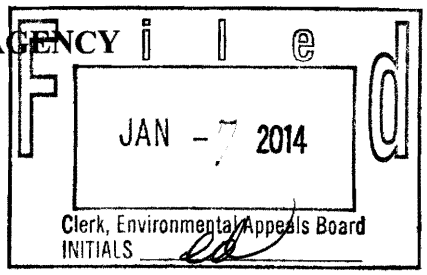
ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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

ORDER DENYING MOTION FOR RECONSIDERATION

On December 2, 2013, the Environmental Appeals Board ("Board") issued an Order Denying Review of a Clean Water Act National Pollutant Discharge Elimination System permit that the U.S. Environmental Protection Agency ("EPA" or "Agency") Region 1 ("Region") issued to the Town of Newmarket. Order Denying Review (Dec. 2, 2013) ("December 2 Order"). The Board received a timely motion for reconsideration from petitioner Great Bay Municipal Coalition ("Coalition") on December 16, 2013. Petitioners' [sic] Motion for Reconsideration (Dec. 16, 2013) ("Motion"). The Region filed a response opposing the Coalition's Motion on January 3, 2014. As explained in more detail below, the Board denies the Coalition's Motion.

A motion for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(m). Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact. *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 2-3 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration); *In re Arizona Municipal Storm Water NPDES Permits*, NPDES Appeal

No. 97-3, at 2 (EAB Aug. 17, 1998) (Order Denying Motion for Reconsideration). The reconsideration process "should not be regarded as an opportunity to reargue the case in a more convincing fashion." *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992), *quoted in In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72, at 2 (Feb. 10, 2000) (Order Denying Motions for Reconsideration); *see also In re Town of Ashland Wastewater Treatment Plant*, NPDES Appeal No. 00-15, at 2 (EAB Apr. 9, 2001) (Order Denying Motion for Reconsideration) (citing *Knauf*, at 2 (Feb. 10, 2000)). Federal courts employ a similar standard. *See, e.g., Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for Reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.") (citation omitted); *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004).

Petitioner's Motion largely reiterates the same arguments that it made in its petition and multiple replies filed in this proceeding. Petitioner fails to demonstrate that the Board made a manifest error of law or fact, and instead expresses its disagreement with the Board's conclusions. This is insufficient to meet the Board's standard for reconsideration.

Petitioner's Motion contains a number of allegations of legal error, including, most significantly, that the Board erred by: (1) applying the wrong standard of review to the Region's permit decision, *see* Motion at 9, and (2) misinterpreting the decisions of the U.S. District Court for the District of Columbia in *City of Dover v. Environmental Protection Agency*. *Id.* at 14.

The Board does not agree.

Petitioner contends that the Board's December 2 Order applied an improper standard of review by presuming that the Region's responses to comments were correct and failing to seek verification and support for those responses in the administrative record. *Id.* at 9. This is an inaccurate characterization. As reflected in the detailed citations to the record in the December 2 Order, the Board carefully reviewed the record on each of the issues raised and concluded that the Region's decisions and explanations were rational, persuasive and supported by the record. Petitioner appears to be confused about the standard of review that applies in this proceeding, suggesting that the burden is on the Region, and now on the Board, to refute their contrary conclusions.[1] As explained in the regulations and the Board's December 2 Order, Petitioner has the burden of proof on this appeal, and is required to demonstrate that the Region made a clear error of law or fact or abused its discretion in selecting the numeric effluent limitation for nitrogen in the Town of Newmarket's permit. 40 C.F.R. § 124.19; *see* December 2 Order at 5-8. After thoroughly examining Petitioner's numerous arguments and the voluminous record in this matter, the Board concluded that Petitioner had failed to do so.

Petitioner's Motion also contends that the Board has misinterpreted the District Court for the District of Columbia's decision in *City of Dover et al. v. EPA*, No. 12-CV-01994-JDB (D.D.C. July 30, 2013). Petitioner belatedly brings to the Board's attention a new decision in that case that was issued on November 15, 2013, more than two weeks prior to the issuance of

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[1] *See, e.g.*, Motion at 13 ("The Board must cite to evidence that forms a sufficient basis to reject the highly specific factual/scientific objections and technical flaws identified by the Coalition in its original comments and raised with particularity on this appeal.").

the Board's December 2 Order.[2] Petitioner has provided no explanation or justification for its failure to bring this second decision to the Board's attention before the Board issued its decision. In any event, the Board finds that the district court's November 15, 2013 decision, permitting the plaintiffs in that action to file an amended complaint, has no effect on the Board's December 2 Order. The Board's Order cited the district court's July 30, 2013 ruling that plaintiffs' original complaint had failed to state a claim for relief.[3] The district court's November 15 decision did not disturb that ruling, but simply allowed the plaintiffs to file a new complaint alleging an alternative theory. The district court has not yet ruled on the plaintiffs' new claim.[4] Therefore, the Board concludes that the district court's November 15 ruling does not affect the Board's December 2 decision in this matter.

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[2] On July 30, 2013, the district court granted EPA's motion to dismiss the complaint in *City of Dover v. EPA* for failure to state a claim, with prejudice. On August 20, 2013, the plaintiffs (the cities of Dover, Portsmouth and Rochester) moved to set aside the judgment and for permission to file an amended complaint. On November 15, 2013, the district court set aside its ruling of dismissal with prejudice and permitted the plaintiffs to file an amended complaint asserting an alternative legal theory.

[3] *See* December 2 Order at 62-63 (citing district court's July 30 memorandum opinion affirming that the *Great Bay Nutrient Report* is not a water quality standard because it is not a provision of state law as required by 40 C.F.R. § 131.3(i), and thus no mandatory duty existed for EPA to review the *Report* as a revised water quality standard under 33 U.S.C. § 1313(c)(2)(a), (c)(3)); *id.* at 74 (citing district court's July 30 memorandum opinion that states "Accordingly, there is no nondiscretionary duty for EPA to undertake any *specific action* to promote public participation, aside from the one expressly mentioned in the text–promulgating regulations–an action that EPA has undisputedly carried out here.") (emphasis in original).

[4] Plaintiffs' new claim, asserted under the Administrative Procedure Act, 5 U.S.C. § 706(2), alleges that EPA's 2009 and 2011 actions in approving the State of New Hampshire's impaired waters lists for nitrogen exceeded EPA's statutory authority and were arbitrary, capricious, and an abuse of discretion. *City of Dover et al. v. EPA*, No. 12-CV-01994-JDB, at 19-22 (Nov. 15, 2013) (Amended Complaint). As the Board noted in its December 2 Order, EPA's approvals of the state's impairment listings were separate agency actions that are not before the Board in this appeal of the Region's permitting decision for the Newmarket sewage treatment plant. December 2 Order at 62 n.28.

Petitioner's Motion also reflects its continuing confusion regarding the legal standards that govern the key issues raised in the petition. Petitioner argues erroneously that: (1) the Region was required to establish a "violation" of the State of New Hampshire's water quality standards for nitrogen before it is legally authorized to set a permit effluent limitation for nitrogen in the Newmarket permit, and (2) that the Region must demonstrate that nitrogen "caused" an impairment of the designated uses of the receiving waters of the Lamprey River and the Great Bay of New Hampshire. This is an incorrect characterization of the applicable legal standard. As explained in the Board's December 2 Order, the Region was required to establish an effluent limitation for nitrogen upon determining that there was a "reasonable potential" for nitrogen in the Newmarket plant's discharge to "cause or contribute to" an exceedance of the State's narrative water quality standard. 40 C.F.R. §122.44(d)(1)(ii); N.H. Code Admin. R. Ann. DES 1702.11, 1703.01, 1703.14 (2013). The Board found that the record supports that determination, as explained in the December 2 Order.

Petitioner's Motion also reiterates and emphasizes its contention that the scientific record does not demonstrate that reducing nitrogen levels in the Lamprey River will restore the river's eelgrass population. This argument similarly mischaracterizes the Region's obligations as the permitting authority for the Newmarket plant. The Clean Water Act does not require permitting authorities to guarantee that their actions will result in the environmental outcomes that are ultimately desired. Permitting authorities are required to adhere to the requirements of the statute and the regulations, including the requirement to establish numeric effluent limits in permits when necessary to achieve water quality standards. When presented with the unavoidable scientific uncertainties involved in establishing numeric permit limits based on narrative water quality standards, permitting authorities must use their best professional and scientific judgment

based on the information that is currently available. The Board continues to believe that the Region has done exactly that in the case of the Newmarket permit.

Petitioner's Motion for Reconsideration is denied.

So ordered.[5]

ENVIRONMENTAL APPEALS BOARD

Date: January 7, 2014

By: _____
Catherine R. McCabe
Environmental Appeals Judge

[5] The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

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

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Dated: 1/7/2014

Annette Duncan
Secretary