



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

VIA ELECTRONIC FILING

June 16, 2021

Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

RE: In re NPDES Permit No. NH0001465; NPDES Appeal Nos. 20-05 and 20-06

Dear Ms. Durr:

Please find the attached *EPA Region 1 Reply to Petitioners' Responses to EPA's Motion for Partial Voluntary Remand and Partial Re-Calendaring of Oral Argument*, and an accompanying Certificate of Service, in connection with NPDES Appeal Nos. 20-05 and 20-06.

Thank you for your assistance with this matter.

Sincerely,

/s/ Mark A. Stein

Mark A. Stein
US EPA – Region 1
Office of Regional Counsel
5 Post Office Square
Mail Code: ORC 04-6
Boston, MA 02109-3912
Tel: (617) 918-1077
Fax: (617) 918-0077
Email: stein.mark@epa.gov

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

_____)	
In the Matter of:)	
Granite Shore Power Merrimack LLC)	
NPDES Permit No. NH0001465)	NPDES Appeal Nos. 20-05 & 20-06
_____)	

**EPA REGION 1 REPLY TO PETITIONERS’ RESPONSES TO EPA’S MOTION
FOR PARTIAL VOLUNTARY REMAND AND PARTIAL RE-CALENDARING
OF ORAL ARGUMENT**

Pursuant to the Environmental Appeals Board’s (the “Board”) “Order Granting in Part Motion for Continuance of Abeyance” (Apr. 28, 2021) (the “Apr. 28 Order”), the Region 1 office (“Region 1” or the “Region”) of the United States Environmental Protection Agency (“EPA”) respectfully submits this Reply to both CLF and Sierra Club’s (the “Environmental Petitioners”) Response and GSP Merrimack LLC’s (“GSP”) Response to EPA’s Motion for Partial Voluntary Remand and Partial Re-Calendaring of Oral Argument (hereinafter the “Environmental Petitioners’ Response” and “GSP Response,” respectively).

On June 4, 2021, Region 1 submitted to the Board its Motion (the “Region 1 Motion for Partial Voluntary Remand”) to request (a) that the Board grant Region 1 a voluntary remand of the effluent limits for combustion residual leachate (“leachate”) in the final Merrimack Station NPDES Permit, issued on May 22, 2020 (the “2020 Permit”), so that the Region can reconsider and reissue leachate limits for public comment, (b) that

if the Board grants the requested voluntary remand of the 2020 Permit's leachate limits, then the Board also dismiss as moot Section VII.B of the Environmental Petitioners' Petition for Review (July 27, 2020) (the "Petition for Review") challenging those limits, and (c) that the Board remove the thermal discharge issues in NPDES Appeal No. 20-05 and the cooling water intake issues in NPDES Appeal No. 20-06 from the current abeyance and re-calendar oral argument to address them.

On June 11, 2021, GSP responded to the Region's motion for voluntary remand of the leachate limits and opposed it based on the assertion that such remand would be contrary to law and beyond the Region's authority. GSP Response at 1-2. GSP took no position on the Region's request to dismiss as moot Section VII.B of the Petition for Review. *Id.* at 1 n.1. Finally, GSP supported the Region's motion to lift the abeyance and re-calendar oral argument for the challenged thermal discharge and cooling water intake conditions. *Id.* at 3-4.

On that same day, the Environmental Petitioners also responded to Region 1's Motion, assenting to and expressing support for the motion for voluntary remand of the leachate limits, but opposing the Region's request that Section VII.B of the Petition for Review be dismissed as moot. Environmental Petitioners' Response at 4. In addition, the Environmental Petitioners requested that "the Board specify and confirm certain effects of the partial remand and any resulting partial dismissal on this proceeding and the permit." *Id.* at 1. Furthermore, the Environmental Petitioners assented to the Region's request to lift the abeyance and re-calendar oral argument for the thermal discharge and cooling water intake conditions. *Id.* at 8.

I. The Board Should Grant Region 1's Motion for Voluntary Remand of the 2020 Permit's Leachate Limits so that they can be Reconsidered and Reproposed for Public Comment

As stated in the Region 1 Motion for Partial Voluntary Remand, at 7, “EPA now views the [2020] Permit’s leachate limits as having been based on an incorrect interpretation of the Clean Water Act and EPA regulations.” As a result, the Region requests a partial remand “to reconsider and repropose leachate limits for the Permit based on a revised interpretation of the applicable law.” *Id.* This request is well within the Region’s authority and is consistent with the relevant regulations and Board precedent governing withdrawal and voluntary remand of permit limits during the pendency of an appeal before the Board. *See Id.* at 4-6 (listing Board decisions and providing legal background and principles governing requests for withdrawal and voluntary remand). The Environmental Petitioners assent to this motion. Environmental Petitioners’ Response, at 4. However, GSP opposes the motion for reasons that are premature and unconvincing, as will be discussed below. GSP Response, at 1-2.

In its response, GSP argues that the question of whether leachate limits should be developed on a best professional judgment (“BPJ”) basis has been briefed to the Board. *See* GSP Response at 2. While this may be true with respect to limits based on EPA’s prior interpretation of the applicable law, EPA intends to revisit those issues. EPA has yet to develop an administrative record supporting BPJ-based leachate limits (including their underlying technical and legal rationale) or brief the Board on issues related to those limits. GSP will have every opportunity, however, to present the Region with its views, including those set forth in its response, at 1-2, during the public notice and comment process that will follow if the Board grants the partial voluntary remand. While GSP may disagree with the

idea of BPJ-based leachate limits, this is not the appropriate stage or forum to raise its concerns or objections because EPA has not yet fully explicated the basis for its revised interpretation and allowed for public comment on the application of that interpretation to the Merrimack Station permit.

GSP also asserts that the Board's recent decision in *In re Arizona Public Service*, 18 E.A.D. 245 (EAB 2020), precludes EPA from adopting a revised interpretation of the relevant regulations and law. GSP Response at 1-2. However, GSP's own articulation of the Board's holding in *Arizona Public Service* (i.e., "following the Fifth Circuit's decision in *Southwestern Electric Power Co. v. EPA*, 920 F.3d 999 (5th Cir. 2019), permit writers are subject to the 1982 [Effluent Limitations Guidelines or ELGs]") leaves ample room for EPA's revised interpretation of what those 1982 ELGs did or did not establish.¹ GSP Response at 2. Regardless, the Region need not address the merits of this assertion at this time, but to the extent that the decision is applicable and relevant to the Region's reconsideration of the leachate limits and underlying rationale, the Region will, of course, take into account and address the decision and any public comments about it as it develops the leachate limits on remand.

Finally, GSP states that a remand of the leachate limits so that the Region may reconsider, revise, and re-propose limits would be a "waste of resources." GSP Response at 2. To the contrary, a remand would serve the policies for judicial/administrative

¹ Notably, the *Arizona Public Service* opinion did not address leachate limits, but rather addressed limits applied to the facility's legacy bottom ash transport water. Additionally, in that appeal, EPA Region 9 expressly declined to take any position on whether the 1982 regulations established BAT limitations, explaining in part that either interpretation of the 1982 regulations would likely not result in changed limits for that particular permit. *Arizona Pub. Serv. Co.*, 18 E.A.D. at 292-93 n.32. As a result, the Board's decision left unanswered the question of whether the 1982 regulations effectively established BAT limits.

efficiency by avoiding further effort by the Board and parties to review permit limits that the Region no longer supports and instead plans to reconsider and re-propose. *See also* Region 1 Motion for Partial Voluntary Remand at 8.

II. The Board Should Grant Region 1's Motion for Dismissal as Moot of Section VII.B of the Environmental Petitioners' Petition for Review

Region 1's Motion for Partial Voluntary Remand not only sought a voluntary remand of the 2020 Permit's leachate limits, but it asked the Board to dismiss Section VII.B of the Environmental Petitioners' Petition for Review which challenged those leachate limits. Region 1 Motion for Partial Voluntary Remand at 8-9. While GSP takes no position on that part of the Region's motion, GSP Response, at 1 n.1, the Environmental Petitioners oppose it. Environmental Petitioners' Response at 1, 5-6. Environmental Petitioner's arguments are unpersuasive.

Environmental Petitioners state that the Region supported its motion by citing to five prior EAB orders—from the *Nashua*, *DuPont*, *Teck Alaska*, *San Jacinto*, and *Keene* appeals²—involving unilateral withdrawals and that, as such, the Region “has not cited any authority for the principle that a petition or portion thereof becomes moot when it is remanded by the Board, voluntarily or otherwise.” Environmental Petitioners' Response at 5. Yet, Environmental Petitioners then contradict themselves by correctly noting that

² See Region 1 Motion for Partial Voluntary Remand 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); *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); and *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 *Nashua* Order cited by Region 1 involved the Board dismissing as moot claims concerning permit provisions that were unilaterally withdrawn *and* a provision that was withdrawn pursuant to a motion for voluntary remand. *Id. See Nashua*, at 3-4.

Moreover, Environmental Petitioners do not explain why dismissal for mootness is appropriate for claims concerning a permit provision that has been unilaterally withdrawn so that it can be reconsidered and reissued for public comment, but is not also appropriate for claims concerning permit provisions subject to a voluntary remand for the same purpose. In both cases, the permitting authority has decided to reconsider the permit limits in question, reissue them for public review, and, after considering public comments, make a new final decision on the permit limits that may be appealed. As a result, claims regarding the withdrawn provisions of the permit are, in fact, moot and should be dismissed. Indeed, no party is prejudiced by such dismissal because all will have the right to submit comments on the newly proposed limits and to appeal the new final limits consistent with 40 C.F.R. § 124.19. As noted in Region 1's Motion for Partial Voluntary Remand, at 4-5, Board decisions recognize that EPA regulations at 40 C.F.R. § 124.19(j)(2018) set up different, but parallel, procedures that allow the permitting authority (a) to unilaterally take back a permit condition for reconsideration and re-proposal, if it does so prior to 30 days after the response to the petition for review has been filed (or prior to any oral argument that occurs within 30 days after the response to the petition for review), and (b) to seek a voluntary remand for the same purpose, if the time has passed for unilaterally taking back a permit provision. *See Nashua*, at 2, 3 (“If the Regional Administrator wishes to withdraw the permit or portions of the permit after the 30-day deadline, it must not do so unilaterally, but must seek leave from the Board.”);

W. Bay, at 2 (“Once the 29-day period following the Region’s response to the petition has expired, a Regional Administrator must obtain, by motion, a voluntary remand of the permit before withdrawing it.”) and n.1. Yet, whether permit provisions are unilaterally withdrawn, or a voluntary remand is granted for that purpose, the result should be the same: claims regarding the permit provisions being reconsidered should be dismissed as moot.

Finally, Environmental Petitioners acknowledge that “if granted, the Motion [for voluntary remand of the leachate limits] will obviate the need for the Board to hear argument and rule on the leachate issue, at least at this juncture.” Environmental Petitioners’ Response at 6. This is correct but, more to the point with regard to the mootness issue, if the Board grants the Motion for voluntary remand of the leachate limits, it will obviate the need *ever* to address the current claims pertaining to the leachate limits in the 2020 Permit. The Region will reconsider those limits, re-propose them for public comment, and ultimately issue new final limits based on a new record. This may result in a new appeal of the new limits and the record supporting them but claims as to the old permit limits are moot.

III. Region 1 Does Not Oppose the Environmental Petitioners’ Requests for Clarification About Certain Procedural Ramifications of a Voluntary Remand of the Leachate Limits

The Environmental Petitioners’ Response, at 6-8, asks the Board to clarify the procedural ramifications of the requested voluntary remand of the leachate limits and “any related dismissal” of claims from the Petition for Review. *Id.* at 6. First, Environmental Petitioners ask the Board to specify, pursuant to 40 C.F.R. § 124.19(l)(2)(iii) (2018), where any appeal of the reissued leachate limits must initially

be filed, at the Board or in federal court. Environmental Petitioners' Response at 6. Region 1 does not oppose this request.

Second, Environmental Petitioners ask the Board to confirm their understanding that under 40 C.F.R. § 124.19(l)(2)(iii) (2018), for the purposes of judicial review, there can be no final agency action on any of the challenged permit limits until the remand proceedings on the leachate limits are concluded before EPA, including any appeal to the Board if the Board dictates that any appeal of the Region's decision on remand must first be filed with the Board. *Id.* at 6-7. Region 1 concurs with Environmental Petitioners' understanding of the regulations and does not oppose their request for clarification from the Board.

Finally, Environmental Petitioners appear to seek confirmation from the Board that until the Region issues a final permit decision under 40 C.F.R. § 124.19(l)(2)—which it cannot do until Agency review procedures under 40 C.F.R. § 124.19 are exhausted, *see* 40 C.F.R. § 124.19(l)(2)—contested conditions of the permit remain stayed and the corresponding provisions of the prior (1992) permit remain in effect. Environmental Petitioners' Response at 7-8. Region 1 agrees that this is so and does not oppose Environmental Petitioners' request for clarification on this point.

IV. The Board Should Grant the Region's Unopposed Motion to Remove the Thermal Discharge and Cooling Water Intake Structure Conditions from Abeyance and Re-Calendar Oral Argument

The Region's Motion for Partial Voluntary Remand, at 9-12, requested that the Board remove the thermal discharge and cooling water intake structure issues from the abeyance and re-calendar oral argument to address them. This request is warranted for the

reasons set forth in the Region's Motion. *Id.* Additionally, Region 1 notes that all Petitioners have assented to this request and provided additional grounds in support of this motion and/or emphasized certain grounds presented by the Region. *See* Environmental Petitioners' Response at 8; GSP Response at 3-4. Should the Board grant this request, EPA is amenable to conferring with the Petitioners, as they suggested, to jointly identify and propose potential dates for oral argument for the Board's consideration. *See* GSP Response at 3 n.3; Environmental Petitioners' Response at 8.

V. Conclusion

For the foregoing reasons, Region 1 respectfully requests that that the Board grant its motion seeking voluntary remand of the leachate limits, dismissal as moot of Section VII.B of the Environmental Petitioners' Petition for Review, and re-calendar of oral argument to address the thermal discharge and cooling water intake issues.

Respectfully submitted,

Mark A. Stein /s/

Mark A. Stein, Sr. Assistant Regional Counsel
Cayleigh Eckhardt, Assistant Regional Counsel
Michael Curley, Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square
Boston, MA 02109
Tel: (617) 918-1077 or (617) 918-1044
Email: Stein.Mark@epa.gov

Of Counsel:

Jessica Zomer, Attorney
Eleanor Garretson, Attorney
Pooja Parikh, Attorney
Water Law Office, Office of General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20004

Dated: June 16, 2021

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this EPA Region 1 Reply to Petitioners' Responses to EPA's Motion for Partial Voluntary Remand and Partial Re-Calendaring of Oral Argument in NPDES Appeal Nos. 20-05 and 20-06, contains fewer than 15 pages in accordance with 40 C.F.R. § 124.19(f)(5).

Dated: June 16, 2021

Respectfully submitted,

Mark A. Stein /s/

Mark A. Stein

Senior Assistant Regional Counsel

US Environmental Protection Agency

Office of Regional Counsel, Region I

5 Post Office Square - Suite 100

Boston, MA 02109-3912

Tel: (617) 918-1077

Fax: (617) 918-0077

E-mail: stein.mark@epa.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing EPA Region 1 Reply to Petitioners' Responses to EPA's Motion for Partial Voluntary Remand and Partial Re-Calendaring of Oral Argument, in connection with In re Granite Shore Power Merrimack LLC, NPDES Appeal Nos. 20-05 and 20-06, was sent to the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

By Electronic Filing and Electronic Mail:

Reed W. Super, Esq., Edan Rotenberg, Esq., and Julia Muench, Esq.
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, NY 10038
reed@superlawgroup.com
edan@superlawgroup.com
julia@superlawgroup.com

P. Stephen Gidiere III, Esq., Thomas G. DeLawrence, Esq., and Julia B. Barber, Esq.
Balch & Bingham LLP
1901 6th Avenue North, Suite 1500
Birmingham, Alabama 35203
sgidiere@balch.com
tdelawrence@balch.com
jbarber@balch.com

K. Allen Brooks
Senior Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street Concord, NH 03301
Allen.brooks@doj.nh.gov

Dated: June 16, 2021

Mark A. Stein /s/
Mark A. Stein, Esq.
US Environmental Protection Agency
Office of Regional Counsel, Region I
5 Post Office Square - Suite 100
Boston, MA 02109-3912
E-mail: stein.mark@epa.gov