



conservation law foundation

February 21, 2013

For a thriving New England

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Eurika 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 Permit No. NH0100196
EAB Appeal No.: NPDES 12-05

Dear Ms. Durr:

Please find enclosed for filing in the above-referenced matter the Non-Party Amici Filing of Conservation Law Foundation, Town of Newington, and Audubon Society of New Hampshire in Opposition to Petitioner's Motion to Suspend Briefing Schedule and to Amend Briefing Schedule and Page Limits.

The above-referenced documents have been filed with the Environmental Appeals Board this day electronically, and copies have been sent by U.S. Mail, First Class, postage prepaid, to counsel for the Environmental Protection Agency, Region 1, for the Petitioner, Great Bay Municipal Coalition, and for *amicus* State of New Hampshire.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Thomas F. Irwin

Encls.

cc: Michael T. Racine, Esq.
Samir Bukhari, Esq.
John C. Hall, Esq.
Evan J. Mulholland, Esq.

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

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In the Matter of:) NPDES Permit Appeal No. 12-05

Town of Newmarket)

Wastewater Treatment Plant)

NPDES Permit No. NH 0100196)

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**NON-PARTY AMICI FILING OF CONSERVATION LAW FOUNDATION,
TOWN OF NEWINGTON, AND AUDUBON SOCIETY OF NEW HAMPSHIRE
IN OPPOSITION TO PETITIONER’S MOTION TO SUSPEND
BRIEFING SCHEDULE AND TO AMEND
BRIEFING SCHEDULE AND PAGE LIMITS**

Conservation Law Foundation (“CLF”), the Town of Newington, New Hampshire (“Town of Newington”), and Audubon Society of New Hampshire (“NH Audubon”), which were granted leave to submit a non-party *amici* brief in response to Petitioner Great Bay Municipal Coalition’s (“Petitioner”) Petition for Review,¹ respectfully request leave to submit the instant filing as non-party *amici*, opposing the Petitioner’s requests to suspend the briefing schedule in this matter and to enlarge the schedule and page limits for its reply brief, and stating in support of such opposition as follows:

1. This action involves an appeal by the Cities of Dover and Rochester (under the name “Great Bay Municipal Coalition”) challenging a NPDES permit issued to the Town of Newmarket relative to Newmarket’s sewage treatment plant, which discharges into the Lamprey River, which is part of the Great Bay estuary.

¹ See Order Granting Motion to File Non-Party Amicus Brief (Feb. 11, 2013).

2. CLF, the Town of Newington, and NH Audubon are greatly concerned with the declining health of the Great Bay estuary, including the Lamprey River, and with the lengthy delays that have already occurred with respect to the issuance and implementation of NPDES permits establishing stringent water quality based effluent limits for total nitrogen, as required by the Clean Water Act.²

3. As set forth in our brief urging the Environmental Appeals Board (“Board”) to deny Petitioner’s Petition for Review, it is not evident what, if any, legitimate interest the Petitioner has in the permit at issue in this appeal – a permit that pertains to the Town of Newmarket and that has no binding effect whatsoever on either Dover or Rochester and their respective sewage treatment plants. Rather, it appears the only interest on the part of Dover and Rochester in prosecuting this action is to delay finalization of Newmarket’s permit on the misguided theory that it will create some sort of “firewall” to delay the issuance and / or finalization of NPDES permits for their respective sewage treatment plants.³

4. Petitioner’s interest in delaying the finalization of Newmarket’s permit is strongly evident in its pleadings. For example, in its Petition for Review, Petitioner’s first request for relief is not for a substantive decision by the Board, but for a stay of the proceedings until various other advocacy efforts pursued by Petitioner are resolved. *See* Petition for Review at 97. Moreover, simultaneous with its Petition for Review, Petitioner filed a motion seeking an additional thirty-day time period to supplement its Petition for Review with further, supplemental briefing (a motion denied by the Board). *See* Petitioner’s Motion for Extension of Time to File a Supplemental Petition for Review (Dec. 14, 2012); Order Denying Motion to File

² CLF’s, the Town of Newington’s, and NH Audubon’s strong interests in this matter are set forth in their February 7, 2013 motion to intervene.

³ EPA has issued a draft NPDES permit for the City of Dover’s sewage treatment plant. It has not yet issued a draft NPDES permit for the City of Rochester’s facility.

Supplemental Brief and Allowing Reply Briefs (Jan. 11, 2013). And now, in its most recent filing, Petitioner seeks to suspend the Board's pending briefing schedule on the theory that – despite a 98 page Petition for Review and more than 2,000 pages of accompanying materials – it needs, *inter alia*, to resolve discrepancies regarding the administrative record and to obtain resolution of its meritless *Daubert* argument.

5. In addition to relief specifically sought by Petitioner, Petitioner's strategy of delay is evidenced by the confusing and repetitive nature of its Petition for Review, itself. Petitioner should not be permitted additional time – or the expansion of the reply-briefing page limit already established by the Board – to cure deficiencies in or otherwise enhance arguments that it made, or could have made more clearly, and with appropriate supporting references, in its Petition for Review. In its order denying Petitioner's motion to file a supplemental brief, the Board already determined that it “is not persuaded that the [Petitioner] 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 presented.” Order Denying Motion to File Supplemental Brief and Allowing Reply Briefs (Jan. 11, 2013) at 5. Petitioner is effectively seeking to circumvent this determination, as well as the Board's twenty-five page reply-brief limitation, by seeking more time – and more pages – in which to make its case.

6. For the above reasons, and because the health of the Lamprey River and Great Bay estuary cannot afford the continuing delays sought by Petitioner, we urge the Board not to amend its pending briefing schedule and reply-brief page limitations.

WHEREFORE, CLF, the Town of Newington, and NH Audubon respectfully request that the Board:

A. Accept this non-party *amicus* filing for consideration in determining whether to grant or deny Petitioner's motion to suspend the briefing schedule and motion to enlarge the schedule and page limitations for Petitioner's reply brief;

B. Deny Petitioner's motions to suspend the briefing schedule and to enlarge the schedule and page limitations for Petitioner's reply brief; and

C. Grant such other relief as it deems appropriate and just.

Respectfully Submitted,

CONSERVATION LAW FOUNDATION

By its attorney,

/s/ Thomas F. Irwin

Thomas F. Irwin, Esq.

Vice President & CLF New Hampshire Director

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TOWN OF NEWINGTON, NEW HAMPSHIRE

and

AUDUBON SOCIETY OF NEW HAMPSHIRE

By their attorney,

/s/ Michael T. Racine

Michael T. Racine, Esq.

PO Box 644

Hillsborough, NH 03244

Tel: 603.748-4570

Dated: February 21, 2013

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing pleading, in connection with NPDES Appeal No. 05-12, was sent this day to the following persons by First Class U.S. Mail, postage prepaid:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
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Mr. Samir Bukhari
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Dated: February 21, 2013

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