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

In re:	)	
	)	
Granite Shore Power Merrimack LLC	)	NPDES Appeal No. 20-05
	)	
NPDES Permit No. NH0001465	)	
	)	

REGION 1 REPLY TO PETITIONERS' OPPOSITION TO THE REGION'S MOTION TO STRIKE ATTACHMENTS 36 THROUGH 41 TO THE PETITION FOR REVIEW

Respectfully submitted,

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INTRODUCTION

On September 25, 2020, together with its Response (the "Response") to the Petition for Review in the instant case (the "Petition"), the Region 1 office ("Region 1" or "the Region") of the United States Environmental Protection Agency ("EPA") moved that the Board strike (the "Motion to Strike") Attachments 36 through 41 to the Petition ("Attachments 36 through 41"). *See* Docket for NPDES Appeal 20-05 at Filing # 4 (Attachments 36-39) and Filing #5 (Attachments 40-41). These Attachments are the following:

Attachment 36.	Letter from Super Law Group, LLC to EPA Region 1 submitting 15-minute data and Declaration of Matthew Hodge, May 22, 2020.
Attachment 37.	Declaration of Matthew Hodge, May 14, 2020, submitted with Attachment 36.
Attachment 38.	River Monitor Data 1998-2006, submitted with Attachment 36.
Attachment 39.	River Monitor Data 2006-2017, submitted with Attachment 36.
Attachment 40.	River Monitor Data 2018, submitted with Attachment 36.
Attachment 41.	River Monitor Data 2019, submitted with Attachment 36.

Although none of the materials comprising Attachments 36 through 41 are included in the certified Administrative Record for the National Pollutant Discharge Elimination System ("NPDES") permit that is the subject of this appeal – *i.e.*, NPDES Permit No. NH0001465 (the "Final Permit") issued by Region 1 to the Merrimack Station power plant in Bow, New Hampshire (the "Facility") – Petitioners included these Attachments with the Petition without identifying them as extra-record materials or proposing any justification for why the Board should nonetheless consider them.[1]

As Region 1 stated in the Motion to Strike, at 3-4, prior to issuance of the Final Permit, Attachments 36 through 41 had not been submitted to the Region and were not otherwise in the

[1] The Certified Index to the Administrative Record is included in Filing #9 in the Docket for this Appeal.

Region's possession at the time it issued the Final Permit.[2] Accordingly, Region 1 moved that the Board strike these materials from the record for this appeal on the grounds that submission of these extra-record materials is inconsistent with both the record review basis of an NPDES permit appeal to the Board and 40 C.F.R. § 124.19(d)(2) ("parts of the record … may be appended to the brief submitted"). Motion to Strike at 4-5. In addition, the Region also moved that Attachments 36 through 41, and particularly Attachments 36 and 37, be stricken because they constitute additional argument over the word limits applicable to the Petition in this case. *Id*. at 5-6.

Petitioners' Opposition to EPA Region 1's Motion to Strike ("Petitioners' Opposition"), at 2, acknowledges that Attachments 36 through 41 are extra-record materials but also, for the first time, argues why the Board should accept these materials into the record for this permit appeal. As the Region demonstrates below, Petitioners' new arguments are unpersuasive.

I. Statement of Facts

Region 1 presents below the facts related to the arguments and data presented by Petitioners in Attachments 36 through 41. The Region has already addressed some of these facts in its Response, at 41-43, but here provides additional factual context relevant for responding to Petitioners' Opposition.

In the record for the Draft Permit, Region 1 identified and discussed the issue of "cold shock." AR-618 at 349. The Region explained that "cold shock" refers to a type of harm that

[2] In the Motion to Strike, at 4 n.2, Region 1 noted that "*some but not all* the data in the Spreadsheet included as Attachment 39 to the Petition are also included in AR-1662" so that "Attachment 39 to the Petition is not part of the Administrative Record for the Final Permit, but a subset of the data in that Spreadsheet is included in the Administrative Record in AR-1662."

aquatic organisms can potentially experience if they are inhabiting warmer water but then are suddenly exposed to colder water. *Id*. at 348. The Region further explained that cold shock is a consideration during the winter when power plant thermal discharges could expose fish to warm water but, "[i]f an abrupt shutdown of power generating units occurs during winter months, such as due to some type of forced outage, a rapid decline in discharge water temperature can result." *Id*. Region 1 also pointed out that because fish generally acclimate relatively slowly to colder water, a "relatively rapid reduction in discharge temperature associated with winter shutdowns can lead to the physiological impairment of fish, and even to death." *Id*.

At the time of the Draft Permit, in 2011, this was only a theoretical concern for Merrimack Station because (a) the facility operated as a baseload generator that produced a relatively constant source of heated effluent throughout the colder fall and winter seasons, and (b) there was no evidence of past cold shock-related fish mortality at Merrimack Station from forced outages. *Id.* In addition, the Region also noted that cold shock would be a lesser concern if thermal discharges were reduced by using closed-cycle cooling, which was the technology upon which the Region based the Draft Permit's thermal discharge limits. *Id*. The Draft Permit record did not discuss the implications of reduced, intermittent plant operations for the issue of cold shock, as Merrimack Station did not operate in that manner at that time. Petitioners' comments on the 2011 Draft Permit did not address cold shock but supported the proposed thermal discharge limits based on closed-cycle cooling.

In 2017, Region 1 reopened the comment period for the Draft Permit and presented a "Statement of Substantial New Questions for Public Comment" for public review and comment (the "2017 Statement"). AR-1534. In the 2017 Statement, the Region expressly invited public comment related to, among other things, new and preexisting thermal discharge data, the

Region's assessment of that data as presented in the 2017 Statement, and the effect that the Facility's recently reduced, intermittent operations should have on new permit limits. *Id*. at 4-5, 7, 8, 36-41, 68-69. In their comments in response to the 2017 Statement, Petitioners stated the following:

> [Merrimack Station] also has failed to carry its burden by not addressing the thermal implications of its recent operating history as a "peaker" plant that runs intermittently. As EPA observed in 2011, abrupt shutdowns in the colder seasons could cause "cold shocks" …. EPA noted that studies "show that acclimation to cooler temperatures, at least for fish, is considerably slower (e.g., days versus hours) than acclimation to warmer temperatures." [citation omitted] In this regard, Merrimack's practice of operating sporadically in the winter months poses a threat to the BIP.
>
> Thermal shock is an important consideration and one that has been masked by [Merrimack Station's] daily averaging of the continuous data set. Even with an averaged data set, however, there is evidence that Merrimack's sporadic operations greatly affect water temperatures in the Hooksett Pool. Hickey Report Figures 11-13 show sharp changes in water temperature that correspond with reduced discharge from Merrimack. And these figures are based on temperature changes in summer months, when the difference between discharge temperatures and ambient temperatures is much less that in winter. [Merrimack Station] has not provided data for the winter months when the change in temperature from shutting down operations would likely be even greater than the average changes observed in the summer months. Again, [Merrimack Station] has failed to provide adequate data – in this case, to determine whether its operating history causes thermal shocks that harm the BIP.

AR-1573 at 12-13. In addition to considering these and other comments, Region 1 also continued to discuss the prospective new permit with the Permittee, GSP, as well as with Petitioners. *See, e.g.*, AR-1879 (discussions with GSP); AR-1773 (discussion with Petitioners). As part of these discussions, the Region developed a draft set of possible thermal discharge limits for discussion with GSP that did not include closed-cycle cooling-based limits and, instead, included, among other things (a) instream temperature limits to prevent acute effects to fish, (b) instream temperature limits to prevent chronic effects to fish, and (c) a capacity factor limit that would apply as a compliance alternative for the chronic limits from May 1 to September 30. *See, e.g.*,

AR-1879 at 3, 5, 7 n.6. As discussed in the Response, *see, e.g.*, Response at 13, 15, these draft limits were based on a permitting option that the Region had detailed in the record supporting the Draft Permit and they turned out to be an early version of the limits ultimately adopted by the Region for the Final Permit. *Compare* AR-1879 *with* AR-1886 at 17-19. Region 1 also shared this "Discussion Draft" of possible thermal discharge limits with Petitioners and discussed it with their counsel over the telephone. *See* AR-1912 (Nov. 22, 2019, discussion between Region 1 and Petitioners' counsel concerning the Discussion Draft's chronic limits and capacity factor compliance alternative, acute limits, and the possibility of not retaining narrative limits addressing thermal discharges).

In an earlier telephone call between the counsel for the Region and Petitioners on October 24, 2019, the latter requested any "15-minute temperature data" that Region 1 had from Merrimack Station.[3] The Region indicated that it would provide Petitioners with the data it had, but that it was not planning to seek more such data from the Permittee. AR-1878.

On January 7, 2020, Petitioners sent Region 1 a 30-page, post-comment-period comment letter addressing their concerns regarding permit limits for thermal discharges. The Region included Petitioners' letter in the Administrative Record. *See* AR-1688. Petitioners provided

[3] The existing (1992) Permit required "continuous" temperature monitoring at sampling stations N-10, S-0 and S-4. AR-236 at 16 (Part I.A.11.a). Because of the safety risks of deploying and using the temperature monitors during cold, high flow winter conditions, *see* AR-618 at 14 n.5, the 1992 Permit required that "[t]emperature monitoring at Station S-0 was to be performed year-round, while monitoring at the N-10 and S-4 stations would commence in the spring when ambient river temperatures (measured at N-10) exceed 50˚F and end in the fall when the ambient temperatures decreased to 40˚F." *Id*. at 14; AR-236 at 16 (Part I.A.11.a). Monitoring was required at S-0 even in the winter because that station – which is deemed representative of where the Facility's discharge meets the river – is located just *inside* the discharge canal so that winter data collection is safe at that location. *See* AR-618 at 14 n.5; AR-1885 at II-129. Although the Facility collected 15-minute data, it had for years been providing EPA with annual reports that compiled and summarized the data in various ways rather than providing all the individual 15-minute data points for each day of the year.

many pages of comments raising issues and questions related to the permit limits in the Discussion Draft. *See id.* at 18-30. These comments included the following:

> Whether the permit requirements would sufficiently address the problem of "cold shock" for fish that find refuge in the heated discharge during winter and are then harmed or killed when warm water suddenly disappears because the Station powers down; [and] …
>
> Whether GSP has submitted, and EPA has analyzed, *all* of the 15-minute interval temperature data that the company has for the years 2013-2017, or only such data for the warmer months of the year.

Id. at 21, 22. In another phone call between counsel for Region 1 and Petitioners on January 21, 2020, Petitioners' counsel again offered their views about various aspects of the permit, but also indicated that Petitioners had obtained year-round 15-minute-data from GSP in discovery in separate litigation and might send this data to the Region. AR-1916. In a March 25, 2020, phone call, Petitioners' counsel asked about the status of the permit development and Region 1's counsel "told him that we were working on it as fast as we can …." AR-1773. In addition, on May 20, 2020, Petitioners' counsel called Region 1's counsel to indicate he had heard from EPA administrative staff that the Final Permit would be issued that week and to ask if that was so. AR-1859. Region 1's counsel indicated that he "wasn't sure whether it would or would not be issued this week, but that it was very close and we were trying for this week …, [but he also] thought it possible that it could slip into next week." *Id*.

As it turned out, Region 1 issued the Final Permit at 12:08 PM on Friday, May 22, 2020. AR-1886 at 1 (*see* signature timestamp). The Region simultaneously issued a detailed Responses to Comments document in support of the Final Permit. AR-1885. These Responses to Comments addressed Petitioners' comments pertaining to cold shock submitted both during the comment period for the 2017 Statement, AR-1573, and after the comment period in the January 7, 2020, comment letter. AR-1688. *See* AR-1885 at II/110 (Response II.3.4.4 addressing Petitioners'

comments about cold shock in AR-1573), and II/328 (Response II.6.3.2, cross-referencing Response II.3.4, which includes II.3.4.4 addressing Petitioners' comments about cold shock). The Region's responses considered and responded to Petitioners' concerns about the threat of cold shock associated with the Facility operating only intermittently, stating, among other things, the following:

> … decreasing demands for Merrimack Station's electricity has resulted in minimal-to-no need for the Facility to operate during much of the Fall (October – early December). This allows resident species to adjust naturally to colder ambient temperatures throughout Hooksett Pool, and would prevent fish from maintaining an artificially high body temperature as they might if the plant was operating continuously from summer to winter. So, while some fish are likely to be attracted to the Facility's elevated water temperatures, the potential for cold shock to occur would be limited to only those fish within the canal and not the Hooksett Pool proper where the plume's temperature drops fairly quickly as it comes in contact with the ambient river water and dissipates. Therefore, going forward, even if the Facility shuts down abruptly during the winter months, EPA does not expect there to be more than minimal impacts associated with cold shock, and such impacts would not likely affect any species at the population level and would not harm the BIP.
>
> For the Final Permit, EPA has determined that, under the current operation of Merrimack Station, specific alternative effluent temperature limits are sufficiently stringent to ensure the protection and propagation of the BIP.

AR-1885 at II/112-13.

After the Region issued the Final Permit, Petitioners then submitted later that evening, at approximately 8:00 PM on May 22, 2020, *see* Region 1 Motion to Strike at 3, the four spreadsheets of year-round 15-minute data that were later included as Attachments 38, 39, 40 and 41 to the Petition, along with the four-page, single-spaced letter from Petitioners' counsel and the 8-page Declaration of Matthew Hodge, an engineer hired by Petitioners,[4] that were later attached to the Petition as Attachments 36 and 37, respectively. While the letter is addressed to

[4] Mr. Hodge forthrightly acknowledges that he is "not an expert in biology," though he states that he is "generally familiar with the basic principles of environmental health (e.g., acute versus chronic exposures and cold shock)." Petition Att. 41 at 3 n.1.

Region 1 and dated May 22, 2020, *see* Petition Att. 36 at 1, the Declaration appears to have been prepared for a federal court case that Petitioners have brought against GSP and is dated May 14, 2020. Petition Att. 37 at 1 and 8. Both the letter and the declaration present arguments about, among other things, what the thermal data indicate with respect to the assessment of possible cold shock impacts to fish from Merrimack Station operations. *See* Petition Att. 36; Petition Att. 37 at 5.

Petitioners' letter also asks Region 1 to add all these materials to the administrative record for the Final Permit. Petition Att. 36 at 4. The Region declined to do so, however, because the material was submitted after issuance of the Final Permit and including it in the administrative record would be inconsistent with EPA regulations, *see* 40 C.F.R. § 124.18(c) ("The record shall be complete on the date the final permit is issued."); *In re Dominion Energy Brayton Point(Dominion I)*, 12 E.A.D. 490, 518-19 (EAB 2006) ("We interpret this to mean that the record is closed at the time of permit issuance and that documents submitted subsequent to permit issuance cannot be considered part of the administrative record.") (citations omitted), and basic principles of administrative law. *See, e.g.*, *Dominion I*, 12 E.A.D. at 518-19 (explaining that the administrative record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision, but that an agency cannot possibly have considered or relied on materials that were not before it when it made that decision).

II. Legal Background

NPDES Permit appeals to the Board, and the scope of the administrative record for such permits, are governed by EPA regulations and Board precedent. While the Board may look to

federal court decisions for guidance as to how to apply principles of administrative law that may be relevant to a permit appeal, the Board is not an Article III federal court applying the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq.*, to an executive agency action. (Of course, a final EPA permit decision issued after an appeal to the Board may eventually be challenged in federal court under the APA.)

The plain language of EPA's regulations is clear that a permit must be based on the administrative record, 40 C.F.R. § 124.18(a), and that the record is complete upon the date the final permit is issued, 40 C.F.R. § 124.18(c). As noted above, the Board interprets 40 C.F.R. § 124.18(c) "to mean that the record is closed at the time of permit issuance and that documents submitted subsequent to permit issuance cannot be considered part of the administrative record." *Dominion I*, 12 E.A.D. at 518 (citations omitted). *See also id.* at 508-09 n.28. *Accord In re Dominion Energy Brayton Point (Dominion II)*,13 E.A.D. 407, 417 (EAB 2007). The Board also has explained that its "disposition of an appeal ordinarily takes one of two forms: either it sustains the permit decision as rationally based on the record before the permit issuer or it remands the permit based on the determination that the record is inadequate or that the permit issuer otherwise erred in issuing the permit." *Dominion I,* 12 E.A.D. at 508.

This disciplined approach to defining the administrative record for judicial review of an administrative decision, whether before the EAB or a federal court, serves several important public policies. To require materials submitted after the decision to be incorporated within the administrative record would unreasonably require agencies to be prescient or, conversely, allow them to rely on *post hoc* rationalizations to justify their actions. *See id*. at 519 (*citing Walter O. Boswell Mem. Hospital v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)); *City of Taunton v. EPA*, 895 F.3d 120, 127 (1st Cir. 2018) (*citing Boswell Mem. Hospital*, 749 F.2d at 792). Furthermore,

allowing such late submissions to the record might encourage parties to hold back relevant material so that they can proffer it on appeal and seek a remand for the late material to be considered, thus preventing the administrative process from being finalized. *See In re W. Bay Exploration Co.*, UIC Appeal No. 14-66, at 11-12 (EAB Sept. 22, 2014) (Order Denying Review). Finally, allowing such late submissions would run counter to the goal of keeping the locus of decision-making authority with the expert offices charged by Congress and/or EPA with making those decisions. *In re Arizona Pub. Serv. Co.*, 18 E.A.D. 245, 285 (EAB 2020); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1325-26 (D.C. Cir. 1984).

While federal courts reviewing agency decisions under the APA have in narrow circumstances allowed or ordered supplementation of the administrative record with post-decision materials. *See City of Taunton*, 895 F.3d at 127 (narrow exceptions to rule limiting judicial review to the administrative record include order for supplementation of administrative record due to a strong showing of bad faith or improper behavior or to aid court understanding of highly technical matters or when inadequate explanation for a decision serves to frustrate judicial review); *Amfac Resorts v. U.S. Dept. of the Interior*, 143 F.2d 7, 11-12 (D.C. Cir. 2001) (noting similar exceptions to the rule limiting judicial review of agency action to the administrative record). None of these unusual circumstances are at issue here, however, and this case is not in federal court. As a result, the federal court cases concerning the record review rule, and exceptions to it, are not controlling with respect to the Board's review of NPDES permits under EPA regulations. Indeed, if any of the circumstances noted in the cited court cases arose in an appeal before the Board, the Board would most likely remand the permit to the Region to correct or supplement the record and reconsider the issues. *See Dominion I*, 12 E.A.D. at 508 (explaining that the Board ordinarily remands permit to permit issuing office if record is inadequate or

permit issuer erred). That said, in a different context, the Board has allowed petitioners to submit new materials in a permit appeal as argument in response to materials newly added to the administrative record by the permitting office before the final decision but *after* the comment period closed. *See Dominion II*, 13 E.A.D. at 418, 419. The Board has recognized that a permit appeal provides the petitioner an opportunity to challenge such post-comment period additions to the record by the permitting office and, as a result, it may be appropriate to allow the petitioner to submit new information to support its challenge to such new record material. *Id*.

III. Argument

A. Petitioners Concede that their Attachments 36 through 41 Should Not Be Added to the Administrative Record for the Final Permit, But Incorrectly Argue that they May Nevertheless Be Considered by the Board Because Region 1 "Improperly Failed to Obtain and Consider the Data in those Attachments"

Although they cite numerous inapposite federal court cases involving questions of whether an administrative record can be "completed" or "supplemented," *see* Opposition at 5-6, Petitioners' do not ultimately ask the Board to supplement the administrative record for the Final Permit with *any* of the material comprising Attachments 36 through 41. Instead, Petitioners effectively, and correctly, concede that none of the Attachments should be ordered to be included in the administrative record for the Final Permit. Opposition at 2 (arguing "Board may look outside the record to review Attachments 36-41").

Petitioners raise an alternative argument, however, which is that the Board may consider these extra-record materials because Region 1, they allege, "improperly" failed to obtain and consider this information. *See* Opposition at 8. This argument must fail. First, it cannot reasonably be raised with respect to either Attachments 36 or 37 – the letter from Petitioner's

counsel and the declaration by their hired engineer – because neither was even created by Petitioners until May 2020 and Region 1 had no knowledge that these records existed until Petitioners submitted them to the Region *after* the Final Permit had been issued. Petitioners cannot seriously argue that the Region somehow erred by failing to obtain and consider these documents. Petitioners, on the other hand, could have created and submitted these materials to the Region before the Final Permit was issued on May 22, 2020, but they did not.[5]

Petitioners also show nothing "improper" about Region 1's affirmative choice not to obtain and consider all the winter 15-minute data contained in Attachments 38 through 41. There is no legal requirement that the Region obtain the winter 15-minute data. The Region reviewed a huge quantity of thermal data gathered over many years, including daily data. *See* AR 1885 at II/38 n. 6, II/63-65 n.11, II/111 (discussing review of daily data from 2004 to 2019); AR-1715. Region 1 also sought, obtained and reviewed 15-minute data for the summer months, *see,* AR-1703 at 3; AR-1659; AR-1662, but simply concluded that it was not necessary to obtain and review the winter 15-minute data to assess the issue of cold shock adequately. AR-1878.

Region 1 plainly did not ignore the issue of cold shock. Indeed, the Region identified the issue of winter cold shock as a possible concern in the record for the 2011 Draft Permit, while it also noted that there was no current evidence that fish had, in fact, been harmed by cold shock at Merrimack Station. AR-618 at 349. The Region then further considered the issue of cold shock in response to Petitioners' comments submitted in response to the 2017 Statement, and its

[5] As noted above, the Hodge Declaration, Petition Attachment 37, is dated May 14, 2020, and was apparently developed for a separate federal district court case. The Region is not obliged to obtain materials from unrelated legal proceedings that were not submitted to the Region during its permit proceeding. *See In re Kendall New Century Development*, 11 E.A.D. 40, 55 (EAB 2003) (permit issuer is not required to seek out and review possibly relevant materials from other legal proceedings, whereas petitioners *are* required to submit materials to the permit issuer in a timely way if they want those materials to be considered) (citations omitted).

January 7, 2020, comments. AR-1573 at 12-13; AR-1688 at 21-22. Region 1 considered and responded to these comments but decided it was not necessary to obtain the winter 15-minute data to assess the cold shock issue. *See* AR-1885 at II/110, 112-23, and 328. Region 1 concluded, instead, that the information it had was enough. As a result, Region 1 forthrightly told Petitioners in October 2019 that it did not intend to seek this winter data. AR-1878. In response to comments, Region 1 explained that, given the facts at hand, cold shock was not likely to have any more than minimal adverse effects on fish populations and would not harm the BIP. AR-1885 at II/112-13.

The question is not whether there may be a significant temperature drop in the discharge canal in the winter if the Facility happens to be generating electricity and then stops doing so – obviously, water temperatures in the discharge canal will drop in such circumstances – the question is whether that precludes reasonable assurance of the protection and propagation of the BIP in accordance with CWA § 316(a). Region 1 concluded that on the facts of this case it would not. Petitioners do not respond to or address the Region's analysis. Petitioners, instead, merely emphasize that the data show that a rapid temperature drop can occur if the facility is generating electricity in the winter but then stops doing so, but they fail to establish that this is *biologically significant for the BIP*. Petitioners argue in the Opposition, at 8, that the Hodge Declaration explains that "evaluating the rate of change in water quality conditions is necessary to identify harm to fish from cold shock," but the Declaration merely discusses the temperature changes evident in the data. It does not establish that it is "necessary" to evaluate these data to assess the possible effects of thermal shock on the BIP. It also neither indicates how the biological effects of those temperature changes on the BIP should be analyzed nor establish that the temperature changes in question will appreciably harm the BIP in the Hooksett Pool. Similarly, the letter

from Petitioners' counsel also does not establish that the BIP will be harmed from cold shock as a result of the indicated temperature changes. This is perhaps not a surprise given that the Facility has been operating on an intermittent basis since at least 2013 and no evidence of fish kills from winter cold shock has been identified by anyone. *See* AR-1885 at II/134.

Region 1 also points out that Petitioners informed Region 1 that they had obtained the winter 15-minute data in January 2020. AR-1916. Thus, they could have submitted it to the Region at any time thereafter. Had they done so, the Region would have included the material in the administrative record, considered it, and responded to it directly, just as the Region did with Petitioners' January 7, 2020, letter. *See* AR-1688; AR-1885 at II/296-339. Petitioners should not be rewarded for waiting until after the Final Permit was issued to submit the information to the Board in an effort to seek a remand so that the information can be considered by the Region now. *See In re Jordan Dev. Co.*, 18 E.A.D. 1, 20-21 (EAB 2019) (denying a petitioner's attempt to rely on an EPA Regional guidance document and scientific article in the Petition that could have been, but was not, presented to the Region earlier).

Petitioners have established no basis for the Board to consider these extra-record materials due to Region 1's decision not to obtain the winter 15-minute data and Attachments 36 through 41 should be stricken from the record of the appeal. If, however, the Board decides to consider these materials, it should defer to the Region's technical judgment that the review of the winter 15-minute data was not necessary to assess the issue of cold shock, and to the Region's technical conclusion that the Permit's limits reasonably assure the protection and propagation of the BIP under CWA § 316(a), taking into account the issue of cold shock.

B. Attachments 36 through 41 to the Petition Should be Stricken from the Record of this Appeal as Additional Argument Beyond the Applicable Word Limits for the Case.

Region 1 argued in the Motion to Strike, at 5-6, that Attachments 36 through 41 to the Petition, and in particular Attachments 36 and 37, should also be stricken because they constitute additional argument beyond the 18,000-word limit permitted for the Petition in this case. In support of this argument, the Region cited to *In re City of Taunton*.17 E.A.D. 105, 129 (EAB 2016) (striking declaration submitted by a petitioner with its brief because of procedural improprieties, including that the combined word total of the brief and declaration exceeded the applicable limit).[6] Petitioners argue in response that "Attachments 36 and 37 are not argument directed to the Board, but were directed to the Region as context for the data that EPA should have considered but did not." This admission by Petitioners should prove fatal to their effort to get the Board to consider these materials. As submissions to the Region after the Final Permit was issued, these materials are not part of the administrative record and, for that reason, do not belong in the record of this appeal. The only possible justification for the Board to consider this material is if it constitutes argument by Petitioners responding to new materials added to the record by the Region in response to comments, in accordance with *Dominion II*, 13 E.A.D. at 418, 419. If the materials do not represent such additional argument,[7] then they should not be

[6] Petitioners' effort to distinguish *Taunton* is unavailing. They point out that the Board indicated that the petitioner in *Taunton* could have, but failed to, raise in its petition the arguments in the declaration and, instead, only presented the arguments in a reply brief, which was too late in violation of 40 C.F.R. § 124.19(c)(2). Opposition at 9-10. Yet, this does not change the fact that the Board also found that those arguments had exceeded the word limits allocated for the petitioner's filings. The Board did not say that the word limits could be exceeded as long as the excess words were packaged in a letter or a declaration. If that was the case, then the word limits would be rendered meaningless.

[7] Petitioners late-submitted, extra-record materials suggest that there will be notable discharge temperature drops if the Facility starts and then stops generating electricity during the winter, but they do not present, or even claim to present, a response to Region 1's analysis of the cold shock issue in the Responses to Comments. AR-1885 at II/112-13.

considered by the Board under *Dominion II*. Conversely, if the Attachments do constitute additional argument, then Petitioner's arguments must remain within the word limit and they have not. Perhaps that is why Petitioners argue these materials are not additional argument, but Petitioners cannot have it both ways in an effort to get these extra-record materials before the Board.

Based on the foregoing, the Region respectfully requests that the Board strike the Attachments 36 through 41 to the Petition.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that Region 1's Reply to Petitioners' Opposition to the Region's Motion to Strike Attachments 36 Through 41 to the Petition for Review in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal No. 20-05, contains less than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5). Specifically, the word count by Microsoft Word count indicates that this Motion contains 5,361 words, in total, excluding the cover page, Table of Contents, Table of Authorities, Statement of Compliance with Word Limitations, Certificate of Service and signature block.

Dated: December 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Region 1's Reply to Petitioners' Opposition to the Region's Motion to Strike Attachments 36 Through 41 to the Petition for Review in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal No. 20-05, was served on the following persons by Electronic Filing:

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