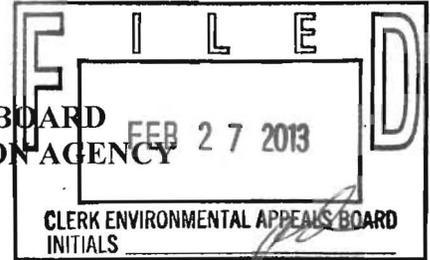


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC



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

ORDER

On February 14, 2013, the Great Bay Municipal Coalition (“Coalition”), the petitioner in the above-captioned matter, filed a motion requesting that the Environmental Appeals Board (“Board”) take the following actions: (A) suspend the briefing schedule pending resolution of certain evidentiary and administrative record issues raised by the Coalition; (B) strike the appendices attached to U.S.EPA Region 1’s (“Region”) February 8, 2013 Memorandum in Opposition to the Petition for Review (“Region’s Response Brief”) that allegedly conflict with page limitations in the Board’s January 11, 2013 Order Denying Motion to File Supplemental Brief and Allowing Reply Briefs (“Jan. 11 Order”); and (C) further extend the briefing schedule and enlarge the page limitation on the Coalition’s reply brief (currently set at 25 double-spaced pages pursuant to the Board’s Jan. 11 Order). *See* Motion to Suspend the Briefing Schedule, Strike Appendices A and B of Respondent’s Memorandum in Opposition to the Petition for Review, and Amend the Briefing Schedule and Page Limit (Feb. 14, 2013) (“Motion”). The Region opposes the Motion. *See* Region 1’s Opposition to Petitioner’s Motion to Suspend the Briefing Schedule, Strike Appendices, and Amend the Briefing Schedule and Page Limit (Feb.

20, 2013) (“Region’s Opposition”). The Coalition has filed a Reply to the Region’s Opposition. See Reply to EPA’s Objection to Motion to Suspend the Briefing Schedule, Strike Appendices A and B of Respondent’s Memorandum in Opposition to the Petition for Review, and Amend the Briefing Schedule and Page Limit (Feb. 26, 2013). For the reasons stated below, the Motion is denied in part and granted in part. The Coalition will be permitted to file a supplemental brief specifying the documents it believes were improperly excluded from the existing administrative record as well as a combined response to the two amicus briefs filed by the New Hampshire Department of Environmental Services and the Conservation Law Foundation, Town of Newington, and New Hampshire Audubon. The Motion is denied in all other respects.

A. Evidentiary and Administrative Record Issues

The Coalition asserts that disputes over the content of the administrative record prevent it from submitting a “cogent” reply brief and warrant a stay of the briefing schedule. Motion at 2-3. The coalition makes three arguments in support of this assertion. First, the Coalition asserts that certain documents, including records in the Region’s possession before issuance of the draft and final permits and certain post-permit issuance records, were improperly excluded from the permitting record. *Id.* The Coalition does not specify the documents to which it is referring but states that it is “preparing a motion outlining the documents that still need to be included in the administrative record and reasons why the Board must include these documents in the record” and that briefing should be stayed until this matter is resolved. *Id.* at 3. In its opposition, the Region states that disputes over the content of the administrative record involve only nine documents and do not support a stay of the briefing schedule. Region’s Opposition at 2. Upon

consideration, the Board finds no basis to stay this matter. Any dispute regarding the content of the administrative record in this matter can await resolution of the petition itself. *See, e.g., In re Dominion Energy Brayton Point Station, LLC*, 12 E.A.D. 490, 511-534 (EAB 2006). However, the Coalition may submit a supplemental brief specifying which documents it believes the Region has improperly excluded from the existing administrative record. The brief must include a numbered list containing all identifying information for each document, *e.g.* date, title, author, that the Coalition alleges should be, but is currently not, included in the administrative record for this permit. The Coalition must file this supplemental brief with the Board no later than March 8, 2013. The brief may not exceed twenty-five double-spaced pages (including exhibits, appendices, and attachments). The Region may file a response no later than March 15, 2013. The Region's response is also limited to twenty-five double-spaced pages (including exhibits, appendices, and attachments).

Second, the Coalition argues that a stay is warranted pending a determination by the Board of whether deposition testimony cited in the Petition for Review "will be allowed in the final administrative record."¹ Motion at 4. As the Region points out, however, the testimony at issue is already included in the administrative record. *See* Region's Opposition at 4 (citing Certified Index to the Administrative Record at D.4). While the Region argues that the Coalition's arguments in support of Board review that rely on the deposition testimony fail to meet the Board's threshold procedural requirements (*see id.*), this is not a basis for delaying the briefing in this matter. On the contrary, if the Coalition believes that the Region's assertions in this regard are erroneous, the March 1 reply brief is the appropriate vehicle for airing its legal arguments.

¹ The depositions are in connection with an action in New Hampshire Superior Court challenging the State's 2009 Numeric Nutrient Criteria report.

Finally, the Coalition asserts that the current briefing schedule should be suspended “pending additional briefing (and the Board’s ruling)” on the applicability to this NPDES permitting proceeding of the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (delineating standards for evaluating expert scientific testimony in federal trials). *See* Motion at 8. The Petition asserts that certain scientific data relied on by the Region in developing the permit’s effluent limits for total nitrogen should be excluded from the record in accordance with *Daubert*. *See* Petition at 91-94; Motion at 7-8. The Region asserts, *inter alia*, that this argument was not raised during the comment period and therefore was not preserved for review by the Board. *See* Region’s Response Brief at 66; Region’s Opposition at 5. The coalition provides no basis for either a stay or additional briefing on this issue. If the Coalition disagrees with the Region’s response on this issue, it may express its disagreement and supporting rationale in its March 1 reply brief.

B. Consistency with the Board’s January 11, 2013 Order

The Coalition asserts that the Board should strike appendices A and B from the Region’s Response Brief as inconsistent with the Jan. 11 Order. Appendix A to the Region’s Response Brief is a 51-page, single-spaced spread sheet titled “Responses to Scientific and Technical Issues.” According to the Coalition, this spread sheet is the equivalent of a 175-page double spaced document. Motion at 10 n.10. Appendix B to the Region’s Response Brief is an eighteen-page document responding to the Coalitions “deposition-based arguments.” The Coalition argues that the length of these appendices is “excessive, improper, and fundamentally unfair given the restrictions the Board placed on the Petitioners” in the Jan. 11, Order. *Id.* at 11.

The Jan. 11 Order denied the Coalition's request for an extension of the 30-day time period for filing an appeal provided in 40 C.F.R. § 124.19 in order to submit a supplemental petition for review. As the Board stated, the Coalition had already "submitted a one hundred and one page petition for review * * * accompanied by fifty-three exhibits, detailing its objections to the Region's permit determination and the Coalition's rationale for Board review. As reflected in the table of contents, twenty-seven pages of the petition are devoted to detailing the Coalition's legal and procedural objections. Another thirty-nine pages are devoted to what the Coalition labels as "scientific" arguments supporting Board review." Jan. 11 Order at 4-5. The Board was not persuaded "that the Coalition had not had sufficient time to identify the issues and to substantively support its arguments or that additional time was needed under the circumstances." *Id.* at 5. According to the Coalition, it is unfair and a violation of its due process rights to allow the Region to include the Appendices in its response brief and to limit the Coalition to its initial brief.

Upon consideration, the Coalition's motion to strike the appendices is denied. As the Board stated in the Jan. 11 Order, the Coalition has had sufficient time and opportunity to prepare a petition for review and has submitted a lengthy petition with this Board detailing its legal, technical, and scientific claims. Indeed, the length of its petition (101 pages including the table of contents) more than doubles what the Board's Practice Manual suggests is an appropriate length for a brief.² The petition also attaches 53 exhibits totaling over 2000 pages. Under these circumstances, the Coalition's suggestion that it has been in any way limited in its ability to

² See Environmental Appeals Board, U.S. EPA, Practice Manual at 17 (June 2012), *available at* <http://www.epa.gov/eab> (click on EAB Guidance Documents) ("The parties are strongly encouraged to limit briefs to 50 pages (including the certificate of service, table of contents, and table of authorities").

adequately file a petition with the Board is without merit. Further, the Coalition has failed to demonstrate that the Region violated any provision of the Jan. 11 Order or that the Coalition would suffer any prejudice should the appendices to the Region's Response Brief remain in the record before the Board. Finally, as the Board stated in its Jan. 11 Order, the Coalition will have the opportunity to respond to the Region's brief.³

C. Briefing Schedule and Page Limitations

In its Jan. 11 Order, the Board allowed the Coalition to file a reply to the Region's Response Brief. The deadline for filing that reply is March 1, 2013. *See* Order Extending Time to File Reply Briefs (Jan. 25, 2013). Any sur-reply from the Region must then be filed no later than March 15, 2013, in accordance with the Jan. 11 Order (as amended). *Id.* These filings are limited in length to twenty-five double-spaced pages.⁴ Jan. 11 Order at 5. In its Motion, the Coalition asserts that the twenty-five-page limit "is no longer reasonable" because the Region has challenged much of the evidence submitted with the Petition as insufficient to support Board review and the Coalition is therefore obligated to provide additional information in support of its Petition. *See* Motion at 12-13. The Motion requests that the page limit be expanded to seventy-five pages if the Board strikes Appendix A and B of the Region's Opposition or one-hundred-fifteen pages if the appendices are not stricken from the Region's Opposition. Motion at 13. The Coalition's motion is denied. As previously stated, the Coalition has failed to convince the Board that it has not had sufficient time and opportunity to submit its arguments in support of

³ The Coalition should be aware that its response brief may only respond to issues raised in the Region's Opposition Brief. New issues or arguments will not be considered. *See In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (new issues raised in reply briefs are equivalent to late-filed appeals and must be denied as untimely).

⁴ This page limitation includes exhibits, appendices, and attachments.

Board Review. To the extent that the Coalition wishes to contest the assertions in the Region's Opposition it may do so in its Reply due on March 1, 2013.

The Motion also requests that the Coalition be given the opportunity to respond to two amicus briefs filed with the Board by the New Hampshire Department of Environmental Services and the Conservation Law Foundation, Town of Newington, and New Hampshire Audubon. See Amicus Brief of N.H. Department of Environmental Services (Feb. 6, 2013) ("NH Brief") and Brief of Conservation Law Foundation, Town of Newington, and New Hampshire Audubon (Feb. 7, 2013) ("CLF Brief"). The motion to respond to the amicus briefs is granted. The coalition is hereby permitted to file a combined response to both briefs. This combined response must be filed with the Board no later than March 8, 2013 and is limited to twenty-five double-spaced pages (including exhibits, appendices, and attachments).⁵

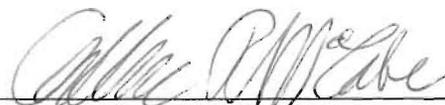
No further briefing will be permitted in this matter.

So ordered.

Dated: Feb. 27, 2013

ENVIRONMENTAL APPEALS BOARD

By:



Catherine R. McCabe
Environmental Appeals Judge

⁵ On February 9, 2013, the Coalition filed a Motion for Reconsideration of the [Board's February 7, 2013] Order Granting Hampshire [sic] Department of Environmental Services' Motion to File Non-Party Amicus Brief and Motion to Strike the Amicus Brief ("Motion to Strike"). The Motion to Strike is denied. The Board notes, however, that the fourteen-page Motion to Strike includes a substantive response to the issues raised in the NH Brief. Thus, the Coalition may wish to focus the bulk of its March 8 combined response on the CLF brief.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order in the matter of Town of Newmarket Wastewater Treatment Plant, NPDES Appeal No. 12-05, were sent to the following persons in the manner indicated:

By First Class Mail and Facsimile: John C. Hall
1620 I Street, NW
Suite 701
Washington, D.C. 20006
Fax No. (202) 463-4207

Evan J. Mulholland
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol St.
Concord, NH 03301
Fax No. (603) 271-2110

Thomas F. Irwin
Vice President & CLF New Hampshire Director
Conservation Law Foundation
27 North Main Street
Concord, NH 03301
Fax No. (603) 225-3059

By First Class Mail: Michael T. Racine
PO Box 644
Hillsborough, NH 03244

By EPA Pouch Mail and Facsimile: Samir Bukhari (ORA 18-1)
U.S. EPA, Region 1
Office of Regional Counsel
5 Post Office Square - Suite 100
Boston, MA 02109-3912
Fax No. (617) 918-0095

Dated: FEB 27 2013


Annette Duncan
Secretary