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

In the Matter of: City of Manchester NPDES Permit No. NH0100447	NPDES Appeal No. 25-04

EPA REGION 1'S MOTION TO STRIKE

Respectfully submitted,

LINDSEY SHORT

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I. INTRODUCTION

On December 3, 2025, Petitioner Conservation Law Foundation ("CLF") filed a Petition for Review (the "Petition") of National Pollutant Discharge Elimination System ("NPDES") Permit No. NH0100447 (the "Final Permit") issued by the Region 1 office ("the Region") of the United States Environmental Protection Agency ("EPA") to the City of Manchester ("Permittee") for the Manchester Wastewater Treatment Facility ("Facility"), located in Manchester, New Hampshire.

The Petition includes, as Attachment 11, sampling data that "were not submitted during the public comment period or considered by the Region when finalizing the Permit." ("Attachment 11"). Petition, 10. Attachment 11 presents study results of the forty PFAS compounds included in Method 1633A in surface water, sediment, and fish downstream of the Facility's discharge and compares the results to New Hampshire screening levels and Massachusetts action levels. The surface water results detected seven of the forty compounds and all seven were below the applicable screening/action levels. The sediment results detected one of the forty compounds (PFOS) in one of the two samples, and it was 1,000 times below the screening value. The fish results detected thirteen of the forty compounds in whole fish and nine of the 40 compounds in fish filets but only one (PFOS) was above the corresponding screening/action levels.

Petitioner "does not seek to add new information to the record" but rather submits this data to "contextualize[] the issues raised by Petitioner's comments that are properly before the Board." *Id.* "Petitioner therefore requests that the Board treat the report as supporting documentation rather than a motion to supplement" on the theory that "[o]n occasion, the Board has 'considered newly submitted materials in the course of evaluating the merits of a petition.'" *Id*. at 10-11, quoting *In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 37 (EAB 2010).

As Attachment 11 is not a part of the administrative record and does not fall within a Board-recognized exception, consideration of it would be improper under longstanding principles guiding the Environmental Appeal Board's ("EAB's" or "Board's") permit reviews. For the reasons below, the Region moves to strike this extra-record document. The Region has, consistent with 40 C.F.R. § 124.19(f)(2), ascertained that the Permittee assents to the motion and joins in the requested relief, and that Petitioner objects to the motion.

II. ARGUMENT

A. Attachment 11 to the Petition is Not Part of the Administrative Record.

The Region must base final NPDES permit decisions on the administrative record. 40 C.F.R. § 124.18(a). The administrative record comprises "all documents, materials, and information that the agency relied on directly or indirectly in making its decision." *In re Dominion Energy Brayton Point L.L.C.*, 12 E.A.D. 490, 519 (EAB 2006) ("*Dominion*") (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 738-739 (10th Cir. 1993); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)); 40 C.F.R. § 124.18(b). It is complete on the date the final permit is issued. 40 C.F.R. § 124.18(c); *see also* 45 Fed. Reg. 33,412 (May 19, 1980) ("By requiring the record to be assembled before the permit is issued, EPA has ensured that the Regional Administrator can base final decisions on the administrative record as a whole."). The Board "interpret[s] 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." *Dominion*, 12 E.A.D. at 518 (citations omitted.).

By Petitioner's own admission, Attachment 11 was "not submitted during the public comment period" and the Region did not otherwise "consider[]" it "when finalizing the Permit." Petition, 10, n.47. Indeed, the data in Attachment 11 were presented to the Region for the first time

with the Petition. Under these circumstances, Attachment 11 could not possibly have been part of the Region's consideration of its final permitting decision and thus is not part of the administrative record. *See Dominion*, 12 E.A.D. at 519 ("[T]here is no possible way in which those late-arriving documents could have been considered in developing the [] permit since it had alread been issued at the time of their arrival.").

B. The Board should not consider Attachment 11 in this review of the permitting record.

The Board reviews NPDES permits on a "record review" basis. *Dominion*, 12 E.A.D. at 508, 509 n.28; *see* 40 C.F.R. § 124.19. Absent an exception, Petitioner may not attach non-record materials to the Petition. 40 C.F.R. § 124.19(d)(2) ("Parts *of the record* to which the parties wish to direct the Environmental Appeals Board's attention may be appended to the brief submitted.") (emphasis added). The Board is "reluctant to consider materials that were not actually before the decisionmaker at the time of the decision that is under review." *In re Gen. Elec. Co.*, 18 E.A.D. 575, 608 (EAB 2022) ("*General Electric*"); *see also Dominion,* 12 E.A.D. at 519 (explaining courts' reluctance to "include in an administrative record materials that were not actually before the agency when it made its decision"). This reluctance reflects the longstanding principle that

> Scientific arguments and questions should first be presented to the Region, which has the technical expertise to address them. The Board's role is not to evaluate scientific arguments in the first instance. Instead, the Board's role is to review whether the Region's permitting decision is based on clearly erroneous conclusions of fact or law.

General Electric, 18 E.A.D. at 618; *see also In re Peabody Western Coal Co.*, 12 E.A.D. 22, 33-34 (EAB 2005) ("[T]he locus of responsibility for important technical decisions rests primarily with the permitting authority, which has the relevant specialized experience and expertise.").

As Petitioner notes, in *Russell City Energy* the Board acknowledges it may consider newly submitted materials in limited instances: "on occasion, the Board has 'considered … newly

submitted materials in the course of evaluating the merits of a petition…." 15 E.A.D. at 39 (citation omitted.). As an exception to the rule, the Board considers extra-record documents in three narrow circumstances, at the Board's discretion:

> (1) to allow a petitioner to question the validity of material added to the administrative record in response to public comment, (2) to take official notice of relevant information that is publicly available and incontrovertible, and (3) to supplement the administrative record with material that (a) is required to be included under the regulations, or (b) the Agency relied on in its permitting decision.

General Electric, 18 E.A.D. at 609.

Petitioner does not even attempt to satisfy the Board's standard for considering material outside the administrative record. Petitioner does not allege that Attachment 11 was submitted in response to new materials Region 1 added to the administrative record in response to comments. *See* Petition, 10-11, n.47. Petitioner does not argue that Attachment 11 is appropriate for official notice, nor can it because it does not establish, or even allege, that the data is incontrovertible. *See id*. Attachment 11 is not required to be included under the regulations, and by Petitioner's own admission, the Region did not rely on it in its permitting decision. *Id*. For these reasons, Petitioner's proffered extra-record document, Attachment 11, does not fall under a recognized exception to the general rule that the Board will only review record material.

As the limited exceptions laid out in the Board's operative test are facially inapplicable, Petitioner manufactures a new standard more suited to its purposes, describing very generally that Attachment 11 is relevant to: 1) "the Region's decision to avoid a reasonable potential analysis for PFAS" and 2) "its position that the 'data gathered in accordance with the permit's monitoring requirements will help EPA to better understand these risks and take future action, if appropriate, to reduce risks.'" Petition, 11 n.47. However, "[i]t is not sufficient to simply allege… that [extra-record] materials 'are relevant.'" *In Re Town of Newmarket*, 16 E.A.D. 182, 241 (EAB 2013).

In summary, Attachment 11 is not part of the Permit's administrative record and Petitioner has not established any valid ground for the Board to find an exception to the rule against considering extra-record materials. Extra-record attachments undermine the Board's central task of a record review to determine whether the agency made a reasonable decision based on the information available in the record. For these reasons, the Board should strike Attachment 11.

CONCLUSION

For the foregoing reasons, the Region moves under 40 C.F.R. § 124.19(f) to strike Attachment 11 to the Petition.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that Region 1's Motion to Strike Petitioner's Attachment 11 to the Petition for Review in the matter of City of Manchester, NPDES Appeal No. 25-04, contains fewer than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5).

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CERTIFICATE OF SERVICE

By electronic filing, authorized by the Board's Sept. 29, 2025 standing order:

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