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

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

REGION 1'S OPPOSITION TO PETITIONER'S MOTION FOR EXTENSION OF TIME TO FILE A SUPPLEMENTAL PETITION FOR REVIEW

EPA Region 1 respectfully opposes the Great Bay Municipal Coalition's Motion for Extension of Time to File a Supplemental Petition for Review. The Coalition claims that more time is required "to prepare a petition sufficiently outlining the major legal, procedural, and scientific issues in enough details," Mot. at 3, but it has done precisely that in a *98-page* petition, accompanied by over *2,100 pages* of exhibits, all in a challenge to *one* effluent limitation—a nitrogen limit imposed on a municipality not even party to this appeal. The Coalition's request for additional briefing beyond its initial voluminous submission comes on the heels of extensive comments and exhibits submitted by it during an extended public comment period that ran for more than twice the time mandated by regulation; nine additional sets of comments submitted after the close of the comment period; 46 Freedom of Information Act requests; lawsuits filed in federal district court and New Hampshire Superior Court pertaining to the development of numeric nutrient criteria; and separate requests to EPA's Office of Water and the Office of Inspector General for investigations into Region 1's derivation of the nitrogen limit, all

within the past year and a half. Meanwhile, the Town of Newmarket, whose existing permit was issued almost a dozen years ago and contains *no* nitrogen limit, has voted to accept the new permit and will be in a position to fully implement its provisions assuming a timely resolution of the pending dispute. Pet. at 27, fn 30.[1] Yet, the Coalition has made no secret of its desire to forestall any ruling by the Board on their petition, *see* Pet. at 97 (requesting a stay based on various administrative and judicial litigation matters instituted by the Coalition that are collateral, if not irrelevant, to the disposition of this proceeding), an interest that would only be furthered by the needless injection of still more paper and more cumulative argument into this appeal.

There is no good cause to delay water quality improvements and allow nitrogen loading from the facility to continue unabated for any longer than necessary while Great Bay and its tidal tributaries continue to suffer from the effects of cultural eutrophication, which would be the only substantive result of granting the Coalition's motion. If indeed EPA, alongside New Hampshire Department of Environmental Services and leading academic experts in the field of estuarine science, have erred so repeatedly and so clearly—indeed so 'astoundingly' and 'schizophrenically'—then these are allegations that the Coalition has already rendered in meticulous (and repetitious) detail, and should be abundantly clear from the petition as filed; EPA's response to that petition; and any further briefing on *subsequently* allowed by the Board. This sequence of events will allow the Board to focus their attention on those issues requiring more careful or extended consideration, and will not risk an unnecessary proliferation of argument at the

[1] The Coalition represents the Cities of Dover and Rochester, New Hampshire, neither of which discharge to the Lamprey River. To date, Dover has only received a draft NPDES permit with a nitrogen effluent limitation of 3 mg/l. Rochester has yet to receive even a draft permit. Their interest in Newmarket's permit, whose effluent limitations were determined on a case-specific basis, is at best unclear.

very outset of this proceeding, which will entail the commitment of time and resources of EPA and the Board to no effect other than to introduce delay.

For the reasons explained below, EPA submits that the Coalition has failed to show good cause to warrant an extension of time under Part 124 procedures.

ARGUMENT

In general, the regulations governing permit proceedings before the Board "do not contemplate [supplemental briefing], except when the Board grants review of a petition." *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 111 n.8 (EAB 1997), citing 40 C.F.R. § 124.19(c). "On occasion" the Board will depart from its ordinary procedures "for good cause shown" and grant a petitioner's motion to file a supplemental brief in addition to a timely "summary" petition for review. *In re Guam Waterworks Authority*, NPDES Appeal Nos. 09-15 & 09-16, at 4 (EAB Nov. 9, 2009) (Order Granting Motion in the Alternative to Timely File Summary Petitions with Extension of Time to File Supplemental Briefs). In most if not all cases, such a departure is precipitated by the parties filing a mutually agreed upon briefing schedule that contemplates supplemental filings or a decision by EPA not to oppose the late filing. *See, e.g.*, *In re Guam Waterworks Authority*, *Id.; In re City and County of Honolulu*, NPDES Appeal No. 09-01 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review); *In re Peabody Western Coal Co.*, NPDES Appeal No. 09-10 (EAB Sept. 29, 2009) (Order Granting Extension of Time to Supplement Petition); *In re Desert Rock Energy*, PSD Appeal Nos. 08-03 & 08-04 (EAB Aug. 21, 2008) (Order Granting Desert Rock's Motion to Participate, Granting a 30-Day Extension of Time, and Denying a Stay of Briefing on Certain Issues).

The Coalition contends that that the Board should grant leave to file a supplemental brief, even before the Board has ruled on whether to grant or deny review, because the effluent limitations contained within the permit are of a "complex and controversial nature," involving "several thousand pages of highly technical information and regulatory studies." Mot. at 2, 3. More specifically, the Coalition claims that EPA excluded from the record "hundreds of pages of supplemental data and analyses submitted by the Petitioners." Mot. at 3. On these two bases, the Coalition claims that it will be prejudiced if not afforded an additional opportunity "to sufficiently outlin[e] the major legal, procedural, and scientific issues in enough details to satisfactorily demonstrate the Region failed to respond to comments submitted by the Petitioner." *Id.*

The Coalition has fallen far short of satisfying the requisite showing of "good cause" in this instance. Petitioners' generalized justification for an extension – that the permit is complex and controversial and, thus, requires more time to identify and outline the issues – is, without more, unpersuasive, applying as it does to most NPDES permits, and certainly all such permits with nutrient limitations. As the Board has noted in the context of filing a timely petition, "[h]aving to conduct legal and technical research in preparation for an appeal does not, without more, fall into the category of circumstances the Board would consider special. Rather . . . these are the types of obstacles most petitioners ordinarily confront when preparing timely petitions." *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 8 (EAB Mar. 27, 2007) (Order Denying Review). Furthermore, "[t]he 30-day deadline is not an unreasonable deadline and, indeed, is routinely met." *In re Peabody Western Coal Co.*, NPDES Appeal No. 09-10, at 3 (EAB Sept. 29, 2009) (Order Granting Extension of Time to Supplement Petition).

EPA submits that the Coalition has, to its credit, successfully overcome any challenges presented by the 30-day deadline, as is evident from the unusually lengthy and detailed petition it filed; the Coalition does not require more time to burden the Board with more of the same. This is especially true where its existing 98-page petition already runs counter to Board guidance governing the length of filed documents:

> "The parties are strongly encouraged to limit briefs to 50 pages (including the certificate of service, table of contents, and table of authorities). 'To assure the efficient use of Agency resources,' the EAB has the discretion to reject a brief on the ground that it is unduly long. *In re Rocky Well Service, Inc.*, SDWA Appeal Nos. 08-03 & 08-04, at 1 (EAB Dec. 15, 2008) (Order Rejecting Brief Because of Excessive Length and Requiring Revised Brief)."

U.S Environmental Appeals Practice Manual at 17. Moreover, it is nowhere made apparent why the Coalition believes that it is entitled to an additional opportunity to provide a more 'detailed outline' of an alleged *failure to respond to comments*. Although EPA vigorously disagrees that there has been any such failure, to the extent the Coalition believes otherwise, the *absence* of a response, or evidence of *clear* or *compelling* error, should be easily discerned upon review of the Response to Comments. To the extent the Coalition is arguing that it has not satisfactorily demonstrated error on EPA's part through the provision of its initial petition, Mot. at 3 (claiming "[in]adequate time to prepare a petition sufficiently outlining the major issues… in enough details to satisfactorily demonstrate" error), and if simply given more time it would somehow be able to make such a demonstration, then that fault does not lie with EPA, and the burden of that failing should not fall on EPA, this Board or Great Bay.

Neither of the two cases the Coalition cites in support of their request for an extension to file a supplemental brief compels any departure from the Board's default procedures. Foremost, in both cases, the petition initially filed with, or shortly after, the

motion could be fairly characterized as "summary" and merely identified the contested issues, unaccompanied by further argument or discussion. *In re Guam Waterworks Auth.*, at 4-5 (granting the petitioner leave to file "*summary* petitions for review" within the regulatory deadline and an extension to file supplemental briefs) (emphasis added); *In re City & County of Honolulu*, at 3 (same). In contrast, the Coalition's motion to supplement is accompanied by an "initial" petition for review of almost 100 pages, together with more than 50 exhibits, amounting to an entire submission of well over 2,200 pages, which can hardly be characterized as "summary." Again, Petitioner's vague claim that 30 days is somehow an inadequate time period within which to present arguments and information to support the issues raised in their petition is belied by their preparation within that time frame of an extensive submission.

Additionally, in both of the cited cases, the Region had issued two separate final permit decisions on the same day and, therefore, the regulatory deadline to file *two* petitions for review of those permits expired on the same day. *In re Guam Waterworks Auth.*, at 4 (granting extension "in light of the burden imposed upon [petitioner] by preparing two potentially complex appeals simultaneously"); *In re City & County of Honolulu*, at 3 (same). Ultimately at issue in this appeal is a single effluent limitation (nitrogen) in one permit. Moreover, the effluent limitation at issue was present in the draft permit issued October 5, 2011, and, the only change made to limit itself was favorable to the permittee (change from a monthly limit to a rolling seasonal average).

Finally, in each case, the Board granted the motion where the Region did not oppose the extension. *In re Guam Waterworks Auth.*, at 4; *In re City & County of Honolulu*, NPDES Appeal No. 09-01, EPA Region IX's Response to Motion for

Extension of Time to File Petitions for Review, at 5 (Jan. 29, 2009) (noting that the Region did not oppose granting an extension to file supplemental briefs "so long as the summary petitions briefly identifying the issues (and bases) for any of the various challenges that [petitioner] may raise are filed" within the time frame contemplated by 40 C.F.R. §124.19 (a)).

The Coalition's more specific justification for an extension, *i.e.*, the claim that its supplemental comments were excluded from the administrative record , Mot. at 3, is based on a purely mistaken assumption and, for this and other reasons detailed below, cannot serve as a basis for additional time and opportunity for briefing. The Coalition's supplemental comments are part of the record. The Coalition's misunderstanding of EPA's position on this issue is the product of a pure misreading of the Response to Comments, where EPA simply stated that it was not treating the comments as *timely* within the meaning of 40 C.F.R. § 124.13 and that they therefore did not legally require a written response. Had the Coalition requested to examine the administrative record of the permit, which they did not, or asked to see a draft record index, which they did not, or simply inquired as to the status of these documents, which they did not, they would have been apprised of the fact that these late submissions were indeed included in the record.[2]

The Coalition, moreover, does not explain why EPA's decision to treat the supplemental comments as untimely in any way compromised their ability to demonstrate a failure of EPA to respond to comments, especially where the Coalition itself states:

> "It should be noted that none of the Coalition's supplemental comments actually raised new comment issues. The Coalition was simply providing supplemental

[2] EPA fully apprehends that its decision must ultimately be "rational in light of all of the information in the record," not just the comments. *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 718 (EAB 2006) (quoting *In re MCN Oil & Gas Co.*, UIC Appeal No. 02-03, at 25-26 n.21 (EAB Sept. 4, 2002) (Order Denying Review)), *appeal dismissed per stipulation of parties*, No. 06-1817 (1st Cir. 2006).

> information with respect to issues previously raised in the Coalition's original, timely filed comments." Pet. at 29.

Given the commonality between the original and supplemental comments, it is a mystery to EPA why the Coalition requires additional time to point out any deficiencies in EPA's response. Indeed, in rejecting the comments as untimely, EPA remarked on the overlapping subject matter between the timely and late-filed comments. *See* Response to Comments at 2, fn 1 (http://www.epa.gov/region1/npdes/permits/2012/finalnh0100196permit.pdf).[3]

It is an irony, and a grave deficiency, of the Coalition's request that the supplemental comments and thousands of other pages in the record that it now claims to have impeded its ability to craft an adequate petition for review were manufactured and submitted, if not actually authored, by the Coalition's attorneys and consultants themselves, experienced Clean Water Act practitioners all.[4] The Coalition's claim that it requires additional time to "sufficiently outline…in enough detail" errors in the EPA's response based on this body of material is simply not credible; the Coalition is, to be certain, intimately familiar with this information and demonstrably fluent in the technical, legal, scientific and policy aspects of this permitting action. This is borne of experience, as the Petitioners have, *inter alia*, submitted multiple FOIA requests to the Region and to Headquarters (Pet. Ex. 1, 28-30, 33-50; Pet. at 97); instituted a scientific misconduct proceeding against the Region (Pet. Ex. 2) in connection with the permit; commenced a legal proceeding against the New Hampshire Department of Environmental Services in

[3] EPA notes that many of these supplemental comments were submitted by the Coalition months (as many as eleven) after the close of the public comment period.

[4] The Coalition makes reference to the length of EPA's Response to Comments, Mot. at 2, but that document reproduced verbatim all comments on the permit, including public hearing comments, which of course included extensive submissions by the Coalition. The actual responsive portion of the document is substantially shorter than 150 pages.

state court regarding the State's narrative nutrient criteria (Pet., at 17); and commenced a citizen suit against the EPA in federal district court (Pet., at 3 n.4). EPA respectfully submits that the Coalition has demonstrated through the course of its actions a grasp of the issues sufficient to enable it to identify the issues and to set forth legal and technical arguments in support thereof within a single, timely petition for review.

Thus, this is not a case where petitioners have claimed, for example, that they did not have access to the administrative record for the Region's permitting decision or that experts with whom they intend to consult are unavailable. *See, e.g., In re Peabody Western Coal Co.*, NPDES Appeal Nos. 10-15 & 10-16 (EAB Nov. 4, 2010) (Order Accepting Supplemental Brief for Filing and Granting Permittee Permission to Respond to Petitions) (granting the petitioners a 30-day extension where the Region had sent an e-mail to petitioners stating that petitioners "might not have received the full administrative record"). Nor have they asserted that they did not receive timely notice of the issuance of the permit. *See, e.g., In re BHB Billiton Navajo Coal Co.*, NPDES Appeal No. 08-06 (EAB Apr. 24, 2008) (Order Denying Extension of Time to File Petition for Review).

Finally, EPA observes that the Coalition, now seeking to double the prescribed time to file a petition for review, did not even avail itself of the time afforded under the regulations for preparation of its original petition, having filed almost a week *early*. *See* 40 C.F.R. §§ 124.19(a), 124.20 ("Computation of Time").[5] It is therefore, unclear, whether a more extensive petition could not have been filed within the time available or if simply no attempt was made to do so.

[5] EPA explained in its transmittal letter that the 30-day appeals period would be calculated from the date of actual receipt of the final permit. The Coalition received notice of the permit via certified mail on November 19, 2012.

EPA respectfully submits that it is not in the interest of justice for EPA, and Great Bay, to bear the burden of the Coalition's decisions to date in this case. It might have been one thing had EPA in actuality excluded relevant material from the record, as claimed, and still another if EPA had relied in its final permit decision on extensive new material to support its determinations, or perhaps if the Coalition had contracted new counsel that needed to familiarize themselves with the record. But none of that occurred here. By requesting this extension, petitioners functionally seek to evade the timeliness requirements for filing a petition for review. *See In re Peabody Western Coal Co.*, NPDES Appeal No. 09-10, at 3 (EAB Sept. 29, 2009) (Order Granting Extension of Time to Supplement Petition). The Town of Newmarket has chosen to accept the permit and is ready to implement it in order to protect the waters of Great Bay. Press Release, Town of Newmarket, Town Accepts EPA Permit for Wastewater Treatment Facility (Dec. 10, 2012), *available at* http://web2.newmarketnh.gov/docs/TownEPAPermitDec2012.pdf (stating that "it is in the best interest of our community to work with the EPA to protect Great Bay instead of entering into a lengthy and costly legal process"). Time, therefore, is of the essence. The interests of justice militate against the further delay, commitment of administrative resources and environmental harm that would result were the Coalition's motion to be granted.

REQUESTED RELIEF

The Coalition has failed to demonstrate good cause to warrant a supplemental brief, additional paper that will not facilitate the orderly, accurate and expeditious disposition of this matter. EPA requests that the Board deny the Coalition's motion to file a supplemental brief. The proper, and more logical, opportunity for additional

explication of the issues in this dispute short of granting review is a concise reply brief, which EPA would not oppose so long as it is subject to reasonable page limitations, and so long as EPA would have an opportunity for a brief sur-reply.[6]

Dated: January 4, 2013

/s/

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[6] By December 21, 2012, letter to the Board, the Coalition also moved to extend all filing deadlines of the parties, due to the scheduling uncertainty and conflicts caused by filing of its Motion for Extension of Time to File a Supplemental Petition for Review. The December 21 motion does not appear to have been served upon EPA. Still, EPA concurs with the Coalition to the extent that the motion to file a supplemental brief has indeed introduced uncertainty that has adversely impacted EPA's drafting of a Response to Petition, as EPA is unsure at this stage of the proceedings what precisely to respond to. EPA is prepared to commit all necessary resources to file its response on February 8, 2013; however, in order to efficiently deploy scarce legal and technical assets, EPA would not oppose a revised response date calculated from the date of the Board's ruling on the motion. In the event the Board grants the Coalition's request to file a supplemental petition, EPA respectfully requests that it be subject to reasonable but strict page limitations in light of the 98-page document already submitted to enable a very concise presentation of the issues.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to Petitioner's Motion for Extension of Time to File a Supplemental Petition for Review in connection with NPDES Appeal No. 12-5, were sent to the following persons in the manner indicated:

By Electronic Filing:

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Dated: January 4, 2013

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