided within the 30-day period to produce the initial Petition, if only Petitioner had decided to ask. Whatever Petitioner's calculus for its delay in requesting the SMAST data, its attempt to challenge the Region's permitting determinations so far out of time is highly improper, especially through recourse to the conclusory and argumentative assertions contained in the Kirby Declaration. Mr. Kirby merely alleges that he has been unable to reproduce the Region's analysis. It is, however, impossible to tell whether that fault lies with technical missteps by the Region or by Mr. Kirby, as Petitioner has not provided Mr. Kirby's work or calculations to the Board.[2]

In the end, Petitioner defaults to unsubstantiated allegations of bad faith, accusing the Region of purposefully withholding documents, including the data underlying the 2007 SMAST Report, in order to frustrate Petitioner's chances on appeal. Yet all of the SMAST data Petitioner states were utilized in the Kirby Declaration were in the administrative record upon final permit issuance and indeed have been available to Petitioner for years—not only prior to permit

[2] Whatever the answer, it does not matter to the permit result, as explained in Section C below.

issuance, but prior to the close of the *comment period*. Petitioner lodged detailed comments on the nitrogen limit and its derivation, including the 2007 SMAST Report, and even at that time evidenced familiarity with the data underlying the Report. *RTC* at 15 ("The analysis performed by USEPA in the Fact Sheet relies on sampling performed by SMAST as part of the Mount Hope Bay Estuarine Monitoring Program, during the months of June, July and August of 2004 through 2006."). In any event, in the Response to Comments, the Region explicitly identified the source of the data used for the data plots at issue in this Motion to Strike. *See, e.g.*, *Resp. to Pet.*, Att. 4 at 17, 91-99 ("Source data: SMAST, *Summary of Water Quality Monitoring Program for the Mount Hope Bay Embayment System (2004 – 2006)* (2007), Appendix D."). The SMAST Report itself incorporated the data sets underlying it into the report by designating a specific appendix for them. *Resp. to Pet.*, Att. 10 at Appendix D. When Petitioner finally requested the data from the Region, it exhibited no difficulty in either determining the sources of information used for the Region's Response to Comments' analysis or in determining the precise location of these data in the SMAST Report. Kirby Declaration, Att. 1 ("In EPA's final response to comments, as you know, numerous new graphs were created by EPA using Appendix D of the 2007 SMAST report."). Petitioner, obviously, cannot now claim to have been caught unawares. For reasons that have never been explained, Petitioner elected to lodge technical comments and file a Petition challenging EPA's technical and scientific conclusions on the SMAST Report without first obtaining and analyzing (as the Region did) the underlying SMAST dataset, even though it has long been aware that the dataset existed.[3]

[3] In Petitioner's comments on the Draft Permit, it stated: "Assuming EPA's approach is valid, we have recalculated the allowable total nitrogen load following the procedures established by USEPA and incorporating the 2006 monitoring data." *RTC* at 15.

Even so, the Region made the Administrative Record available to Petitioner on multiple occasions. For instance, on September 16, 2014, Petitioner submitted a supplemental comment letter requesting that the Region "promptly" provide it with any supplemental information included in the administrative record of the permit regarding assertions allegedly made by the Region at a September 10, 2014 meeting with the City. *Pet.*, Att. 23 (September 16, 2014 Supplemental Comments and Request for New Information Regarding the Scientific Basis for Draft Permit #MA0100897). This request identified seven different categories of information and, for each, requested that the Region review the administrative record and gather any documents from it that "confirm" or "show" specific conclusions to be true. In response, the Region contacted Petitioner, explaining that 40 C.F.R. Part 124 (Procedures for Decisionmaking) sets forth the process for participating in a permitting process and include the development of an Administrative Record, "*which is available for review by any interested member of the public*." *Mot. to Stri*ke, Att. A (October 7, 2015 Email Correspondence between Ms. Murphy and Mr. Hall) (emphasis added) at 2. The Region further informed counsel for Petitioner that, "[i]f you or any other representative of the City would like to review the Administrative Record in EPA's offices in Boston, please contact me to arrange an appointment." *Id.* Petitioner did not avail itself of EPA Region 1's offer to review the publicly available administrative record, informing the Region:

> "I am thoroughly aware of how the NPDES administrative record process operates. Suggesting that we travel to Boston to scour the administrative record to determine the bases for the claims EPA made in the recent meeting with the City is not appropriate. That is an unnecessary cost to the City. As noted in my earlier email to you we will repackage the information request under FOIA to obtain the information."

Id. Put otherwise, Petitioner made a fully informed, calculated decision to forego routine Part 124 procedures for administrative record review in favor of FOIA procedures, which precipitated legal objections by the Region over the interrogatory-like form of the FOIA and a failure to reasonably describe the records being sought, and ultimately led to a lawsuit in federal court. Although Petitioner invokes this litigation to insinuate that the Region deliberately withheld documents in order compromise the City's ability to write its Petition, *Response* at 2-3, n.2, Petitioner fails to note that this litigation did not involve the 2004-2006 SMAST data that is the subject of the Kirby Declaration and this Motion to Strike.

B. Petitioner's Response Confirms That Its Other Attachments Constitute Late-filed and Over-length Argument

In its Response, Petitioner fails to provide any reason to justify why the argumentation contained in Attachments 79, 80 and 84 ("Attachments") could not have been included in the Petition or, to the extent allowed, in the Reply. The Attachments should be stricken in their entirety. *In re Steel Dynamics, Inc*., 9 E.A.D. 165, 219-20 n.62 (EAB 2000) (declining to consider petitioners' rebuttal argument which could have been raised earlier in the petition); *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 (EAB 2006) (denying review of an issue first raised in response briefs).

Moreover, Petitioner's Attachments 79 (contending that the Region purportedly failed to encompass certain of Petitioner's claims in the Response to the Petition), 80 (contending that new issues were raised in RTC), 84 (disputing Region's claims of failure to preserve issues) are on their face legal argument. As such, they should have been included within the four corners of the Petition or Reply, as allowed. In Response, Petitioner retreats to tautologies and semantics. The Attachments, in Petitioner's assessment, are not argument, they are "summaries or

compendiums." *Response* at 8. Of what? "[O]f excerpts and citations from both the administrative record and the parties' prior filings to this Board." *Id.* at 8-9. They are, accordingly, not arguments *per se*, but restatements or collections of arguments. Even if accurate, how this irrelevant distinction improves the situation for Petitioner is beyond the Region.

Petitioner also posits that all materials in the administrative record and filings before the Board are fair game for inclusion in an attachment because they are broadly part of the record of the proceeding, and therefore fall within the term "record" as it appears in 40 C.F.R. § 124.19(d)(2). Petitioner's reading of this regulatory provision is a triumph of form over substance; it would erase the distinction between the Petition and attachments. This is not a case where a petitioner has merely provided an excerpt from the administrative record to provide documentary support for a particular assertion made by it in the main filing. Rather, through its attachments, Petitioner excerpts, juxtaposes, re-characterizes and otherwise manipulates administrative record materials in order to elaborate upon cursory statements in – or to create new statements omitted altogether from – the Petition or Reply. An attachment does not become exempt from applicable requirements governing the timeliness and length of filings merely because it excerpts or references some portion of the administrative record, but that is exactly what Petitioner is proposing. If Petitioner's reading of 40 C.F.R. § 124.19(d)(2) were to be endorsed, parties confronting the Board's procedural limitations will simply do what Petitioner has tried to do here—cut offending material from the brief and paste it into an attachment, where it would be conveniently inoculated from the Board's length and timeliness requirements.[4]

[4] Petitioner's expansive interpretation of "record" to include party filings would similarly erase the distinction between briefs and attachments. Under Petitioner's view, a party would be free to newly configure or otherwise marshal relevant portions of earlier filings—or even refile them

C. The Kirby Declaration is Outside the Administrative Record

In responding to the Region's Motion to Strike, Petitioner rehashes arguments made in its own earlier motion to supplement the administrative record with certain documents (that, notably, do not include the Kirby Declaration), arguing not only that the Kirby Declaration should not be stricken, but that it should be added to the Administrative Record. *Response* at 7-8. None of its arguments now support such an action. Instead, the Kirby Declaration should be stricken in its entirety.

Exceptions to the general rule against supplementing the administrative record with post-decisional documents "are quite narrow[,] rarely invoked," *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C.C. 2014), and only applicable in "exceptional circumstances." *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72 (D.D.C. 2008); *see also Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). In Taunton's view, however, the Kirby Declaration is such an exceptional document that should be added, because it purportedly "correct[s] erroneous assumptions, predictions, or facts forming the predicate for agency-decision making," *Response* at 7 (quoting *Afghan Am. Army Servs. Corp. v. U.S.*, 106 Fed. Cl. 714, 724 (2012)). The basic premise of this claim, however, is flawed.

Taunton states that the Kirby Declaration "focused specifically on attempts to reproduce EPA's new charts with the database EPA claims it used to develop the evaluations," *Response* at 8, by which Petitioner evidently means the data in Appendix D of the SMAST report. *Id.* (citing

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wholesale—by merely providing them in the form of an attachment. This would be true even if such filings were comprised of purely legal argument, allowing a party to revise and extend claims made in the main brief via attachments. There is nothing in the text of § 124.19 nor its preamble to sanction this outcome, which would cut against the very objective of the Board's procedural regulations, that is, to provide "efficiency and integrity of the overall administrative permitting scheme." *See In re BP Cherry Point*, 12 E.A.D. 209, 219 (EAB 2005).

Response at 5 n.5). Accordingly, the Kirby Declaration spends much of its length and energy identifying perceived "inconsistencies" and "anomalies" in several EPA figures that appear in the RTC in an attempt to show that a permitting decision based thereon is incorrect. Taunton, however, conveniently ignores two significant details.

First, the charts and regression analyses of which Petitioner now complains were developed in direct response to charts and analyses that it developed and submitted in comments on the Draft Permit. Second, although the Region's responsive analyses were provided to show that Taunton's analyses and corresponding comments were flawed, the Region emphasized that it "did *not* use such regression analyses as the basis for its permit limits." *RTC* at 92 (emphasis added). The Region further explained that Taunton's comments suffered from a fundamental problem: the dataset is not suited "for the type of stressor-response analysis performed by the commenter," which is why the Region "did not perform this type of analysis in its original permit development." *Id.* at 90, 98.[5] The Kirby Declaration simply presupposes that these data are appropriate for such analyses, and never attempts to explain why they are well-matched to this purpose. Thus, the Kirby Declaration decidedly does *not* "correct[] erroneous assumptions,

[5] "The results of EPA's analysis are shown below; however EPA notes that the data collection effort for this dataset was not designed for the type of stressor-response analysis performed by the commenter and is generally expected to be insufficient to support statistically significant correlations. This is the reason EPA did not perform this type of analysis in its original permit development. EPA therefore emphasizes that the following analysis, while generally supporting EPA's conclusions when all appropriate data are considered, is not expected to provide statistically significant results for determining TN criteria for these waters." *RTC* at 90. *See also id.* at 94 ("EPA is reluctant to put much weight on simple regression relationships using a small dataset"), 95 (noting the limited "extent [to which] any conclusions can be drawn from these simple regression relationships"), 96 ("EPA emphasizes that it did not base its permit analysis on stressor-response relationships such as those set forth here, which are based on small datasets and have low statistical significance. Indeed these simple regression analyses demonstrate the ease with which statistical analyses of small datasets can be interpreted to support a range of positions."), 99-100.

predictions, or facts *forming the predicate for agency-decision making*," *Response* at 7 (quoting *Afghan Am. Army Servs.*, 106 Fed. Cl. at 724) (emphasis added), because, even if one were to assume that its criticisms were valid, the charts and analyses it attacks do not form the predicate for the Region's permitting decision.[6] Consequently, the Kirby Declaration's criticisms of these charts have no bearing on the issue of "whether [the Region's] 'decision was correct or not.'" *Response* at 7 (citing *Nat'l Wilderness Inst. v. U.S Army Corps of Eng'rs,* 2002 U.S. Dist. LEXIS 27743 at *10 (D.D.C. 2002).[7]

Taunton also asserts that the Kirby Declaration is timely and should not be stricken – but, again, added – because "EPA 'deliberately or negligently' prevented Taunton's review and consideration of critical permit documents," *Response* at 7, prohibiting Taunton from presenting the Kirby Declaration earlier, *id.* at 8. This premise, too, is flawed.

First, as noted above, the analyses criticized in the Kirby Declaration do not form the basis for the permit limits, and, thus, can hardly be said to represent "critical permit documents." Second, Taunton does not dispute that it only requested data underlying the SMAST Report more than a month after filing its Petition for Review, *compare Mot.* at 8 *with Response* at 5 n.5, that the data used in the Kirby Declaration were in the administrative record and available to Taunton prior to the close of the draft permit's comment period, *see Mot.* at 9 n.3, nor that the

[6]Taunton's reliance on *Afghan American Army Services Corp. v. United States*, 106 Fed. Cl. 714 (2012) is additionally misplaced, because the document added to the record in that case was "the Government's own determination" (and was being used against the Government), not an argumentative, self-serving document developed by the party seeking supplementation. *See id.* at 724. Furthermore, supplementing the record with the document in that case allowed the Court to consider a fact that both parties did not dispute – that is, that the proposed disbarment had been terminated. *Id.* Such is not the case here.

[7] Taunton erroneously suggests that the Certified Index to the Administrative Record did not include the data, and yet surprisingly it does not now ask the Board to add the data to the record but rather "its own expert's newly created analysis responding to that data." *CTS Corp.*, 759 F.3d at 64-65.

Region made the administrative record available to Taunton on several occasions, *see id.* at 7-8. Third, Taunton neglects to explain why additional analyses presented in the Kirby Declaration based on certain RIDEM data that the Region analyzed in the Draft Permit, *see* FS at 25, could not have been submitted during the public comment or at least presented in the Petition for Review, given that these data are likewise in the Administrative Record, *see* Certified Index at O.39-45, and that the Region even included a weblink to the data in the Fact Sheet, *see* FS at 25. Consequently, Taunton's analyses of these RIDEM data presented in the Kirby Declaration are likewise untimely and further support that the Declaration should be stricken. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999).

II. CONCLUSION

For the foregoing reasons, the Region respectfully requests that the Board grant the Motion to Strike.

Dated: September 30, 2015

Respectfully submitted,

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Samir Bukhari
Michael Curley
Assistant Regional Counsels
US Environmental Protection Agency
Office of Regional Counsel, Region 1
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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to Petitioner's Response to the Motion to Strike, 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:

John C. Hall, Esq.
Philip D. Rosenman, Esq.
Hall & Associates
1620 I Street (NW)
Suite #701
Washington, DC 20001

Dated: September 30, 2015

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Samir Bukhari