

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

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In re:)	
)	
Granite Shore Power Merrimack LLC)	NPDES Appeal Nos. 20-05, 20-06
)	
NPDES Permit No. NH0001465)	
)	

**ORDER GRANTING MOTION FOR CONTINUANCE OF ORAL ARGUMENT DATE
AND ABEYANCE**

On February 3, 2021, EPA Region 1 (“Region”) filed a motion seeking a continuance of the scheduled oral argument date and an abeyance of sixty (60) days in NPDES Appeal Nos. 20-05 and 20-06. EPA Region 1 Motion for Continuance of the Date for Oral Argument and Abeyance (February 3, 2021) (“Motion”). Oral argument is currently scheduled for February 16, 2021. *See* Corrected Order Scheduling Oral Argument and Directing Parties to File Notice of Participation (Dec. 22, 2020). The Region requested this continuance and abeyance so that the EPA leadership under the new Administration, which took office on January 20, 2021, “can be briefed on the cases and the underlying action to determine the Agency’s position going forward in this matter.” Motion at 1. In support, the Region cited a recent executive order that directs federal agencies to review past EPA actions to determine if they are consistent with, among other things, the policy of “improv[ing] public health and protect[ing] our environment, and ensur[ing] access to clean air and water.” Motion at 2; *see* Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

In its motion, the Region stated that it contacted counsel for the petitioners in Appeal No. 20-05, Sierra Club and Conservation Law Foundation, and the petitioner in Appeal No. 20-06,

GSP Merrimack LLC, to ascertain their position on this motion. The Region reported that Sierra Club and the Conservation Law Foundation have “assented” to the motion but that GSP Merrimack stated that it takes “no position on the motion at this time and reserves the right to file a response in accordance with the Board’s rules after the motion is filed.” Motion at 2. On February 3, 2021, the Environmental Appeals Board (“Board”) issued an order providing that GSP Merrimack file a response to the motion as soon as possible but no later than February 8, 2021. Order Setting Deadline for Response to Motion for Continuance of Oral Argument Date at 2 (Feb. 3, 2021)

GSP Merrimack has since filed a response requesting that the Board deny the motion. Permittee GSP Merrimack LLC’s Response to EPA’s Motion for Continuance of the Date for Oral Argument and Abeyance (Feb. 8, 2021) (“Response”). GSP Merrimack asserts that the “agency review provisions of Executive Order No. 13,990 do not apply to the Permit and do not provide good cause to postpone oral argument in these appeals or to hold them in abeyance” and that the executive order “does not * * * require the agency to review its prior permitting actions for individual facilities.” Motion at 1.

Contrary to GSP Merrimack’s argument, it seems appropriate for the Region to invoke the executive order. The executive order’s plain language reflects that the new Administration plans to undertake a broad review of the prior Administration’s environmental actions and “consider suspending, revising, or rescinding” those actions and explicitly revokes a permit. 86 Fed. Reg. at 7037, 7041. And putting aside the executive order, the Region’s request for a sixty-day abeyance of the date for oral argument in order to allow time to brief the incoming Agency leadership is reasonable so that the Region and EPA Headquarters can provide the Board a coordinated legal position for these appeals. Under longstanding EPA procedures, the

Agency's Regional and Headquarters offices must coordinate with respect to their views on issues raised in permit appeals so that the positions presented to the Board consistently represent those of the Agency as a whole, which also properly takes into account the views of a new Administration. *See* Memorandum from Ray Ludwiszewski, Acting Gen. Counsel, Office of Gen. Counsel, and Herbert H. Tate, Jr., Ass't Adm'r, Office of Enforcement, U.S. EPA, to Reg'l Counsels, Assoc. Gen. Counsels, and Enforcement Counsels (Jan. 25, 1993) (attaching procedures for coordination of matters before the Environmental Appeals Board); *see also In re Evoqua Water Techs. LLC*, RCRA Appeal No. 18-01 (Order for Further Briefing on Evoqua's Motion for Stay of Permit Provisions Pending Board Review) (Dec. 14, 2018) (directing the "Region * * * to confer with the EPA's Office of General Counsel to ensure that the Region's responses * * * reflect the Agency's views").

Accordingly, the Board **GRANTS** the Region's motion, **VACATES** the December 22, 2020 Corrected Order Scheduling Oral Argument, and **CANCELS** the oral argument scheduled for February 16, 2021. On or before **April 19, 2021**, the Region shall file with the Board:

1. A motion to remove the litigation from abeyance and re-calendar the oral argument;
2. A motion requesting a voluntary remand, *see* 40 C.F.R. § 124.19(j); *In re W. Bay Exploration Co.*, UIC Appeal Nos. 13-01 & 13-02, at 1-2 (Apr. 16, 2013) (Order Dismissing Petitions for Review as Moot);
3. A motion requesting further abeyance, including the basis for the request and the length of the abeyance being sought; or
4. A motion seeking other appropriate relief or next steps.

Responses to the Region's motion may be filed consistent with the requirements in 40 C.F.R. § 124.19(f)(3), including the requirement governing when such responses are due.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Date: February 9, 2021

By: 

Aaron P. Avila
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **ORDER GRANTING MOTION FOR CONTINUANCE OF ORAL ARGUMENT DATE AND ABEYANCE** in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal Nos. 20-05 and 20-06, were sent to the following persons by email:

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Dated: February 9, 2021



Eurika Durr
Clerk of the Board