



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**Region 1 – New England**  
**5 Post Office Square, Suite 100**  
**Boston, MA 02109-3912**

September 1, 2020

**VIA ELECTRONIC FILING AND EMAIL**

Ms. Eureka Durr  
Clerk of the Board  
U.S. EPA Environmental Appeals Board  
1200 Pennsylvania Avenue, NW (Mail Code 1103M)  
Washington, D.C. 20460-0001

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**RE: Merrimack Station (NPDES Permit No. NH0001465)**  
**NPDES Appeals No. 20-05 and No. 20-06**

Dear Ms. Durr, Mr. Super, Mr. Gidiere, *et al.*:

In accordance with 40 C.F.R. §§ 124.16 and 124.60, and in connection with the above-referenced NPDES permit appeals, Region 1 (“Region 1” or “the Region”) of the United States Environmental Protection Agency (EPA) provides this notice of the uncontested and severable conditions of National Pollutant Discharge Elimination System (NPDES) Permit No. NH0001465 (the “Permit”). While certain conditions of the Permit are stayed as a result of the appeals, the uncontested and severable conditions will go into effect on October 1, 2020, which is 30 days from the date of this notice. *See* 40 C.F.R. §§ 124.16(a)(2)(i), 124.60(b)(1) and (5).

When a new NPDES permit is issued (or reissued) by EPA but is appealed to the EAB, EPA must issue a notification identifying which permit conditions are stayed as a result of the appeal and which permit conditions will go into effect. *See* 40 C.F.R.

§ 124.16(a)(2)(i) and (ii). While a permit appeal is pending, the contested permit conditions are stayed. *Id.* § 124.16(a)(1). Contested conditions include those directly challenged in the appeal as well as any uncontested permit conditions that are “inseverable” from the directly contested conditions. *Id.* §§ 124.16(a)(2)(i), 124.60(b)(4). Uncontested permit conditions that are “severable” from the contested conditions, however, are not stayed and become enforceable conditions of the permit. *Id.* § 124.16(a)(2)(i), (ii). *See also* 40 C.F.R. § 124.60(b)(5).

Region 1 reissued the Permit to GSP Merrimack, LLC (“GSP” or the “Permittee”) on May 22, 2020. GSP timely petitioned EPA’s Environmental Appeals Board (EAB) for review of the Permit on July 27, 2020 (EAB Appeal NPDES No. 20-06) (the “GSP Petition”). The Permittee contests the following provisions of the Permit:

1. Conditions at Parts I.E.1, 2, 4 and 7.a - 7.c related to installing and operating wedgewire screens (WWS) from April 1<sup>st</sup> through August 15<sup>th</sup> of each year;
2. The condition at Part I.G.3, related to scheduling the Unit 2 annual maintenance outage to occur between May 15<sup>th</sup> and June 15<sup>th</sup> of each year; and
3. The condition at Part I.E.7.d requiring installation of the fish return sluices within six months of the effective date of the Permit.

*See* GSP Petition at 2. The Permittee states that “GSP does not contest the requirement to construct and operate the fish return sluices,” *id.* at 6, as specified by Part I.E.3 of the Permit. Furthermore, neither the Permittee nor any other party contests any of the other provisions at Part I.E.3. As a result, Part I.E.3 will need to be satisfied regardless of the outcome of the appeal. Therefore, it is an “uncontested condition” of the Permit pursuant to 40 C.F.R. § 124.60(b)(6)(ii). Moreover, no Petitioner states that the provisions of Part I.E.3 will be incompatible with the combination of technologies it favors for complying with CWA § 316(b). Therefore, Part I.E.3 is also an “uncontested condition” under 40 C.F.R. § 124.60(b)(3). As noted above, the Permittee does, however, contest *the schedule* specified in Part I.E.7.d. As a result, the Permit’s schedule requirement – calling for the fish return sluices to be installed within six months of the effective date of the Permit – is a “contested condition” and must be stayed.

The Sierra Club, Inc. (Sierra Club), and the Conservation Law Foundation, Inc. (CLF), also jointly filed a timely petition seeking EAB review of the Permit on July 27, 2020 (the “Sierra Club/CLF Petition”). These Petitioners contest the following provisions of the Permit:

1. Conditions at Part I.A.11 related to in-stream temperature limits;
2. The *absence* of a permit provision related to thermal discharge plumes equivalent to either Part I.A.1.g of the prior NPDES Permit for Merrimack Station – which was issued on June 25, 1992, and modified October 22, 1992 (the “1992 Permit”) – or Part I.A.23 of the 2011 Draft Permit for Merrimack Station;
3. The condition at Part I.A.12 related to non-thermal water quality standards, as it has been interpreted by EPA; and

4. The *absence* at Part I.A.4 of more stringent limits based on best available technology (BAT) for discharges of combustion residual leachate (“CRL”).

See Sierra Club/CLF Petition at 2-3.

For the purposes of this notice, and in light of the arguments made in the Sierra Club/CLF Petition and the facts in the record for the Permit, Part I.A.4 of the Permit as it pertains to CRL is an “uncontested condition” within the meaning of 40 C.F.R. § 124.60(b)(6)(ii) (uncontested conditions include “[p]ermit conditions which will have to be met regardless of the outcome of the appeal”). This is because Petitioners Sierra Club/CLF seek *more stringent* limits for CRL than were included in the Permit, but there is no argument by any petitioner that these limits should be made *less* stringent. As a result, the Permittee will at least need to meet the limits for CRL in Part I.A.4 of the Permit but, depending on the result of the appeal, could also potentially have to meet even more stringent limits later. In addition, because the limits for CRL currently included in Part I.A.4 of the Permit can be satisfied with existing technology at the facility and require compliance with the same TSS limits that were in the 1992 Permit, meeting the limits for CRL in Part I.A.4 of the Permit will not be incompatible with any future ruling that calls for more stringent limits.

In sum, as explained above, Parts I.E.3 and I.A.4 (as it pertains to CRL) are “uncontested conditions” of the Permit within the meaning of 40 C.F.R. § 124.60(b)(6)(ii). Otherwise, the above-detailed conditions of the Permit challenged by the various Petitioners are stayed and are collectively referred to herein as the “contested conditions.” These contested conditions of the Permit are stayed pending final agency action on the Permit. *Id.* §§ 124.16(a)(1), 124.19(l). Specifically, the stayed conditions are the following: Parts I.E.1, 2, 4, and 7.a - 7.c; Part I.G.3; Part I.E.7.d; Part I.A.11, and Part I.A.12.<sup>1</sup>

EPA has determined that all other conditions of the Permit are uncontested and severable, and, accordingly, these conditions will become fully effective and enforceable beginning on October 1, 2020, which is 30 days from the date of this notice.

As required by 40 C.F.R. § 124.16(c)(2), to the extent that conditions of the Permit are stayed, the Permittee must comply with the conditions of its existing permit (*i.e.*, the 1992 Permit) that correspond to the stayed conditions listed above. The 1992 Permit conditions that remain in effect are: Part I.A.1.b,<sup>2</sup> Part I.A.1.c, Part I.A.1.f, Part I.A.1.g, Part I.A.4.f, Part I.A.11.a-b and Part I.A.13.

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<sup>1</sup> The Sierra Club/CLF Petition, at 2-3, states that in addition to contesting the thermal discharge limits in Part I.A.11 of the Final Permit, it also contests both the Final Permit’s failure to include a provision like Part I.A.1.g of the 1992 Permit and “[t]he Region’s purported limitation of Part I.A.12 [of the Final Permit] (which continues the prohibition against violating water quality standards from Part I.A.1.b of the 1992 Permit) to not pertain to thermal discharges as interpreted by Region 1.” Due to these challenges, Region 1 has determined Part I.A.12 of the Permit is contested and stayed. In its stead, the corresponding provision of the 1992 Permit, Part I.A.1.b, remains in effect. Region 1 notes, however, that it and Petitioners Sierra Club and CLF may have conflicting interpretations of Part I.A.1.b of the 1992 Permit.

<sup>2</sup> See n. 1 (discussing Part I.A.1.b of the 1992 Permit).

If you have any questions regarding this notice, please contact, of our Office of Regional Counsel, either Mark Stein at (617) 918-1077, Cayleigh Eckhardt at (617) 918-1044, or Michael Curley at (617) 918-1623.

Sincerely,

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Dennis Deziel  
Regional Administrator  
US EPA-Region 1

cc (by email): Steve Neugeboren, OGC-Water Law Office  
James S. Andrews, GSP Merrimack LLC  
Elizabeth Tillotson, GSP Merrimack LLC  
Allan Palmer, GSP Merrimack LLC  
Stergios Spanos, NH Department of Environmental Services  
Damien Houlihan, EPA  
Marie McDonald, EPA

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Uncontested and Severable Conditions, in the Matters of Granite Shore Power Merrimack LLC and GSP Merrimack Station, NPDES Appeals No. 20-05 and No. 20-06, was served on the following persons in the manner indicated:

By Electronic Filing:

Eurika Durr  
Clerk of the Board  
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By email, by agreement of the parties:

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Dated: September 1, 2020

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