

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

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In re: )  
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Granite Shore Power Merrimack LLC )  
 )  
NPDES Permit No. NH0001465 )  
\_\_\_\_\_ )

NPDES Appeal No. 20-05

**EPA REGION 1 MOTION TO STRIKE PETITIONERS'  
ATTACHMENTS 36 - 41 TO THE PETITION FOR REVIEW**

Respectfully submitted,

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**Dated: September 25, 2020**

## LIST OF ATTACHMENTS

### **ATTACHMENT 1:**

Email from Reed Super to Sharon DeMeo, EPA, "Merrimack Station, Bow, NH; NPDES Permit No. NH0001465," enclosing letter and Declaration (Friday, May 22, 2020 8:08:03 PM).

### **ATTACHMENT 2:**

Email from Reed Super to Sharon DeMeo, EPA, "(2 of 5) (2019) --- Re: Merrimack Station, Bow, NH; NPDES Permit No. NH0001465," enclosing Spreadsheet (River Monitor 2019 (MK-19-216-DNH-00024138).xlsx) (Friday, May 22, 2020 8:09:31 PM).

### **ATTACHMENT 3:**

Email from Reed Super to Sharon DeMeo, EPA, "Re: (3 of 5) (2018) --- Re: Merrimack Station, Bow, NH; NPDES Permit No. NH0001465," enclosing Spreadsheet **River Monitor 2006 2017 (MK-19-216-DNH-00023991)** (Friday, May 22, 2020 8:14:23 PM).

### **ATTACHMENT 4:**

Email from Reed Super to Sharon DeMeo, EPA, "Re: (4 of 5) (2006 to 2017) --- Re: Merrimack Station, Bow, NH; NPDES Permit No. NH0001465," enclosing Spreadsheet (River Monitor 2018 (MK-19-216-DNH-00024126).xlsx) (Friday, May 22, 2020 8:12:47 PM).

### **ATTACHMENT 5:**

Email from Reed Super to Sharon DeMeo, EPA, "Re: (5 of 5) (1998 to 2006) --- Re: Merrimack Station, Bow, NH; NPDES Permit No. NH0001465," enclosing Spreadsheet (River Monitor 1998 2006 data (MK-19-216-DNH-00023990).xlsx) (Friday, May 22, 2020 8:14:32 PM).

## INTRODUCTION

On July 27, 2020, Petitioners Sierra Club and Conservation Law Foundation (“CLF”) (collectively, “Petitioners”) filed a Petition for Review (the “Petition”) appealing National Pollutant Discharge Elimination System (“NPDES”) Permit No. NH0001465 (the “Final Permit”) issued by the Region 1 office (“Region 1” or “the Region”) of the United States Environmental Protection Agency (“EPA”) to the Merrimack Station power plant in Bow, New Hampshire (the “Facility”). Petitioners append 43 attachments to the Petition. *See* EAB Appeal No. 20-05, Docket No. NH 0001465, Filings #4 and #5.

Respondent Region 1 moves that EPA’s Environmental Appeals Board (the Environmental Appeals Board (“EAB” or the “Board”)) strike from the record for this permit appeal Attachments 36 through 41 to the Petition. *Id.* at Filing # 4 (Attachments 36-39) and Filing #5 (Attachments 40-41). These Attachments are as follows:

- Attachment 36. Letter from Super Law Group, LLC to EPA Region 1 submitting 15-minute data and Declaration of Matthew Hodge, May 22, 2020.
- Attachment 37. Declaration of Matthew Hodge, May 14, 2020, submitted with Attachment 36.
- Attachment 38. River Monitor Data 1998-2006, submitted with Attachment 36.
- Attachment 39. River Monitor Data 2006-2017, submitted with Attachment 36.
- Attachment 40. River Monitor Data 2018, submitted with Attachment 36.
- Attachment 41. River Monitor Data 2019, submitted with Attachment 36.

As explained below, Region 1 moves to strike these documents both because they are not part of the administrative record supporting the Final Permit and because they constitute additional argument beyond the expanded word limit specifically authorized by the Board for this case.

In accordance with 40 C.F.R. § 124.19(f)(2), the undersigned counsel for movant Region 1, Mark Stein, contacted counsel for both the Petitioners and the Permittee, GSP Merrimack LLC

(“GSP”), to ask if they would assent to this Motion to Strike.<sup>1</sup> GSP assented to the motion but Petitioners did not.

## ARGUMENT

### **I. Attachments 36-41 to the Petition Are Not Part of the Administrative Record for the Final Permit.**

The Board reviews NPDES permits on a “record review” basis. *See, e.g., In re Dominion Energy Brayton Point LLC*, 12 E.A.D. 490, 508-09 & n.28 (EAB 2006). Final NPDES permits must be based on the permit’s administrative record, 40 C.F.R. § 124.18(a), *see also id.* § 124.17 (administrative record for draft permits), and the Board evaluates permitting decisions in light of that record. *See Dominion*, 12 E.A.D. at 509 n.28. The contents of the administrative record for a final permit are defined at 40 C.F.R. § 124.18(b). *See also* 40 C.F.R. § 124.18(d).

The administrative record for a decision closes at the time the decision is formally rendered. As the Board has indicated, “many courts have explained that the complete or official administrative record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision.” *Dominion*, 12 E.A.D. at 519 (citations omitted). In making decisions, an agency cannot possibly have considered or relied on materials that were not before it when it made that decision. *Id.*

In the instant case, the Final Permit was issued by the Region based on the administrative record that the Region has certified in connection with this permit appeal. Region 1’s responsible official signed the Final Permit on May 22, 2020, at 12:08 PM. *See* AR-1886 at 1 (including

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<sup>1</sup> Region 1 notes that although EPA recently amended certain aspects of 40 C.F.R. § 124.19, 85 Fed. Reg. 51650, 51657 (Aug. 21, 2020), the instant permit appeal was filed prior to those amendments and is not governed by them. 85 Fed. Reg. at 51654 (“The final rule does not apply to any appeal that was filed before the effective date of this rule.”) That said, the recent amendments made no changes to 40 C.F.R. § 124.19(f)(2).

timed e-signature stamp). At that time, the administrative record closed. Records submitted to, or created by, Region 1 after that time could not, by definition, have been considered by the Region in issuing the Final Permit.

Then, at 8:08 PM on May 22, 2020, Reed Super, Counsel for Petitioners Sierra Club and CLF, sent Region 1 an email that attached a letter from him to the Region (the “Letter”) to which was appended the Declaration of Matthew Hodge (the “Hodge Declaration”). The Letter and the Hodge Declaration offer various arguments and opinions about issues related to the Final Permit, and Petitioners later have attached these two documents to the Petition as Attachments 36 and 37, respectively. Upon emailing the Letter and the Hodge Declaration to Region 1, Petitioners also emailed to Region 1 four spreadsheets of temperature data (the “Spreadsheets”). Both the Letter and the Hodge Declaration refer to the Spreadsheets. *See, e.g.*, Attachment 36 at 1-2; Attachment 37 at ¶¶ 16, 21. Petitioners later attached the Spreadsheets to their Petition as Attachments 38, 39, 40 and 41, and proceeded to make arguments in the Petition referencing all six of these Attachments (*i.e.*, Attachments 36 through 41). *See* Petition at 55-56, nn.203, 207-209.

Region 1 has attached true copies of the five transmittal emails sent by Petitioners to Region 1 as Attachments 1, 2, 3, 4 and 5 to this Motion. These attachments show the times of each email during the evening of May 22, 2020.

Petitioners submitted all these materials – that is, the documents comprising Attachments 36 through 41 to the Petition and the emails comprising Attachments 1 through 5 to this motion – to Region 1 *after* the Final Permit was signed. None were previously in the Region’s possession

and the Region had not seen any of them before.<sup>2</sup> As a result, *none* of these materials are part of the administrative record for the Final Permit. *Dominion*, 12 E.A.D. at 518. Accordingly, Region 1 did not add these materials to the administrative record for the Final Permit.

Consistent with the principles of record review, EPA regulations governing permit appeals before the Board allow a petitioner to attach documents from the Administrative Record to its petition, but that regulation does not authorize attaching non-record materials to the petition. 40 C.F.R. § 124.19(d)(2) (“Parts *of the record* to which the parties wish to direct the Environmental Appeals Board’s attention may be appended to the brief submitted.”) (emphasis added). Since Attachments 36 through 41 to the Petition are not part of the administrative record for the Final Permit, it is inconsistent with 40 C.F.R. § 124.19(d)(2) for Petitioner to have attached them to the Petition. Therefore, Region 1 moves under 40 C.F.R. § 124.19(f) to strike Attachments 36 through 41 to the Petition from the record for this permit appeal. The Region also moves that any arguments based on these extra-record documents be stricken from the record for this permit appeal or otherwise disregarded.

In addition, Region 1 notes that Petitioners submit this extra-record material primarily in support of their argument that the Final Permit may authorize thermal discharges by Merrimack Station that will cause “cold shock” impacts to fish in the Hooksett Pool section of the Merrimack River. Region 1 has responded to these arguments in its Response to the Petition filed simultaneously with this motion and will not repeat that response here. The Region does note, however, that it has taken account of the issue of cold shock in its thinking since the 2011 Draft Permit. *See* AR-618 at 349. Moreover, when Region 1 reopened the public comment period for

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<sup>2</sup> Region 1 notes that *some but not all* the data in the Spreadsheet included as Attachment 39 to the Petition are also included in AR-1662. In other words, Attachment 39 to the Petition is not part of the Administrative Record for the Final Permit, but a subset of the data in that Spreadsheet is included in the Administrative Record in AR-1662.

the permit in 2017, *see* AR-1534, it specifically invited public comment on thermal discharge issues and on the import of the Facility's reduced operations for setting permit limits. Therefore, any concerns about cold shock in connection with reduced operations could have been raised in comments at that time. Petitioners did, in fact, comment about their concern about cold shock, AR-1573 at 12, and further did so in their post-comment-period comment letter from January 7, 2020. AR-1688 at 21-22. Region 1 considered and responded to these comments and addressed the issue of cold shock in its Responses to Comments document. AR-1885 at 110, 112-13, 325, 328. There is no reason that Petitioners could not have gathered and submitted the materials in Attachments 36 through 41 before the Final Permit was issued. *See* AR-1885 at 328. Petitioners may argue that they could not have known to submit these arguments and materials until they saw the Final Permit which had different conditions than were in the Draft Permit issued in 2011. Any such argument would be belied, however, by Petitioners' prior comment letters from 2017 and 2020, which raise the cold shock issue directly. AR-1573 at 12, AR-1688 at 21-22.

**II. Attachments 36 through 41 to the Petition Should be Stricken from the Record of this Permit Appeal Because They Constitute Additional Argument that, When Considered Together with the Petition, Exceeds the Word Limit Approved by the Board for this Case.**

Attachments 36 through 41 to the Petition should also be stricken because they constitute additional argument beyond the word limit authorized by the Board in this case. EPA regulations limit petitions for review to 14,000 words, subject to the Board approving an expansion of the word limit. 40 C.F.R. § 124.19(d)(3). In this case, the Petitioners, Region 1, and the Permittee agreed to seek an expansion of the word limits to 18,000 for both Petitioners' petition for review and the Region's and GSP's responses. The Board approved the requested expanded word limit. *Order Granting Consent Motion* (June 16, 2020), EAB Appeal No. 20-05, Docket No. NH

0001465, Entry #3. The Petitioners certify that their brief is already 17,941 words, Pet. at 76, but Petitioners' Attachment 36 adds a four-page, single-spaced letter by Petitioners' counsel making arguments about the Final Permit, and Attachment 37 adds an eight-page declaration from a consultant engineer making additional arguments. These documents would clearly push Petitioners' submissions of argument well over the 18,000-word limit. Parties cannot use extra-record letters and declarations attached to their brief to circumvent otherwise applicable word limits. *See In re City of Taunton*, 17 E.A.D. 105, 129 (EAB 2016) (striking declaration submitted by a petitioner with its brief because of procedural improprieties, including that the combined word total of the brief and declaration contravened the applicable limitation). Thus, Petitioners should not be permitted to avoid the applicable word limit by tacking on 12 additional pages of argument in the form of extra-record letters and declarations. If Petitioners felt they should have more words to work with, they should have moved for a further expansion of the limit. The Board's rules uniformly govern all parties to this permit proceeding and the procedures governing the length of replies were specifically added to the Board's regulations to provide "guidance on the form and content of submissions to the Board," with the objective of "improv[ing] the quality and consistency of filings before the Board, which will also contribute to greater efficiency." 78 Fed. Reg. 5281, 5283 (Jan. 25, 2013). The rules were crafted by the Board to enable it to manage its docket in an orderly fashion and "provide greater clarity and efficiency to the appeals process." *Id.* Petitioners should not be allowed to evade these rules—and the Board's June 16, 2020, Order—by writing additional arguments and labelling them Attachments to a brief that is already at the word limit.

Based on the foregoing, the Region respectfully requests that the Board strike the Attachments 36 through 41 to the Petition.

**STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS**

I hereby certify that Region 1's Motion to Strike Petitioners' Attachments 36 through 41 to the Petition for Review in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal No. 20-05, contains less than 7,000 words in accordance with 40 C.F.R. § 124.19(f)(5). Specifically, the word count by Microsoft Word count indicates that this Motion contains 2,030 words, in total, excluding the cover page, Statement of Compliance with Word Limitations, Certificate of Service and signature block.

Dated: September 25, 2020

Respectfully submitted,

Mark A. Stein /s/

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Region 1's Motion to Strike Petitioners' Attachments 36 through 41 to the Petition for Review in the matter of Granite Shore Power Merrimack LLC, NPDES Appeal No. 20-05, was served on the following persons by Electronic Filing:

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