

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

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| _____                      | ) |                        |
| In the Matter of:          | ) |                        |
|                            | ) |                        |
| Town of Newmarket          | ) |                        |
| Wastewater Treatment Plant | ) |                        |
|                            | ) | NPDES Appeal No. 12-05 |
| NPDES Permit No. NH0100196 | ) |                        |
| _____                      | ) |                        |

**RESPONDENT REGION 1’S OPPOSITION TO PETITIONER’S REQUEST TO  
STAY THE PROCEEDING**

The Coalition requests the Board to complete its full review, but then to stay the proceedings until three collateral matters are resolved. *Pet.* at 3 n.4, 97. “As a general matter, the Board typically grants a motion where the movant shows good cause for its request and/or granting the motion makes sense from an administrative or judicial efficiency standpoint.” *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 to 08-06, slip. op. at 19 (EAB 2009). In this case, far from showing good cause, the Coalition has provided only conclusory, hypothetical and speculative grounds in support of its request to stay the proceedings. Accordingly, the Board should deny the Coalition’s request.<sup>1</sup>

First, the Coalition asserts that the Board should stay this proceeding because three members of the Coalition filed a “Clean Water Act [§] 505(a) mandatory duties

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<sup>1</sup> The Coalition’s request, which the EPA has construed as a motion, was not filed as a separate motion, but rather is contained within the Petition for Review. *See Pet.* at 3 n.4, 97. In addition to the arguments presented here, EPA, where appropriate and in the interest of brevity, has included citations to arguments contained within the Response to the Petition.

suit” in federal court, which the Coalition asserts – without explanation – would either result in a remand of the permit, *Pet.* at 3 n.4, or would render this proceeding moot, *Pet.* at 97, if the suit should prove successful. In that case, the Coalition alleges that the threshold values identified in New Hampshire’s 2009 *Great Bay Nutrient Report* constitutes new numeric nutrient criteria and that EPA failed to perform its mandatory duty under CWA Section 303(c) by not reviewing and approving or disapproving these numeric nutrient criteria. But the resolution of that case is unknown, and will be for the foreseeable future, and there is no reason to presume either (1) that a judgment will be entered in favor of the Coalition or, (2) in the event it is, that the relief ultimately obtained from the court would (or even could) result in a remand of the permit or moot this permit proceeding.

The issue of whether EPA has failed to perform a mandatory duty to review a new or revised state water quality standard does not diminish in any way EPA’s ability to use the *Great Bay Nutrient Report* to interpret the State’s narrative nutrient criterion, as EPA has explained. *See* Respondent Region 1’s Memorandum in Opposition to the Petition for Review (“Reg. Mem. Opp”), dated February 7, 2013, at Section V.A.1.b.i (explaining that the relevance of the *Great Bay Nutrient Bay Report* as a source of information to consider in the process of translating applicable narrative water quality criteria into a numeric effluent limitation does not turn on whether numeric thresholds have been finalized, adopted as rules under RSA 541-A or submitted to EPA for approval as a revised WQS pursuant to section 303 of the Act).

The Coalition also seeks a stay until after the outcome of a FOIA appeal, *Pet.* at 97, implying that such appeal, if successful, would result in the production of documents

relevant to the Petition for Review and dispositive of the issues therein. Not only is the outcome of such an appeal speculative, but the Coalition has failed to explain its significance in any meaningful way. Moreover, even if successful, the Coalition would nonetheless face the “high threshold” of proving that any newly produced documents should be part of the administrative record in this proceeding. *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 1-2 (EAB June 12, 2009) (Order Denying Stay and Establishing Further Briefing Schedule).

Finally, the Coalition seeks a stay until “EPA Headquarters decides whether to conduct an updated peer review,” *Pet.* at 97. Whether and when such a decision would be made, let alone its outcome, is unknown. Even if a new peer review were to occur, there is no reason to assume that it would differ from reviews that have already been conducted; and if it did differ, it would not necessarily change the permit result here, as EPA’s decision was based on multiple lines of evidence and multiple sources of information, not merely the mechanical application of the numeric thresholds set forth in the *Great Bay Nutrient Report* without review.

Under federal regulations, the Board must issue an order either granting or denying review “[w]ithin a reasonable time following the filing of the petition.” *See* 40 C.F.R. §124.19(c). The Coalition’s request for a stay is deaf to this command, and converts “a reasonable time” to “an indefinite time.” In determining whether to grant a stay, the Board and the courts generally consider questions of judicial economy, fairness, and prejudice. *See, e.g., In re Titan Tire Corp. & Dico, Inc.*, CERCLA § 106(b) Petition No. 10-01, at 4 (EAB Dec. 10, 2010) (Order Granting Stay of Proceedings); *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 to 08-06, slip. op. at 19 (EAB 2009); *In*

*re Strong Steel Prods., LLC*, Docket No. CAA-5-2003-0009, 2004 EPA ALJ LEXIS 12, at \*1-2, 2004 WL 1089217, at \*1-2 (E.P.A. 2004); *In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11, 1990 EPA App. LEXIS 38, at \*4, 1990 WL 324099, at \*2 (Adm'r July 3, 1990) (Order on Motion for Stay); *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066-67 (9th Cir. 2007); *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109-12 (9th Cir. 2005).<sup>2</sup>

The Coalition has failed to demonstrate any basis for concluding that the district court's ruling in the mandatory duty case could resolve any of the Coalition's claims in this permit appeal. This is not a case where the questions before the Board and the district court are duplicative and, hence, where a stay would promote judicial economy. *See, e.g., Titan Tire*, at 4. *In re Env't'l Prot. Servs., Inc.*, Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 25 (EPA 2003) (denying a stay where the respondent "fail[ed] to present a reason compelling enough to support another delay in th[e] case) and *In re Fountain Foundry Corp.*, Docket No. CAA 005-94, 1994 EPA ALJ LEXIS 71 (EPA 1994) (denying a stay where the movant "failed to demonstrate that a stay will serve the interests of judicial economy" and "also failed to show that a stay will not result in unreasonable delay").

Neither has the Coalition presented any basis for a stay on the grounds of fairness or prejudice that could justify allowing nitrogen loading from the facility to continue unabated while Great Bay and its tidal tributaries continue to suffer from the effects of

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<sup>2</sup> Although it is not uncommon for the Board to grant a stay of proceedings, it often occurs where both parties have so moved – frequently in order to negotiate a settlement, *see, e.g., In re Amgen Mfg., Ltd.*, NPDES Appeal No. 11-09, slip. op. at 1 (EAB May 19, 2012) – or where the motion is unopposed, *see, e.g., In re Blue Plains Wastewater Treatment Plant*, NPDES Appeal No. 05-02 (EAB Feb. 20, 2007) (Order Granting Unopposed Motion for Sixth Stay of Proceedings).

cultural eutrophication. *See Lockyer*, at 1112 (noting that where there is “more than just a ‘fair possibility’ of harm,” the proponent of a stay must make out “‘a clear case of hardship or inequity’” (quoting *Landis v. N. Am. Co.*, 299 U.S. 218, 255 (1936))). Far from there being a “clear case of hardship” for the Coalition if a stay is denied, a prompt decision in this appeal will have no direct effect on the Coalition members’ permitted activities, since neither Dover nor Rochester – the only Coalition municipalities appealing Newmarket’s permit, *Pet.* at 2 – have been issued a final permit.<sup>3</sup>

Finally, the Coalition offers no estimate of how long it will take for any of the future collateral actions to be completed and thus how long the abeyance of this case would last. Indeed, any such estimate would be sheer speculation regarding processes that could follow any of several different paths, conceivably taking many months to a year or more. Thus, the Coalition has failed to demonstrate that a stay in this case would be of reasonable duration. *See Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979) (“A stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time in relation to the urgency of the claims presented to the court.”); *accord I.K. ex rel. E.K. v. Sylvan Union Sch. Dist.*, 681 F. Supp. 2d 1179, 1195 (E.D. Cal. 2010); *see also Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (noting that “a trial court abuses its discretion by issuing ‘a stay of indefinite duration in the absence of a pressing need’” (quoting *Landis*, 299 U.S. at 255)).

### **REQUESTED RELIEF**

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<sup>3</sup> The City of Dover was issued a *draft* permit in January 2012, but the final permit has not yet been issued. The City of Rochester has not been issued even a draft permit.

The Coalition has failed to demonstrate that the circumstances justify a stay of this proceeding. EPA requests that the Board deny the motion in light of the continued harmful effects of cultural eutrophication to Great Bay, the ultimate irrelevance of the outcome of the mandatory duty claim to the disposition of this proceeding, and the entirely speculative nature of the Coalition's requests related to a possible future peer review and potential outcome of a FOIA appeal. EPA respectfully submits that, if any of these future decisions yields relevant information, a more appropriate path is for the Coalition to seek a permit modification pursuant to 40 C.F.R. §§ 122.62, 124.5 (allowing permit modification in light of "new information" justifying the "application of different permit conditions").

Respectfully submitted,

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Dated: February 8, 2013

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Petitioner's Request to Stay the Proceeding in connection with NPDES Appeal No. 12-05, were sent to the following persons in the manner indicated:

By Electronic Filing and Express Mail:

Ms. Eurika Durr  
Clerk of the Board  
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Environmental Appeals Board  
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Washington, DC 20004

By First Class U.S. Mail:

Mr. John C. Hall  
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1620 I Street, NW, Suite 701  
Washington, DC 20006-4033

Dated: February 8, 2013

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