

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

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

**RESPONSE OF PETITIONERS SIERRA CLUB AND CONSERVATION LAW
FOUNDATION TO EPA REGION 1 MOTION FOR PARTIAL VOLUNTARY
REMAND AND PARTIAL RECALENDARING OF ORAL ARGUMENT**

Pursuant to the Environmental Appeals Board’s April 28, 2021 order, Sierra Club and Conservation Law Foundation (“Petitioners”) hereby respond to the *EPA Region 1 Motion for Partial Voluntary Remand and Partial Recalendarizing of Oral Argument* (the “Motion”). As discussed below, Petitioners:

(a) Assent to and support the Region’s motion for “a voluntary remand of the effluent limits for combustion residual leachate (‘leachate’) in the final Merrimack Station NPDES Permit (the ‘Permit’) so that the Region can reconsider and reissue leachate limits for public comment”;

(b) Oppose the Region’s request that the Board “dismiss as moot Section VII.B” in Petitioners’ petition. Further, Petitioners request the Board specify and confirm certain effects of the partial remand and any resulting partial dismissal on this proceeding and the permit; and

(c) Assent to the Region’s request that the Board remove “the non-leachate issues in the appeals [] from the current abeyance and re-calendar oral argument to address them.” If the Board grants this aspect of the Motion, Petitioners request that they be permitted to confer with all counsel and jointly propose potential argument dates.

I.

PROCEDURAL AND LEGAL BACKGROUND

On July 27, 2020, Petitioners filed their Petition for Review in NPDES Appeal No. 20-05, seeking remand of certain thermal-related and leachate-related provisions and determinations in the Merrimack Station NPDES permit.

On September 1, 2020, in accordance with 40 C.F.R. §§ 124.16 and 124.60, the Region filed a notice identifying which conditions in the 2020 permit are contested or are uncontested and inseverable from a contested condition (hereinafter, the “contested conditions”). Citing 40 C.F.R. §§ 124.16(a)(1) and 124.19(l), the Region’s notice stated that the “contested conditions of the Permit are stayed pending final agency action on the permit.” Dkt. No. 7 at 3.

As noted in the Motion, EPA’s regulations¹ provide a limited period of time in which the Region may “withdraw” a permit or portion of a permit. After that, the Region must request that the Board grant a “voluntary remand” of the permit or any portion thereof. Motion at 4 (citing, *inter alia*, 40 C.F.R. § 124.19(j)).

With respect to “final agency action,” 40 C.F.R. § 124.19(l) provides as follows:

(l) Final disposition and judicial review.

- (1) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of the final agency action.
- (2) For purposes of judicial review . . . , final agency action on a . . . NPDES . . . permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under this paragraph. A final permit decision must be issued by the Regional Administrator:

¹ This permit appeal is governed by the 2018 version of 40 C.F.R. § 124.19, not by the 2020 amendments. *See* Motion at 4 n.1.

(i) When the Environmental Appeals Board issues notice to the parties that the petition for review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

II.

ARGUMENT / RESPONSE TO MOTION

A. THE BOARD SHOULD GRANT THE REGION'S MOTION FOR PARTIAL VOLUNTARY REMAND OF THE LEACHATE LIMITS.

As discussed in Petitioners' Petition for Review, the Region erred in declining to set more stringent case-by-case Best Available Technology Economically Achievable ("BAT") limits on the Station's discharges of combustion residual leachate. In the absence of applicable effluent limitation guidelines establishing BAT limits for this waste stream, EPA is required to establish BAT limits on a case-by-case basis using its best professional judgment ("BPJ"). 40 C.F.R. § 125.3(a), (c)(2)–(3). Instead, in the 2020 permit, the Region unlawfully established case-by-case BAT limits for combustion residual leachate that are identical to the inadequate 1982 limits that the Fifth Circuit recently vacated in *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999 (5th Cir. 2019). Petition at 68–75. To remedy that clear error, Petitioners sought a remand of the permit to the Region to require it to set new, more stringent BAT limits on the Station's combustion residual leachate discharges. *Id.* at 75.

In the Motion, the Region states:

[A]fter careful deliberation and consideration of, among other things, the plain language of the regulatory text codifying the steam electric effluent limitation

guidelines (“ELGs”), 40 C.F.R. part 423, EPA now views the Permit’s leachate limits as having been based on an incorrect interpretation of the Clean Water Act and EPA’s regulations. . . . Under the revised interpretation, given that the steam electric ELGs do not specify applicable effluent limitations for leachate discharges under the Clean Water Act’s “best available technology economically achievable” (“BAT”) standard, *see* 33 U.S.C. § 1311(b)(2)(A); 40 C.F.R. § 423.13, the Region intends to propose for public comment new leachate limits for the Permit based on a site-specific, Best Professional Judgment (“BPJ”) application of the BAT standard to Merrimack Station, *see* 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3.

Motion at 6–7.

The Region therefore asked the Board to grant a voluntary remand of this aspect of the permit so that it can “determine BPJ-based BAT limits for leachate discharges at Merrimack Station . . . [,] issue for public review and comment a revised draft permit in accordance with 40 C.F.R. § 124.6 to address (solely) the new proposed leachate limits . . . [and] then issue final permit limits for leachate.” *Id.* at 7–8 (citations omitted). “At that point,” the Region explains, “interested persons will have the opportunity . . . to appeal the new leachate limits . . . either directly to federal court or back to the Board, depending on whether the Board has specified that appeal of the decision on remand must be made to the Board to exhaust administrative remedies.” *Id.* at 8 (citing 40 C.F.R. § 124.19(l)(2)(iii) (2018)).

Given that the Region has now recognized that its 2020 determination for leachate limits was erroneous and is seeking through voluntary remand essentially the same remedy that Petitioners sought from the Board in Section VII.B of their Petition — *i.e.*, remand of that aspect of the permit to the Region with a requirement to propose new BPJ-based BAT limits on the Station’s combustion residual leachate discharges — Petitioners support the Region’s request for voluntary remand and ask that the Board grant it.

B. THE BOARD SHOULD DENY EPA’S REQUEST TO DISMISS AS MOOT SECTION VII.B OF THE PETITION. RELATEDLY, THE BOARD SHOULD SPECIFY AND CONFIRM THE EFFECTS OF THE PARTIAL VOLUNTARY REMAND AND ANY PARTIAL DISMISSAL ON THE PROCEEDING AND THE PERMIT.

In the final paragraph of Section III.A of the Motion, “the Region respectfully requests that the Board dismiss as moot Section VII.B of the Environmental Petitioner’s Petition for Review.” Motion at 8. Petitioners do not believe that mootness is the correct legal principle in this context, given that, if the first part of the Motion is granted, the permit will be *remanded*, in part, to the Region. Further, Petitioners respectfully request that the Board, in its Order, specify and confirm certain ramifications of the partial voluntary remand and any partial dismissal on this proceeding and on the permit.

To begin with, the five EAB orders that the Region cites in support of this aspect of its motion — from the *Nashua*, *DuPont*, *Teck Alaska*, *San Jacinto*, and *Keene* appeals² — all involved the unilateral *withdrawal* of one or more challenged permit conditions through notice to the Board pursuant to the first sentence of 40 C.F.R. § 124.19(j) (or its predecessor regulation). None of them involved a motion for voluntary remand (although *Nashua* involved both a unilateral withdrawal of certain conditions before the 30-day deadline and a motion for leave to withdraw another condition after that deadline). Thus, the Region has not cited any authority for

² See Motion at 9 (citing *In re City of Nashua, NH*, NPDES Appeal No. 15-06, at 3-4 (EAB July 16, 2015) (Order Addressing Partial Withdrawal of Permit Conditions and Dismissing Related Permit Challenges as Moot). See also *In re E.I. DuPont De Nemours & Co.*, RCRA Appeal Nos. 13-01 & 13-02, at 2 (EAB May 14, 2014) (Order Dismissing Appeals); *In re Teck Alaska, Inc., Red Dog Mine*, NPDES Appeal No. 10-04, at 4-10, 12-13 (EAB Apr. 30, 2010) (Order Dismissing Petition for Review in Part and Denying Cross Motion to Stay the Entire Permit); *In re San Jacinto River Auth.*, NPDES Appeal No. 07-19, at 4 (EAB Mar. 28, 2008) (Order Dismissing Petition for Review); *In re City of Keene Wastewater Treatment Facility*, NPDES Appeal No. 07-18, at 2 (EAB Dec. 5, 2007) (Order Noticing Partial Withdrawal of Permit and Dismissing Portion of Petition for Review as Moot)).

the principle that a petition or portion thereof becomes “moot” when it is remanded by the Board, voluntarily or otherwise. Petitioners do recognize, of course, that, if granted, the Motion will obviate the need for the Board to hear argument and rule on the leachate issue, at least at this juncture.

Apart from the “mootness” issue, Petitioners believe that the parties would benefit from the specification and confirmation of certain practical ramifications of a partial voluntary remand and any related dismissal, as follows:

(1) First, as Section 124.19(l)(2)(iii) provides, and the Region noted, upon the completion of remand proceedings, appeal of the remand decision would be made either to directly to federal court or back to the Board, depending on whether the Board’s remand order specifically provides that appeal of the decision on remand must be made to the Board. Motion at 8. Petitioners respectfully request that the Board specify where any appeals of the Region’s leachate decision on remand must be filed.

(2) Second, Petitioners respectfully request confirmation as to when “final agency action” on the permit could occur. Petitioners’ understanding from Section 124.19(l)(2) is that, if partial voluntary remand is granted — regardless of whether the Board proceeds to render a decision on the contested non-leachate conditions — there can be no final agency action on any of the challenged conditions (leachate or non-leachate) until the Region completes the remand proceedings on the leachate limits. 40 C.F.R. § 124.19(l)(2)(iii). Completion of the remand proceedings on the leachate limits would occur either upon EPA’s issuance of a revised final permit imposing the new leachate limits (if appeals go directly to federal court) or upon final resolution of any further appeal to this Board of the revised final permit’s leachate limits (if appeals are to be filed with the Board). Indeed, as stated in the Motion, “[t]he Region recognizes

that it cannot take final agency action on the thermal discharge or cooling water intake requirements until resolution of the entire permit appeal before the Board.” Motion at 11, n.3 (citing 40 C.F.R. § 124.19(*I*)). Petitioners understand that this result is dictated by EPA’s regulations, which prevent piecemeal appeals to federal court from one permit. Petitioners believe that confirmation by the Board as to when final agency action on the non-leachate conditions may occur will be useful to the parties, given that the Region is seeking partial voluntary remand and partial dismissal.

(3) As a corollary to the previous point, while the Motion stated that “[u]ntil new limits for leachate discharges are finalized and put into effect, the limits governing leachate discharges from the 1992 Permit will remain in effect,” (Motion at 7, n.2), the Motion appears to be silent on the effect of partial remand, if any, on the effectiveness of other contested conditions and the continued effectiveness of the conditions of the existing permit that correspond to the stayed contested conditions. Petitioners’ understanding, based on Section 124.19(*I*), as well as 40 C.F.R. §§ 124.15(b) (effective date of permits) and 124.16(a) (stays of contested permit conditions pending final agency action), is that all of the contested conditions identified in the Region’s September 1, 2020 notice of contested conditions remain stayed pending final agency action on the leachate limits and the permit as a whole. Likewise, pursuant to 40 C.F.R. § 124.16(c)(2), all of the conditions of the existing permit that correspond to the stayed conditions remain in effect pending final agency action on the whole permit. This result is indicated by the Region’s September 1, 2020 notice of contested conditions. *See* Permit Issuer Notice of Uncontested and Severable Conditions, Sept. 1, 2020 (Dkt. # 7) at 3 (citing 40 C.F.R. §§ 124.16(a)(1), 124.16(c)(2), 124.19(*I*), identifying contested conditions in new permit and corresponding conditions in existing permit, and stating that “[t]hese contested conditions of the

Permit are stayed pending final agency action on the Permit . . . [and] the Permittee must comply with the conditions of its existing permit (*i.e.*, the 1992 Permit) that correspond to the stayed conditions listed above”). Petitioners understand that this result is dictated by EPA’s regulations to avoid a situation where a new permit condition goes into effect but cannot be appealed due to the absence of final agency action on the permit.

Petitioners believe that confirmation of all of these procedural issues will be beneficial to the parties, and respectfully request that the Board addresses them in its Order on the Motion.

C. THE BOARD SHOULD GRANT THE REGION’S REQUEST TO RE-CALENDAR ORAL ARGUMENT ON THE NON-LEACHATE ISSUES.

Finally, the Region requests that the Board “re-calendar oral argument and proceed to rulings on the thermal discharge and cooling water intake requirements currently on appeal before the Board.” Motion at 9 (heading III.B). Petitioners support this aspect of the Motion and ask the Board to grant it. As discussed in Section VII.A of the Petition for Review, Petitioners believe that the Region erred, not only with respect to leachate limits, but also with respect to thermal discharge conditions. *See* Petition at 38–68. Petitioners are eager to pursue their request that the Board remand the contested thermal conditions and determinations to the Region for a revised draft permit, public comment period, and revised final permit. As the Region stated in the Motion, “while the voluntary remand of the leachate limits is in process . . . if the Board decides to remand to the Region any issue (or issues) related to the thermal discharge and/or cooling water intake requirements, then that remand could be dealt with sooner, rather than having it occur after reissuance of the remanded leachate limits.” Motion at 10–11. Petitioners agree.

Petitioners further request that if the Board grants this aspect of the Motion, that they be permitted to confer with all counsel and jointly propose potential argument dates.

III.

CONCLUSION

For these reasons, Petitioners respectfully request that the Board issue an Order:

- (a) Granting the Region's request for partial voluntary remand as to the combustion residual leachate limits in the Merrimack Station NPDES permit;
- (b) Denying the Region's request that the Board dismiss as moot Section VII.B of their Petition for Review, and specifying and confirming the effect on the proceeding and permit of partial voluntary remand and any partial dismissal, as discussed on pages 6–8, above; and
- (c) Granting the Region's request to re-calendar oral argument and proceed to rulings on the thermal discharge conditions contested in this appeal, and allowing the parties to propose potential oral argument dates.

Dated: June 11, 2021

Respectfully Submitted,

/s/ Reed W. Super

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this response to motion contains fewer than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5) (2018).

/s/ Reed W. Super
Reed W. Super

CERTIFICATE OF SERVICE

I, Reed W Super, hereby certify that on June 11, 2021, I caused to be served a true and correct copy of the foregoing motion to the following by email and through the EAB's e-filing system:

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