

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

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In re: )

Granite Shore Power Merrimack LLC )

NPDES Permit No. NH0001465 )

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NPDES Appeals No. 20-05, 20-06

**PERMITTEE GSP MERRIMACK LLC'S RESPONSE TO EPA'S MOTION FOR CONTINUANCE OF THE DATE FOR ORAL ARGUMENT AND ABEYANCE**

GSP Merrimack LLC ("GSP"), permittee for Permit No. NH0001465 (the "Permit"), respectfully files this response to the U.S. Environmental Protection Agency's ("EPA") Motion for Continuance of the Date for Oral Argument and Abeyance, filed with the Board on February 3, 2021 ("Motion"). For the reasons discussed below, the Board should deny the motion.

As the sole grounds for its motion, EPA cites Executive Order No. 13,990 signed by the President on January 20, 2021. *See* Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021) ("Order"). The Motion asserts that the Executive Order directs federal agencies to "examin[e] whether past Agency actions are consistent with its goals." Motion at 2. The Motion further asserts that "[t]he requested abeyance will provide an opportunity for the Agency to act in this case in a manner consistent with policies expressed in this Executive Order" and allow "the new Administration . . . the opportunity to determine its position in this proceeding." *Id.*

The agency review provisions of Executive Order No. 13,990, however, do not apply to the Permit and do not provide good cause to postpone oral argument in these appeals or to hold them in abeyance. Contrary to the suggestion in EPA's Motion, Executive Order No. 13,990 does not, by its own terms, require the agency to review its prior permitting actions for individual facilities, such as the issuance of the National Pollutant Discharge Elimination System ("NPDES") Permit for

Merrimack Station, or to review the agency’s “position in this proceeding.” *Id.* Instead, Executive Order No. 13,990 applies to “all existing regulations, orders, guidance documents, policies, and any other *similar* agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021.” Order at § 2(a); 86 Fed. Reg. at 7,037 (emphasis added). The Executive Order further directs *the Attorney General*, in pending litigation *in the courts*, to request a stay so that review of these enumerated actions can be completed. Order at § 2(d); 86 Fed. Reg. at 7,039.

But the Executive Order does not direct EPA to review all of its individual *permitting* actions or its “positions” in administrative proceedings taken since January 20, 2017, or to seek stays in *administrative* appeals so it can conduct such reviews. An NPDES permit issued to an individual facility is not “similar” to the enumerated actions in the Executive Order—all of which are broadly-applicable agency actions. Tellingly, EPA does not assert in its Motion that it interprets the Executive Order to apply to NPDES permitting actions or that the agency is undertaking an agency-wide review of all of its NPDES permitting actions in the last four years. Indeed, the Motion does not assert that any other NPDES action is being reviewed for consistency with the Executive Order other than GSP’s Permit. Executive Order 13,990 thus does not authorize or direct the Region to revise or withdraw the Permit at issue here, or provide a basis for the agency to change its positions before the Board. Thus, with briefing complete and the agency’s “position” already well-established in its filings with the Board, there is no reason to delay oral argument or a decision by the Board.

In any event, if the Board in its discretion nevertheless concludes that a temporary postponement of the February 16, 2021 oral argument is warranted, it should deny the request for any abeyance that the Region says it needs in order to “make a recommendation to the Board as to further proceedings.” Motion at 1. As discussed above, the agency has made its position clear in its filings with the Board—that the Petitions for Review should be denied in full. And in its Motion, the agency does not assert that its position in this regard has changed, nor has it identified any specific issue raised

in the Petitions that it may reconsider. Further, even if the agency had determined that it must revisit the issues raised in the pending Petitions for Review based on Executive Order 13,990, or seek to revise or withdraw the Permit to address those issues, the Board's rules and precedent require more than a "recommendation" from the Region. As the Board has explained, "[a]fter the 30-day window under 40 C.F.R. section 124.19(j) closes, the Region must file a motion with the Board seeking a voluntary remand of the permit before withdrawing it, stating explicitly its intentions regarding withdrawal, reissuance, and notification of interested parties." *In Re: Savoy Energy, L.P.*, 17 E.A.D. 200, 202 n.2 (EAB June 3, 2016) (citing *In re West Bay Exploration Co.*, UIC Appeal Nos. 13-01 & 13-02, at 4 n.4 (EAB May 29, 2013) (Order Denying Reconsideration)). Here, that 30-day window has long-since closed, and thus the Region must seek leave from the Board and state its intentions regarding proceedings on remand. If the Region files such a motion, GSP should be provided adequate opportunity to respond (40 C.F.R. § 124.19(f)(3)) and to seek additional relief in light of the Region's motion and stated intentions (*Id.* § 124.19(f)(1)).

Dated: February 8, 2021

Respectfully submitted,

s/ P. Stephen Gidiere III

P. Stephen Gidiere III

[sgidiere@balch.com](mailto:sgidiere@balch.com)

Thomas G. DeLawrence

[tdelawrence@balch.com](mailto:tdelawrence@balch.com)

Julia B. Barber

[jbarber@balch.com](mailto:jbarber@balch.com)

Balch & Bingham LLP

1901 6th Avenue North, Suite 1500

Birmingham, Alabama 35203

Telephone: (205) 251-8100

Facsimile: (205) 488-5710

*Counsel for Permittee GSP Merrimack LLC*

**STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

I hereby certify that this Response, including all relevant portions, contains fewer than 7,000 words, in accordance with 40 C.F.R. §124.19(f)(5). Not including the caption, signature block, statement of compliance with the word limitation, and certification of service, this Response contains 851 words.

s/ P. Stephen Gidiere III  
*Counsel for Permittee GSP Merrimack LLC*

Date: February 8, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Response were served by email on the following persons, this 8th day of February, 2021:

*For Sierra Club, Inc. and  
Conservation Law Foundation*  
Reed W. Super  
Edan Rotenberg  
Julia Muench  
SUPER LAW GROUP, LLC  
180 Maiden Lane, Suite 603  
New York, NY 10038  
212-242-2355, ext. 1  
855-242-7956 (fax)  
[reed@superlawgroup.com](mailto:reed@superlawgroup.com)  
[edan@superlawgroup.com](mailto:edan@superlawgroup.com)  
[julia@superlawgroup.com](mailto:julia@superlawgroup.com)

*For New Hampshire Department of Environmental  
Services*  
K. Allen Brooks, Senior Assistant Attorney  
General  
New Hampshire Department of Justice  
33 Capitol Street  
Concord, NH 03301  
[Allen.brooks@doj.nh.gov](mailto:Allen.brooks@doj.nh.gov)

*For EPA*  
Mark Stein, Assistant Regional Counsel  
U.S. EPA, Region 1  
5 Post Office Square, Suite 100  
Boston, MA 02109-3912  
[stein.mark@epa.gov](mailto:stein.mark@epa.gov)

Steve Neugeboren, Associate General  
Counsel  
James Curtin  
Pooja Parikh  
Jessica Zomer  
Richard T. Witt  
OGC-Water Law Office  
1200 Pennsylvania Ave. NW  
MC-2355A  
Washington, DC 20460  
[neugeboren.steven@epa.gov](mailto:neugeboren.steven@epa.gov)  
[curtin.james@epa.gov](mailto:curtin.james@epa.gov)  
[parikh.pooja@epa.gov](mailto:parikh.pooja@epa.gov)  
[zomer.jessica@epa.gov](mailto:zomer.jessica@epa.gov)  
[witt.richard@epa.gov](mailto:witt.richard@epa.gov)

s/ P. Stephen Gidiere III  
*Counsel for Permittee GSP Merrimack LLC*

Date: February 8, 2021