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February 14, 2013

Via Electronic Filing

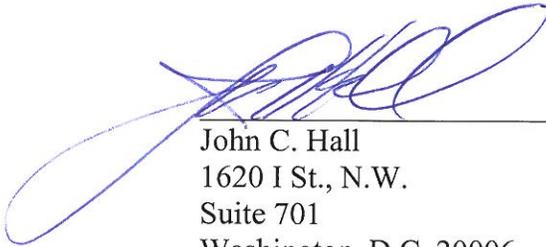
U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board 1103M
1200 Pennsylvania Avenue, N.W.
East Building
Washington, D.C. 20460-0001

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

Dear Ms. Durr,

Please find attached the Petitioners' Motion to Suspend the Briefing Schedule, Strike Appendices A and B of Respondents Memorandum in Opposition to the Petition for Review, and Amend the Briefing Schedule and Page Limit and accompanying Certificate of Service regarding NPDES Appeal No. 05-12.

Sincerely,



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

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

MOTION TO SUSPEND THE BRIEFING SCHEDULE, STRIKE APPENDICES A AND B OF RESPONDENT’S MEMORANDUM IN OPPOSITION TO THE PETITION FOR REVIEW, AND AMEND THE BRIEFING SCHEDULE AND PAGE LIMIT

Petitioners, the Great Bay Municipal Coalition (“the Coalition”), hereby file a motion to the Environmental Appeals Board (“EAB” or “the Board”) to (1) suspend the briefing schedule pending resolution of evidentiary and administrative record issues, (2) strike EPA’s appendices in its Memorandum in Opposition to the Petition for Review (“Response Brief”) that are legal and regulatory arguments in conflict with the Board’s decision on Petitioners’ request to submit a supplemental (replacement) brief, and (3) amend the briefing schedule and page length requirement set forth in the Board’s Order Extending Time to File Reply Briefs dated January 25, 2013. As discussed below, good cause exists for granting this motion.

I. Unresolved Record and Evidentiary Issues Preclude Further Briefing at This Time

There continue to be several major unresolved administrative and procedural issues associated with this appeal. Individually, and collectively, these issues preclude Petitioners’ ability to submit a cogent Reply Brief, with valid evidentiary support, that responds only to the relevant issues before this Board. Accordingly, the Board should stay this briefing pending resolution of these issues.

a. The Parties are Still Resolving the Contents of the Administrative Record

On January 9, 2013, Petitioners received EPA's draft administrative record. Following their review, Petitioners, in the interest of efficiency, sent two letters outlining modifications and additions to the draft administrative record.¹ The additional documents, *inter alia*, included (1) records EPA had in its possession before the draft permit and the final permit were issued, and (2) post-permit issuance records showing EPA's impairment characterizations were misplaced. Although EPA subsequently included some of the documents identified by Petitioners in its revised administrative record, EPA has chosen to exclude many others. Therefore, Petitioners are preparing a motion outlining the documents that still need to be included in the administrative record and reasons for why the Board must include these documents in the record. Until this issue is briefed and the content of the administrative record is settled, briefing on the merits should be stayed.

b. EPA has Requested that Specific Administrative Records be Stricken from the Board's Consideration

In its Response Brief, the Region asks the Board to disregard all of the deposition testimony of key New Hampshire Department of Environmental Services ("NHDES") officials who were involved in the creation of the 2009 Numeric Criteria document.² Appendix B, *passim*. Specifically, the Region objects to the "deposition-based arguments," as it calls them,

¹ See Attachments 1 and 2 (Letters to Region 1 on January 15 and 29, 2013).

² The key NHDES officials deposed in connection with *City of Dover v. New Hampshire Department of Environmental Services* were Philip Trowbridge, NHDES Scientist and author of the 2009 Numeric Criteria document, and Paul Currier, former Administrator of the New Hampshire Department of Environmental Services Watershed Management Bureau and Mr. Trowbridge's supervisor throughout the development of the 2009 Numeric Criteria document. In addition, because NHDES relied heavily upon the findings of Dr. Fred Short, University of New Hampshire eelgrass scientist, in developing the document, Dr. Fred Short was deposed.

contained in the Petition for Review (“Petition”) because it alleges that the depositions fail to meet threshold procedural requirements for the Board’s consideration of such information.

Appendix B, at 1-3.³ Moreover, while EPA does not dispute the veracity of the testimony, EPA also claims that the relevant sections of the depositions need to be cited with greater specificity. Appendix B, at 2-3.

Given EPA’s Response Brief and the uncertainty on whether this testimony (which was in EPA’s possession 5 months prior to permit issuance) will be allowed in the final administrative record, a decision on this issue is essential for the briefing to proceed. Petitioners have extensively relied upon the deposition testimony of the key NHDES officials to support their arguments. This testimony came from officials who were directly involved in the development of the 2009 Numeric Criteria document and therefore, who have the most direct knowledge of the scientific basis for the document and the regulatory issues surrounding its implementation. Petitioners Reply Brief necessarily would continue to rely on the deposition testimony to show a number of EPA’s claims are clear error and, in fact, are complete fabrications.⁴ However, if the Board decides that the deposition testimony will not be considered then the Petitioners would not cite to this testimony in the Reply Brief but rather to other agency documents contained in the record supporting the arguments. Therefore, in light of the Region’s Response Brief seeking to strike this deposition testimony, the Petitioners request that this Board

³ Based on EPA Region I’s recent Freedom of Information Act (“FOIA”) responses, it is apparent why it wants the Board to ignore the deposition testimony of the NHDES officials responsible for preparation of the 2009 Numeric Criteria document. EPA Region I admitted that, in response to Petitioners’ “science fraud” filing with EPA Headquarters (AR H.14), the Region provided no information showing any of the deposition statements cited as the basis for this allegation and proof that the 2009 Numeric Criteria were known to be unsupported, were incorrect. Attachment 3 is a listing of the critical factual statements within the FOIA requests that the Region did not dispute.

⁴ *See e.g.*, Petitioners’ Brief on Motion for Reconsideration of the Order Granting NHDES’ Motion to File a Non-Party Amicus Brief (submitted February 9, 2013) (raising fraud on the court as a result of NHDES’s amicus brief). It is the sworn deposition testimony that unequivocally shows that fundamental misrepresentations are being made.

stay the briefing schedule, thereby allowing the Board to render a ruling on whether the final Administrative Record will include the deposition testimony after receiving Petitioners' response on this specific issue.

c. Petitioners' Arguments in Favor of Expanding the Record to Include Deposition Testimony have Merit

While Petitioners will refrain from delving into a thorough analysis of the issue at this point, there is ample precedent for allowing courts and administrative tribunals to consider the deposition information to be part of the administrative record. Where it is apparent that an agency failed "to disclose the substance of other relevant information that has been present to it..." the reviewing court "... must treat the agency's justification as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54-55 (D.C. Cir. 1977). The depositions prove that the relevant study results were never presented to the public or the peer review.

Moreover, the preamble to the 2000 amendments establishing the role of the Board in, among other things, NPDES permit appeals, states that "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." 65 Fed. Reg. 30886, 30899 (May 15, 2000). Additionally, post-comment period closure information is often admitted when it confirms specific facts or scientific positions are in error. *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."). In some cases,

supplemental information is admitted after the parties have had a hearing on the merits. *See e.g., Turk v. United States*, 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.”). Certainly, including deposition testimony from NHDES officials confirming EPA statements are inaccurate would be in the “interests of justice.”⁵

In addition, Petitioners have raised Agency “bad faith” in purposefully excluding prior studies from the 2009 Numeric Criteria document and subsequent peer review. *See* AR H.14, *supra* note 3. The resolution of such allegations, which are well documented by the deposition testimony, warrants the inclusion of that additional information. *See e.g. Consejo de Desarrollo Economico de Mexicali v. United States*, 438 F. Supp. 3d 1207, 1221 (Dist Ct. Nev. 2006) (“When [a] Plaintiff makes a showing of agency bad faith” supplemental records may be added to the record for the reviewing court to consider). In this instance the deposition testimony, as well as the other excluded documentation, confirmed that certain EPA factual and scientific claims are admitted to be in error and in direct conflict with the data for this system. As these records confirmed that EPA ignored the relevant information and “proceed[ed] upon assumptions that were entirely fictional or utterly without scientific support” a supplement is permissible. *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-812 (9th Cir. 1980). As this rationale has been repeatedly recognized as sufficient justification to expand an administrative record, Petitioners’ arguments on the scope of the administrative record should be heard in advance of further briefing.

⁵ The Environmental Appeals Board has similar authority. *In the matter of Public Service Co. of New Hampshire, et al.* NPDES Appeal No. 76-7. 1 E.A.D. 389, 397-398 (allowing supplementation of administrative record based upon public interest); *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).

d. Additional Critical Evidentiary Issues Need to be Resolved

A critical evidentiary issue – that could control the entire outcome of this appeal – also remains unresolved by the Board. As noted earlier, “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.” 65 Fed. Reg. 30886, 30899 (May 15, 2000). In its Petition, Petitioners argued that that the 0.3 mg/l TN instream target was not developed using scientifically acceptable methods and should be precluded from the record in accordance with *Daubert*.⁶ EPA’s Response Brief argued that the *Daubert* argument has not been preserved, and that, even if it had been preserved, it was not controlling in administrative agency decisions and the Clean Water Act only requires EPA to consider relevant documents, not scientifically acceptable documents. Response Brief at 66-69. The “*Daubert*” test is a far more restrictive test that prevents courts (and juries) from hearing evidence that is based on “reasoning or methodologies” that are not “scientifically valid,” “reliable,” and “controllable,” or cannot otherwise “be tested.” *Daubert*, 509 U.S., at 592-593. This Board, like any other tribunal, should not render any decision on information that cannot even pass this standard. If the Board agrees with Petitioners and finds that the 2009 Numeric Criteria document fails to meet even the *Daubert* standard, then the Region may not rely on that document in developing the permit limitations and the permit would need to be remanded.⁷ In either case, the Board’s

⁶ See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (directing courts to serve as the gatekeeper for expert scientific/technical testimony prior to its admittance into a lawsuit).

⁷ The Region’s Response Brief acknowledges that its approach should only be upheld if it is “rational in light of all the information in the record” and that the Region’s conflicted view is accepted only if there is a “bona fide difference of expert opinion or judgment on a technical issue...” Response Brief at 39 citing *NE Hub*, 7 E.A.D., at 567-568. Obviously, if the report the Region is relying on is invalidated, EPA’s use of it cannot be deemed a “bona fide difference of expert opinion.”

decision on the application of *Daubert* and the ability to “submit written evidence to contradict the assumptions, data, and analysis” would dramatically alter the scope of briefing moving forward. Accordingly, Petitioners request the briefing schedule to be suspended pending additional briefing (and the Board’s ruling) on whether the 2009 Numeric Nutrient Criteria document satisfies the threshold requirements of *Daubert*.

In summary, Petitioners request that briefing be stayed until the following has occurred: (1) Petitioners have been allowed to submit their discrepancies with the record, a response to EPA’s request to strike the deposition testimony issue, and Petitioners’ arguments for a *Daubert* hearing by March 10, 2013, and (2) the Board has ruled on each of these unresolved issues.

II. EPA’s Brief Must Conform to the Board’s January 11, 2013 Order

Petitioners also request that the Board require EPA to comply with the underlying rationale set forth in the Board’s Order of January 11, 2013, governing Petitioners’ filings by striking Appendices A and B from EPA’s Response Brief and thereby, limiting EPA to its “main brief” of 98 pages. As the Board is aware, Petitioners filed a Motion for Extension of Time to File a Supplemental Petition for Review (“Motion for Supplemental Petition”) with its opening brief. Petitioners specifically stated they were “making a good faith effort to make sure each detailed analysis occurs by [the date the Petition was due], however, the record is lengthy and issues are complex.” Mot. for Supp. Pet. at 2-3. Petitioners’ asked for permission to file a supplemental petition that would allow it to more fully “show the deficiencies in EPA’s Response to Comments . . .” Mot. for Supp. Pet. at 3. Inclusion of more detailed citations to the relevant records, was identified as areason for the supplemental brief:

Granting the Motion to File a Supplemental Petition for Review will ensure appropriate detail is provided such that the Board can understand whether or not we have provided sufficient document[ation] as to justify review of this permit. The purpose of allowing such a supplemental petition is to more clearly direct the

Board to where in the record supporting evidence to our claims may be found and why the Region's responses failed to adequately consider that information.

Petitioners' Reply to Region 1's Mot. in Opp. to Mot. for Supp. Pet. at 3.

The Region argued aggressively that Petitioners should not be allowed to supplement their filing because the submission was already over length (98 pages). Region 1's Mot. in Opp. to Mot. for Supp. Pet. at 4-5.⁸ Based on this filing, the Board refused to allow Petitioners to supplement their brief finding: "The Board is not persuaded that the Coalition has not had sufficient time to identify the issues and to substantively support its arguments or that additional time is warranted based on the circumstances present." Order Denying Mot. to File Supp. Pet. filed January 11, 2013, at 5. The Board also noted "that the Coalition's one hundred and one page brief more than doubles what the Board's Practice Manual suggests is an appropriate length for a brief." *Id.* at 4 n.2. This decision prevented Petitioners from putting in more specific deposition citations, deposition quotes, and specific sections of the materials reference in support of Petitioners' claims of clear scientific and legal error.

The Region has now raised arguments that (1) the failure of the Petition to identify or provide the specific citations to the deposition statements (by page and line) means that the claims should be rejected⁹ and (2) did this in a response that actually exceeds 290 pages! The Region submitted a 98-page response and then, under the guise of calling certain documents appendices (i.e. Appendices A and B), submitted additional substantive legal and factual arguments in opposition to the Petition. These documents, if they complied with the Board's

⁸ The Region based its argument on the EAB Practice Manual. *See* U.S. Environmental Appeals Practice Manual at 17 ("The parties are strongly encouraged to limit briefs to 50 pages (including the certificate of service, table of contents, and table of authorities). 'To assure the efficient use of Agency resources,' the EAB has discretion to reject a brief on the ground that it is unduly long. *In re Rocky Well Service, Inc.*, SDWA Appeal Nos. 08-03 & 08-04, at 1 (EAB Dec. 15, 2008) (Order Rejecting Brief Because of Excessive Length and Requiring Revised Brief).")

⁹ *See* Appendix B at 5, 6 and Response Brief at 40 n. 26, at 41 n. 27, at 65 n.36.

guidance on formatting, would comprise about another 200 pages of rebuttal arguments.¹⁰ These documents are repeatedly identified in the “main brief” as the basis for rejecting the Petitioners’ claims. *See* Response at 40, 45, 46, 49, 59, 62, 63, 66, 69, 73, 77, and 92 (citing Appendix A); at 40, 46, 49, and 61 (citing Appendix B).

The Region attempts to characterize Appendices A and B as “guide[s] or reference[s] for the Board in its consideration of [the Petitioner’s] claims.” Response Brief at 40 n. 26. However, these documents are plainly the Region’s substantive legal and factual arguments in opposition to the Petition, as the Region, itself, admits. The Region states that Appendix A addresses “the majority of the assertions raised in the section of the Petition labeled, ‘Scientific Issues,’” and Appendix B “addresses the extensive deposition testimony drawn from a state court case relied on by the Coalition in its Petition.” Response Brief at 40 n. 26. In addition, the Region’s reason for not including the arguments in its “main brief” is simply, it wanted to “address [the numerous technical and scientific allegations] comprehensively, and separately.” *Id.* That rationale, while illuminating, is irrelevant to how such an argument must be presented. It is axiomatic that briefs, not appendices, are to contain the legal, factual, and regulatory arguments of the parties.¹¹ The legal, technical, and regulatory arguments presented in Appendices A and B directly respond to the Petition, therefore, these documents should be

¹⁰ Appendix A is a 51-page, single-spaced document written in extremely small font, containing, as the title states, responses to the Petitioners’ scientific and technical issues. When formatting Appendix A according to the recommendations made in the EAB Practice Manual and putting it into a document resembling a brief, the first page of Appendix A equates to 3.5 pages. *See* U.S. Environmental Appeals Practice Manual at 17 (“The EAB prefers that all documents be typed and double-spaced . . .”) and Attachment 4 that converts the first page of the Appendix A into a document complying with the EAB Practice Manual. If the Region had complied with the EAB Practice Manual¹⁰, Appendix A would be at least 175 pages in length. Additionally, Appendix B, which challenges the use of the depositions and includes deposition quotes to support the arguments, is another 18 page document. The total length of these “appendix” rebuttal arguments is about 200 pages.

¹¹ For example, the DC Circuit Court rules specific state: “Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. . .” Rule 30(a)(2).

included in the Region's main brief. Petitioners presume that this formatting game of including the arguments in the Appendix and significantly reducing the font was played to give the appearance that the Region's response was not over the page limit the Region, previously, labeled as "counter to Board guidance governing length of filed documents." Region 1's Mot. in Opp. to Mot. for Supp. Pet. at 5.

The Region has submitted a response that is actually over 290 pages in length. In light of EPA's Opposition to the Motion for Supplemental Petition and the Board's subsequent Order, this is excessive, improper, and fundamentally unfair given the restrictions the Board placed on the Petitioners at the Region's request. Petitioners have been prevented from providing the additional documentation and clarification to help guide the Board to relevant sections of the lengthy administrative record. *See* Order Denying Mot. to File for Supp. Pet. The Board also seriously restricted the reply brief length. *See id.* at 5. The Region's response now claims that the Board should reject the Petition because inadequate record citations were provided. *See e.g.*, Response at 40 n. 26, at 41 n. 27, at 65 n.36; Appendix A; and Appendix B. The Region's latest position shows that Petitioners' rationale for submitting a supplemental petition, rejected at the Region's urging, was in fact accurate. *Supra* at 8.

It is patently unfair for the Region to raise the "specificity" argument where (1) the Board has prevented Petitioners from including such documentation and clarification at the Region's request and (2) Petitioners were limited to a Petition length of 1/3 of the Region's Response Brief and a 25 page Reply Brief. As Petitioners' "main brief" was limited to less than 100 pages, by the Board's order, it would violate the Petitioners' due process rights if the Board now allows the Region to submit a 290 page Response Brief. The Region must also be so limited.

As the Region asserts that “its main brief provides all the legal, factual and scientific rationale necessary to decide this case” (Response Brief at 40 n. 26 (emphasis added)), the Appendices are admitted to be superfluous. In similar circumstances, the Board has directed the party to withdraw the offending brief and submit a brief in accordance to the page limit set by the Board. *In re Rocky Well Service, Inc.*, SDWA Appeal Nos. 08-03 & 08-04, at 1 (EAB Dec. 15, 2008) (Order Rejecting Brief Because of Excessive Length and Required Revised Brief) (rejecting a 221 page brief that contained a 36-page table of contents because it was “unnecessarily verbose and redundant, resulting in a lack of clarity and excessive page count.”).

Therefore, the Petitioners request that the Board strike Appendix A and Appendix B (1) due to the Region’s attempt to disguise plainly excessive substantive arguments as Appendices and (2) to ensure consistency with the Board’s prior ruling that Petitioners’ Petition length could not exceed 100 pages.

III. Petitioners Should Be Afforded Additional Time and Page Length Requirements in their Reply Brief

Based on the foregoing, it is apparent that the Board’s earlier decision to restrict Petitioners’ Reply Brief to 25 pages, and the parties’ subsequent agreement to file its response on March 1, 2013, are no longer reasonable. First, to respond to the Region’s assertion that deposition testimony has been misrepresented and not provided with sufficient specificity, Petitioners will now include the precise deposition statements in the reply brief itself, in order to prevent the EPA’s professed confusion over what part of a specific page is applicable. Response Brief at 40 n.26, Appendix B. Petitioners undertook this approach in its Motion to Strike the Department of Environmental Services’ amicus brief which resulted in a thirteen page filing on disputed factual claims alone. To address the Region’s objections, Petitioners expect to include approximately forty (40) deposition excerpts, most in their entirety, which itself is expected to

encompass at least thirty (30) pages to demonstrate EPA's position is based on a scientific position admitted to be unsupported.

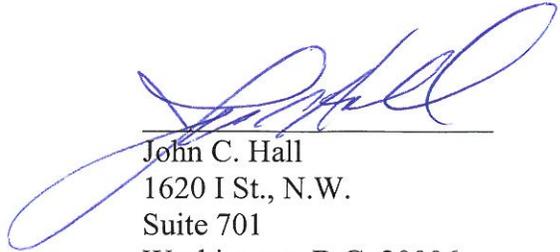
Second, there are two amicus briefs that Petitioners should be provided the opportunity to rebut. While the Petitioners have moved for Reconsideration of the Order Granting the New Hampshire Department of Environmental Services Amicus Brief, the Board has yet to rule on that motion.¹² The Board also accepted the Conservation Law Foundation, Town of Newington, and New Hampshire Audubon Amicus Brief that included similar undocumented allegations requiring specific rebuttal (approximately ten pages).¹³ Third, if the Board does not strike Appendices A and B, at least another fifty (50) pages will be required to rebut claims contained therein (1/4 of the total page length of the Appendix filings). This means that a reply brief of up to 115 pages will be needed, depending upon how the Board rules on this motion. Finally, as discussed earlier, the time frame for triggering a reply should not occur until the scope of the administrative record is known.

Therefore, following the Board's decision on the content of the administrative record and related evidentiary issues, Petitioners request twenty-eight (28) days to submit the reply brief and the page length be extended to seventy five (75) pages if Appendices A and B are withdrawn and forty (40) days and one hundred and fifteen (115) pages if those Appendices are not withdrawn.

¹² See Petitioners' Motion for Reconsideration of the Order Granting New Hampshire Department of Environmental Services' Motion to File a Non-Party Amicus Brief, February 9, 2013.

¹³ See the Board's Order Granting Motion to File Non-Party Amicus Brief dated February 11, 2013.

Respectfully submitted,



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Date: Feb 14, 2013

CERTIFICATION OF SERVICE

I hereby certify the copies the Petitioners' Motion to Suspend the Briefing Schedule, Strike Appendices A and B of Respondents Memorandum in Opposition to the Petition for Review, and Amend the Briefing Schedule and Page Limit, 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
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Date: Feb 14, 2013

Attachment 1

HALL & ASSOCIATES

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January 15, 2013

VIA E-MAIL

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

**Re: Draft Administrative Record Index for the Town of Newmarket, New Hampshire
NPDES Permit No. NH0100196**

Dear Mr. Samir Bukhari,

After reviewing the Draft Newmarket Administrative Record Index received on January 9, 2013, the Great Bay Municipal Bay Coalition has a few modifications and additions we request be made to the record before the final administrative record index is submitted to the EPA Environmental Appeals Board. Please find attached the modifications and additions we request be made to the document given (1) information previously submitted and (2) information not available at the time the comment period closed. Please note a number of records listed by EPA had extensive attachments. Those attachments should be separately listed for ease of reference by the parties.

If you have any questions, please do not hesitate to contact our office.

Sincerely,

/s/ John C. Hall
JOHN C. HALL

CC: Dan Arsenault, EPA
Enclosures:

**Requested Modifications and Additions to the Draft Newmarket
Administrative Record Index**

Section D. Supplemental Comments

1. The following supplemental comment submitted by the Great Bay Municipal Coalition is not included in the Draft Newmarket Administrative Record Index (“Draft AR Index”) and we request it be added:
 - a. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA. RE: Transmitting Transcripts of Paul Currier, Philip Trowbridge and Fred Short. August 30, 2012.
 - i. Attachments:
 1. Deposition Transcript of Paul Currier.
 2. Deposition Transcript of Philip Trowbridge.
 3. Deposition Transcript of Fred Short.

2. Regarding the supplemental comment submitted on August 15, 2012, it is unclear which email is being referred to in the Draft AR Index since the Coalition sent two emails on that date. The following are the two emails and accompanying attachments that were sent by the Coalition on August 15, 2012, we request that whichever one is not being referenced in the Draft AR Index be added to the record:
 - a. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. August 15, 2012.
 - i. Attachments:
 1. Graph: Great Bay eelgrass versus 3-year moving average spring flow.
 2. Graph: Great Bay transparency changes- buoy data 2004-2008.
 3. Trowbridge Deposition Exhibit 71: P. Trowbridge email to F. Short 11/14/07 attaching PowerPoint Presentation from 11/8/2007 entitled “Toward a New Conceptual Model for Nutrient Criteria Development in a New Hampshire Macrotidal Estuary”.
 4. Trowbridge Deposition Exhibit 72: P. Trwobridge email to P. Colarusso 3/20/08 attaching PowerPoint Presentation from 3/25/08 entitled “Nutrient Criteria Development for the Protection of Eelgrass in NH’ Estuaries”.
 - b. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No.

Attachment 1

NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. August 15, 2012.

i. Attachments:

1. Currier Deposition Exhibit 31: PowerPoint Presentation by P. Trowbridge entitled “New Hampshire Estuaries Project Environmental Indicators” 6/15/06.
2. Currier Deposition Exhibit 32: PowerPoint Presentation by P. Trowbridge entitled “Summary of Light Availability and Light Attenuation Factors for Great Bay Estuary” 2/14/07.

3. It is unclear whether the attachments to each supplemental comment are included in the record. For clarification purposes, we request that each attachment be listed below the corresponding supplemental comment. The following is the list of the supplemental comments and attachments submitted by the Coalition.

a. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gillinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. August 15, 2012.

i. Attachments:

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4. Trowbridge Deposition Exhibit 72: P. Trowbridge email to P. Colarusso 3/20/08 attaching PowerPoint Presentation from 3/25/08 entitled “Nutrient Criteria Development for the Protection of Eelgrass in NH’ Estuaries”.

b. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. August 15, 2012.

i. Attachments:

Attachment 1

1. Currier Deposition Exhibit 31: PowerPoint Presentation by P. Trowbridge entitled “New Hampshire Estuaries Project Environmental Indicators” 6/15/06.
 2. Currier Deposition Exhibit 32: PowerPoint Presentation by P. Trowbridge entitled “Summary of Light Availability and Light Attenuation Factors for Great Bay Estuary” 2/14/07.
- c. Letter. Great Bay Municipal Coalition. John C. Hall, Hall & Associates to Stephen S. Perkins, EPA. RE: Supplemental Comments in Response to Draft NPDES Permit for the City of Dover, NH – NPDES Permit No. NH0101311, Town of Exeter, NH, NPDES Permit No. NH0100871, and Town of Newmarket, NH NPDES Permit No. NH0100196. August 30, 2012.
- i. Attachment:
 1. Draft PREP Report Figures.
- d. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenaault, EPA; Ellen Gilinsky, EPA-HQ. RE: Electronic Copy of Great Bay Municipal Coalition Letter to EPA Documenting Apparent Region I Scientific Misconduct and Agency Bias and Requesting Transfer of Matter to Independent Panel of Experts- Supplemental Letter. September 7, 2012.
- i. Attachment:
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- e. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenaault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. September 12, 2012.
- i. Attachments:
 1. Salinity Readings Great Bay Buoy 2005-2011.
 2. Causes of Periodic Low DO unknown- Trowbridge Deposition – 6/23/12.
 3. Elevated TN Did Not Cause Increased Algal Growth Impacting Transparency – Trowbridge Deposition – 6/23/12 and 7/11/12.
 4. Exclusion of Prior Studies form Record – Trowbridge Deposition 7/11/12.
 5. Experts Confirm Great Bay NOT Transparency Limited System- Trowbridge Deposition 6/23/12 and 7/11/12.
 6. Macroalgae Impacts on Eelgrass in Great Bay Not Apparent- Trowbridge Deposition 6/23/12 and 7/11/12.

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7. TN Control Ineffective in Tidal Rivers- Trowbridge Deposition 7/11/12 pages 421-434.
 8. Email dated 09-24-12 from John Hall to EPA Director, Stephen Perkins, Dan Arsenault EPA and Ellen Gilinsky EPA – with ATTACHMENTS – New Hampshire Fish and Game - (09-20-12).
- f. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. September 24, 2012.
- i. Attachment:
 1. Dean Peschel Little Bay Eelgrass Phone Notes 9-20-12 after talking to Bruce Smith, NH Fish and Game.
- g. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. October 18, 2012.
- i. Attachments:
 1. Photograph 2012-10-17_09-33-57_613.
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 3. Photograph 2012-10-17_09-34-28_803.
 4. Photograph 2012-10-17_09-38-40_869.
 5. Photograph 2012-10-17_09-39-03_903.
 6. Photograph 2012-10-17_09-39-19_640.
 7. Photograph 2012-10-17_10-19-17_68.
 8. Photograph 2012-10-17_10-20-30_683.
- h. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA. RE: Great Bay Municipal Coalition Peer Review – Supplemental Comments. November 5, 2012.
- i. Attachments:
 1. Photograph Showing Naturally Occurring CDOM in Salmon Falls River.
 2. SWA- UNH Peer Review Response Letter 10/26/2012.
 3. UNH Peer Review Letter 9/07/2012.
 4. Stoner Letter 11/2/12.
 5. Burack Response to Questions Letter.

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- i. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. November 5, 2012.
- j. Email. Great Bay Municipal Coalition. Keisha Sedlacek, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault EPA. RE: Supplemental Comments by the Great Bay Coalition re: draft NPDES permits No. NH0101311 (Dover), No. NH0100871 (Exeter), and No. NH0100196 (Newmarket). November 8, 2012.
 - i. Attachments:
 1. Burack Letter 10/19/12.
 2. DES Slides form EPA Meeting on 9/28/12.

Section H. Correspondence

1. Although, it appears that some of the science misconduct exhibits/letters have been incorporated into the Draft AR Index, there are a few letters that have not made it into the record and we request that they be added:
 - a. Letter. Senator Frank Guinta to Lisa Jackson, EPA Administrator. RE: Scientific Misconduct. June 26, 2012.
 - b. Letter. Eric Spear, Mayor of Portsmouth and Sean Trefethen, Mayor of Dover to Ellen Gilinsky, EPA. RE: June 28, 2012, Meeting on Great Bay Nutrient and Science Misconduct Issues. June 29, 2012.
 - c. Letter. Senator Jeanne Shaheen and Senator Kelly Ayotte to Lisa Jackson, EPA Administrator. RE: Great Bay Municipal Coalition Peer Review Request. August 30, 2012.
2. There are numerous other relevant correspondence which have not been included in the draft AR Index. We request the following emails and letter be added as they explain that NHDES agreed to the MOU, after Philip Trowbridge did his preliminary rebuttal in January 2011:
 - a. E-mail. John C. Hall, Hall & Associates to Paul Currier, NHDES. RE: Draft Minutes from 4-5-11 Tech. Meeting with DES. April 29, 2011.
 - b. Emails. Between Ted Diers, NHDES and John C. Hall, Hall & Associates and Paul Currier, NHDES. RE: Draft MOU on GB. May 6, 10, 13, 2011.
 - c. Emails. Between John C. Hall, Hall & Associates and Ted Diers, NHDES. Re: Eelgrass comment by Fred Short. May 12-13, 2011.
 - d. Letter. Harry Stewart, NHDES to Local City Managers. RE: Great Bay Publicly Owned Treatment Works Meeting December 2, 2010. January 7, 2011.

Section I. Freedom of Information Act (FOIA) Requests

1. We request the following FOIA request to EPA Headquarters be included in the Draft AR Index:

- a.** FOIA EPA-HQ-2013-000711. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- b.** FOIA EPA-HQ-2013-000712. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- c.** FOIA EPA-HQ-2013-000713. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- d.** FOIA EPA-HQ-2013-000714. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- e.** FOIA EPA-HQ-2013-000715. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- f.** FOIA EPA-HQ-2013-000716. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- g.** FOIA EPA-HQ-2013-000717. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- h.** FOIA EPA-HQ-2013-0007123. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
- i.** FOIA EPA-HQ-2013-000197. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 4, 2012.

Attachment 1

- j.** Letter. Deborah Nagle, EPA to John C. Hall, Hall & Associates. Re: Response to FOIA request EPA-HQ-2013-000197, -000711 through-000717, -000723. November 30, 2012.

Section K. Site-Specific Background Studies, Reports, and Information

- 1.** EPA relied heavily on the PREP 2012 Draft Environmental Data Report and therefore, we request the final PREP 2012 State of the Estuaries Report be added to the Draft AR Index:
 - a.** PREP. 2012. State of the Estuaries Report. Piscataqua Region Estuaries Partnership, University of New Hampshire, Durham, NH. (December 8, 2012).

Section N. Other

- 1.** We request the following documents be added to this section in the Draft AR Index:
 - a.** Meeting Notes. Great Bay Municipal Coalition Meeting with EPA Administrator, Lisa Jackson. June 28, 2012.
 - i.** Attachments:
 - 1.** Email. S. Silva to C. Deloi. Re: Great Bay SWA legislation. February 11, 2010.
 - 2.** Email. G. Comstock to P. Currier, et al. Re: 303d- EPA wants us to list Gt Bay for N. November 26, 2008.
 - 3.** Deposition Summary.
 - 4.** Transparency-Phytoplankton Relationship Chart for the Squamscott River.
 - 5.** Transparency-Phytoplankton Relationship Chart for the Upper Piscataqua River (2003-2008).
 - 6.** Relationship Between Light Attenuation Coefficient and TN at Trend Stations (NH DES, 2009).
 - 7.** Algal Levels in Great Bay and other Estuaries.
 - b.** Power Point Presentation. John C. Hall, Hall & Associates. Overview of Great Bay Restoration Approach. Presented at meeting with the Town of Dover, EPA, and the Coalition. February 16, 2010.

HALL & ASSOCIATES

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

January 29, 2013

VIA E-MAIL

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

**Re: Draft Administrative Record Index for the Town of Newmarket, New Hampshire
NPDES Permit No. NH0100196**

Dear Mr. Samir Bukhari,

We have looked at the Draft Administrative Record for the Town of Newmarket that you provided on January 9, 2013 and in our opinion it is materially incomplete and “skewed.” In particular, it is well understood that the administrative record on review is supposed to reflect all the documents EPA had in its possession at the time the permit was issued, regardless of whether the documents support or refute the agency’s position or were ultimately relied upon by the agency. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). For example, these would include numerous emails and DES/TAC analyses showing that (1) nitrogen is not affecting system transparency, (2) Great Bay is not a transparency limited system, and (3) evidence of macroalgae impairing eelgrass was not apparent in the system. The fact that the Region ultimately accepted a position directly opposed to these various technical findings is not relevant to whether these records should be part of this administrative record. On January 15, 2013, we sent you a number of emails and other documents that were absent from, but should have been included in, the “full record.”

In the interest of efficiency, the Petitioners are providing EPA with a list of records central to decision making which (1) EPA had in its possession before the draft permit was issued and are directly applicable to central issues in the permit such as whether TN caused a transparency impairment or whether there was excessive macroalgae growth in the Great Bay estuary; (2) EPA had in its possession before the final permit was issued showing major factual/scientific errors occurred in the drafting of this permit; and (3) post-permit issuance records including FOIA responses from EPA showing that no relevant information existed supporting the permit rationale and the Final PREP report showing EPA’s impairment characterizations in the Fact

Attachment 2

Sheet were misplaced. In addition, local counsel submitted deposition exhibits from the state court action to the Region which are absent from the administrative record. The Coalition requests these documents be added to the administrative record for this permit.

If you have any questions, please do not hesitate to contact our office.

Sincerely,

/s/ John C. Hall

JOHN C. HALL

CC: Dan Arsenault, EPA

Enclosures:

**Additions to the Draft Newmarket
Administrative Record Index**

The following documents have not been included in the draft Administrative Record for the Town of Newmarket even though the EPA had them in its possession before issuing the final permit and, therefore, must be added to the Administrative Record.

Section D. Supplemental Comments

1. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA. RE: Transmitting Transcripts of Paul Currier, Philip Trowbridge and Fred Short. August 30, 2012.
 - a. Attachments:
 - i. Deposition Transcript of Paul Currier.
 - ii. Deposition Transcript of Philip Trowbridge.
 - iii. Deposition Transcript of Fred Short.

2. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. August 15, 2012.
 - a. Attachments:
 - i. Graph: Great Bay eelgrass versus 3-year moving average spring flow.
 - ii. Graph: Great Bay transparency changes- buoy data 2004-2008.
 - iii. Trowbridge Deposition Exhibit 71: P. Trowbridge email to F. Short 11/14/07 attaching PowerPoint Presentation from 11/8/2007 entitled "Toward a New Conceptual Model for Nutrient Criteria Development in a New Hampshire Macrotidal Estuary".
 - iv. Trowbridge Deposition Exhibit 72: P. Trwobridge email to P. Colarusso 3/20/08 attaching PowerPoint Presentation from 3/25/08 entitled "Nutrient Criteria Development for the Protection of Eelgrass in NH' Estuaries".

3. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. August 15, 2012.
 - a. Attachments:

Attachment 2

- i. Currier Deposition Exhibit 31: PowerPoint Presentation by P. Trowbridge entitled “New Hampshire Estuaries Project Environmental Indicators” 6/15/06.
 - ii. Currier Deposition Exhibit 32: PowerPoint Presentation by P. Trowbridge entitled “Summary of Light Availability and Light Attenuation Factors for Great Bay Estuary” 2/14/07.
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 - b. Attachments:
 - i. Currier Deposition Exhibit 31: PowerPoint Presentation by P. Trowbridge entitled “New Hampshire Estuaries Project Environmental Indicators” 6/15/06.
 - ii. Currier Deposition Exhibit 32: PowerPoint Presentation by P. Trowbridge entitled “Summary of Light Availability and Light Attenuation Factors for Great Bay Estuary” 2/14/07.
6. Letter. Great Bay Municipal Coalition. John C. Hall, Hall & Associates to Stephen S. Perkins, EPA. RE: Supplemental Comments in Response to Draft NPDES Permit for the City of Dover, NH – NPDES Permit No. NH0101311, Town of Exeter, NH, NPDES Permit No.

Attachment 2

NH0100871, and Town of Newmarket, NH NPDES Permit No. NH0100196. August 30, 2012.

c. Attachment:

i. Draft PREP Report Figures.

7. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Electronic Copy of Great Bay Municipal Coalition Letter to EPA Documenting Apparent Region I Scientific Misconduct and Agency Bias and Requesting Transfer of Matter to Independent Panel of Experts- Supplemental Letter. September 7, 2012.

d. Attachment:

i. Great Bay Municipal Coalition Letter to EPA Documenting Apparent Region 1 Scientific Misconduct and Agency Bias and Requesting a Transfer of Matter to an Independent Panel of Experts.

8. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. September 12, 2012.

e. Attachments:

- i. Salinity Readings Great Bay Buoy 2005-2011.
- ii. Causes of Periodic Low DO unknown- Trowbridge Deposition – 6/23/12.
- iii. Elevated TN Did Not Cause Increased Algal Growth Impacting Transparency – Trowbridge Deposition – 6/23/12 and 7/11/12.
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- v. Experts Confirm Great Bay NOT Transparency Limited System- Trowbridge Deposition 6/23/12 and 7/11/12.
- vi. Macroalgae Impacts on Eelgrass in Great Bay Not Apparent- Trowbridge Deposition 6/23/12 and 7/11/12.
- vii. TN Control Ineffective in Tidal Rivers- Trowbridge Deposition 7/11/12 pages 421-434.
- viii. Email dated 09-24-12 from John Hall to EPA Director, Stephen Perkins, Dan Arsenault EPA and Ellen Gilinsky EPA – with ATTACHMENTS – New Hampshire Fish and Game - (09-20-12).

9. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of

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Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. September 24, 2012.

- f. Attachment:
 - i. Dean Peschel Little Bay Eelgrass Phone Notes 9-20-12 after talking to Bruce Smith, NH Fish and Game.

- 10. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. October 18, 2012.
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 - viii. Photograph 2012-10-17_10-20-30_683.

- 11. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA. RE: Great Bay Municipal Coalition Peer Review – Supplemental Comments. November 5, 2012.
 - h. Attachments:
 - i. Photograph Showing Naturally Occurring CDOM in Salmon Falls River.
 - ii. SWA- UNH Peer Review Response Letter 10/26/2012.
 - iii. UNH Peer Review Letter 9/07/2012.
 - iv. Stoner Letter 11/2/12.
 - v. Burack Response to Questions Letter.

- 12. E-mail. Great Bay Municipal Coalition. John Hall, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault, EPA; Ellen Gilinsky, EPA-HQ. RE: Supplemental Comments by the Great Bay Municipal Coalition re: Draft NPDES Permit No. NH0101311 for the City of Dover, NH; Town of Exeter, NH, NPDES Permit No. NH0100871; Town of Newmarket, NH NPDES Permit No. NH0100196. November 5, 2012.

- 13. Email. Great Bay Municipal Coalition. Keisha Sedlacek, Hall & Associates to Stephen Perkins, EPA; Dan Arsenault EPA. RE: Supplemental Comments by the Great Bay Coalition

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re: draft NPDES permits No. NH0101311 (Dover), No. NH0100871 (Exeter), and No. NH0100196 (Newmarket). November 8, 2012.

- i. Attachments:
 - i. Burack Letter 10/19/12.
 - ii. DES Slides form EPA Meeting on 9/28/12.

Section H. Correspondence

1. Letter. Senator Frank Guinta to Lisa Jackson, EPA Administrator. RE: Scientific Misconduct. June 26, 2012.
2. Letter. Eric Spear, Mayor of Portsmouth and Sean Trefethen, Mayor of Dover to Ellen Gilinsky, EPA. RE: June 28, 2012, Meeting on Great Bay Nutrient and Science Misconduct Issues. June 29, 2012.
3. Letter. Senator Jeanne Shaheen and Senator Kelly Ayotte to Lisa Jackson, EPA Administrator. RE: Great Bay Municipal Coalition Peer Review Request. August 30, 2012.
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5. Emails. Between Ted Diers, NHDES and John C. Hall, Hall & Associates and Paul Currier, NHDES. RE: Draft MOU on GB. May 6, 10, 13, 2011.
6. Emails. Between John C. Hall, Hall & Associates and Ted Diers, NHDES. Re: Eelgrass comment by Fred Short. May 12-13, 2011.
7. Letter. Harry Stewart, NHDES to Local City Managers. RE: Great Bay Publicly Owned Treatment Works Meeting December 2, 2010. January 7, 2011.
8. Email. Between Philip Trowbridge and EPA and DES officials. RE: Southeast Watershed Alliance- Ad hoc committee. March 1, 2010.

Section I. Freedom of Information Act (FOIA) Requests

1. FOIA EPA-HQ-2013-000711. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
2. FOIA EPA-HQ-2013-000712. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated

Attachment 2

with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.

3. FOIA EPA-HQ-2013-000713. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
4. FOIA EPA-HQ-2013-000714. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
5. FOIA EPA-HQ-2013-000715. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
6. FOIA EPA-HQ-2013-000716. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
7. FOIA EPA-HQ-2013-000717. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
8. FOIA EPA-HQ-2013-0007123. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 22, 2012.
9. FOIA EPA-HQ-2013-000197. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. RE: Freedom of Information Act Request for Records Associated with EPA's Response to the Great Bay Municipal Coalition's Scientific Misconduct Letter. October 4, 2012.

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10. Letter. Deborah Nagle, EPA to John C. Hall, Hall & Associates. Re: Response to FOIA request EPA-HQ-2013-000197, -000711 through-000717, -000723. November 30, 2012.
11. FOIA EPA-R1-2013-0023333. Letter. John C. Hall, Hall & Associates to Freedom of Information Officer, EPA. Re: Dr. Fred. Short's 2012 eelgrass survey including any and all communications between EPA Region 1 and any other party. December 20, 2012.
12. FOIA EPA-R1-2013-0023333. Letter. Cristeen L. Schena, EPA to John C. Hall, Hall & Associates. Re: Dr. Fred. Short's 2012 eelgrass survey including any and all communications between EPA Region 1 and any other party. January 25, 2013.
 - a. Attachment:
 - i. Short, F. Great Bay Estuary Eelgrass: 2012 Observations. Memo received via e-mail (Fred Short, EPA to Dan Arsenault, EPA on September 11, 2012).

Section K. Site-Specific Background Studies, Reports, and Information

1. PREP. 2012. State of the Estuaries Report. Piscataqua Region Estuaries Partnership, University of New Hampshire, Durham, NH. (December 8, 2012).
2. The data collected and aerial photographs taken by Fred. Short which he references and basis his conclusions on in the Memo entitled "Great Bay Estuary Eelgrass: 2012 Observations".

Section N. Other

1. Meeting Notes. Great Bay Municipal Coalition Meeting with EPA Administrator, Lisa Jackson. June 28, 2012.
 - a. Attachments:
 - i. Email. S. Silva to C. Deloi. Re: Great Bay SWA legislation. February 11, 2010.
 - ii. Email. G. Comstock to P. Currier, et al. Re: 303d- EPA wants us to list Gt Bay for N. November 26, 2008.
 - iii. Deposition Summary.
 - iv. Transparency-Phytoplankton Relationship Chart for the Squamscott River.
 - v. Transparency-Phytoplankton Relationship Chart for the Upper Piscataqua River (2003-2008).
 - vi. Relationship Between Light Attenuation Coefficient and TN at Trend Stations (NH DES, 2009).
 - vii. Algal Levels in Great Bay and other Estuaries.

Attachment 2

2. Power Point Presentation. John C. Hall, Hall & Associates. Overview of Great Bay Restoration Approach. Presented at meeting with the Town of Dover, EPA, and the Coalition. February 16, 2010.

**Freedom of Information Act Requests Sent to Region 1 Regarding
Great Bay NPDES Permits**

Following EPA Headquarters denial that Region I had committed “science misconduct” with respect to requirements for the Great Bay Estuary, a series of Freedom of Information Act Requests (“FOIA”) were sent to Region 1 on September 26, 2012. The FOIA requests sought the records that showed statements (1) made by Dr. Fred Short or Mr. Philip Trowbridge during deposition testimony; (2) from the Fact Sheets for the draft NPDES permits for the towns of Exeter¹, Newmarket, and Dover²; (3) from a letter dated July 13, 2012 to EPA Headquarters from the Coalition entitled “Confirmation of Major Scientific Errors/Uncertainties Regarding Proposed TN reductions for Great Bay Estuary in Depositions of Mr. Philip Trowbridge and Dr. Fred Short”; or (4) from the Memorandum of Agreement between the Coalition and New Hampshire Department of Environmental Services were incorrect. The Region’s FOIA response dated November 30, 2012, stated that it submitted no information to EPA Headquarters to demonstrate that the following factual statements were in error:

- Dr. Fred Short has not conducted research in the Great Bay Estuary that was designed to demonstrate what factors are causing changes in eelgrass populations. (01-FOI-00252-12).
- Cause of eelgrass loss in tidal rivers is unknown. (01-FOI-00253-12).
- A large increase in rainfall and major floods occurring in 2006 (a natural condition) could be the primary cause of significant eelgrass declines that occurred in Great Bay during that period due to increased turbidity and CDOM. DES failed in declaring that Great Bay was nutrient impaired to assess the importance of these events in triggering the eelgrass decline in the system despite the obvious temporal correlation. (01-FOI-00254-12).
- In the Great Bay Estuary numeric TN criteria for eelgrass and DO were not based on a demonstrated ‘cause and effect’ relationship for this system. (01-FOI-00255-12).
- There is no analysis of data from the Great Bay Estuary demonstrating increasing TN levels caused changes in the eelgrass population in (a) tidal rivers in the Great Bay Estuary or (b) Great Bay/Little Bay. (01-FOI-00256-12).
- There is no analysis of data from the Great Bay Estuary demonstrating macroalgae growth caused changes in the eelgrass population in Great Bay/Little Bay.(01-FOI-00257-12).

¹ NPDES Permit No. NH0100871.

² Draft NPDES Permit No. NH0101344.

Attachment 3

- There is no documentation showing that excessive macroalgae growth is occurring in the tidal rivers of the Great Bay Estuary. (01-FOI-00258-12).
- Epiphytes have not been demonstrated to be a major factor adversely impacting eelgrass populations in the Great Bay Estuary. (01-FOI-00259-12).
- Algal levels in Great Bay/Little Bay did not change materially from 1980 to present, despite an estimated 59% increase in TN levels between 1980 and 2012 *and therefore TN inputs could not have caused changed transparency in Great Bay/Little Bay.* (01-FOI-00260-12).
- There is no analysis of data from the Great Bay Estuary demonstrating transparency caused changes in the eelgrass population in (a) tidal rivers in the Great Bay Estuary or (b) Great Bay/Little Bay. (01-FOI-00261-12).
- Data for tidal rivers (Squamscott, Lamprey, Piscataqua) shows TN control will not meaningfully improve transparency. (01-FOI-00262-12).
- Existing transparency is too poor to support eelgrass in tidal rivers (Squamscott, Lamprey, Upper Piscataqua) because of naturally high turbidity and CDOM. (01-FOI-00263-12).
- Great Bay is not a transparency limited system because eelgrass populations receive sufficient light during the tidal cycle. (01-FOI-00264-12).
- The best available information shows that transparency in Great Bay and Lower Piscataqua River did not change materially from 1990 to 2005; *therefore this parameter could not be the factor causing eelgrass declines found in the system prior to that time as assumed in the draft 2009 numeric criteria.* (01-FOI-00265-12).
- Transparency in the major tidal rivers (Squamscott, Lamprey, Upper Piscataqua) is poor, but the available data shows that: (1) the effect of algal growth on transparency is generally negligible [and] (2) CDOM and turbidity are the key factors controlling transparency in this area of the system. (01-FOI-00266-12).
- Since 2005, there has been “no site-specific research” conducted that was designed to evaluate the cause of recent eelgrass declines anywhere in the Great Bay system. To date, the causes of such eelgrass declines remain unknown. (01-FOI-00267-12).

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- The various DES analyses submitted to EPA that confirmed (1) TN increases did not cause changes in transparency, algal levels or DO and (2) a “cause and effect” relationship between TN and transparency/DO did not exist, were excluded from the technical information presented in the 2009 numeric nutrient criteria document and, therefore, were never presented to EPA’s internal peer review panel. (01-FOI-00268-12).
- Dissolved nutrient concentrations (2009-2011) have returned to pre-1995 levels when eelgrass thrived in Great Bay. There is no information from the Great Bay Estuary showing this level of TIN will impair the eelgrass population. (01-FOI-00269-12).

Appendix A. Responses to Scientific and Technical Issues (p.1)

CLAIM AS SET FORTH IN PETITION:

B. Draft PREP 2012 Report

The data contained in the Draft PREP 2012 Report confirmed nitrate and TN levels had decreased markedly over the past three years, returning to 1980 levels, as extreme weather conditions were no longer occurring. This information was relevant to whether and how much nitrogen reduction was necessary and to the degree to which it should be required given the recognition that nitrate is the most important parameter in controlling excessive plant growth in the system. This same fact was verified by the October 19, 2012 response from Commissioner Burack (Figure 4) and the final PREP 2012 SOE Report at 13 (Figure 2.3) (Exhibit 25).

a. Record

PREP Draft Data Report (July 16, 2012) at 45, 53, 69 (Ex. 36)). PREP 2013 SOE Report at 14 (Petitioner Exhibit 24. RTC at 24, 46, 58, and 99 (Ex. 1) (TN, not subspecies of nitrogen, is the most important parameter to control)).

i. Technical Assessment

This statement is partly an overstatement and largely incorrect. First, it is not true with respect to TN. Adams Point is the only station for which nitrogen data exists from the 1980 period. For that station, the PREP Report found no trends in TN concentrations, and TN was not measured in the 1974-1981 period that is the basis for the comparison to 1980s levels. PREP, 2012 at 69. For nitrate at that station, the PREP report contains results for nitrate + nitrite indicating a long term upward trend but a recent lowering trend based on variance between the 2006-08 and 2009-11 periods. Id. at 45. The relevant chart in that Report shows that concentrations in 2009-11 are similar, though at the upper end, of concentrations encountered in

the 1970s although not as low as 1980 levels. The pattern for DIN is similar to that of nitrate and nitrite (long term upward trend with recent lowering), PREP 2012 at 53, and was the subject of the statement in the Burack letter on this issue, as follows: "DES agrees that average annual DIN concentrations at Adams Point have decreased in the last few years and are similar to concentrations measured in the 1970s. However, as discussed previously, DIN is an inferior indicator of nitrogen pollution compared to TN because DIN is a subset of TN that is the most reactive in the environment. DIN does not include nitrogen that is incorporated into plants and organic matter. DIN concentrations can be very low during periods of high plant growth because the DIN is pulled out of the water and incorporated into phytoplankton, macroalgae, and other plants." Other stations show no recent trend for nitrate + nitrite. The Coalition cites PREP 2013 SOE Report Figure 2.3, which gives nitrogen loads by month and is not relevant to this issue. The Coalition may be referring to Figure 3.2 on page 15 which depicts DIN trends; the limitations of DIN as an indicator of nitrogen pollution are discussed above and were noted in the PREP 2013 SOE Report at 14.

1. Basis for Denying Review

Mischaracterizes/unsupported by the record, including EPA's responses to the Coalition's comments, and therefore fails to substantively confront EPA's response. At most, it is a bona fide difference of technical opinion that does not demonstrate clear error on EPA's part.

C. 2011 Eelgrass Report

1: The 2011 Eelgrass Report for the system issued on September 12, 2012 by Dr. Short demonstrated that eelgrass coverage had dramatically rebounded in Little Bay despite claimed inadequate transparency levels in that system.

a. Record

NHDES 2009 Great Bay Nutrient Report. Fact sheet at 19 and 23 (Ex. 2); RTC at 4 fn 6, 93, 138-139 (Ex. 1).

i. Technical Assessment

Little Bay was identified as having marginal transparency in the 2009 Great Bay Nutrient Report. Great Bay Nutrient Report at 56 ("In the Great Bay, Little Bay, and Upper Piscataqua River, the Zmax is below (less than) Zmin but the difference is less than 1 meter. This result is consistent with observations that eelgrass in these areas is either declining or has recently disappeared (PREP, 2009; NHDES, 2008b)."). Little Bay had highly variable eelgrass population consistent with this marginal transparency.

1. Basis for Denying Review

Mischaracterizes and/or ignores portions of the record, including EPA's responses to comments, and therefore fails to substantively confront EPA's response, which was rational in light of the entire record.

2: This was the most eelgrass present in Great Bay in over 25 years

b. Record

PREP Draft Data Report (July 16, 2012) (Ex. 36); RTC at 4 fn 6 (Ex. 1)

i. Technical Assessment

This is presumably a typographical error and the Coalition meant "Little Bay," as eelgrass decreased in Great Bay proper in 2011. PREP, 2012. Note Little Bay accounts for only 1-2% of eelgrass coverage in the Great Bay Estuary.

1. Basis for Denying Review

Mischaracterizes the record.

3: This information (also referenced in the draft 2012 PREP report cited by EPA but for other reasons) confirms that existing water quality is not preventing eelgrass populations from recovering, as presumed by the analysis performed for the permit.

c. Record

See RTC at 5 fn 7 (Ex. 1) (continued loss in eelgrass biomass); Id. at 58, 84-84, 92-93, 102-103, 109, 110 (relative to concerns with transparency in Great Bay)

i. Technical Assessment

The increase in 2011 is consistent with the historic short term variability of eelgrass and the marginal transparency in Little Bay and does not demonstrate a wholesale recovery of eelgrass populations, as there is still a long term trend of decline in eelgrass coverage and no recovery at all in eelgrass biomass.

1. Basis for Denying Review

Mischaracterizes/unsupported by the record, including EPA's responses to the Coalition's comments, and therefore fails to substantively confront EPA's response. At most, it is a bona fide difference of technical opinion that does not demonstrate clear error on EPA's