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November 4, 2015

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
Response to Board Order**

Dear Ms. Durr:

Attached please find for filing, the City of Taunton's Response to the Board's *Order On Pending Motions And Setting Oral Argument* in the above-captioned appeal. Thank you for your assistance with this filing.

Very truly yours,

John Hall

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

)	
In re:)	
)	
City of Taunton)	NPDES Appeal No. 15-08
Department of Public Works)	
)	
Permit No. MA0100897)	
)	

RESPONSE TO BOARD ORDER

The City of Taunton, Department of Public Works (“City”), hereby responds to the Environmental Appeals Board (“EAB”) *Order On Pending Motions And Setting Oral Argument*, dated October 30, 2015. Specifically, the Board, prior to ruling on the City’s *Motion to Supplement the Administrative Record*, ordered the City “to file with the Board, **no later than November 10, 2015**, the records of communication to which Dr. Howes’ [May 1, 2015] Letter responds.” (Emphasis in original). The instant filing fully, and timely, responds to the Board’s direction.

A. *Record of Communications Requesting Howes’ Letter*

The following represent the record of communications between undersigned counsel and Dr. Howes:

- Email, dated March 10, 2015 (5:49PM) Hall to Howes, reflecting their introductory discussion and requesting confirmation of his email address. (Att. 1);
- Email, dated March 10, 2015 (6:16 PM) Howes to Hall, confirming contact information and noting that “its about time” that Taunton was discussed. (Att. 2);

- Email, dated March 11, 2015 (5:50 PM) Hall to Howes, transmitting extensive *permit and administrative record information and materials*, and requesting a letter from Dr. Howes, essentially as an expert regarding SMAST studies and related site specific information and modeling analyses, related to the science supporting, or not, the “Sentinel Method” and its use for the Taunton NPDES permit. Six attachments were provided. (Att. 3, with attachments 3A - 3F);
- Email dated March 12, 2015 (5:25 AM) Howes to Hall discussing his initial impression and commitment to review all of the materials. (Att. 4);
- Email dated May 6, 2015 (3:31 PM) Howes to Hall informing him that a letter has been sent to J. Federico “as relates to the election of the sentinel station and the Massachusetts Estuaries Project. ... *for the purposes of clarification and accuracy.*” (Att. 5) (Emphasis supplied).

B. *Howes Letter Sought to Avoid Misapplication of The Data and Scientific Methodologies He Developed for the Massachusetts Estuaries Project (MEP)*

It is axiomatic that EPA cannot advance a technically indefensible permit.¹ Taunton sought the expert opinion of Dr. Howes, as the architect of the MEP data collection program, Sentinel station process and Critical Indicators Report used by EPA to derive permit limitations for Taunton. Dr. Howes was not hired or paid any form of compensation for his review. His May 1, 2015, letter was written, in his own words “for the purposes of clarification and accuracy.” (Att. 5). As plainly stated in Dr. Howes’ letter: “Regarding the selection of MB16 as the “sentinel station” for the Taunton River estuarine reaches, the

¹ Permit writers are admonished by the Agency, particularly in the appeals process, to recall their primary, versus an adversary, function: “A permit writer should not attempt to support technically indefensible conditions. Contested permit conditions that are not technically defensible and are not based on any legal requirement should be brought to counsel’s attention, with advice that EPA or the state withdraw those conditions”. *U.S. Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit Writers’ Manual*, (2010), at Ch. 11.4.1.2, at 11-17.

existing data and studies for the system would not support its use as a valid sentinel site, particularly as it relates to the MEP program.” (May 1, 2015 letter).

C. *EPA’s Communications with Dr. Howes*

In keeping with the Board’s Order, the City also provides Dr. Howes’ “initial response” contained in an email, dated March 12, 2015 (5:25am). (Att. 4). That communication noted the careful attention that Dr. Howes promised would be spent on reviewing the record provided, and also contained a surprise: EPA had contacted him directly: “On another note, is there a reason that Region I EPA called me today for a ‘chat’. . . Will talk to them today. Interesting.” (Quotation in original).

Please note that the EPA call, and consideration of its discussion with Dr. Howes, occurred *prior* to close of the permit administrative record. EPA Region I was certainly aware that the City was vigorously disputing the Region’s application of Dr. Howes’ methodologies and data. Via this call, EPA could have sought his input regarding proper application of his methodology. To ensure full transparency, we respectfully request that EPA Region 1 also provide any records of its contemporaneous communications with Dr. Howes.

Further, given the importance of Dr. Howes to the proper application of the entire “Sentinel” process and utilization of the MEP data (used in both Taunton’s NPDES permit and proposed Brockton’s permit), the City would not oppose this Board requesting Dr. Howes for his testimony, however sought, regarding the Taunton NPDES permit. The goal of all parties, after all, is a valid, defensible, NPDES permit, not a litigation result. We look forward to the Board’s further determination in this matter.



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November 4, 2015

Counsel for the Petitioner

CERTIFICATE OF SERVICE

Undersigned hereby certifies that on this day, November 4, 2015, a copy of the foregoing Response to Board Order was served on the parties identified below by electronic mail:

Curt Spalding, Regional Administrator
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Samir Bukhari, Assistant Regional Counsel
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5 Post Office Square - Suite 100
Boston, MA 02109-3912

Dated on the 4th day of November, 2015.

//s// John C. Hall
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