UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1 – New England
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VIA ELECTRONIC FILING

October 25, 2013

Eureka Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, DC 20460-0001

RE: Town of Newmarket Wastewater Treatment Plant
NPDES Permit No. NH0100196; NPDES Appeal No. 12-05

Dear Ms. Durr:

Please find EPA Region 1's Motion to Strike and Opposition to Petitioner's Motion to Supplement the Administrative Record, and accompanying Certificate of Service, in connection with NPDES Appeal No. 12-05.

Sincerely,

_____

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

In the Matter of:	
Town of Newmarket Wastewater Treatment Plant	
NPDES Permit No. NH0100196	NPDES Appeal No. 12-05

RESPONDENT REGION 1'S MOTION TO STRIKE AND OPPOSITION TO PETITIONER'S MOTION TO FILE A SUPPLEMENT TO THE ADMINISTRATIVE RECORD

Respectfully submitted,

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Dated: October 25, 2013

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I. INTRODUCTION

Although nominally styled as a motion to supplement the record and a notice of supplemental authority ("Motion and Notice"), the Coalition's latest filing is in fact a pretext to supplement the briefing in this matter. The Coalition's attempt to introduce nearly 20 pages of supplemental, and late-filed, argumentation over the permit's nitrogen limit should be rejected. The Board has explicitly instructed the parties that, "No further briefing [beyond the Coalition's Reply and Region's Sur-reply] will be permitted in this matter." *See* Order (February 17, 2013) (denying, *inter alia*, the Coalition's request to enlarge the page 25-page limitation for replying to EPA Region 1's Memorandum in Opposition to the Petition for Review ("Opposition")). The Region's Sur-reply was filed March 15, 2013. Since then, the other parties to this action have strictly adhered to the Board's categorical directive. The Coalition, on the other hand, has repeatedly chosen to ignore the Board's prohibition on additional briefing, *see, e.g.*, Docket # 49-52. Nowhere, however, has it contravened that instruction more egregiously than in the instant Motion and Notice. EPA Region 1 respectfully requests that the Board strike the Coalition's Motion and Notice because they are contrary to the Board's Order and, in addition, are late-filed argument. Furthermore, the Coalition has not identified any basis to supplement the record, as explained below.

II. ARGUMENT

A. The Coalition's Motion and Notice Constitute Supplemental Argument, in Violation of the Board Orders Establishing Briefing Deadlines and Page Limitations For This Proceeding, and Should Be Stricken

The nature of a filing ought to be construed on the basis of its content rather than the styling of its caption. *See, e.g.*, *Coleman v. Ohio State Univ. Med. Ctr.*, No. 2:11–cv–0049, 2011 WL 3273531, at *3 (S.D. Ohio Aug. 1, 2011) ("The Court recognizes that filings are to be construed by their substantive content and not by their labels."). Although in form a motion to supplement the administrative record and notice of relevant judicial authority, the Coalition's motion consists of substantive argument meant to bolster, out of time, its original petition for review and to further respond to the Region's Opposition and Sur-reply. Yet the timeframe for substantive briefing by the Coalition on the issues in this case lapsed more than seven months ago. *See* Order Extending to File Reply (January 25, 2013) (establishing a filing date of March 1, 2013, for the Coalition's reply); Order (February 13, 2013) ("To the extent that the Coalition wishes to contest the assertions in the Region's Opposition it may do so in its Reply due on March 1, 2013[,]" and not permitting any further briefing in the case). The Coalition makes no attempt to square its filing with the Board's unambiguous statements.

The Coalition generally utilizes the following methodology for injecting new substantive argument into these proceedings: through the guise of a motion to supplement the record, the Coalition will first argue that an extra-record statement or document (*i.e.*, a FOIA response or a draft permit from another NPDES proceeding) can be construed to contradict a representation made by the Region in its Opposition and/or Sur-reply; next, it will allege or imply that the purported contradiction constitutes "bad faith;" and finally, it will use that allegation as license to argue the substantive merits of the Region's position. *See, e.g.*, Section 2.a (based upon inferences from Freedom of Information Act responses relating to total nitrogen, algae levels and transparency, urging

that "the permit limit should be vacated and the limit reassessed"); Section 2.b (based upon interpretations of FOIA responses regarding alleged deficiencies in the peer review process, arguing that "the Board should strike the Agencies use of the 2010 peer review" and that "The Board should remand the permit action[.]"); Section 2.c (construing FOIA responses to render the nitrogen limit to be based on an "illegal rule interpretation"); Section 2.d (characterizing the basis of decision for a draft permit issued to the Town of Taunton, Massachusetts, as departing from the Region's action in Newmarket, rendering its approach "arbitrary and capricious"); and Section 2.e (arguing that the Region's analysis purportedly contradicts an EPA guidance document issued last month).

The Coalition's extended argumentation, with repeated references to specific arguments in the Petition, Opposition, Reply and Sur-reply, and its requested substantive relief (*e.g.*, permit remand), venture far beyond a mere request to supplement the record, and belie the true nature of this filing. The content of the Coalition's filing is improper both in light of the Board's prior orders and under longstanding Board precedent, which equates new issues filed after the petition for review to late-filed appeals. *See, e.g.*, *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). The Coalition's motion to supplement should be stricken in its entirety. *In re Steel Dynamics, Inc*., 9 E.A.D. 165, 219-20 n.62 (EAB 2000) (declining to consider petitioners' rebuttal argument which could have been raised earlier in the petition); *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 595 (EAB 2006) (denying review of an issue first raised in response briefs); *In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying petitioner's request to file a supplementary brief where the supplementary brief was filed after the appeal period had run and raised a related but "distinct" new issue).

Similarly, the Coalition's Notice of Supplemental Authority is not in actuality confined to notice. Indeed, the two pages of text that accompany the case citations, in which the Coalition argues the cases' applicability to this permit appeal, are superfluous from the standpoint of notice. *See* Mot. and Not. at 20-21. The Board has already been made aware of both cases cited by the Coalition, in one instance by the Coalition itself. Docket # 49, 54. This Board is fully capable of determining the relevance (or lack thereof) of cases that are brought to its attention by notice of a litigant without the need for substantive exposition on how the new authority purportedly applies to the facts of a pending appeal. This in almost all cases should be obvious. For instance, EPA brought the court's decision in the *City of Dover v U.S. Environmental Protection Agency*, No. 12-CV- 01994 (D.D.C. July 30, 2013) to the Board's attention because the then-pending lawsuit had been relied upon by the Coalition in its briefing as a reason to stay permit appeal proceedings. Upon informing the Board of this fact, the Region did not then offer legal argument about the decision's applicability to the appeal. On the other hand, *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), does not even involve the regulatory provision at the heart of this appeal, 40 C.F.R. § 122.44(d)(1)(vi). While this fact may have prompted the Coalition to construct a legal theory to link the *Iowa* case and that regulatory provision, that does not make the argument any more appropriate.[1] EPA requests that the Board strike the "notice."

B. The Coalition Has Not Identified Any Basis for Supplementing the Administrative Record

[1] Or for that matter factually persuasive. As is clear from the permit record and the Region's prior filings with this Board, the contention that the Region utilized the Great Bay Nutrient Report in a binding manner "as if it defined the required nutrient concentration under the narrative criteria[,]" Motion and Notice at 20, is not supported by the record.

"[A] party seeking to supplement the record must establish that the additional information was known to the agency when it made its decision, the information directly relates to the decision, and it contains information adverse to the agency's decision." *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 72 (D.D.C. 2008). This only stands to reason "because supplementation should not be required absent exceptional circumstances." *Id.* With respect to each of the documents at issue in the motion, the Coalition has fallen well short of making this demonstration, failing indeed in some cases to even try. The Coalition's motion should, accordingly, be denied.

1. Background

Pursuant to 40 C.F.R. § 124.17(a), the administrative record in a permit proceeding must contain certain items, including all comments received during the public comment period; the tape or transcript of any hearings held; any written materials submitted at such hearings; EPA's response to comments and any new material placed in the record therein; the final permit itself; and other documents in the supporting file for the permit. It is well settled that "the complete or official administrative record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision." *Dominion I*, 12 E.A.D. 490, 519 (EAB 2006) (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)); *accord In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 to 10-05, slip op. at 48 (EAB Nov. 18, 2010); *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 417 (EAB 2007) *(Dominion II)*. EPA is required to base its final permit decision on the administrative record, 40 C.F.R. § 124.18(a), which "shall be complete on the date the final permit is issued," *id.* § 124.18(c). The Board has interpreted this latter provision to

mean that the administrative record in an NPDES permit proceeding closes at the time the permit is issued and that documents submitted thereafter "cannot be considered part of the administrative record." *Dominion I*, 12 E.A.D. at 518, 519 n.44 (citing 40 C.F.R. § 124.18(c)); *see also In re City of Caldwell*, NPDES Appeal No. 09-11, at 16 (EAB Feb.1, 2011) (Order Denying Review); *In re W. Peabody Coal Co.*, 12 E.A.D. 22, 40 n.42 (EAB 2005); *In re BP Cherry Point*, 12 E.A.D. 210, 221 n.27 (EAB 2005). Thus, as a general rule, it is inappropriate to supplement the administrative record with materials that were not considered by the agency, including those generated after final permit issuance. *Russell City*, slip op. at 115 n.106; *see also Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006).

The very few and limited exceptions to the general rule are to be "narrowly construed," *In re Port Auth. of NY & NJ*, 10 E.A.D. 61, 97-98 (EAB 1996), and applied only in "unusual circumstances," *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). Moreover, an agency is entitled to a strong presumption of regularity in the designation of its administrative record, "absent clear evidence to the contrary." *Bar MK*, 994 F.2d at 740; *see also Port Auth.*, 10 E.A.D. at 98; *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010); *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 157 (D.D.C. 2012); *Franks v. Salazar*, 751 F. Supp. 2d 62, 67 (D.D.C. 2010); *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005). As such, a party may not rebut the presumption with mere speculation, but rather, must adduce concrete evidence that the materials it wishes to add to the administrative record were actually before the agency. *Am. Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33, 42 (D.D.C. 2012); *Nat'l Mining Ass'n*, 856 F. Supp. 2d at 156; *Styrene*

Info. & Research Ctr., Inc. v. Sebelius, 851 F. Supp. 2d 57, 63 (D.D.C. 2012); *Earthworks v. U.S. Dept. of the Interior*, 279 F.R.D. 180, 185 (D.D.C. 2012).

2. The Coalition Has Not Demonstrated that the FOIA Appeal Filings Should be Added to the Record

The Coalition asserts that two documents prepared by EPA and filed in August of 2013 in a FOIA appeal brought by Hall & Associates must be added to the administrative record because the two documents allegedly "confirm that, in fact, EPA has *no* records and analyses to demonstrate its technical claims are true." Mot. and Not. at 7-9. On their face, these documents post-date issuance of the permit, and as such, would not typically be added to the administrative record. *Dominion II*, 13 E.A.D. at 417-18. Thus, for supplementation to be appropriate, the Coalition must satisfy at least one of only a few narrow exceptions. *Port Auth.*, 10 E.A.D. at 97-98. The Coalition, however, has failed to offer an explanation of how any specific information contained within these two FOIA appeal filings falls within any of these narrow exceptions to the general rule.[2] The request should be denied on this basis.

Assuming *arguendo* that the Coalition has recited the appropriate test for supplementing the administrative record, it has failed to show that any of the exceptions apply. The first exception does not, *see* Mot. and Not. at 4 (quoting *Lands Council v. Forester of Region One of the U.S. Forest Serv.*, 395 F.3d 1019, 1030 (9th Cir. 2005)), because the fact that no *additional* documents were supplied to the Coalition in response to its improperly formulated FOIA requests demanding proof that its charge of science

[2] In addition, the Coalition appears to be engaging in a misguided attempt to appeal – *to the Board* – the dismissal of the science misconduct charge the Coalition brought against Region 1. But the issue before the Board in the instant appeal is not whether EPA properly addressed the science misconduct charge, but whether the Region's permit decision is clearly erroneous.

misconduct against the Region was properly dismissed does not equate to the Coalition's familiar (and often hyperbolic) assertions that "EPA has *no* records and analyses to demonstrate its technical claims are true" or that "the technical conclusions relied upon in deriving Newmarket's nutrient limit are invalid." Mot. and Not. at 9. In light of the numerous documents already in the record supporting the permit decision, including statements from many experts in the field, these FOIA filings are of no help to the Board in "determin[ing] whether the [Region] has considered all relevant factors and has explained its decisions." Mot. and Not. at 4 (quoting *Lands Council*, 395 F.3d at 1030); *see also* Mot. and Not. at 8 (recognizing that "EPA confirmed it possesses no *other* records or documents showing that the specific factual and scientific points raised in the science misconduct filing are incorrect" (emphasis added)).[3]

Additionally, the second and third exceptions recited by the Coalition do not apply because the Coalition does not allege that the Region relied on these documents in its permitting decision or that the two documents are necessary to explain technical terms or complex subject matter. *See* Mot. and Not. at 4 (citing *Lands Council*, 395 F.3d at 1030). Finally, the Coalition has failed to make any showing, let alone the required "strong showing," *Roosevelt Conservation P'ship*, 616 F.3d at 514; *Sierra Club v. Slater*, 120 F.3d 623, 638 (6th Cir. 1997), that these particular documents support the claim of

[3] The Coalition hopes to convince the Board that its FOIA requests and EPA's corresponding responses are equivalent to responses to interrogatories or requests for admissions in a civil case. This use of an agency's FOIA responses is, of course, improper, because nothing in FOIA requires EPA "to provide answers to questions disguised as a FOIA request." *See Satterlee v. I.R.S.*, No. 05-3181-CV-S-FJG, 2006 WL 3160963, at *3 (W.D. Mo. Oct. 30, 2006); *see also Hillman v. Comm'r*, No. 1:97-cv-760, 1998 U.S. Dist. LEXIS 12431, at *15 (W.D. Mich. 1998); *Morris v. Cmm'r*, No. CV-F-97-5031-GEB-DLB, 1997 WL 842413, at *1 (E.D.Cal. Nov. 25, 1997) (explaining that "it is clear that nothing in the [FOIA] requires 'answers to interrogatories' but rather and only disclosure of documentary matters which are not exempt") (quoting *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978)); *Fritz v. IRS*, 862 F. Supp. 234, 236 (W.D. Wis. 1994) ("FOIA is a means of obtaining agency records, not a vehicle for interrogating the agency.").

bad faith. At best, these documents reflect yet another example of a difference of technical opinion between the Coalition and the Region. And just as a petitioner does not establish clear error merely by "document[ing] a difference of opinion or an alternative theory regarding a technical matter," *Dominion I*, 12 E.A.D. at 510, any allegation of bad faith here should fail because it amounts to no more than a differences of opinion between the Region and the Coalition.

3. The Coalition Has Not Demonstrated that the Emails Between an EPA Contractor and the Two Peer Reviewers Should be Added to the Record

Next, the Coalition contends that certain emails exchanged between an EPA contractor and the two peer reviewers after the completion of the 2010 peer review must be added to the record, because they "confirm" that the peer review did not address the Coalition's "supplemental comments," Mot. and Not. at 9-11, and that the review was biased against a Coalition member and counsel for the Coalition. These arguments must be rejected for several reasons.

First, there is no claim that the two email messages with which the Coalition has particular complaint were relied on or considered by the Region, either directly or indirectly. *Russell City*, slip op. at 48; *Dominion I*, 12 E.A.D. at 519. Similarly, the Coalition does not claim that the email exchange must be added because it is "necessary to determine whether [the Region] considered all relevant factors and . . . explained its decision" or it is "necessary to explain technical terms or complex subject matter." Mot. and Not. at 4 (quoting *Lands Council*, 395 F.3d at 1030). The Coalition appears to suggest instead that the documents must be added as evidence of bad faith, but any such claim should fail.

More specifically, the Coalition erroneously suggests that the Region has taken the position that the particular comments, which the Coalition itself refers to as "supplemental" and which it sent directly to Drs. Boynton and Howarth, were considered by the reviewers. The citations included in the Coalition's motion to this point, however, do not support such a claim. *See* Mot. and Not. at 10. As the Board is aware, the Coalition submitted numerous sets of comments to EPA and NHDES at various stages of the development of both the Great Bay Nutrient Report and the Newmarket NPDES Permit and the Region has made no specific claim that the peer reviewers considered this particular set of Coalition comments. Thus, the Coalition's claim of bad faith by the Region is unsupported. And, even if the Coalition's motion could be read to include an argument that these documents are "necessary to determine whether [the Region] considered all relevant factors," Mot. and Not. at 4 (quoting *Lands Council*, 395 F.3d at 1030), such a claim should be rejected because there is no conflict between them and the Region's representations that EPA itself considered the referenced post-peer review information and addressed it in the Response to Comments. *See* Response to Pet. at 76. Furthermore, the analyses submitted by the Coalition were also demonstrated by Drs. Valiela and Kinney to be unpersuasive.[4]

As to the claim of bias against the City of Portsmouth[5] and its counsel, the Coalition has failed to surmount the "very high" bar necessary to make such a demonstration. *Dominion I*, 12 E.A.D. at 532; *see also In re Marine Shale Processors*,

[4] Additionally, as the Region has previously noted, *see* Response to Pet. at 74, the Coalition has never confronted the Region's position that peer review is simply not required prior to establishing a water quality-based effluent limitation under Parts 122 or 124 or that, when such additional process is afforded, public participation is not a required element. Thus, any debate the Coalition wishes to engage in about whether the peer reviewers considered the Coalition's supplemental comments has been waived and is completely irrelevant.

[5] As the Board is aware, Portsmouth is not a party to this appeal. *See* Pet. for Rev. at 1.

Inc., 5 E.A.D. 751, 788-789 (EAB 1995). A passing statement made in a single email by Dr. Howarth that he is "a little" saddened by Portsmouth's opposition to the Great Bay Nutrient Report and a remark that Portsmouth may possess the wherewithal to address the discharge of nutrients to the estuary fall far short of the required showing that a "fair and effective" peer review was "foreclosed" by a decisionmaker who was "so psychologically wedded to his opinions that he would consciously or unconsciously avoid the appearance of having erred or changed position." *Dominion I*, 12 E.A.D. at 532 (internal quotations marks and citations omitted). And even if one assumes, for the sake of argument, that Dr. Howarth, a respected expert in the field of estuarine science, was so biased (for whatever unknown reason) against Portsmouth so as to abandon his ethical and contractual duties, this would not vitiate the *second peer reviewer's* support for the Report.

As to Mr. Paul's statements, notably made *after* the review had been completed, they were even more benign. He noted simply that the interest taken by multiple law firms – including a "national attorney (Hall and Associates) who has been challenging limits on nutrients on behalf of dischargers nationwide" – in the peer review of the Great Bay Nutrient Report further supported the notion that their review was important and meaningful. Pet'rs' S.Exh. 27. This is not evidence of bias against either Portsmouth or counsel for the Coalition.

In short, the Coalition has failed to demonstrate that "unusual circumstances" exist that could justify a departure from the general rule that agency action be reviewed on the administrative record compiled by the agency. *City of Dania Beach v. FAA*, 628

F.3d 581, 590 (D.C. Cir. 2010) (citing *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991)).

4. The Coalition Has Not Demonstrated that Documents Received in Response to Three FOIA Requests Should be Added to the Record.

In Section 2.c of its motion, the Coalition asserts that a letter and an accompanying document sent by EPA Headquarters in response to three FOIA requests from Hall & Associates should be added to the administrative record for this permit decision, because, the Coalition argues, the two documents indicate that the Region has "re-interpreted" EPA's NPDES regulations at 40 C.F.R. § 122.44(d). Mot. and Not. at 12-14. After setting forth elsewhere in the motion what it contends are the applicable authorities governing supplementation of the administrative record, *see id.* at 4-6, the Coalition once again proceeds to ignore them, failing to present any argument as to how these documents satisfy those legal rules.[6] The argument presented instead is a purely legal one, offering the Coalition's interpretation of the CWA and its implementing regulations, variations of which the Coalition has set forth in previous filings with the Board, by the now familiar means of presenting a FOIA response as though it were an EPA response to a Coalition interrogatory or request for an admission. As such, it is (re)argument that comes too late, and, accordingly, it should be stricken. *See* Order (February 27, 2013), at 7. Finally, for reasons already explained in its Opposition and

[6] On its face, the letter from EPA Headquarters post-dates the permit decision. The accompanying FAQ document is undated, but, regardless, there is no claim that it was relied on or considered by the Region. *In re Russell City Energy, LLC*, PSD Appeal Nos. 10-01 to 10-05, slip op. at 48 (EAB Nov. 18, 2010). *Dominion I*, 12 E.A.D. at 519. Moreover, none of the several exceptions have been demonstrated with respect to either document. Thus, the motion should be denied with respect to both documents. *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006).

Sur-reply, the Region rejects the Coalition's characterizations of the Region's approach to implementing 40 C.F.R. § 122.44(d)(1).

5. The Coalition Has Not Demonstrated that the Taunton Draft NPDES Permit Should Be Added to the Record

The Coalition also asserts that the draft NPDES Permit for the Taunton Wastewater Treatment Plant should be added to the administrative record for the Newmarket NPDES Permit because alleged inconsistencies between the two "confirm" that the nutrient limit chosen by the Region in the latter permit was arbitrary and capricious. Mot. and Not. at 14-17. Again, there is no explicit claim made by the Coalition that any of the exceptions to the rule against supplementation of the administrative record with post-decisional documents are applicable here. In fact, this section of the motion is purely a legal argument, the time for which has long passed. Additionally, because the Taunton draft NPDES Permit was not before the agency at the time of the permit decision at issue in this appeal, and because the Region has never claimed any reliance on the Taunton permit for the permit decision at issue here, it should not be added to the administrative record. *Dominion II*, 13 E.A.D. at 418. Moreover, none of the several exceptions claimed by the Coalition to be applicable are even asserted for this document, and thus, the motion should be denied with respect to it. *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1145 (9th Cir. 2006). Finally, the Region notes the Coalition's continued repetition of mischaracterizations of methods employed to derive effluent limits in the Newmarket permit[7] and disputes the

[7] For instance, the continued reference to "once in 100 year wet weather condition[s]," Mot. and Not. at 17, has been repeatedly corrected. *See, e.g.*, Response to Pet., App. A, at 31-34.

Coalition's substantive claim that alleged differences between the two permits prove that the Region's permit decision in the instant proceeding was clearly erroneous.

6. The Coalition Has Not Demonstrated that the New "Guiding Principles" Document Should be Added to the Record

Finally, the Coalition asserts that a document released in September 2013 by EPA should be added to the administrative record. Mot. and Not. at 17-19. The Coalition's contention is apparently based on its oft-repeated and mistaken demand for cause-and-effect proof before EPA can derive a numeric in-stream target to interpret a narrative water quality criterion, or impose a water quality-based effluent limitation to implement that criterion.[8] Absent from the Coalition's motion, however, is *any* explanation how this post-decisional document satisfies one of the narrow exceptions applicable for supplementation of the administrative record. *Port Auth.*, 10 E.A.D. at 97-98. The claim should be recognized for what it is: bare legal argument regarding proof of causation disguised as a claim that the document belongs in the administrative record for the permit decision.

In short, the motion should be denied as to this document because the Coalition has failed to demonstrate that any exceptions to the general rule apply. *Northwest Envtl. Advocates*, 460 F.3d at 1145.

III. CONCLUSION

[8] In response, the Region relies on the legal arguments previously provided in its Response to the Petition and Sur-Reply.

EPA respectfully requests that the Board strike the Motion and Notice to extent that they consist of late-filed and extraneous legal argument, and that the Board deny the Motion to Supplement the Record in its entirety.

Respectfully submitted,

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Dated: October 25, 2013

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this motion contains less than 7000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Dated: October 25, 2013

_____
Samir Bukhari

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Strike and Opposition to Petitioner's Motion to Supplement the Administrative Record, in connection with NPDES Appeal No. 12-05, was sent to the following persons in the manner indicated:

By Electronic Filing:

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Dated: October 25, 2013

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