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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 the Petitioners' Motion to Supplement the Administrative Record and to Depose the Experts Relied on by EPA and accompanying Certificate of Service regarding NPDES Appeal No. 12-05.

Sincerely,

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BEFORE THE U.S. EPA ENVIRONMENTAL APPEALS BOARD
WASHINGTON, D.C.

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

Petitioners' Motion to Supplement the Administrative Record and to Depose the Experts Relied on by EPA

Petitioners, the Great Bay Municipal Coalition ("the Coalition"), hereby file a motion to the Environmental Appeals Board (the "Board" or "EAB") to allow Petitioners to supplement the administrative record. In addition, the Coalition requests that it be allowed to depose EPA and Conservation Law Foundation ("CLF") experts relied upon by EPA in issuing the Newmarket National Pollutant Discharge Elimination System ("NPDES") permit.

I. Background

The Coalition seeks to supplement the administrative record as provided for by law. As discussed below, these records include: N.H. Dept. of Environmental Services ("DES") deposition testimony and deposition-related documents; documents pertaining to the Memorandum of Agreement; the affidavits of Dr. Steven Chapra, Thomas Gallagher, and Dean Peschel; a letter from the Univ. of N.H. Professors who conducted or peer reviewed the estuary studies that formed the basis for the 2009 Numeric Criteria document, *i.e.,* the document that EPA relies upon in the permit; documents related to the development of the Memorandum of Agreement ("MOA") and timing of the Coalition lawsuit against DES; and a study by Dr. Steve Jones. *See* Supplemental Exhibit 1 ("S. Exh") (listing the documents to add to the record). Among other justifications, these documents should be included in the administrative record because they (1) were received and considered by EPA in advance of the Newmarket NPDES

permit issuance; (2) depict EPA's involvement in critical regulatory decisions preceding the Newmarket NPDES permit and the rationale for such decisions; (3) were not reasonably ascertainable during the public comment period; (4) confirm specific facts or scientific positions in the Newmarket NPDES permit are in error, using the most reliable source; (5) support the Coalition's claims of bad faith; (6) are necessary to determine whether EPA considered all of the relevant factors; and/or (7) explain technical terms and complex subject matter before the Board. Individually, and collectively, these justifications support the Coalition's position that the documents discussed below either should have been included in the original administrative record or should now be included as supplemental material.

II. Length of Documents Petitioners Wish to Supplement

The Coalition recognizes that the documents it seeks to include in the administrative record, specifically identified and listed in S. Exh. 1, exceed the 25 pages the Coalition was granted by the Board to challenge the record. Feb. 27, 2013, Order at 3. First, federal law does not grant the Board authority to limit the administrative record to a set number of pages. *See Citizens to Preserve Overton Park, Inc., v. Volpe,* 401 U.S. 402 (1971); *infra*, n. 3. To the degree the Board was exercising its discretion to control its docket (Feb. 27, 2013, Order at 3) that power only applies to the brief page length, not to the scope of factual records attached. Moreover, the Coalition cannot imagine the Board being able to evaluate the worthiness of the Coalition's administrative record arguments, without supplying the Board a copy of the very documents at issue.[1] The Coalition further notes that the Motion itself is 24 pages in length, which is well within the Board's Order, and an entirely reasonable length given the

[1] If the allowable brief length includes copies of all the records Petitioners are seeking to be added to the record, no brief would have been possible as the 2013 State of the Estuaries Report, that EPA decided should be excluded from the Board's consideration, is 48 pages in itself. This is an absurd result.

circumstances. The Coalition is not aware of any Court (or tribunal) that has restricted the page limitation of factual exhibits that a party may submit to support its arguments, let alone to 25 pages or less. To the extent the Board strikes these documents because they exceed a page requirement, the Coalition preserves this argument for a potential appeal.

III. Argument

An agency decision may be deemed arbitrary and capricious:

> [I]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency. . . .

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). As such, all documents that reflect such considerations should be included in the administrative record.[2] *See Overton Park,* 401 U.S.402. To provide otherwise, would provide for an automatic rubber-stamping of an agency decision upon review – something that is clearly not envisioned by due process procedures.

A. Administrative Record May Not be Skewed to EPA's Liking

As a start, the administrative record includes, at a minimum, the relevant documents submitted to EPA during the development of the 2009 Criteria document and contemporaneous impairment listings. It does not include only those documents that the Region cherry picks while ignoring documents that do not support its agenda or determinations.[3] *See, e.g., Home Box Office, Inc. v. Fed. Commc'n Comm'n*, 567 F.2d 9, 54 (D.C. Cir. 1977):

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[2] The Petitioners are still waiting on EPA to respond to numerous Freedom of Information Act requests asking for relevant documents to this permit appeal. Once EPA produces said documents, Petitioners intend to move to add the documents to the administrative record. The outstanding FOIA requests on appeal are EPA –HQ-2013-2413-A through HQ-2013-2421-A and EPA-R1-2013-000014 through EPA-R1-2013-000031. The outstanding FOIA requests are EPA-R1-013-003258 and HQ-2013-003781 through HQ-2013-003783.

[3] For example, EPA could not exclude all information pertaining to rainy days to support a finding that it never rains. Likewise, DES and EPA could not exclude from the development record of the 2009 Criteria document those

> [The Supreme Court's opinion in *Overton Park,* 401 U.S. 402] mandate means that the public record must reflect what representations were made to an agency so that the relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information present.[4]

Moreover, the fact that EPA disagrees with a document, or may have reviewed said document informally, has no bearing on whether it belongs in the administrative record. *Am. Farm Bureau v. Envtl. Prot. Agency,* 2011 U.S. Dist. LEXIS 148637, *16 (M.D. Pa. 2011) ("EPA's stance that a document that is considered but dismissed as unworthy ought to be omitted from the record represents a misinterpretation of the standard. As stated, EPA is required to include on the administrative record any materials *that it either directly or indirectly considered* during the decision process.") (emphasis added). As noted in *Am. Farm Bureau,* "[t]he administrative process is one of proposals, drafts, comments, revisions and final drafts and the materials produced in this process are typically part of the administrative record." 2011 U.S. Dist. LEXIS at *26-27. As both DES and EPA have pervasively skewed the administrative record to shore up

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analyses performed by DES confirming that the 2009 criteria were not scientifically supported and were inconsistent with the database underlying the criteria (i.e., transparency changes due to nitrogen induced algal growth never occurred) or that DES changed the impairment listing due to a threatened CLF lawsuit at EPA's request, not due to evidence of transparency induced impairment.

[4] *See also Home Box Office,* 567 F.2d at 54-55 ("We have insisted, for example, that information in agency files or consultants' reports which the agency has identified as relevant to the proceeding" be included in the administrative record. Stated another way, where "an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, . . . but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary."); *Pac. Coast Fed'n of Fishermen's Assoc./Inst. for Fisheries Res. v. Gutierrez*, 2007 U.S. Dist LEXIS 25846 (E.D. Cal. 2007) (citing *Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993)("If the record is not complete, then the requirement that the agency decision be supported by 'the record' becomes almost meaningless); *Environmental Defense Fund v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978) (finding the agency "may not, however, skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question."); *Fund for Animals*, 245 F.Supp.2d 49, 55 (D.D.C. 2003) (finding "[t]he agency may not skew the record in its favor by excluding pertinent but unfavorable information. Nor may the agency exclude information on the grounds that it did not rely on the excluded information in its final decision.").

their flawed decision making process, Petitioners may be allowed to broadly supplement the record to correct this "fictional account".[5] *Home Box Office,* 567 F.2d 9.

B. Good-Cause for Supplementing the Record

In establishing the current EAB NPDES permit review process, EPA specifically assured the public that:

> Under the hearing procedures . . . should a party wish to challenge the testimony of an opposing expert witness, it may present written evidence to contradict the assumptions, data, and analysis of the opposing expert. This sort of challenge would more efficiently and reliably reveal any error or bias in the expert's analysis . . . .

65 Fed. Reg. 30886, 30899 (May 15, 2000). Furthermore, the record may be supplemented for good cause:

> [T]he law is clear that, despite the 'record rule,' a reviewing court may consider extra-record materials in certain circumstances. *See Nat'l. Audobon [Soc'y v. Hoffman (*2d Cir. 1997)] 132 F.3d [7,]at 14. Indeed, 'a strong showing of bad faith or improper behavior' may justify supplementing the record.

Tummino v. Torti, 603 F. Supp. 2d 519, 543 (E.D.N.Y., 2009) (citing *Overton Park,* 401 U.S. 402)*; see also Consejo de Desarrollo Economico de Mexicali v. United States*, 438 F. Supp. 3d 1207, 1221 (D.C. Nev. 2006) (finding the administrative record may be supplemented "[w]hen plaintiffs make a showing of agency bad faith."). The Agency's consistent attempts to skew the record, alter impairment listings without supporting data, prevent public input on the science review process, withhold essential information from their peer review panel and ignore the prior studies confirming the selected "conceptual model" was inapplicable more than meet this threshold.

[5] Petitioners requested the Final 2012 PREP Report (S. Ex. 17) be added to the record. *See* Petitioner's Petition for Review ("Br.") at 25-26- detailed discussion on the relevance of the Final 2012 PREP report.

Bad faith, however, is just one of the justifications for supplementing an administrative record. For instance, it is well-settled that even documents not previously considered by an agency, including post-decisional documents, may be included in an administrative record when it confirms 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. v. U.S.*, 106 Fed. Cl. 714, 724 (2012).[6] In addition, if the agency "proceeded upon assumptions that were entirely fictional or utterly without scientific support" supplementing the record is permissible. *Ass'n of Pac. Fisheries v. Envtl. Prot. Agency*, 615 F.2d 794, 811-812 (9th Cir. 1980). In some cases, supplemental information is admitted after the parties have had a hearing on the merits. *See e.g., Turk v. U.S.*, 429 F.2d 1327, 1329 (8th Cir. 1970) ("when the interests of justice demand it, an appellate court may order the record of a case enlarged."). As the deposition testimony, *see infra*, at 11, and the excluded documents, confirm that EPA factual and scientific claims are fictional and without merit, these documents must be included in the administrative record.

The administrative record may also be supplemented when the inclusion of the document helps explain complex technical issues. *See, e.g., Valley Citizens for a Safe Environment v. Aldridge*, 886 F.2d 458, 460 (1st Cir. 1989) (finding "a reviewing court might want additional

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[6]*See also Nat'l Wilderness Inst. v. Army Corps*, 2002 U.S. Dist. LEXIS 27743, *10 (2002) (supplementing administrative record permitted where "evidence arising after the agency action shows whether the decision was correct or not"); *Esch v. Yeutter*, 876 F.2d 976, 991-92 (D.C. Cir. 1989) (same); *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985) (record may be supplemented with post-decisional evidence that "demonstrates that the actions [of the agency] were right or wrong."); *Am. Petroleum Inst. v. Envtl. Prot. Agency*, 540 F.2d 1023, 1034 (10th Cir. 1976) (EPA introduced post-decisional data to support its contention that technologies were practicable and current.); *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d. Cir. 1982) (finding the factual issue of what constituted the agency's "informational base" was in dispute, and that summary judgment could not be granted "without at least permitting plaintiffs some limited discovery to explore whether some portions of the full record were not supplied to the Court.").

testimony by experts, simply to help it understand matters in the agency record; indeed, it might ask for additional factual evidence as an aid to understanding."). Additionally, if a document reveals that an agency failed to consider relevant factors, courts have permitted parties to enlarge the administrative record with such documentation. *See, e.g., Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 914 n.16 (11th Cir. 2007) (the record may be supplemented with documents that show whether "EPA considered all relevant factors in making its decision").

In *Nat'l Wilderness Inst.*, the Court identified eight bases for supplementing the record for review including:

> . . . (2) when the agency failed to consider factors that are relevant to its final decision; (3) when an agency considered evidence that it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not . . . .

2002 U.S. Dist. LEXIS 27743, *9-10. Therefore, even if the Board finds that documents discussed were not part of the original administrative record, ample grounds exist to require EPA to supplement the record with these documents. Such action has been taken by the EAB in other appropriate situations.[7]

C. Agency Record May be Supplemented Through Discovery Upon a Showing of Agency Bad Faith or an Incomplete Record

Where bad faith is demonstrated, supplementation of the administrative record can provide for "the addition of newly created evidence, such as through the collection of direct

[7] *See, e.g., In re Pub. Serv. Co. of New Hampshire, et al.*, 1 E.A.D. 389, 397-398 (Aug. 12, 1977) (allowing supplementation of administrative record based upon public interest); *In re 170 Alaska Placer Mines, more or less*, 1 E.A.D. 616, 622-623 (Mar. 10, 1980) ("But rather than postpone further examination of this matter until the permits expire, I believe that the better course of action is to reopen the proceedings for the limited purpose of receiving additional evidence on the extra cost of recycling in relation to the pollution reduction benefits to be achieved."); *In re Chevron Chemical Co. (Richmond, CA Facility)*, 4 E.A.D. 18 (Apr. 27, 1992) (instructing the region to determine whether the record should be supplemented with new information); *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872, 879 n.13 (1st Cir. 1978) (recognizing EAB's authority to expand the record and thereby to consider material that was not considered by the Regional Administrator).

testimony from agency decision makers, typically requested by the court to explain part of the record."[8] *Am. Farm Bureau,* 2011 *U.S. Dist. LEXIS 148637,* *11-12.[9] To justify discovery, such as the taking of depositions, a party need not, however, show bad faith, but, instead, need merely provide facts indicating the administrative record is incomplete:

> [T]he court [in *NVE, Inc. v. Dept. of Health and Human Servs.,* 436 F.3d 182, 195 (3d Cir. 2006)] identified two situations where discovery might be permitted: (1) where plaintiff alleges that bias corrupted the agency's decision; and (2) where factors indicate that the administrative record submitted to the district court is incomplete." Thus, to overcome the strong presumption against discovery, Plaintiffs must make a strong showing of bias or incompleteness.

Id. at *29. Similarly, in *Nat'l Wilderness Instit.,* the court noted that when an agency, intentionally or not, excluded evidence from the administrative record that was adverse to its position, discovery would be allowed to supplement the record. 2002 U.S. Dist. LEXIS 27743, 7-8. As explained by the court:

> However, some determinations can only be achieved by looking beyond the record. For example, when the completeness of the record or the good faith of the agency are at issue, there necessarily must be inquiry beyond the record.

Id. at *10-11. In this specific case, it is perfectly clear that critical records were excised from the broader technical analysis used to justify the imposition of nitrogen limitations throughout Great Bay estuary:

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[8] Moreover, "proof of subjective bad faith by [agency decision-makers], depriving a [petitioner] of fair and honest consideration of its proposal, 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).

[9] *See also Consejo de Desarrollo Economico de Mexicali,* 438 F. Supp. at 1221 ("When [a] Plaintiff makes a showing of agency bad faith" supplemental records may be added to the record for the reviewing court to consider); *Portland Audubon Soc'y v. Endangered Species Comm.,* 984 F.2d 1534, 1548 (9th Cir. 1993) (permitting discovery when there is a reason to infer bad faith or improper agency behavior); *Bar MK Ranches v. Yuetter,* 994 F.2d 735, 739 (10th Cir. 1993) (permitting discovery when a party has made a "showing that the record may not be complete"); *Cmty. for Creative Non-Violence v. Lujan,* 285 U.S. App. D.C. 233, 908 F.2d 992, 998 (D.C. Cir. 1990) (permitting discovery when party has made a showing of bad faith or improper agency behavior); *Natural Res. Def. Council v. Rain,* 519 F.2d 298, 292 (D.C. Cir. 1975) (permitting "limited discovery" to guarantee "documents which are properly part of the administrative record have [not] been withheld."); *Pub. Power Council v. Johnson,* 674 F.2d 791, 795 (9th Cir. 1982) ("[C]ourts will go beyond the agency record when agency bad faith is claimed.").

1. Trowbridge testified that results of independent studies, that repeatedly informed both DES and EPA that nitrogen had not caused any material change in algal growth or system transparency, were excluded from the 2009 Criteria document.[10] Trowbridge admitted in the April 5, 2011 MOA pre-meetings that he had completed the same studies as HydroQual, showing nitrogen had not caused either DO or transparency impairment (Affidavit of Thomas Gallagher, S. Ex. 21 at ¶ 7 at 2-3). Those studies never appeared in the record.
2. EPA knew that the 2009 Criteria support document failed to conduct any type of confounding and covarying factors analysis, rendering that document unsupportable under the 2010 Stressor-Response Guidance,[11] but nonetheless told the public that the 2009 document fully met the requirements of the guidance, knowing it did not. AR H.72.

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[10] **Q.** ... 2009 criteria document that you developed, that's a – you said you used a weight of evidence analysis to come up with the criteria in that report; right? **A.** Yes. Q. Did you include in that report the evidence that indicated that transparency was not the cause of eelgrass loss in the system that you had developed in any of your earlier analyses? **A.** What are you referring to for an earlier analysis? **Q.** That transparency, or analysis of transparency had not changed over time; was that included anywhere in that report? **A.** No. **Q.** What about all the statements that Great Bay is not a transparency-controlled system, from EPA and Dr. Short, and those are the ones you and I walked through in your first round of the deposition. Did you include the statements that Great Bay was not transparency-controlled? **A.** I'm not sure; I don't believe so. **Q.** Okay. What about the – did you include the statements that the cause of eelgrass losses and changes in the system were unknown, statements that were contained in the various 303d listing documents? **A.** Uhm, I have to look through. I'm not sure. I'm not seeing it here. **Q.** Did you include any of Morrison's conclusions that the major factors controlling transparency in the system were, in fact, turbidity and color-dissolved organic matter, and not chlorophyll? **A.** I believe we included equations from the Morrison study. **Q.** Did you highlight the Morrison study concluded that the transparency level of Great Bay was acceptable, and that you needed to look at something else as the cause of eelgrass demise? **A.** I'm not sure if we have that statement in here. **Q.** It's pretty important statement, isn't it? It made your report. Did you – well, did you include any discussion about how the primary graphs that you were using to develop the transparency and nitrogen relationships were merely correlations and did not demonstrate causation? **A.** I don't believe so. AR D.4.i.4 at 436-438.

[11] AR M.4- EPA 2010 document entitled "Using Stressor-Response Relationships to Derive Numeric Nutrient Criteria," Office of Water, EPA-820-S-10-001 (Nov. 2010) *available at* http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/Using-Stressor-response-Relationships-to-Derive-Numeric-Nutrient-Criteria-PDF.pdf.

3. DES changed the impairment listing to appease EPA and avoid an alleged lawsuit by CLF. EPA asked DES to declare the waters transparency impaired, knowing that DES had just completed an analysis stating that transparency had not changed and was actually sufficient (i.e., AR K.11) DES never informed the public of the actual basis for the changed impairment listing and EPA asked them to claim they agreed with CLF. AR H.41.
4. DES and EPA completed studies showing that the conceptual model applied to generate the criteria (nitrogen, algal increase, transparency decrease) did not apply to this system. AR D.1.i.3. Via email, EPA and DES agreed to ignore that conclusion and claim the opposite was true. S. Ex. 2 Attach. 2, S. Exh.9, S. Exh. 7.
5. EPA claimed to have completed an "independent" assessment verifying that the 2009 criteria document was fully supported. Resp at 27, 64, 65. In a local NPDES meeting at Dover, the Region I NPDES writer confirmed that claim was a fabrication and no such "independent assessment" was ever completed by the Region. Affidavit of Dean Peschel, S. Ex. 20 ¶ 4, at 1.
6. EPA thoroughly misrepresented the results of the prior research conducted for Great Bay, as confirmed by Drs. Jones and Langan, who were responsible for conducting and peer reviewing that research. S. Ex. 10-11 (Letters to/from Mayors to UNH professors acknowledging, *inter alia*, no transparency or DO related impairments due to excessive algal growth).
7. EPA and DES knew that the methods employed to develop the 2009 criteria were merely correlative and did not, in any way, prove nitrogen caused excessive algal growth, lessening transparency in the system. AR H.72. DES, with EPA's

concurrence, prepared a response to comments claiming "cause and effect" was demonstrated knowing that was an utter fabrication. 2009 Criteria RTC at B3.

These documents and statements taken under oath clearly verify that (1) the record was skewed (2) it was done purposefully and repeatedly; and (3) that EPA has repeatedly misrepresented several complex technical issues associated with the development of the 2009 criteria document and its scientific validity vis-à-vis the SAB review and subsequently issued 2010 Stressor-Response Guidance document. Bad faith has been clearly demonstrated, with particularity.

IV. Documents that Belong in the Administrative Record

As further discussed below, the following documents should be included in the administrative record: (1) DES deposition testimony and the related documents; (2) Affidavit of Dr. Steven Chapra; (3) Affidavit of Dean Peschel; (4) Affidavit of Thomas Gallagher; (5) Letters to and from the Professors at the Univ. of N.H. that authored several of the underlying studies EPA relies upon; (6) documents related to the development of the Memorandum of Agreement ("MOA") and timing of the Coalition lawsuit against DES; and (7) study by Dr. Steve Jones.

A. DES Deposition Testimony and the Deposition-Related Documents

To the extent the EAB rules that the DES deposition testimony and deposition-related documents are not already part of the administrative record, the Coalition seeks to have the record supplemented with such documents. AR D.4.i.1 – 4.

1. Background

Between May and July, 2012, the Coalition deposed several key DES officials on issues directly related to the scientific and legal validity of the challenged NPDES permit – the scientific basis for the 2009 Numeric Criteria document and the regulatory issues surrounding its

implementation.[12] During this discovery, DES provided the Coalition with numerous documents either authored or transmitted to EPA that, despite having been specifically requested from EPA under FOIA, had never been disclosed by EPA (*e.g.*, prior PREP studies confirming nitrogen had not caused adverse effects and EPA's request that DES modify the 2009 impaired waters list to appease CLF). Accordingly, the Coalition quickly moved to supplement its comments on the Newmarket NPDES permit based on the deposition testimony provided by DES officials and this additional documentation disclosed to the Coalition during the state proceeding. *See* S. Ex. 1 (index including deposition-related documents). Although these supplemental comments were received by EPA after the close of the comment period, they were submitted over five months before the final permit was issued. EPA never commented on why these documents, confirming no nitrogen induced impairments, did not justify withdrawing the proposed nitrogen limitations.

2. *The DES testimony (and related documents) should be in the administrative record*

There are ample grounds to include the DES deposition testimony (and related documents)[13] in the administrative record. First, these documents were submitted and considered by EPA well in advance of the issuance of the Newmarket NPDES permit. *Am. Farm Bureau,* 2011 U.S. Dist. LEXIS 148637, at *16 ("EPA's stance that a document that is considered but

[12] The key DES officials deposed in connection with *City of Dover v. New Hampshire Dep't of Envtl. Servs.* were Philip Trowbridge, DES Scientist and author of the 2009 Criteria document, and Paul Currier, former Administrator of the DES Watershed Management Bureau and Mr. Trowbridge's supervisor throughout the development of the 2009 Criteria document. In addition, because DES relied heavily upon the findings of Dr. Fred Short, Univ. of N.H. eelgrass scientist, in developing the document, Dr. Fred Short was deposed.

[13] EPA included in the administrative record a memorandum from Fred Short to Dan Arsenault regarding his 2012 Great Bay eelgrass survey observations. AR K.29. Petitioners have requested on numerous occasions that EPA include the data collected and the aerial photographs taken during the 2012 eelgrass survey on which Fred Short based his observations. When the Region refused, the Coalition submitted a FOIA request (S. Exh. 15-16) asking for documents related to Fred Short's 2012 Great Bay eelgrass surveys; EPA has failed to produce any documents except for the initial memorandum. Therefore, the Petitioners are asking the Board to supplement the administrative record with the data collected and the aerial photographs taken during Fred Short's 2012 eelgrass survey.

dismissed as unworthy ought to be omitted from the record represents a misinterpretation of the standard. As stated, EPA is required to include on the administrative record any materials that it either directly or indirectly *considered* during the decision process"). Contrary to EPA's unsupported assertion, there was no delay in filing the state court action. Peschel Affadavit, S. Ex. 20, ¶¶ 14-22 at 3-5. Thus, the comments are considered timely under 40 C.F.R. § 124.13. Reply Br at 40-37.

Second, the deposition testimony, as well as the other deposition-related documents at issue, confirmed that certain EPA factual and scientific claims are in error and in direct conflict with representations made by EPA regarding the Great Bay system ("relied on best available information" (Resp. at 20); "nitrogen had its greatest effect on tidal rivers" (Resp at 27) "increasing nitrogen caused poor transparency" (Resp. at 28) Lamprey River and Great Bay "clearly" show signs of nutrient driven impairments. Resp. at 34.[14] The testimony also reveals that EPA (and DES officials) was fully aware that key scientific demonstrations were not made or were not supported by the available data, and, accordingly, that key factual determinations made by EPA in the Newmarket NPDES permit are in error.[15] Worse yet, these documents reflect that EPA knew such determinations were indefensible. As described above, such

[14] The Fact Sheet broadly implies, but never specifically states, that TN is causing these effects. For example:

> Studies by NHDES have also reported evidence of eutrophication due to excessive nitrogen input, including elevated levels of chlorophyll a and low levels of dissolved oxygen, as well as evidence of increased in nuisance seaweeds and macro-algae. As illustrated in the figures below, nitrogen concentrations have increased, water clarity has declined, and substantial quantities of eelgrass have been lost.

Fact Sheet at 19 (internal citations omitted).

[15] **Q**. ... So Conclusions, let's look at the conclusions. Traditional concepts for nitrogen eelgrass relationships do not work for Great Bay. By the way, who wrote these conclusions? Was this a collaborative effort between you – between the folks listed on this presentation [see AR D.1.i.3] or was it – were these just your conclusions? **A.** This was certain – certainly collaborative. It wouldn't have everyone's name on it if they didn't review it. AR D.4.i.3. at 222 ln 2-12.

justifications are regularly used to supplement an administrative record. *Esch*, 876 F.2d at 991-92; *see also Consejo de Desarrollo Economico de Mexicali*, 438 F. Supp. 3d at 1221.[16]

Thus, even if the Board determines the deposition testimony and deposition-related documents were not properly in the administrative record in the first instance, the record should be supplemented to include these documents because they correct clear factual errors underlying the development of the draft permit.

B. Affidavit of Dr. Steven Chapra

Dr. Chapra is a world renowned environmental engineer who has provided expert advice to EPA, National Oceanic and Atmospheric Administration, and numerous academic institutions worldwide with expertise in surface water-quality modeling. Dr. Chapra is currently the Berger Chair in Computing and Engineering: Civil and Environmental Engineering Department at Tufts University. Affidavit of Dr. Steven Chapra, S. Ex. 19 at 1 n.1. Dr. Chapra was selected by DES to review the technical sufficiency of the planned Squamscott River model. He was involved in the SAB review process that led to EPA's issuance of the 2010 Stressor-Response Guidance, *supra*, n.11. His treatise entitled "Surface Water-Quality Modeling" is cited as a reference in that document. Among a long list of notable achievements, Dr. Chapra is probably most esteemed for his work in developing the QUAL2K water quality modeling program, one of the most widely employed nutrient models in the world.[17]

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[16] *See also Tummino* at 544 ("[T]he FDA's conduct and the chain of events leading up to the decision . . . cannot be fully understood without reviewing the administrative record the FDA compiles . . . , *the deposition testimony of key FDA decision-makers and other material illuminating these decision-making processes* . . . . ") (emphasis added.)

[17] EPA's Watershed & Water Quality Modeling Technical Support Center offering "Clean Water Act implementation assistance to EPA Regions, State, and Local Governments, and their contractors" offers the QUAL2K model on its website as one of four recommend models. *See* Chapra, S.C., Pelletier, G.J. and Tao, H. 2008. QUAL2K: A Modeling Framework for Simulating River and Stream Water Quality, Version 2.11 *available at* http://epa.gov/athens/wwqtsc/html/qual2k.html.

Dr. Chapra's affidavit highlights the essential analyses that must accompany a defensible stressor-response analysis. He notes that the DES 2009 analysis does not address any of these issues. Thus, the peer review that EPA claims supports their decision was obviously done without consideration of the relevant technical information and had no consideration whatsoever of the 2010 Stressor-Response or 2009 SAB issues. Petitioners offered extensive and detailed assessments of the erroneous assumptions. AR H.4. Dr. Chapra's affidavit simplifies all of these existing comments into a more streamlined assessment of the most obvious and egregious technical errors for the Board's review. S. Ex. 19 at 2-10. His analysis also identifies the key components of scientifically defensible numeric criteria using EPA's 2010 "stressor-response" methodology. *Id.* at 10-14. In Dr. Chapra's opinion:

> *The methods applied are, in fact, grossly incorrect, internally inconsistent and have produced results that bear no reasonable relationship to reality.* Consequently, the analysis was fundamentally flawed and the proposed TN criterion of 0.3 mg/l is not demonstrated to be either necessary or appropriate to protect aquatic resources in the Estuary.

S. Ex. 19 at 1. Thus, consistent with *Esch*, 876 F.2d at 991-92, Dr. Chapra's affidavit should be admitted into the record as a post-decision document because it "shows whether [EPA's] decision was correct or not." Moreover, as Dr. Chapra's affidavit will undoubtedly "help [the Board] understand matters in the agency record" it should be admitted. *See, e.g., Valley Citizens for a Safe Env't*, 886 F.2d at 460.

C. <u>Affidavit of Dean Peschel</u>

The Coalition requests that the administrative record be supplemented to include the Affidavit of Mr. Dean Peschel. S. Ex. 20. Mr. Peschel is the principal of Peschel Consulting, LLC and regularly provides environmental consulting services to the Coalition, including NPDES permit-related issues. Mr. Peschel also served as the spokesperson for the Coalition on issues concerning Great Bay. *Id.*, ¶1 at 1. Mr. Peschel's affidavit provides factual background

information on two issues. First, the affidavit chronicles the Coalition's efforts with DES and EPA in establishing the MOA and explains how and when the Coalition first learned that DES/EPA had rejected the terms of the MOA and filed suit in state court.[18] *Id.*, ¶¶ 5-17, at 1-4. Accordingly, this affidavit speaks directly to the issue of when the Coalition first learned it had a cause of action against DES and refutes EPA's claims that the deposition testimony was "reasonably available and ascertainable during the public comment period." *See, e.g.*, EPA Resp. Br., Appx. B, at 1.

Second, Mr. Peschel's affidavit recounts a meeting he attended on November 19, 2012, with EPA Region I in Dover, wherein EPA personnel stated that the Agency was not relying on the 2009 Criteria document to justify the 3 mg/l TN limit proposed in a draft permit for Dover. This same individual stated that EPA had done its own "independent" analysis and determined that the 3mg/l limit was necessary. However, upon further questioning, EPA could not provide this "independent" analysis and Mr. Peschel was referred to a website of the PREP and DES. *Id.*, ¶ 2-4, at 1. EPA's statements verify that its claims of an "independent assessment" justifying imposition of stringent nitrogen limtiations (Resp at 27, 64, 65) are fabrications. *Id.*, ¶4 at 1.

Therefore, Mr. Peschel's affidavit also should be included in the administrative record because the affidavit shows whether an unsupported proclamation made by EPA "was correct or not" (*Esch*, 876 F.2d at 991-92) and that EPA is purposefully attempting to conceal a lack of scientific foundation for its regulatory approach to Great Bay permitting. *See e.g. Consejo de Desarrollo Economico de Mexicali*, 438 F. Supp. 3d at 1221.

[18] Additionally, S. Exh. 23 verifies that Petitioners were still waiting a response from DES on whether the 2009 Criteria would apply in the tidal rivers, contrary to the MOA, in December 2011.

D. Affidavit of Thomas Gallagher

The Affidavit of Thomas Gallagher (S. Ex. 21) is submitted to address two issues. First, Mr. Gallagher testifies that DES admitted during the MOA discussions that it had completed many of the same analyses proving nitrogen was not the source of impairment. *Id.*, ¶¶5-7, at 2-3. This discussion confirms both DES and EPA purposefully left out such analyses from the record, as they appear nowhere in the 2009 Criteria development document. Second, Mr. Gallagher provides background on how and why the MOA was developed. He confirms that the parties discussed that the DES "DO and transparency relationships" presented in the 2009 Criteria document were physically impossible. *Id.*, ¶¶3-8, at 1-3. It was that discussion that led DES to agree to the MOA and defer application of the 2009 Criteria. Br. at 12. That DES subsequently abandoned the MOA approach at EPA's request does not render the factual points untrue or provide any credibility to any 2012 DES assessments as a basis to reject Petitioners' comments of fundamental scientific error. Resp. at 93. As EPA subsequently recommended that the Board ignore the MOA, given the subsequent DES letters (Resp at 93-95) and its controlling authority in how to proceed in this matter, this affidavit confirms that the findings of the MOA were scientifically valid and the subsequent abandonment of that document by DES was an arbitrary and capricious action, promoted by EPA.

E. Letters to/from University of New Hampshire

The Coalition also requests that the administrative record be supplemented to include the letter from two key Univ. of N.H. professors that have unique and pervasive knowledge of the studies performed to evaluate nutrient impacts in the Estuary and the incoming questions that prompted its response. *See* S. Exs. 10 -11. Drs. Langan and Jones, the authors of the letter, are two of the most knowledgeable and respected individuals on the subject of Great Bay ecology. Further, they both participated in the PREP Technical Advisory Committee (*e.g.*, Dr. Jones was

the Chairman of the 2012 Committee), and served on the TAC panel that peer reviewed the 2009 Numeric Nutrient Criteria document, *i.e.*, the document that the Newmarket NPDES is based upon. Inasmuch as EPA relied upon the documents authored by Drs. Langan and Jones and claimed that these studies demonstrated that nitrogen caused the low DO in tidal rivers and poor transparency (Resp. at 27, 28, 34), the Mayors of the several N.H. cities thought it prudent to confirm whether EPA's assertions regarding the results of the underlying studies were correct.

Following EPA's completion of the Newmarket and Exeter permits, the Mayors posed a series of questions. S. Ex. 10. The incoming letter to the Professors sought their opinion on whether certain nitrogen related impacts had been demonstrated in Great Bay and/or the surrounding tributaries. *Id.* The queried demonstration was something the Coalition believes has not been proven, while EPA argues it has.

The responses from Drs. Langan and Jones, who are not paid consultants of the Coalition or the member Cities, confirm that EPA's assertions are, in fact, in error. S. Ex. 11. For instance, a key question controlling this Board's determination on the permit is whether the TN is causing phytoplankton growth or reduced transparency in Great Bay. EPA claims that such link has been established, while the Coalition disagrees. The letter from the Professors confirms that, in fact, there has been no demonstration showing that TN is contributing to phytoplankton growth or reduced transparency in Great Bay. *Id.* at 1-2. The remainder of the letter is replete with confirmations that "determinations" made by EPA in issuing the Newmarket NPDES permit are not supported by the available scientific studies done for Great Bay, *i.e.*, the studies which these professors authored or peer reviewed. *Id.* at 2-3.

Where an author of a study confirms the Agency is misapplying or misinterpreting its results, the Agency's actions are *per se* arbitrary and capricious. Pet. Reply at 5; Br. at 85-86. Therefore, consistent with the Board's practices of admitting expert testimony to challenge

EPA's conclusions and cases that allow courts to supplement administrative records with documentation showing that a decision is incorrect (*Esch*, *supra*, at 5 n. 4 and EPA preamble (65 Fed. Reg. 30886, 30899 (2000)), the EAB should include the letters to and from the Univ. of N.H. professors in EPA's administrative record.[19] Similarly, since this letter goes toward the issue of whether "EPA considered all relevant factors in making its decision," further grounds for supplementation exist. *Sierra Club, Inc.*, 488 F.3d at 914 n.16.

F. Memorandum of Agreement Documents

1. ***Background***

Recognizing the flaws in the 2009 Numeric Criteria document, DES and the Coalition entered into a MOA in April 2011. Gallagher Affidavit, S. Ex. 21, ¶3, 8 at 1-3; Br at 12-14. Specifically, this MOA noted the substantial uncertainties with the scientific approach in the 2009 Numeric Criteria document and delineated the steps that would be undertaken to resolve these issues. Among other tasks, the MOA discussed the additional data collected and analysis that would need to occur to properly understand the Great Bay system and source of impairment to Great Bay eelgrass. AR H.69 at 2. While EPA did include this MOA in its original administrative record, it failed to include many of the emails and correspondence that led to the development of the MOA, while subsequently including records intended to undercut the document. S. Ex. 3-4. Similarly, EPA's administrative record omitted the analyses that served as the basis for the MOA or were done under the terms of the MOA. An index with the metadata for the specific omitted documents is provided as an Exhibit to this motion.

2. EPA's administrative record should be perfected (or supplemented) to include these MOA documents

[19] Thus, EPA has clearly contradicted its own expert without providing rationale for doing so, and the decision to do so is, therefore, *per se* arbitrary and capricious. *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037-38 (9th Cir. 2001).

The MOA documents, specifically identified in Exhibit 4, belong in the administrative record for several reasons. First, although EPA was not a party to the MOA, these documents show that EPA participated in the meetings related to the MOA both before and after the document was created. If the MOA itself belongs in the record, the documents on which the MOA is based also belong in the record to provide the factual basis for that historic agreement. Thus, in accordance with *Thompson v. U.S. Dept. of Labor*, these documents should be included in the record because they were "*directly or indirectly considered*" by EPA. 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added), *Am. Farm Bureau,* 2011 U.S. Dist. LEXIS 148637, *16 ("EPA is required to include on the administrative record any materials *that it either directly or indirectly considered* during the decision process.") (emphasis added).

Additionally, these MOA documents confirm that certain conclusions made by EPA in regard to the 2009 Numeric Criteria document and the Newmarket NDPES permit are in error. Among other findings, the MOA documents show that (1) there were fundamental errors in development of the 2009 Criteria document; (2) transparency had not changed during the period where eelgrass levels declined; and (3) DO was naturally low in the Great Bay tributaries with no corresponding elevated algal levels.

The permit effluent limitation process in this matter "by its nature, demands cooperative federalism and requires significant levels of coordination and communication between EPA and the state environmental agencies," similar to that associated with a TMDL. *Am. Farm Bureau,* 2011 U.S. Dist. LEXIS 148637, at *21. Where an e-mail chain reflects that EPA is requesting feedback from a State employee regarding the technical aspects of the State's standards it must be included in the administrative record. *Id.* at *23, *25. In fact, similar to the TMDL process, "[i]t is hard to imagine how such feedback was not, at a minimum considered by EPA during the

[ ] drafting process." *Id.* Furthermore, these MOA documents should be admitted because, consistent with *Esch*, 876 F.2d at 991-92, they "show[] whether [EPA's] decision was correct or not."

G. Additional Dr. Jones Study

EPA has failed to include a final report by Dr. Steve Jones entitled "Incident and Timing of Low Dissolved Oxygen Events in the Squamscott River: 2005-2007" (S. Exh. 22) that was done as an addendum to a previous study EPA included in the record entitled "Impacts of Wastewater Treatment Facilities on Receiving Water Quality" (AR K.7). The study included by EPA in the record concluded: "The nutrient and chlorophyll a levels at the different sampling sites in the Squamscott River did not appear to have any discernable relationship with DO levels." AR K.7 at 3. The further evaluation conducted by Dr. Steve Jones, conveniently left out of the record by EPA, found that "low DO conditions were most likely to occur during neap tides" and DO levels are highly variable year to year. S. Exh. 22 at 3. This additional study done by Dr. Steve Jones should be added to the administrative record because it is a further evaluation of the original study and showed an opposite conclusion.

V. EPA Bad Faith and Bias

Lack of evidence of good faith and reasoned agency decision-making are evidenced by "implausible justifications for decision-making" and where the agency's decision "went against the recommendation of a committee of experts it had empanelled to advise it."[20] *Tummino*, 603

[20] In this case, EPA also went against the recommendations of the Science Advisory Board ("SAB"). Pet. Rep., at 2, n.2, 19. Not only does such action reflect bad faith and a lack of reasoned decision-making, it is violative of the standard laid down in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 n.9 (1993) for the admission of scientific opinion. *Daubert* incorporates the administrative law principle that an agency cannot disregard the advice of its own experts or take action inconsistent with the facts demonstrated in the record. *Daubert,* 509 U.S. at 593. Nevertheless, EPA disregarded the express warning of its experts regarding the failure of the EPA nutrient approach to address causation. Br. at 25.

F. Supp. 2d at 523-24.[21] Section III.C, *supra* at 7-11, details a number of affirmative misstatements and record manipulations undertaken by DES and EPA in seeking to impose the stringent nitrogen reduction requirements. These specific acts confirm bad faith.

Inasmuch as the Coalition has already identified documents that have been omitted from the record because they undercut EPA's intended result (*see, e.g.,* Section III.A., *supra* at 3-4; Pet. Rep., at 7-17), with nothing further the Coalition already meets this burden. *Nat'l Wilderness Instit.*, 2002 U.S. Dist. LEXIS 27743, * 15 (citing *Natural Res. Def. Council v. Train,* 519 F.2d 298, 587) ("finding an affidavit from Plaintiff's counsel specifying several documents that had been omitted from the administrative record, constituted a substantial showing that the entire administrative record was not filed with the reviewing court, and thus the Plaintiff was entitled to limited discovery."). The court in *National Wilderness Instit.* further stated:

> It is clear that the completeness of the administrative record is at issue in this action, and, therefore, the Court will permit discovery to ensure that the complete record is before the Court. Failure to consider reports and consultations by agency experts would constitute an abuse of discretion in neglecting to consider relevant factors. [footnote omitted.]

Id. at *15 – 16. The court thus concluded that it "will allow discovery procedure in order to ensure that the full record is available for review." *Id.* *18 - 19.

While the incompleteness of the record in and of itself justifies discovery, the Coalition nevertheless notes the evidence of bad faith by EPA justifies discovery as well. Petitioners have raised Agency "bad faith" in purposely excluding prior studies from the 2009 Numeric Criteria document and subsequent peer review. See AR H.14, *supra* note 3. Furthermore, Petitioners assert, and provide evidence, that EPA skewed the administrative record to support its conclusions and ignored information showing that nutrients were not causing eelgrass

[21] EPA's consideration of the CLF threat of a lawsuit is no different than the bias the court found in discussing the improper political influence discussed is *Tummino*. *Id.* at 544-47.

impairment (Pet. Rep. at 1, 5-17); purposefully excluded data and analyses from the peer review panel, which confirmed there were major flaws in the 2009 Numeric Criteria document (Br. at 37-38, Pet. Rep. at 12-14); instructed the state to base § 303(d) listing decision off an unadopted water quality standard (Br. at 7-9, Pet. Rep. at 10-12); relied upon a "conceptual model" known to be inapplicable to Great Bay estuary (Pet. Rep. at 10-12, 19); requested impairment listing changes based upon purported CLF lawsuit threat, (Br. at 8, 21, 44 n.47; Pet. Rep. at 9-10); and maintained scientific positions it knows to be in error (Br. at 84-86, Pet. Rep. at 12-16).

Given the factual inconsistencies between what EPA originally told the public and the story that is appearing in response to this petition, the parties have made a sufficient case that EPA is acting in bad faith and is purposefully misrepresenting the record. In these circumstances, the EAB may not presume that EPA is responding truthfully, and sworn depositions to investigate the truth are appropriate. We therefore request that the Board allow depositions of the following individuals:

1. Dr. Ivan Valiela is a CLF "expert" EPA is relying heavily on to justify this permit action (RTC at 134, Resp. at 50-57, 76). He needs to be deposed to determine the scope of documents he considered in rendering his "expert" opinion;

2. Dr. Walter Boynton was part of EPA's original peer review panel; he needs to be deposed to determine the scope of records and issues considered in the peer review;

3. Dr. Robert Howarth was part of EPA's original peer review panel; he needs to be deposed to determine the scope of records and issues considered in the peer review;

4. Mr. David Pincumbe is a USEPA permit writer for this permit; he needs to be deposed to determine the existence, or lack thereof, of an "independent" technical assessment of the DES materials;

5. Mr. Philip Colorusso is the regional office eelgrass expert that provided extensive advice to DES on the development of the 2009 Numeric Nutrient Criteria; he needs to be deposed to determine why EPA ignored DES findings that the conceptual model chosen to represent Great Bay estuary was not applicable to this system;

6. Mr. Al Basile is the USEPA regional office person responsible for impairment listings; he needs to be deposed to determine the basis for the claimed CLF lawsuit and why EPA requested that Great Bay Estuary be declared transparency impaired,while knowing that transparency had not changed due to nitrogen;

7. Mr. Steven Perkins managed the NPDES program for USEPA Region 1; he needs to be deposed to determine what steps EPA undertook to have DES abandon the 2011 MOA as information regarding those actions is nowhere in the record; and

8. Mr. Matt Liebman, USEPA scientist who authored the document entitled "Review of Numeric Nutrient Criteria for the Great Bay Estuary, in light of comments made by John C. Hall and Thomas Gallagher"; he needs to be deposed to determine what information he reviewed that led him to determine Great Bay Estuary was transparency impaired in light of the comments/analysis submitted by the Coalition.

For the reasons discussed herein, the requested records and depositions of key experts and agency officials should be granted.

Respectfully submitted,

Date: May 7, 2013

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CERTIFICATION OF SERVICE

I hereby certify the copies of the Petitioners' Motion to Supplement the Administrative Record and to Depose the Experts Relied on by EPA and accompanying exhibits, in connection with NPDES Appeal No. 12-5, were sent to the following persons in the manner indicated:

By Electronic Filing and First Class U.S. Mail:

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