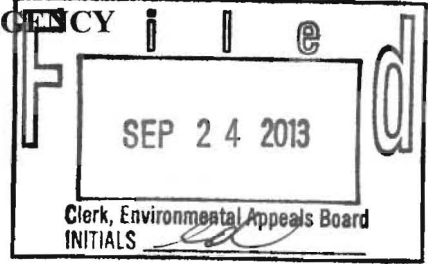


**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, DC**



\_\_\_\_\_  
In re: \_\_\_\_\_ )  
Town of Newmarket \_\_\_\_\_ )  
Wastewater Treatment Plant \_\_\_\_\_ )  
Permit No. NH0100196 \_\_\_\_\_ )  
\_\_\_\_\_ )

NPDES Appeal No. 12-05

**ORDER DENYING MOTION TO DISMISS**

On August 28, 2013, the Great Bay Municipal Coalition (“Coalition”), representing the municipalities of Dover and Rochester, NH, filed a Motion to Dismiss this petition, citing plans for a new peer review of a 2009 New Hampshire Department of Environmental Services (“NHDES”) report titled: “Numeric Nutrient Criteria for the Great Bay Estuary” (June 2009) (“2009 Great Bay Nutrient Report”) (A.R. K.14) to be conducted by the Coalition and NHDES. The Coalition notes that “the key scientific and factual disputes underlying the appeal all relate to whether or how nutrients have adversely impacted the Great Bay system” and that the 2009 *Great Bay Nutrient Report* is “at the heart of the dispute.” Petitioner’s Motion to Dismiss the Petition for Review of the Town of Newmarket NPDES Permit (“Motion to Dismiss”) at 1. According to the Coalition, the new peer review will “cover the central regulatory, scientific and factual disputes of this permit appeal” and will “render moot the legal and factual issues surrounding the prior limited peer review conducted by [the U.S. Environmental Protection Agency (“EPA”)] which excluded participation by the Coalition.” *Id.* The Coalition further

contends that EPA Regional Administrator Spaulding agreed at a recent meeting to consider the outcome of the new peer review in issuing any further National Pollutant Discharge Elimination System (“NPDES”) permits to Great Bay communities. *Id.*

The Region opposes the Coalition’s Motion to Dismiss and objects to the Coalition’s characterization of Regional Administrator Spaulding’s statement, to the extent that it suggests that EPA will delay issuing NPDES permits to other Great Bay communities until the new peer review is completed. Region 1’s Response to Petitioner’s Motion to Dismiss (“Region 1’s Response”) (Aug. 28, 2013). According to the Region, the new peer review “is still in its very early stages, so it is uncertain when the peer review will be completed and what useful information it will provide.” *Id.* at 2. Further, the Region emphasizes that the issues in this case have been fully briefed for months and are poised for decision following an extensive commitment of resources by all parties. The Region disputes that the issues of statutory and regulatory interpretation will be mooted by the further peer review, and notes that “[t]hese issues will only have to be relitigated in the future, which would be a waste of scarce administrative and judicial resources.” *Id.* at 3.

Conservation Law Foundation (“CLF”), participating as *amicus curiae*, also opposes the Coalition’s Motion to Dismiss.<sup>1</sup> Non-Party Amicus Filing of [CLF] in Response to Petitioner’s Motion to Dismiss (“CLF Response”) (Aug. 30, 2013). CLF contends that the Coalition’s plan for a new peer review of the 2009 *Great Bay Nutrient Report* “simply has no bearing on this appeal, which is premised on, and limited to, an established administrative record.” *Id.* at 2.

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<sup>1</sup> The Board hereby grants CLF’s August 30, 2013, request for leave to file its Response to Petitioner’s Motion to Dismiss.

CLF also points out that significant resources already have been invested in this pending appeal and that “[a] dismissal at this eleventh hour \* \* \* will only open the door for matters that already have been fully litigated to be *re*-litigated in upcoming NPDES permits anticipated to be issued by EPA (particularly permits to be issued to the Cities of Dover and Rochester, the municipalities which brought this appeal in the first place).” *Id.* CLF argues that “[i]n addition to greatly undermining the efficiency of the administrative and adjudicative process and further burdening administrative and judicial resources, such a result will result in delayed implementation of necessary and well-supported Clean Water Act protections in the Great Bay estuary, to the detriment of the estuary’s health.” *Id.* at 2-3. CLF also states that it “has been greatly troubled by the multi-pronged strategy of delay employed by the Petitioner as a means to slow the regulatory process as it relates to nitrogen pollution in the Great Bay estuary – a strategy that has included, but is not limited to, federal litigation against [EPA] (recently dismissed by the U.S. District Court for the District of Columbia), state-level litigation against [NHDES] (dismissed by the N.H. Superior Court and currently pending on appeal in the N.H. Supreme Court), and this appeal.” CLF Response at 1-2 (footnote omitted).

In its Reply to the Responses from Region 1 and CLF, the Coalition “acknowledge[s] that Administrator Spalding did not agree to delay the Dover permitting process.” Petitioner’s Reply to Region 1’s Response to Petitioner’s Motion to Dismiss and Conservation Law Foundation’s Motion for Leave to Submit a Non-Party Amicus Filing (Sept. 9, 2013) (“Reply”) at 1. However, the Coalition asserts that its peer review process is likely to be completed by early January 2014 at the latest and that the Dover permit is not likely to be finalized until after the end of 2013. Therefore, the Coalition contends, “EPA’s primary concern is misplaced.” *Id.* at 1. The

Coalition further asserts that a possible outcome of its peer review is a conclusion that “(1) nutrients are not the likely cause of periodic low dissolved oxygen and eelgrass population decline within the Great Bay system and/or (2) the 2009 Numeric Nutrient Criteria are not based on reliable scientific analysis.” *Id.* at 2. Finally, the Coalition asserts that “[a]n adverse decision for Petitioners [in this case] would cause the Coalition to file an appeal to the First Circuit resulting in ‘further delay’ of the implementation of the Newmarket permit.” *Id.* at 2-3

The Environmental Appeals Board (“Board”) finds considerable lack of clarity in the Coalition’s position as to its plans for further litigation in this matter if the Board were to grant its motion to dismiss. Its statement in its Reply that it will appeal any adverse decision issued by the Board, causing further delay in the Newmarket permit, is inconsistent with the usual posture of a petitioner who wishes to end all litigation of a matter.<sup>2</sup> Further, the Coalition appears to be placing considerable reliance on the expectation that its new peer review of the 2009 *Great Bay Nutrient Report* will be completed before further Great Bay NPDES permits are issued, that the new peer review will change the scientific conclusions from that Report, and that the new peer review will lead to a different result for future permits (most notably, the City of Dover’s permit). If all those expectations are not met, as appears quite possible, the Coalition is clearly signaling its intention to continue to litigate what it has identified as the key issue involved in this case –

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<sup>2</sup> To the extent that the Coalition is suggesting that the Newmarket permit would not become final in the event of a judicial appeal, it is incorrect. The permit decision becomes final agency action, and goes into effect immediately, upon completion of administrative proceedings and issuance of the final permit by the Regional Administrator following action by the Board. 40 C.F.R. § 124.19(l)(2). It is unclear whether the Coalition’s implied threat to continue to delay the Newmarket permit reflects an intent to seek a stay of the permit on appeal.

the scientific defensibility of the 2009 *Great Bay Nutrient Report* and the scope of EPA's legal authority and discretion to consider that Report in setting nitrogen limits in NPDES permits.<sup>3</sup>

The cities represented by the Coalition in this matter (Dover and Rochester) have demonstrated their resolve to continue litigation of these issues by seeking to reopen their federal district court litigation, *City of Dover v. U.S. Environmental Protection Agency*, No. 12-CV-01994 (D.D.C., July 30, 2013), following the recent dismissal of that action. The cities' proposed amended complaint seeks judicial review of the scientific defensibility of the 2009 *Great Bay Nutrient Report* and the scope of EPA's authority and discretion to rely on that Report in making permitting decisions. Further, the proposed amended complaint requests an injunction against EPA's ability to issue *or enforce* permit limits relying on the 2009 Report, *and specifically lists the Newmarket permit* among the NPDES permits at issue. See Proposed Am. Compl. at ¶ 68, D, H, at 15, 23. In addition, the Coalition cities are continuing to pursue their state court challenge to the 2009 *Great Bay Nutrient Report* on appeal to the New Hampshire Supreme Court, following dismissal by the N.H. Superior Court for lack of justiciability. *City of Dover v. NHDES*, No. 2012-CV-00212 (N.H. Super. Ct., Nov. 7, 2012), *appeal docketed*, No. 2013-0119 (N.H. July 16, 2013).

These actions make it abundantly clear that the Coalition plans to continue to litigate the key issues that it has raised to the Board in this matter. Petitioner's Motion to Dismiss does not reflect a decision to cease and withdraw from litigation, but simply a desire to move the Coalition's challenge to a different forum and/or to delay the Board's ability to review the key

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<sup>3</sup> See, e.g., *City of Dover v. EPA*, No. 12-CV-01994 (D.D.C., July 30, 2013), Proposed Am. Compl. ¶¶ 5, 10, D, H., at 2-3, 4-5, 23.

issues that the Coalition has raised in this matter. Under these circumstances, the Board cannot conclude that the controversy over the key issues that the Coalition has raised in this matter is resolved or that the issues are mooted by the Coalition's request to withdraw its petition.

Under the governing regulations, it is within the Board's discretion to grant or deny a petitioner's motion to dismiss a petition. There is no unilateral right to withdraw a petition. *See* 40 C.F.R. § 124.19(k) (providing that "Petitioner, by motion, *may* request to have the Environmental Appeals Board dismiss its appeal."<sup>4</sup> The rule does not require the Board to grant that request. Moreover, the Board has full authority and discretion to manage its docket. *See* 40 C.F.R. § 124.19(n).<sup>5</sup> While the Board generally will grant requests for voluntary

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<sup>4</sup> The EAB recently revised its regulations governing permit appeals before the Board, 40 C.F.R. § 124.19, and the provisions of the revised rule took effect on March 26, 2013, and are applicable to any document filed with the Board on or after that date, including the Coalition's Motion to Dismiss.

<sup>5</sup> *See In re Peabody Western Coal Co.*, CAA Appeal No. 10-01 (EAB Aug. 13, 2010) (Order Granting Motion for Voluntary Remand) (articulating Board's inherent authority to rule on motions and fill other "gaps" in its procedural rules); *see also, e.g., In re MGP Ingredients of Illinois, Inc.*, PSD Appeal No. 09-03 (EAB Jan. 8, 2010) (Order Imposing Sanctions, Setting Final Deadline for Filing Response and Scheduling Status Conference) (imposing page-limit sanction against permit issuer and ordering appearance at a status conference in response to "systematic failure to timely assemble the administrative record, provide representation and defend a permit issued"); *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 to 08-06 (EAB May 21, 2009) (Order Denying Motion to Participate) (initially denying amici's motion to participate filed two months after the deadline for submission without explanation or justification). Further support for the Board's inherent authority to manage its docket may be found in general and well-established principles of administrative law. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543-44 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."); *see also American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (explaining that it is "always within the discretion of \* \* \* an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.").

dismissal, in the interests of efficiency and justice, there may be circumstances under which it is appropriate to decline to do so. *See, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06,, *slip op.* at 17 (Sept. 24, 2009), 14 E.A.D.\_\_\_\_. In *Desert Rock*, the Board explained the requirement that permit issuers must seek Board permission to withdraw a permit when a petition for review of that permit has been under Board review for some time:

It allows the Board to decide whether, after the Board has granted review and performed a substantial review of the case, it would be more appropriate for the Board to issue a final decision on the merits or grant the voluntary remand request. Thus, for example, in cases where significant time has passed following the submission of final briefs by all the parties, the Board may be in a position to issue a final decision at the time of a request for voluntary remand. *See Indeck-Elwood 2004 Stay Order* at 9 and n.16 (noting that a stay – rather than a remand – was appropriate where the Board has already “made considerable headway in its examination of the record”).

*Id.*

Similarly, in the federal courts, a motion by an appellant to dismiss an appeal “is generally granted, but may be denied in the interest of justice or fairness.” See Fed. R. App. P. 42(b); *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004) (stating that “[d]oubtless there is a presumption in favor of dismissal but the procedure is not automatic,” and denying plaintiff’s motion to dismiss where plaintiff’s counsel was seeking to gain a litigation advantage in future cases by avoiding adverse precedent); *Am. Auto. Mfrs. Ass’n v. Comm’r, Mass. Dep’t. of Env’l. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (allowing dismissal under the facts of that case, but noting that dismissal may not be warranted in some circumstances, such as an attempt to evade appellate review or to frustrate orders governing the conduct of appeal); *Twp. of Benton. v. Cty. of Berrien*, 570 F.2d 114, 118-19 (6th Cir. 1978) (denying plaintiff’s motion to dismiss where the court would have to address the relevant issues in any event due to co-appellants’ intent to continue

their appeals); *Ford v. Strickland*, 696 F.2d 804, 807 (11th Cir.), *cert. denied*, 464 U.S. 865 (1983) (denying late request for voluntary dismissal from a death row inmate, in part, because the case involved issues that repeatedly occur in capital cases); *see also Suntharalinkam v. Keisler*, 506 F.3d 822, 823 (9th Cir. 2007) (Kozinski, J., dissenting) (arguing that the majority's dismissal of the appeal in that case upon appellant's motion made after oral argument threatened the integrity of the appellate process based on the conclusion that appellant's counsel's motivation was to evade appellate determination of questions that could undermine present and future petitions of his other clients).

The Board will consider similar factors to those considered by the federal courts to determine whether to exercise its discretion to grant or deny the Petitioner's motion to dismiss in this case, including whether the motion is opposed, whether it is untimely in light of the stage of the proceedings, whether the Board is likely to have to address the issues presented in any event, whether Petitioner may be seeking dismissal for improper purposes such as evading Board review or improperly attempting to manipulate the administrative and judicial review system, and other factors as justice may require. As noted above, both the Region and CLF oppose Petitioner's motion to dismiss, on various grounds, including the concern that the issues of statutory and regulatory interpretation raised in the petition will not be mooted by further peer review and will have to be relitigated in the future, causing further delay. The Board agrees with the Region that this would be a waste of scarce administrative and judicial resources. On the issue of timeliness, the Board notes that Petitioner's motion to dismiss was filed eight months after the filing of the petition and five months after the completion of extensive briefing (including multiple replies, sur-replies and motions filed by Petitioner). The Board already has



invested considerable resources in reviewing the myriad legal and factual arguments raised by Petitioner and an extensive and complicated administrative and scientific record, and expects to issue a final decision on the merits in the near term.

While these factors alone would not dissuade the Board from dismissing a case if dismissal would finally resolve all issues, that does not appear to be the case under the unusual circumstances presented here. In this case, the Coalition and the cities it represents have made clear their intent to continue litigating the key issues they have raised to the Board, either in the judicial forum or in future permit appeals to the Board, or both.

Petitioner's motion to dismiss this case cites its plans for a new peer review of the 2009 *Great Bay Nutrient Report* as its reason for seeking dismissal. Petitioner contends that the new peer review will "cover the central regulatory, scientific and factual disputes of this permit appeal" and will "render moot the legal and factual issues surrounding the prior limited peer review conducted by EPA which excluded participation by the Coalition." Motion to Dismiss at 1. This claim is, at best, highly speculative. The record shows that there already were two peer reviews of the 2009 Report by nationally-recognized experts. Additional peer reviews, even if they support the Coalition's views as the Coalition seems to expect, would not "moot" the prior reviews. New and conflicting scientific opinions would set up a "battle of the experts," requiring additional review and evaluation by the Region and the State to determine whether their prior assessments of the reliability of the 2009 Report should be changed. This could be a complex and time-consuming process, and its outcome is unpredictable.

The Board must consider the potential effect on other parties and the public of granting or denying Petitioner's motion to dismiss at this late stage of the proceedings. Certainly dismissal

of this petition with prejudice would have the beneficial effect of providing certainty and finality for the permittee, the Town of Newmarket, by allowing its NPDES permit to become immediately final and precluding Petitioner's threatened judicial appeal.<sup>6</sup> That certainty is clouded, however, by the Coalition cities' continuing federal district court litigation, which includes a request for an injunction against issuance or enforcement of the Newmarket NPDES permit. *See, e.g., City of Dover v. EPA*, No. 12-CV-01994 (D.D.C., July 30, 2013), Proposed Am. Compl. ¶¶ 68, D, H., at 15, 23. Newmarket's permit also will become final if the Board denies Petitioner's motion to dismiss and affirms the Region's permitting decision. *See* 40 C.F.R. § 124.19(k)(2).<sup>7</sup> In that event, however, Newmarket would continue to be subject to some future uncertainty in light of Petitioner's threat to appeal an adverse decision by the Board.<sup>8</sup>

Immediate dismissal of the petition also could have a beneficial environmental effect if it would expedite implementation of nitrogen controls on the Newmarket plant's discharges. Given the late stage of the proceedings before the Board in this matter, however, it is not at all apparent that there would be any significant difference in this respect between an immediate dismissal of the petition and issuance of an affirming decision on the merits.

A Board decision on the merits of the key issues raised by the Coalition could provide some guidance and lessen uncertainty as to how EPA will proceed for other Great Bay

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<sup>6</sup> If this appeal is dismissed without a decision on the merits, the Coalition would not have exhausted its administrative remedies, which is a prerequisite for seeking judicial review. *See* 40 C.F.R. § 124.19(l).

<sup>7</sup> The Coalition is incorrect in suggesting in its Reply that Newmarket's permit will not become final if the Coalition appeals an adverse Board decision in this matter. *See* Reply at 3.

<sup>8</sup> While the permit would remain final pending appeal, absent a stay, there would remain some risk of an adverse decision on appeal and remand that could change the terms of the permit.

communities whose NPDES permits could be affected by the Coalition's continuing litigation over the Region's use of the 2009 *Great Bay Nutrient Report*. While EPA decisions on all permits are made on a case-specific and site-specific basis, the scientific defensibility of the 2009 *Great Bay Nutrient Report* could be a key common issue for many permits. A Board decision on that issue would, at a minimum, provide EPA's final position with respect to whether the existing administrative record supports the scientific validity of that Report and the Region's consideration of that Report in determining permit limits. In addition, a Board decision could provide helpful analysis for the courts' review of these complex scientific issues in the likely event that the Coalition continues to bring this issue to the courts for resolution.

On balance, under the circumstances presented in this unusual case, the Board concludes that justice will be best served by denying Petitioner's belated motion to dismiss this action. In light of Petitioner's continuing litigation of the key issue it has raised to the Board, the important public interest in resolving this controversy as soon as possible to protect the health of the Great Bay Estuary, and the significant loss of efficiency and scarce administrative resources that would result if the Board were to set aside this complex matter, only to have to take it up again in the future, the Board will exercise its discretion to manage its docket by completing its consideration of the key issues raised by Petitioner in this matter.

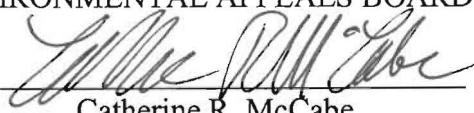
Accordingly, Petitioner's Motion to Dismiss is DENIED.

Dated:

Sept. 24, 2013

ENVIRONMENTAL APPEALS BOARD

By:



Catherine R. McCabe  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Motion to Dismiss in the matter of Town of Newmarket Wastewater Treatment Plant, NPDES Appeal No. 12-05, were sent to the following persons in the manner indicated:

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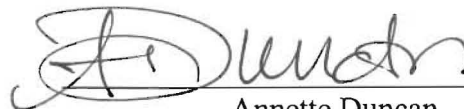
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Dated: SEP 24 2013



Annette Duncan  
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