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

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| In re: | ) | |
| | ) | NPDES Appeal No. 20-05 |
| Granite Shore Power Merrimack LLC | ) | |
| NPDES Permit No. NH0001465 | ) | |

**PETITIONERS' OPPOSITION**
**TO EPA REGION 1'S MOTION TO STRIKE**

## INTRODUCTION

Merrimack Station's 1992 Permit requires GSP Merrimack LLC (the "Permittee" or "GSP") to continuously monitor river surface temperature at monitoring stations N-10, S-0, and S-4. The permit also requires the Station's owners to submit its continuous monitoring data to EPA by December 31 of the following year.

Since 1992, the Station's former owner (PSNH) and the Permittee have collected temperature readings from those monitoring stations every 15 minutes (96 times per day) on every day, with limited exceptions due to equipment malfunction or when the permit allows certain probes to be removed from the Merrimack River. But their annual reports included only statistical summaries (daily minimums, maximums, and averages). Thus, EPA did not receive and review all of the continuous monitoring data the Permittee collected.

Recognizing that the statistical summaries were inadequate and often confusing, EPA requested from GSP a limited amount of 15-minute temperature data. However, EPA requested and received temperature data only from certain months in certain years. EPA never requested or received the temperature data from all years, or from all months in the years requested.

While review of the administrative record is generally limited to the administrative record, the Board may review material beyond the record if the agency improperly failed to consider evidence that could have been adverse to its final decision, or if the agency failed to consider factors that are relevant to its final

decision. Here, the EPA failed to consider the full set of 15-minute temperature data (contained in Attachments 36-41 to the Petition for Review) and thus failed to gain a full picture of the Station's effect on water quality, habitat, and fish when it made its final decision. Because EPA ignored this crucial data, Board may look outside the record to review Attachments 36-41, especially to evaluate whether the Region acted improperly in not requesting and reviewing that data.

## BACKGROUND

### A. Facts and Procedural History

On December 18, 2017, Sierra Club and Conservation Law Foundation (collectively, "Petitioners") submitted comments in response to the Statement of Substantial New Questions for Public Comment concerning Merrimack Station, NPDES Permit No. NH0001465.[1] These comments built on the comments that the organizations previously submitted on the 2011 Draft Permit and the comments and reply comments submitted on the 2014 Revised Draft Permit. In their 2017 comments, Petitioners noted that the Permittee failed to demonstrate that the thermal discharges from Merrimack station would not change the balanced indigenous population ("BIP") of Hooksett Pool.[2] The Petitioners stated that the

[1] Sierra Club, Conservation Law Foundation, et al. Response to Statement of Substantial New Questions for Public Comment, Merrimack Station, NPDES Permit No. NH0001465, Dec. 18, 2017 ("2017 Comments") (Att. 26 to Petition; AR-1573).

[2] The permittee has the burden of proof in persuading the permitting authority that the non-variance limits are more stringent than is needed and that an alternative set of limitations will be sufficient to protect the BIP. 33 U.S.C. § 1326(a); 40 C.F.R. § 125.73(a).

Permittee "has failed to show, under a retrospective analysis, that 'no appreciable harm has resulted from the normal component of the [past thermal] discharge' at the Merrimack Station."[3]

Specifically, the Petitioners noted that abrupt shutdowns in the colder seasons can cause "cold shock," *i.e.*, a relatively rapid reduction in discharge temperature, which can lead to the physiological impairment of fish and even to death. The Petitioners stated that the Station's practice of operating sporadically in the winter months poses a threat to the BIP.[4] Notably, the Petitioners stated:

> Thermal shock is an important consideration and one that has been masked by [the Permittee's] daily averaging of the continuous data set. . . . [The Permittee] has not provided data for the winter months when the change in temperature from shutting down operations would likely be even greater than the average changes observed in the summer months. . . . [The Permittee] has failed to provide adequate data – in this case, to determine whether its operating history causes thermal shocks that harm the BIP.[5]

Thus, in 2017, the Petitioners first made EPA aware that the Permittee failed to provide data necessary for EPA to determine if a variance was appropriate.

In addition, one of Petitioners' technical consultants informed EPA that ""Daily statistical summaries mask river temperature fluctuations over time making it impossible to see temperature fluctuations that would be apparent in the continuous temperature measurements. For example, large, short-term (e.g., over

[3] 2017 Comments at 8.

[4] *Id.*

[5] *Id.* at 12–13.

periods of minutes or hours) temperature variations that can harm aquatic organisms are not detectable in daily summary statistics."[6]

On January 7, 2020, Petitioners submitted a letter to EPA inquiring as to whether the Permittee "has submitted, and EPA has analyzed, all of the 15-minute-interval temperature data that the company has for the years 2013-2017, or only such data for the warmer months of the year."[7] Accordingly, Petitioners again made EPA aware that the necessary 15-minute data was lacking from the record.

Later, during discovery in the case *Sierra Club, et ano. v. Granite Shore Power, LLC, et al*., No. 1:19-cv-216-JL (D.NH), the Permittee provided Petitioners with the complete 15-minute data for temperature at monitoring stations N-10, S-0, and S-4 for the years 1998 through 2019.

On May 22, 2020, at 12:08 PM, EPA issued NPDES Permit No. NH0001465 for Merrimack Station (the "Permit"). On the same day, at 8:08 PM, Petitioners submitted to EPA the complete 15-minute data they had obtained from GSP, along with a letter requesting EPA to consider the data in any decisions EPA makes regarding the renewal of Merrimack Station's NPDES permit. Petitioners also requested EPA to add the letter, the 15-minute data, and a declaration by Matthew

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[6] Ken Hickey and Peter Shanahan, PhD, HydroAnalysis Inc., Dec. 11, 2017, *Review of Available Water Temperature Data and Thermal Plume Characterizations related to the Merrimack Power Station in Bow, NH* (Att. 28 to Petition; AR-1575).

[7] Jan. 7, 2020 Letter from Reed Super to Sharon DeMeo, EPA, at 22 (Att. 35 to Petition; AR-1688).

Hodge, a professional water resources engineer, to the administrative record.[8] EPA did not add the materials to the record. In fact, EPA never obtained the complete 15-minute data from Permittee, and never considered the 15-minute data that was submitted by Petitioners.

**B. Legal Framework**

While review of agency action is generally limited to review of the administrative record, certain circumstances justify expanding review beyond the record. Review beyond the administrative record is justified (1) when agency action is not adequately explained in the record; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a tribunal needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.[9]

Courts have also admitted extra-record evidence when the agency excluded documents that may have been adverse to its decision.[10] Likewise, courts have

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[8] May 22, 2020 Letter from Reed Super to Sharon DeMeo, EPA, at 4 (Att. 36 to Petition).

[9] *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197–98 (D.D.C. 2005).

[10] *Kent Cty., Del. Levy Court v. U.S. EPA*, 963 F.2d 391, 393 (1992).

reviewed material beyond the record when the agency failed to consider relevant evidence. In *Center for Native Ecosystems v. Salazar*,[11] petitioners challenged the U.S. Fish and Wildlife Service's de-listing of a species, the Preble's meadow jumping mouse, from the Endangered Species Act's list of threatened and endangered species.[12] Petitioners sought to supplement the record with Biological Assessments and Biological Opinions associated with formal and informal consultations between various government agencies and the U.S. Fish and Wildlife Service concerning the impacts of various projects in Wyoming on the species of concern.[13] In determining whether to review these materials, the court noted:

> Where an agency fails to consider evidence relevant to the final decision, its rationale and justification may be undermined. By its very nature, evidence which the agency fails to consider is frequently not in the record. Accordingly, in order to allow for meaningful, in-depth, probing review, such extra-record evidence is often properly included in the Administrative Record.[14]

The court further noted that it is "appropriate to allow supplementation of an Administrative Record where necessary for determining whether the agency considered all relevant factors including evidence contrary to the agency's position."[15] The court admitted the documents into the record since they contained

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[11] 711 F. Supp. 2d 1267 (D. Colo. 2010).

[12] *Ctr. for Native Ecosystems v. Salazar*, 711 F. Supp. 2d 1267, 1271 (D. Colo. 2010).

[13] *Id.* at 1276.

[14] *Id.* at 1280.

[15] *Id.* (citing *Franklin Savings Ass'n v. Office of Thrift Supervision*, 934 F.2d 1127, 1137 (10th Cir. 1991)).

detailed information and analysis relating to the mouse, and were thus relevant to the agency's decision.[16]

In its Motion to Strike, the Region cited to *In re Dominion Energy Brayton Point LLC*,[17] for the principle that the Environmental Appeals Board (the "Board") reviews NPDES permits on a record review basis. However, in an appeal to the Board following the remand order in that case, the Board noted that admitting extra-record material may be permissible in certain circumstances.[18] The Board explained:

> [T]he appellate review process can serve as a petitioner's first opportunity to question the validity of material added to the administrative record in response to public comment, or . . . in response to a remand order. . . In such cases, where a petitioner submits documents in response to new materials added to the record by the Region in response to comments or on remand, and where the Board's task is to review the record and the Region's rationale for its final decision, it seems logical if not necessary that the Board consider the petitioner's proffer of evidence in support of its assertion that the Region's conclusions are erroneous or that the Region erred in failing to take into account such materials.[19]

Thus, the Board may consider extra-record evidence when the Region "erred" in failing to take the evidence into account.

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[16] *Id.* at 1281.

[17] 12 E.A.D. 490, 508–09 & n.28 (EAB 2006).

[18] *In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407 (EAB 2007).

[19] *Id. at* 418; s*ee also In re Metcalf Energy Ctr.*, 2001 EPA App. LEXIS 39, *40-43, n.13 (EAB 2001); *In the Matter of Three Mt. Power, LLC*, 2001 EPA App. LEXIS 27, *1-3 (EAB 2001).

## ARGUMENT

### A. The Board may consider Attachments 36-41 because EPA improperly failed to obtain and consider the data contained in those attachments.

Although EPA requested and received the Permittee's 15-minute data for warmer months (May–September) in certain years,[20] it never sought the data for cooler months *in any year*. If EPA had obtained and considered the complete 15-minute data, EPA could have properly analyzed whether the Station's operation in recent years *assures* protection of Hooksett Pool's BIP from in cold shock in winter. But it did not.

As expert Matthew Hodge explained in his declaration, evaluating the rate of change in water quality conditions is necessary to identify harm to fish from cold shock.[21] For example, on December 14, 2018, the maximum temperature recorded at S-0 was 22.0°C and the minimum temperature was 9.0°C. It is impossible to tell from Permittee's annual reports the rate of change, *i.e.*, whether the 13.0°C drop in river temperature was gradual or rapid. However, the 15-minute data shows that the rate of temperature change at S-0 on that day ranged from 1.1°C per hour to 2.8°C per hour between 2:00 PM and 4:15 PM. In comparison, the maximum rate of temperature change on December 16, 2018, a day when Merrimack Station was not generating electricity, was 0.7°C per hour. Thus, the rate of temperature change at S-0 was approximately four times greater on December 14, 2018 when the Station

[20] AR-1868 (June–Sept. 2013–2016 data); AR-1662 (May–Sept. 2017 data).

[21] Att. 37 to Petition, Declaration of Matthew Hodge, May 14, 2020.

was operating and then shut down, as compared to December 16, 2018, when it was not operating at all. This data shows that when Merrimack Station stops generating electricity the temperature drops rapidly—on the order of hours.[22]

EPA improperly failed to obtain information that would have been critical to its decision-making. It would not have been difficult for EPA to request the complete 15-minute data from Permittee. Because EPA did not obtain the data, EPA was left in the dark as to the full extent of the Station's effect on water quality, habitat, and fish. However, EPA proceeded to issue the Permit anyway. The Board may review the 15-minute data, contained in Attachments 36-41, because the data is particularly relevant to evaluating the Permit, and EPA failed to obtain such crucial data.

**B. Attachments 36-41 do not constitute additional argument.**

In its Motion to Strike, the Region argues that Petitioners, through Attachments 36 and 37, are adding additional pages of argument in excess of the 18,000-word limit for the Petition. EPA's argument is without merit. The Petition contains 17,941 words and is under the limit. Attachments 36 and 37 are not argument directed to the Board, but were directed to the Region as context for the data that EPA should have considered but did not.

EPA cites to *In re City of Taunton*.[23] However, that case concerned materials included for the first time with a reply brief that raised new issues which were

[22] *Id*. at ¶¶18–22.

[23] 17 E.A.D. 105, 129 (EAB 2016).

never raised during the comment period. The Board noted that the petitioner could have raised the arguments in a declaration submitted with its petition but could not do so "for the first time in reply."[24] Unlike *City of Taunton*, here the Petitioners made clear during the 2017 comment period—and then again in January 2020—that the complete 15-minute data was lacking from the record. This issue was not raised for the first time on reply, or for that matter, in the Petition. The absence of the 15-minute data was raised with EPA years ago, and EPA never corrected it.

## CONCLUSION

For the foregoing reasons, the Board should deny EPA Region 1's Motion to Strike Petitioner's Attachments 36-41 to the Petition for Review.

Dated: November 9, 2020

Respectfully Submitted,

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[24] *Id.* at 128 ("While it may be true, as the City argues, that in its Petition the City could have challenged the charts included in the Region's Response to Comments, it cannot raise those challenges for the first time in reply.")

## STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this opposition to the Motion to Strike contains less than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5). Not including the cover page signature block, statement of compliance with word limitation, and certificate of service, this opposition contains 2,449 words (including footnotes), as counted by Microsoft Word. This opposition is written in Century Schoolbook, 12-point font.

/s/ *Reed W. Super*
Reed W. Super

## CERTIFICATE OF SERVICE

I, Reed W Super, hereby certify that on November 9, 2020, I caused to be served a true and correct copy of the foregoing opposition to motion to the following by email and through the EAB's e-filing system:

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