Hall & Associates

Suite 701
1620 I Street, NW
Washington, DC 20006-4033
Telephone: (202) 463-1166 Web: http://www.hall-associates.com Fax: (202) 463-4207

Reply to E-mail:
jhall@hall-associates.com

November 4, 2013

Via Electronic Filing

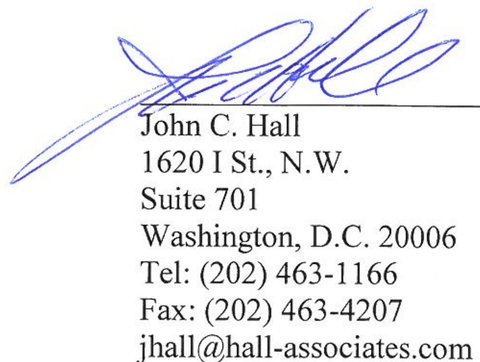
U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board 1103M
1200 Pennsylvania Avenue, N.W.
East Building
Washington, D.C. 20460-0001

Re: Town of Newmarket Wastewater Treatment Plant
Permit Number: NH0100196
Appeal Number: NPDES 12-05

Dear Ms. Durr:

Please find attached Petitioners' Response to Respondent's Motion to Strike and Reply to Respondent's Opposition to Petitioner's Motion to File a Supplement to the Administrative Record, and accompanying Certificate of Service regarding NPDES Appeal No. 12-05.

Sincerely,



John C. Hall
1620 I St., N.W.
Suite 701
Washington, D.C. 20006
Tel: (202) 463-1166
Fax: (202) 463-4207
jhall@hall-associates.com

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

In re: Town of Newmarket NPDES Permit No. NH0100196	))))))	NPDES APPEAL No. 12-05

PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO STRIKE AND REPLY TO RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO FILE A SUPPLEMENT TO THE ADMINISTRATIVE RECORD

Petitioners, the Great Bay Municipal Coalition ("the Coalition"), hereby file this response to Respondent's motion to strike and reply to Respondent's opposition to our motion to file a supplement to the administrative record ("EPA's response") to the Environmental Appeals Board (the "Board" or "EAB"), applicable to the above captioned matter. As discussed in greater detail below, the Coalition's September 23, 2013, motion to supplement the administrative record ("Petitioners' motion") does not constitute supplemental briefing, as argued by EPA, as the Coalition was only providing the requisite "particularity" required under 40 C.F.R. § 124.19(f)(2) for such a motion and, therefore, the motion is not contrary to the Board's February 17, 2013, Order. Additionally, the documents meet the various judicial tests for admitting supplemental records pursuant to *Afghan Am. Army Servs. Corp. v. U.S.*, 106 Fed. Cl. 714 (2012), *Nat'l Wilderness Inst. v. Army Corps*, 2002 U.S. Dist. LEXIS 27743 (2002), *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 65 (D.D.C. 2008) and *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989). In particular, all of the submitted documents, whether pre- or post-permit issuance, are EPA created documents that "correct erroneous assumptions, predictions, or facts", confirm bias in the administrative process and/or demonstrate that "the Agency proceeded upon assumptions that were entirely fictional or utterly without scientific support." *Afghan Am. Army*

Servs. Corp., 106 Fed. Cl. at 724. Therefore, the administrative record must be expanded to include these documents showing EPA's actions in issuing the Newmarket permit were "clear error."

Moreover, the supplemental authority the Coalition has brought to the Board's attention is not offered as supplemental argument nor does the Coalition attempt to raise new issues as argued by EPA.[1] Rather, the Coalition simply explains how this new authority addressed existing arguments and rebuttals previously raised by the parties. Consequently, the Board may heed the decisions as it feels appropriate.

I. Argument

a. The Legal Standard for Supplementing the Administrative Record

Petitioners' motion and EPA's response both identified longstanding jurisprudence for when it is proper to supplement an administrative record. First, both parties agree that any existing, pre-decisional record in EPA's possession which addresses the matter at hand should be included in the record on review. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see also* EPA Resp., at 5, Pet. Mot., at 3.[2]

Second, as stated in *County of San Miguel*, cited by EPA (EPA Resp., at 5), it is a general principle that in a permitting decision the administrative record "include[s] all materials that 'might have influenced the agency's decision and not merely those on which the agency relied in its final decision." *County of San Miguel*, 587 F. Supp. 2d at 71 (*citing Amfac Resorts v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001); *see also* EPA Resp., at 5. The

[1] EPA has identified no instances where any new arguments have been raised by Petitioners regarding the applicability of these cases.

[2] EPA erroneously presumes that "exceptional circumstances" must be presented to include any of the various documents as part of the administrative record. This is clearly incorrect as records in existence prior to the final permit decision and relevant to the decision may be included in the administrative record without showing that the document falls within an exceptional circumstance. *See* 40 C.F.R. § 124.18(c) ("The [administrative] record shall be complete on the date the final permit is issued.").

purpose being that the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *County of San Miguel*, 587 F. Supp. 2d at 71 (*citing Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 378 (1989)). Therefore, a reviewing court must be able to review the entire record to "ensure that an agency [did] not skew the record in its favor by excluding pertinent but unfavorable information." *Id.* at 72 (internal citations omitted) (*citing The Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005)); *Walter O. Boswell Mem'l Hosp. v. Heckler*, 242 U.S. App. D.C. 110, 749 F.2d 788, 792 (D.C. Cir. 1984). Thus, as EPA itself acknowledges (EPA Resp., at 5), "a party seeking to supplement the record must establish that the additional information was known to the agency when it made its decision, the information directly relates to the decision, and it contains information adverse to the agency's decision." *County of San Miguel*, 587 F. Supp. 2d, at 72 (*citing San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 243 U.S. App. D.C. 68, 752 F.2d 1287, 1327 (D.C. Cir 1984), aff'd 252 U.S. App. D.C. 194, 789 F.2d 26 (1986)). Upon such a showing, these pre-decisional documents are always added to the administrative record. *Afghan Am. Army Servs. Corp.,* 106 Fed. Cl. 724 (*citing Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n. 10 (D.C. Cir. 1974)).

Moreover, "it is axiomatic that documents created by an agency itself or otherwise located in its files were before it" and "known to the agency." *County of San Miguel*, 587 F. Supp. 2d at 76.[3] Responsive documents produced under the Freedom of Information Act, 5 U.S.C. § 552, are, by definition, "documents from the [agencies] files" and if the request only seeks records in the agency's possession prior to the final action and related to the agency's action, they are records eligible for inclusion in the administrative record. *Id.* at 76 (*citing NLRB*

[3] Information is "known" to the agency if, for example, the documents were "created by an agency itself or otherwise located in its files before it." *County of San Miguel*, 587 F. Supp. 2d at 76.

v. Robbins Tire & Rubber Co., 437 U.S. 214, 221 (1978)). Consequently, if the FOIA responses (a) represent the scope of agency records pre-final action, (b) relate to the matter and (c) contain information "adverse" to the agency's position they must be included in the record. *Id.* at 76-77.

Additionally, both parties agree that the administrative record may be supplemented by "post decisional" information in "exceptional circumstances" such as:

1. When the records show that the agency failed to consider factors which are relevant to its final decision;
2. In cases where evidence arising after the agency action shows whether the decision was correct or not; and,
3. When bias or improper behavior on behalf of the Agency is demonstrated.

Esch, 876 F.2d at 991; *Home Box Office, Inc. v. Fed. Commc'n Comm'n*, 567 F.2d 9, 54 (D.C. Cir. 1997); *Ass'n of Pac. Fisheries v. Envtl. Prot. Agency*, 615 F.2d 794, 811-812 (9th Cir. 1980); *Tummino v. Torti*, 603 F. Supp. 2d 519, 543 (E.D.N.Y., 2009) (citing *Overton Park,* 401 U.S. 402); *Afghan Am. Army Servs. Corp.*, 106 Fed. Cl. 724; *see also* EPA Resp., at 5-7, Pet. Mot., at 4-6.

Supplementing the record with such post-decisional records is permissible as "[a]llowing [an Agency decision] to be decided upon an [administrative record] which does not reflect what actually transpired would perpetuate error and impeded and frustrate effective judicial review." *Afghan Am. Army Servs. Corp.*, 106 Fed. at 724 (*citing AshBritt, Inc. v. U.S.*, 98 Fed. Cl. 344, 366 (2009)). Thus, post decisional documents generated by EPA may be added to the record if (a) they confirm important factors were not considered, (b) they demonstrate an error in decision-making or (c) demonstrate bias or improper behavior in decision-making.

b. All of the supplemental records meet the various tests for admission to the administrative record

i. General response to EPA's objections

Contrary to the Region's assertions discussed below, under the standards set forth in *County of San Miguel*, *Afghan Am. Army Servs. Corp.* and *Esch*, there is ample justification for including all of the documents identified in Coalition's motion to supplement the administrative record. Though EPA repeatedly claims that "the Coalition has not identified any basis for supplementing the administrative record" (EPA Resp., at 1, 4, 7, and 12), the motion specifically identified the bases for inclusion and expressly stated how these documents show error in EPA's decision-making. Pet. Mot., at 2-3. Each sub-section of the Petitioner's motion describes, with particularity, how the documents are "adverse to the agency's final ...determination." However, as in *County of San Miguel*, EPA does not even attempt to argue that these Agency documents are not "adverse" to its position. 587 F. Supp. 2d at 76.[4]

Petitioners' argued and EPA did not dispute, that these records, some pre-decisional and some not, all (1) relate directly to the veracity and validity of statements and determinations made in the Newmarket permit, (2) contain information adverse to EPA's findings in the Newmarket permit, and/or (3) reveal that the peer review, which was highly influential to the Newmarket permit decision, was purposefully skewed and conducted by reviewers with significant bias. *See, e.g.*, Pet. Mot., at 3, 4-6.

Therefore, regardless of whether a document was created pre- or post-decision, at a minimum, they are to be added because these documents confirm (1) EPA "failed to consider factors relevant to its final decision", (2) provide "evidence [on]... whether the decision was

[4] Likewise, EPA repeatedly claims that the motion did not show EPA "relief on the documents." EPA Resp., at 8, 9, 12 n.6. Such a requirement is not a prerequisite to admission of either pre- or post-decisional documents. *County of San Miguel*, 587 F. Supp. 2d at 72, *Esch*, supra n.3.

correct or not", and (3) confirms "bias" or "improper behavior" in decision-making. In accord with *Afghan Am. Army Servs. Corp.* and *Esch*, the documents should now be admitted to the administrative record due to their remarkable content. *See supra* at 5.

ii. Specific Response to EPA's Objections

1. Two filings by EPA in pending Freedom of Information Act appeals regarding the Coalition's science misconduct allegations

As discussed in the initial motion, the Coalition seeks to enlarge the record to include two EPA filings in FOIA appeals pending in the U.S. District Court for the District of Columbia. *See* S. Exhs. 24-25. Petitioners' previous motion provided details on the relevancy of these filings and how the filings demonstrate various EPA technical positions are in error.[5] EPA has provided no contradictions to the specific representations to be drawn from these agency documents that confirm prior FOIA responses were complete and no other records exist to refute the specific scientific issues raised in the Newmarket appeal.[6] Therefore, under *Afghan Am. Army Servs. Corp.*, these filings should be added to the administrative record as they confirm the Agency has no records showing that the <u>specific</u> technical and scientific issues raised by the Coalition in the Newmarket permit are in error, despite repeated claims to the contrary. *See* S. Exh. 24, at 11 (EPA has "produced ... all of the responsive, non-exempt Agency records subject to the FOIA to which [the Coalition] is entitled."); S. Exh. 25, at 1 (in response to the one FOIA request EPA responded too, EPA has stated it "has ... produced ... all of the non-exempt, responsive records

---

[5] Pet. Mot., at 7-9 ("These FOIA responses (or lack thereof) confirm that the Agency's technical claims underlying the draft permit are unsupported. ... EPA confirmed it possess[es] no other records or documents showing that the specific factual and scientific points raised in the science misconduct filing are incorrect.").

[6] EPA's claim that there are "numerous documents already in the record supporting the permit decision" rendering these FOIA filings of "no help to the Board" is irrelevant. EPA Resp., at 8. The test for supplementing the record does not depend on whether there are already some documents in the record which the Agency claims support its decision. Rather, one of the purposes for supplementing the record is to show that specific facts or scientific positions relied upon by the Agency in decision-making were based on "erroneous assumptions, predictions, or facts". *Afghan Am. Army Servs. Corp.*, 106 Fed. Cl. at 724. If EPA were relying on generalized information on impacts nutrients "might" cause and ignoring the site-specific data that such conditions did not occur, the action would clearly be arbitrary and capricious. These findings are inapposite to the Region's assumptions underlying the issuance of the permit and response to comments on these issues. *See generally* A.R. B.1 at 3-7.

subject to the FOIA to which it is entitled ..”), at 14 (with regards to the other eight requests that EPA asserted “do not reasonably describe the records being sought”, the Agency stated “EPA properly determined that Headquarters likely did not have any records responsive to this request …”). Regardless of how the Board views these records (as either a description of pre-final agency action records under FOIA or a new admission that the agency possesses no records to refute specific technical positions documented by the Coalition in its comments), the records should be included under either *County of San Miguel* or *Afghan Am. Army Servs. Corp.* and *Esch*, respectively.

Nonetheless, EPA broadly objects to inclusions of these records in a conclusory form because the documents “post-date issuance of the permit,” do not constitute “additional documents” and fail to meet the “narrow exceptions” allowing the filings to be added to the record. EPA Resp., at 7. Such conclusory assertions are insufficient to rebut the detailed rationale for inclusion provided in Petitioner’s Motion (at 7-9) and the relevant case law that both parties agree applies in this situation.

First, assuming *arguendo*, the filings verifying the accuracy of EPA’s earlier FOIA response are considered “post decisional,” the administrative record may include “post-date[d]” information if the documents shows the Agency’s position was incorrect. *See Afghan Am. Army Servs. Corp.*, 106 Fed. Cl. at 724; *Ass’n of Pac. Fisheries v. Envtl. Prot. Agency*, 615 F.2d at 811-812; *Esch*, 876 F.2d at 991.[7] Second, the Agency’s filings themselves obviously constitute “documents.” Third, it is irrelevant that the documents do not meet any of the exceptions articulated in *Lands Council v. Forester of Region One of the U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2005); it only matters that the documents fall within one of the many exceptions

[7] While the summary judgment filings were not in EPA’s possession at the time of permit issuance, they memorialize exactly what records were, or in this case, were not in EPA’s possession when the Newmarket permit was issued. *See County of San Miguel*, 587 F. Supp. 2d at 76.

recognized by courts where documents may be added to the administrative record. As Petitioners' motion notes, the administrative record may also include post-decisional documents "correcting erroneous assumptions, predictions or facts forming the predicate for agency decisionmaking" (*Afghan Am. Army Servs. Corp.*, 106 Fed. Cl. at 724), which EPA's response did not dispute. Pet. Mot., at 4.

Finally, the Petitioners' motion noted that any documents that show "bad faith" on the part of the Agency should be included in the administrative record. Pet. Mot., at 5-6. EPA claims these documents do not evidence "bad faith" but simply reflect a "difference of technical opinion." EPA Resp., at 9. EPA claimed that it performed a "careful review" of the science misconduct issues underlying the Newmarket permit issuance. Pet. Mot., at 9. Based on the agency's filings (and the agency's inability to produce a single document addressing the major scientific issues in dispute following the "careful review") it is obvious that the Headquarters' review never even looked at any of these issues or asked the Region for a single relevant record showing its regulatory positions to the contrary were adequately based. Pet. Mot., at 9. This refusal to investigate certainly indicates that the agency "failed to consider relevant factors" (*i.e.,* whether EPA ignored documents showing their position was unsupported or misplaced). *Lands Council*, 395 F.3d at 1030. Moreover, the Agency's "very careful" determination, intended to bolster the issuance of the Newmarket permit (which occurred approximately 6 weeks later) was plainly misleading and a "fictional account of what had transpired." *Home Box Office,* 567 F.2d at 54-55. Lying to the public on such a matter central to the validity of the Newmarket permit plainly evidences that the Agency acted in "bad faith." *Lands Council*, 395 F.3d at 1030. Consequently, exceptional circumstances had been verified by Petitioners allowing for the inclusion of this document, even if it is considered post-decisional.

2. Internal EPA Documents Regarding the Scope of the 2010 Peer Review

EPA asserts that documents (S. Exhs. 26-27) demonstrating (1) EPA misrepresented the scope of the 2010 peer review to the public and this Board and (2) the peer review was biased cannot be considered unless we prove (a) EPA considered and relied upon these records or (b) that the documents fall within one of the "unusual circumstances" listed in *Lands Council*. EPA Resp., at 9-12. Specifically, the Region argues that the documents do not fall within the "bad faith" or the "necessary to explain technical terms or complex subject matter" exceptions. EPA Resp., at 9. EPA also asserts it never made a "specific claim" that the peer reviewers actually reviewed the Petitioner's updated comments. EPA Resp., at 10. Again EPA's understanding of the applicable case law for inclusion of these documents and conclusory statements miss the mark. EPA's attempt to restrict all records to only those "exceptional" circumstances discussed only in *Lands Council* is misplaced as these plainly were not post-decisional records and other post-decisional exceptions apply if they are.

First, the peer review records were in EPA's possession (pre-final action), they directly relate to the matter (the scientific validity of suing the 2009 numeric criteria) and are plainly "adverse" to EPA's position, which EPA does not deny. They, therefore, must be included per *County of San Miguel* and *NLRB*. There is no need to "prove" EPA "relied" on these email records to have them admitted under the circumstances.[8]

Likewise, EPA's attempt to avoid a "bad faith" basis for admission of these records or to claim the records do not demonstrate factual errors in EPA's decision making also miss the mark. EPA's conclusory statement that it has not made a "specific claim that the peer reviewers

[8] Obviously EPA Region I knew of the records, it conducted the peer review with EPA Headquarters assistance. Thus, EPA Region I knew that the Office of Science and Technology had directed the reviewers to not consider any updated information from the Coalition.

considered" the Coalition's comments (EPA Resp., at 10) is false and irrelevant to whether the record is "adverse" or shows "error" in decision-making. For example, EPA stated in its Memorandum in Opposition to the Petition for Review:

> The Coalition's implication that EPA and NHDES sought to *preclude* the peer reviewers from considering the Coalition's comments *is false* ... Moreover, as evidenced by the peer review results themselves, the *fundamental issues of concern to [sic] Coalition – e.g., correlation versus cause, sufficiency and interpretation of data, adequacy of the weight of the evidence approach – were considered by Boynton and Howarth* ...

Memo. In Opp. to Pet. for Rev., at 75 (emphasis added and internal citations omitted). Based on the "post hoc rationalization" contained in EPA's Response, what EPA apparently meant to say in its Memorandum in Opposition to the Petition for Review is that EPA did not preclude the peer review from considering "all" of the Coalition's comments, only the consideration of any post-2009 comments (*i.e.*, the most detailed comments including the results of its own SAB). Of course, had EPA admitted that fact, it could not have reasonably relied on the peer review to claim issues raised in later filed permit comments were adequately addressed by the 2010 reviewers. However, that is precisely the position it took in its response to comments (*see* A.R. B.1, at 2, n.1) and the documents at issue confirm this assertion was false.

It is indisputable that EPA relied heavily upon the 2010 peer review as justification for the use of the 2009 Criteria in setting the Newmarket TN limit.[9] The Board's recent decision denying the motion to dismiss this appeal because EPA asserted that a new peer review will only

---

[9] Moreover, the Coalition commented extensively that the peer review could not be used to refute its scientific positions. *See, e.g.*, Pet. for Rev., at 37-38, 87-99; Reply, at 5-7, 12-14, 17-19. These records demonstrate that, the Region's repeated claim (in the permit comment responses and to this Board) that the peer review addressed the broad issues raised by the Coalition was a complete and utter fabrication. This easily meets the test for allowing records that confirm specific facts or scientific positions or is used for "correcting erroneous assumptions, predictions, or facts forming the predicate for agency decision-making...." *Afghan Am. Army Servs. Corp.*, 106 Fed. Cl. at 724. If there is any ongoing uncertainty regarding this assertion, as previously requested, a deposition of Dr. Boynton would resolve the matter quickly and should be granted. At a minimum, the information must be admitted to prove that the prior peer review did not address the Coalition's issues and was biased by EPA, just as the Coalition has asserted.

set up a "battle of the experts" underscores just how important the scope of this "expert" review is to justifying the reasonableness of EPA's proposed permit action. EAB Feb. 17, 2013, Order, at 9. While it is certainly true that the particular comments were ignored at EPA's insistence (itself a sufficient basis to throw out those peer review reports as biased and skewed, *supra* at 5), EPA's FOIA response cover letter confirms that the directive to exclude issues on review was far broader, that none of the new issues raised by the Coalition would be considered including the results from the agency's own Science Advisory Board review, directly applicable to assessing the reasonableness of the methods used to derive the 2009 Criteria:[10]

> On June 7, 2010, the Coalitions submitted their May 12, 2010, comments as well as a final report form EPA's Scientific Advisory Board directly to Drs. Boynton and Howarth. [footnote omitted]. *EPA shortly thereafter decided that these and any further comments would not be allowed within the authorized scope of Drs. Boynton and Howarth's peer review.* (S. Exh. 26, at 2 (emphasis added)).
>
> We had N-Steps experts review the information was provided to us by the State and will not be opening the review up for any more information. If the State wants to take into account the new information, that is their prerogative. (S. Exh. 27, at 3 (email from branch chief at EPA Office of Science and Technology)).

Consequently, EPA's assertion that the Agency has never taken the position that these "particular set of Coalition comments" were reviewed by the peer reviewers and the Coalition's fundamental issues of concern were reviewed (EPA Resp., at 10), is dissembling and Orwellian newspeak. *Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013).

The documents plainly evidence that EPA directed the peer reviewers to not consider key scientific information and the SAB findings that the Coalition (and EPA itself) considered relevant. Thus, one need not inquire further into the mind of the reviewer to include these records as EPA suggests (citing I*n re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 532

---

[10] *See* Pet. for Rev. at 37-38, Reply at 5-7.

(EAB 2006), given this information. EPA Resp., at 11.[11] The effect of that decision is obvious; an incomplete, biased review intended to avoid information contrary to the agency's intended result. This meets the "fictional account" test for finding bias under *Home Box Office* (Pet. Mot., at 12), and demonstrates that the agency "failed to consider factors [e.g., the SAB review recommendations] which are relevant to the final decision." *Esch*, 876 F.2d at 991.

Finally, EPA's observations regarding the timing of the statements (allegedly post –report completion) (EPA Resp., at 11) does nothing to diminish the uncontroverted fact that the reviewers and the Agency review staff were plainly biased against considering the information provided and the persons providing it. These existing records provide objective, "[p]roof of subjective bad faith by [agency decision-makers], depriving a [petitioner] of fair and honest consideration of its proposal, [that] generally constitutes arbitrary and capricious action." *Latecoere Int'l, Inc. v. U.S. Dept. of Navy,* 19 F.3d 1342, 1356 (11th Cir. 1994); *James Madison Ltd. v. Ludwig,* 317 U.S. App. D.C. 281, 82 F.3d 1085, 1096 (D.C. Cir. 1996)). Moreover, they prove the scope of the peer review was skewed, precisely as Petitioners alleged and EPA has denied. Therefore, even if these were not pre-decision records they would meet the test for "exceptional" consideration under *Lands Council* and *Esch.*

3. Responsive Documents Regarding the Implementation of 40 C.F.R. § 122.44(d)

With regard to the responsive FOIA documents (S. Exhs. 28-31) addressing how EPA intended 40 C.F.R. § 122.44(d) to be implemented, EPA argues that the Coalition failed to argue the basis for supplementing the administrative record and claims the Coalition is simply making

[11] Of course, it gets worse. EPA does not dispute that at least two parties involved in the 2010 peer review made disparaging comments regarding the Coalition's comments and legal representation. Petitioners noted this objectively qualifies as "bad faith" or "improper behavior" (Pet. Mot., at 11-12), tainting the entire process. *Home Box Office, Inc.*, 567 F.2d at 54. EPA's claim that we must provide further evidence that the peer reviewer, Dr. Howarth, was "psychologically wedded to his opinions" (EPA Resp., at 11) is irrelevant since the peer reviewers were directed not to consider relevant scientific information adverse to EPA's viewpoint and complied without opposition.

a "(re)argument" in its explanation for why the document should be admitted to the record. EPA Resp., at 12. First, the Coalition is not making a "(re)argument" but rather has provided enough specificity to the Board to determine whether or not the FOIA documents should be added to the administrative record as required under 40 C.F.R. § 124.19(f)(2). This is all that occurred in this filing and EPA provides no specific demonstration to the contrary.

Second, EPA is mistaken on all counts. Again, these FOIA requests (like the record review FOIAs addressing science misconduct issues) sought only pre-existing EPA records that explained the proper application of § 122.44(d) in this circumstance. Thus, any records or responses considered "adverse" to EPA would necessarily be designated for inclusion in the administrative record. *County of San Miguel*, 587 F. Supp. 2d at 72.

Contrary to EPA's conclusory statements, Petitioners' motion specified the reasons for why these FOIA documents were adverse to EPA, explicitly stating:

> EPA responsive documents released under a FOIA request regarding the proper implementation of 40 C.F.R. § 122.44(d), which confirm that the public was never informed that EPA would use this rule to generate numeric criteria to claim impairments and narrative violations exist, rather than EPA having to make a demonstration that the pollutant caused or was project to cause the impairment as required by the adopted narrative standard. Thus, [] EPA's claim that this rule contains no causation requirement is a substantive reinterpretation of the published rule. (Pet. Mot. at 2-3).
>
> Put differently, as EPA's responses to these three FOIAs indicates that EPA is employing an unadopted and therefore illegal rule interpretation, in issuing the Newmarket permit, these documents should be added to the administrative record. (Pet. Mot. at 14).

Thus, as EPA does not dispute that the records were pre-existing, in their possession and adverse to the Agency's position stated in its briefs and permit comment responses under *County of San Miguel*, they must be admitted.

4. Draft NPDES Permit for the Taunton, MA Wastewater Treatment Plant

As noted in Petitioner's motion, EPA Region 1 recently released a draft NPDES permit for the Taunton, MA Wastewater Treatment Plant which discusses what constitutes a protective level of total nitrogen producing "excellent to good" and "unimpaired" conditions in nearby estuarine water bodies. S. Exh. 32. EPA contends that the Taunton draft permit Fact Sheet should not be added to the record because the Coalition has made no claim as to which of the record exceptions the documents fall within, the document "was not before the agency at the time of the permit decision ... and because the Region has never claimed any reliance on the Taunton permit" in issuing the Newmarket permit. EPA Resp., at 13. Again, these rationales are misplaced and irrelevant as to whether or not these records should be admitted.

First, Petitioners' specifically stated that the Taunton permit should be added to the record because "the discussion in the Taunton draft permit directly contradicts EPA Region 1's position in the Newmarket permit that a 0.3 mg/l TN instream criterion is necessary to protect eelgrass populations in Great Bay" (at 14); "[i]t is clear from the Taunton draft permit, that EPA Region 1's actions in setting the Great Bay nutrient criterion are arbitrary and capricious" (at 15); "the Taunton permit action confirms that EPA misapplied the 0.3 mg/l numeric criteria, in deriving the Newmarket permit limits, precisely as Petitioners argues" (at 16); and "EPA's own actions in the Taunton matter proved that these concerns [misapplication of nutrient criteria] were valid and that the agency's approach to Great Bay effluent development was arbitrary and capricious" (at 17). When an agency's own statements indicate error in its prior decision, they may be included in the administrative record, even if post decisional. Pet. Mot., at 4-5. Thus, these statements, included in the Motion, fit precisely within *Afghan Am. Army Servs. Corp.,*

Esch, and *County of San Miguel*, as a basis for inclusion of these records in the administrative record. Therefore, EPA's claim that adequate bases were not presented is misplaced.

Second, EPA nowhere argues that the statements contained in the Taunton permit Fact Sheet are not adverse to the position it has taken in this matter. In fact, EPA knows that, in the Newmarket permit, it made the *opposite* recommendations on how to properly apply nutrient criteria to derive appropriate effluent limits under § 122.44(d). Pet. Mot., at 15-16. Petitioners had raised precisely the same issues in the Newmarket permit comments, which EPA rejected as unsupported. *See, e.g.,* A.R. C.2 at 5-6, 10. The Taunton Fact Sheet constitutes an admission that the prior observations made by Petitioners were correct and EPA refusal to change its position for Newmarket was incorrect (satisfying the second prong of *County of San Miguel*) and the basis for admission of post-decisional information under *Esch* and *Afghan Am. Army Servs. Corp*. The only question is whether the record should be admitted as a pre-decisional per *County of San Miguel* or post- decisional document per *Afghan Am. Army Servs. Corp.*

On this point, as noted in the Motion, the purpose of bringing the Board's attention to the Taunton permit was not to highlight the Taunton permit *per se*, as EPA issues numerous permits for Massachusetts and New Hampshire. Rather, the purpose was to highlight the Region's reliance and discussion on the document entitled "Site-Specific Nitrogen Thresholds for Southeastern Massachusetts Embayments: Critical Indicators- Interim Report" (hereinafter "2003 Report") produced by the Massachusetts Estuaries Project (with EPA's assistance)[12] and relied upon by that State and EPA in determining whether estuarine waters are truly nutrient impaired. Pet. Mot., at 14-15. The 2003 Report, discussed in the Fact Sheet, was in EPA's possession, pre-final permit action. The 2003 Report plainly contains information adverse to the agency's

[12] Massachusetts Estuaries Project, *Site-Specific Nitrogen Thresholds for Southeastern Massachusetts Embayments: Critical Indicators- Interim Report* (2003) *available at* http://www.mass.gov/dep/water/resources/nitroest.pdf.

decision since it shows that water quality in the Great Bay system should be considered either "good to excellent" or "not impaired," precisely as Petitioners' have alleged. As the discussion surrounding the 2003 Report in the Taunton permit Fact Sheet specifically states that EPA finds that estuaries are not expected to be impaired if TN is within a range of 0.3-0.4 mg/l, which current conditions in Great Bay fall within this range, it is clear the Taunton permit Fact Sheet statements are directly related to the Newmarket decision. *See* Pet. Mot., at 15-16. Moreover, a statement by the Region that it knows that estuaries are not expected to be impaired if TN is within 0.3-0.4 mg/l is clearly adverse as EPA completely contradicted itself in the Newmarket permit by finding an estuary within this TN concentration range is impaired. Given that the 2003 Report was (1) in EPA's possession, (2) is clearly relevant to determine if estuarine waters are nutrient impaired and (3) is plainly adverse to EPA's position, the Taunton Fact Sheet should be added pursuant to *County of San Miguel*, as requested by Petitioners. Alternatively, if considered wholly "post-decisional" these same facts allow its admittance under *Afghan Am. Army Servs. Corp.* Pet. Mot., at 4.

5. EPA's Guiding Principles Document

On September 12, 2013, EPA released a document entitled "Guiding Principles on an Optional Approach for Developing and Implementing a Numeric Nutrient Criterion that Integrates Causal and Response Parameters." S. Exh. 33. EPA objects to the inclusion of this document asserting that Petitioner's offered no explanation how this, a "post-decisional document," falls within any of "the narrow exceptions applicable for supplementation of the administrative record." EPA Resp., at 14. Apparently, EPA failed to read Petitioner's filing in making this objection, as the basis for inclusion was plainly stated on pages 3, 18, and 19:

> New guidance just released by EPA stating that direct effects of nutrients on algal growth should be confirmed prior to deriving appropriate nutrient endpoints. As claimed by Petitioners, and admitted to be correct in the FOIA responses, EPA's

> analyses never demonstrated that TN triggers excessive algal growth in this system. System data confirmed such increased/excessive algal growth did not occur. In deriving the TN numeric criteria, EPA and DES jumped over this determining fact when it erroneously claimed that DO and transparency impacts were caused by increased algal levels due to TN inputs. The new guidance confirms that action was clear error. (at 3).
>
> Moreover, the "guiding principles" confirms that Petitioners were correct in stating that the approach used in the 2009 Numeric Nutrient Criteria was not scientifically defensible and not consistent with the development of numeric nutrient criteria using "stressor-response" methods. (at 18)
>
> Second, one cannot plot TN versus transparency or DO to conclude that TN is the cause of the condition because the causal parameter has no direct effect on this metric. (at 19).
>
> Therefore, the evaluation used to create the response criteria and the causal variable (nitrogen) was not based on a sufficient or scientifically defensible demonstration, as confirmed by EPA's "Guiding Principles" document. (at 19).

As with all prior EPA objections, nowhere does EPA refute the information showing how the record is "adverse" to EPA or demonstrates an error in decision-making. The Guiding Principles are national guidelines published by EPA, which state that there must be a cause and effect demonstration when developing numeric nutrient targets. Thus, EPA's characterization of the Coalition's argument that a cause and effect demonstration is necessary in implementing a narrative criteria to develop the Newmarket nutrient limit, as an "oft-repeated and mistaken demand" (at 14) is, on its face, contrary to the Agency's own national guidance on proper methods for setting nutrient objectives. In Great Bay, EPA admits that it did not undertake such a demonstration between elevated algal growth and increased TN. Pet. Mot., at 18-19. The Guiding Principles confirm that EPA's technical approach in assessing numeric nutrient criteria in Great Bay and use of the 2009 Criteria is in error and is therefore, an admissible "post-decisional" document under *Esch* and *Afghan Am. Army Servs. Corp.*

c. The Coalition's Motion to Supplement the Record is not a Supplemental Brief

EPA's assertion that the Coalition's motion is "supplemental, and late-filed, argumentation" and prohibited by the Board's February 17, 2013 Order, is conclusory and baseless. EPA Resp., at 1. EPA itself recognized that the motion had "repeated references to arguments in Petition, Opposition, Reply and Sur-reply" (EPA Resp., at 3) confirming these documents do not go towards raising new arguments but rather related to previously raised issues. Moreover, EPA provides no specific examples of the "distinct new issues" or "first raised" arguments in support of its claims that the motion constituted supplemental briefing. EPA Resp., at 3. Thus, factually, EPA's position must be rejected as unsupported. Consequently, cases cited by EPA regarding late-filed arguments (EPA Resp., at 3) are inapposite and require no further rebuttal.

Petitioners' filed this motion after corresponding with the Clerk of the Board after one of the Petitioners' letters to the Board had not been docketed and the Clerk stated that because briefing had ended that Petitioners must request leave from the Board to file a motion to supplement the record with the additional information instead of filing the information by letter to the Board. *See* Attachment A- email from Eurika Durr, Clerk for the Board to John Hall, Hall & Associates (Sept. 28, 2013). Thus, Petitioners filed a motion to supplement the record including any additional information that Petitioners' had previously filed via letter to the Board (*i.e.*, Dkt # 49-53). Therefore, in order to comply with the Board's new rules, the Coalition's motion had to "state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support the motion." 40 C.F.R. § 124.19(f)(2). EPA itself cites the tests that must be demonstrated to allow admission of records previously excluded by the agency. EPA Resp., at 5-7. Obviously, "stating with particularity" requires an explanation of how the record fits into the case and is at odds with the agency's position. Moreover, EPA itself has

argued that the failure to explain the relevance of documentation with particularity allows the Board to summarily reject an argument.[13]

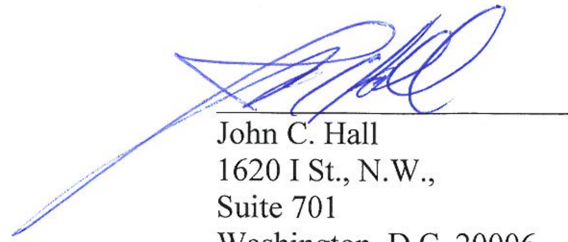
Likewise EPA's claim that the Coalition's filing should have just provided "notice" of the existence of a recent legal precedent (EPA Resp., at 4), without any explanation of relevance, has no support in rule or jurisprudence. Again, consistent with the Board's rules on explaining the grounds for relief sought, the Coalition provided a background on the new case law and why the decisions are relevant to the present appeal. Clearly, the Board is free to look at this discussion, review the case, and put as much or as little stock in these decisions as it feels appropriate. In short, the Coalition could not justify its request to supplement the record without discussing the nature of the documents, their relevance to the appeal, and/or specific grounds for inclusion in the record. EPA has offered no jurisprudence to the contrary and the Board's prior order on supplemental briefing did not preclude filing such a motion. Therefore, EPA's motion to strike should be denied.

II. Conclusion

For the reasons discussed herein, we respectfully ask the Board to deny EPA's motion to strike and grant the Coalition's September 23, 2013, motion and allow these supplemental documents to be added to the administrative record and ask that the Board take into consideration the supplemental authority provided.

[13] *See, e.g.,* Memo. In Opp. to Pet. for Rev., at 40, n.26; at App. B at 2-3.

Respectfully submitted,



John C. Hall
1620 I St., N.W.,
Suite 701
Washington, D.C. 20006
Tel: (202) 463-1166
Fax: (202) 463-4207
jhall@hall-associates.com

CERTIFICATION OF SERVICE

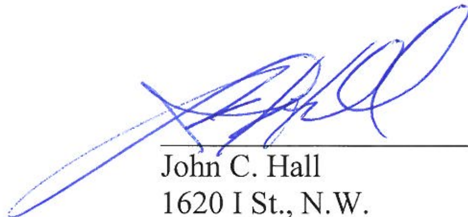
I hereby certify the copies of the foregoing Petitioners' Response to Respondent's Motion to Strike and Reply to Respondent's Opposition to Petitioner's Motion to File a Supplement to the Administrative Record, in connection with NPDES Appeal No. 12-05, were sent to the following persons in the manner indicated:

By Electronic Filing:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board 1103M
1200 Pennsylvania Avenue, N.W.
East Building
Washington, D.C. 20460-0001

By First Class U.S. Mail:

Mr. Samir Bukhari
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 1
5 Post Office Square- Suite 100
Mail Code: ORA 18-1
Boston, MA 02109-3912



John C. Hall
1620 I St., N.W.
Suite 701
Washington, D.C. 20006
Tel: (202) 463-1166
Fax: (202) 463-4207
jhall@hall-associates.com

Date: 11-4-13