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

In re GSP Merrimack Station Name of Permittee: Granite Shore Power Merrimack LLC NPDES Permit No. NH0001465	)	NPDES Appeal No. 20-06

PERMITTEE GSP MERRIMACK LLC'S REPLY IN SUPPORT OF PETITION FOR REVIEW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Environmental Appeals Board / EPA Administrative Decisions

Statutes

Regulations

INTRODUCTION

GSP Merrimack LLC ("GSP" or "Permittee") files this reply in support of its Petition for Review of certain provisions of National Pollutant Discharge Elimination System ("NPDES") Permit No. NH0001465, issued by U.S. Environmental Protection Agency Region 1 ("EPA" or "Region 1") on May 22, 2020. The Region's response to the Petition confirms that EPA committed clear error when it imposed cylindrical wedgewire screens ("CWWS") for entrainment based on data that is not reflective of the actual recent operation of Merrimack Station. Using the best data in the record that is reflective of the Station's current operations, it is apparent that no additional controls are warranted under §316(b) and EPA's regulations. EPA further committed clear error by separately requiring in the final permit an annual outage of Unit 2 at the Station during the critical entrainment period but never evaluating or justifying the supposed benefits of CWWS in conjunction with the outage requirement. Lastly, the agency erred by establishing a six-month compliance schedule for the installation of new fish return systems without explaining how or why this allotted time is adequate (in fact, it is not) without accounting for the time needed to obtain permits from other regulatory agencies and the lack of control GSP has over this process, and by requiring the installation of the systems in harsh winter conditions.

For these reasons and those in GSP's Petition for Review, the Board should remand Parts I.E. 1, 2, 4, and 7a.-7.c., Part I.G.3 (related to the cooling water intake structure), and Parts I.E.3 and 7.d. (related to the fish return systems).

ARGUMENT

I. The CWWS Provisions Are Clearly Erroneous Because the Region Admittedly Relied on Data That Is "Not Reflective of the Actual Recent Operation of the Plant" and Misconstrued and/or Misapplied Applicable §316(b) Laws.

EPA's rationale for the requirement in the Permit to install CWWS to address entrainment is clearly erroneous.[1] As GSP explained in its Petition, "[t]he CWWS requirement should be remanded because the Region required the CWWS (at a total cost of $10+ million) based on outdated operational information for Merrimack Station . . . . [T]he record includes information that demonstrates that the reduced operations of the facility in recent years can provide substantial reductions in entrainment without the installation of costly CWWS." Pet. at 2-3. Thus, contrary to EPA's response brief (EPA Resp. at 2), the Petition both addressed the Region's explanation for its §316(b) determination (that a cost of $10+ million was justified based on the Region's predictions of entrainment reductions from CWWS) and established why that explanation was clearly erroneous (it was based on outdated data that did not reflect the current operation of the Station and was squarely contradicted by other data in the record). *See* Pet. at 2-3, 2 n.9, 4 nn.12-13, 21 nn.76-77, 22 ("The record demonstrates that Merrimack Station's most recent operations achieve the entrainment reductions . . . without the installation of costly CWWS.").[2]

This clear error is only confirmed by EPA's response to the Petition. EPA's response claims that the Region did consider the Station's "recent reductions" because "the Region's analysis included

[1] These provisions are Parts I.E.1, 2, 4, and 7.a.-7.c.

[2] EPA repeatedly asserts that GSP "ignores" or has failed to "confront" the agency's explanations on reduced operations set out in its Response to Comments. *See, e.g.,* EPA Resp. at 2, 24. This is not true. In reality, EPA barely acknowledged Merrimack Station's reduced operations in recent years in determining best technology available ("BTA") pursuant to §316(b) and failed to provide any meaningful explanation of the agency's reasoning on how—if at all—the sizable associated flow reductions were taken into account in its final decision. Indeed, it is telling that EPA repeatedly cites the same two pages from its Response to Comments (AR-1885 at III-110-11) in its brief to defend that it adequately considered flow reductions in its BTA evaluation. *See* EPA Resp. at 25-26, 28. GSP cited this discussion in its Petition. Pet. at 3, 21.

an evaluation of the potential entrainment losses at actual intake flows [AIF] for the years 2007 to 2016[.]" EPA Resp. at 26-27. But EPA's Response to Comments in addressing §316(b) cost issues proves the opposite. In this portion of the agency's Response to Comments, EPA concluded that the period 2007 to 2016 was "*not* reflective of the actual recent operation of the plant" and included capacity factor data that was "biased high." AR-1885 at III-102 (emphasis added). Instead, the Region explained that the period "2012 through 2019" "best reflects Merrimack Station's current operation as a peaking unit[.]" *Id.* Thus, EPA's analysis to determine whether CWWS were BTA admittedly *did not use* the "best" data regarding the Station's substantially reduced operations under GSP. Instead, it uses—as the Region now concedes in its response (EPA Resp. at 26)—only data from a period that the agency itself identifies elsewhere in its Response to Comments as "not reflective" of the Station's reduced operations.[3] It is EPA—not Petitioner—that fails to confront and explain this contradiction in the record.

This was a consequential error in the §316(b) analysis, and it skewed the conclusion in favor of EPA's selection of CWWS as BTA. EPA conceded in the Response to Comments that its "estimate of entrainment reduction just from reduced intake flow" using 2007-2016 data "may be on the low side since the AIF values were based on years beginning in 2007, which was before Merrimack Station had shifted to operating as a peaking plant." AR-1885 at III-111 & n.63. In other words, EPA's use of old data overestimated the entrainment reduction benefits of CWWS versus no additional controls.[4]

[3] EPA argues that one of the many citations included in GSP's Petition demonstrating that the agency relied on outdated data in determining BTA for entrainment is not relevant because it applied only to impingement mortality. *See* EPA Resp. at 27 n.7. A plain reading of the text in footnote 10 on page III-30 of EPA's Response to Comments undermines this assertion. *See* AR-1885 at III-30 n.10 (referencing "entrainment" five separate times). Nevertheless, EPA notably does not dispute any of GSP's other citations to the agency's reliance on outdated data in making its entrainment determinations.

[4] EPA's brief seeks to justify its use of 2007-2016 data (to the exclusion of more recent data) based on the fact that the prior permit holder used that data in a 2017 submission, and GSP never "withdrew" these comments. EPA Resp. at 28. This is no justification. Of course, comments

And, the one time in the Response to Comments in which the agency looked at *some* of the more recent and "best" data for a portion of the relevant entrainment period, EPA calculated that the Station's recent operations—without CWWS—reduce flow intake (and thus entrainment) by 83% or more over design intake flow, which is essentially the same as EPA's best estimate of entrainment reduction from the $10+ million CWWS.[5] *Id.* at III-111 (explaining that Station's capacity factor in May-June of 2012-2018 was 17%); *see also id.* at III-34 n.14 (finding that "the combined average monthly flow for May based on DMR data from 2013 through 2019 was, at most, about 6% of the permitted flow.").[6] Entrainment reductions would be even greater utilizing 2019 intake flow data, given the Station's capacity factor was less than 10% in that year. *See, e.g.*, AR-1890; AR-1717.

submitted in 2017 would only include data through 2016. But that does not justify EPA's decision to ignore 2017-2019 data (which was in the record) in issuing the Permit in 2020. Nor is GSP required to "withdraw" comments from a prior permit holder (if that were even possible) in order for EPA to be under an obligation to base its decision on the best data in the record. The agency's reference to GSP's request to temporarily withdraw the request for authorization to discharge FGD wastewater from Merrimack Station from the pending permit application, *see* EPA Resp. at 29 (citing AR-1690), proves nothing and does not place a burden on GSP to withdraw comments from another party that it does not agree with.

[5] EPA based its BTA analysis on the assumption that entrainment reduction from CWWS would be approximately 89%. AR-1885 at III-111. It obtained this figure from a pilot study conducted by the prior permit holder, not GSP. That study, however, did not consider the Station's much reduced operations and does not provide an accurate estimate of actual entrainment reductions that would be achieved under the Station's current reduced operations (either with CWWS or without them). AR-1550. Moreover, that study demonstrated that entrainment reductions varied considerably based on the timing of the peak entrainment period, meaning that targeted flow reductions could be as effective as and more reliable than CWWS. *See*, *e.g.*, *id.* at 46. Regardless, even assuming 89% is the proper benchmark (which GSP does not concede), the Region failed to engage with the best data that shows no further controls achieve the same actual reductions without CWWS and remand is appropriate for that reason alone.

[6] GSP agrees with EPA's conclusion that closed-cycle cooling (at a cost of approximately $100 million, AR-1885 at III-103) was clearly not BTA and could not be justified under any operational profile for the Station. *Id.* at III-111-12. But the question here is not whether EPA should have selected closed-cycle cooling versus CWWS, but whether it should have selected CWWS versus no further controls in light of the Station's reduced operations.

Thus, the basis for EPA's conclusion (AR-1885 at III-112) that CWWS were BTA, but that the Station's reduced operations with no further controls was not (*id.*), was hopelessly flawed. By EPA's own calculations, the two approaches achieved approximately the same entrainment reductions, but the cost of the CWWS was estimated at $10 million. *Id.* at III-110 (cost is between $10.71 and $8.67 million). EPA recognized that the 2014 Final Rule specifically contemplates situations in which no further controls are needed based on an assessment of the costs and benefits of the available options. *Id.* at III-100, 112 n.64 (citing 40 C.F.R. §125.98(f)(4)). But in making its decision regarding those relative costs and benefits here, it relied on data that even it concedes was "not reflective of the actual recent operation of the plant," *id.* at III-102, and thus overstates the entrainment reduction benefits from CWWS. Had EPA considered the "best" data that "reflects Merrimack Station's current operation as a peaking unit," *id.*, GSP submits that EPA would necessarily have concluded that CWWS were not BTA and that no further controls were warranted per the 2014 Final Rule. But that is not GSP's burden to show in this appeal. Rather, because EPA's BTA determination was based on clearly erroneous facts, the Board should remand the §316(b) provisions of the Permit so that EPA can conduct its analysis using the correct and "best" information. 40 C.F.R. §124.19(a).

The Region's flawed BTA analysis is not saved by the speculation in EPA's response brief that "market conditions *could* change in the future" and entrainment numbers increase with "more frequent operation[]" of the Station. EPA Resp. at 26 (emphasis added). EPA cites no basis for this speculation, other than its 2017 request for comments, which also cites no basis. *Id.* (citing AR-1534 at 69). And it is directly contrary to EPA's conclusion in the Response to Comments that "[t]he decline in coal-fired generation in New England, *and at Merrimack Station*, is *not* expected to reverse in the near future." AR-

1885 at III-110 (emphasis added).[7] EPA cites no authority that would require it to ensconce the Station's current and expected operations into the Permit in order to consider those operations as part of the BTA analysis and, indeed, the 2014 Final Rule specifically recognizes that in some instances no controls may be the appropriate result. 40 C.F.R. §125.98(f)(4). What EPA is required to do is to take an approach that is "rational in light of all information in the record," which it failed to do here. *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *see also In re Teck Cominco Alaska Inc., Red Dog Mine*, 11 E.A.D. 457, 473 (EAB 2004). By disregarding its own conclusion that Merrimack Station's reduced generation "is not expected to reverse in the near future" (AR-1885 at III-110), EPA has failed to meet that standard of rational decisionmaking.

EPA's complaint that GSP did not provide "a specific proposal" for an alternative §316(b) approach is a red herring and beside the point. EPA Resp. at 16, 32-33. Tellingly, the agency does not cite any authority that establishes a "specific proposal" threshold before a compliance option may be considered. Furthermore, EPA specifically found in 2017 that because Merrimack Station's permit involved "ongoing permitting proceedings," the applicant was *not* required to submit any additional information on the §316(b) issue, and EPA affirmatively found that it "has sufficient information in the record to determine the BTA requirements for the Merrimack Station permit." AR-1534 at 16. As the permit writer, EPA is obligated to rationally justify its selection of BTA, which includes a consideration of whether no further controls are needed, even absent a submission from the permittee.[8] *See* 40 C.F.R. §125.98(f)(4).

---

[7] EPA's repeated citations to the 40% capacity factor permit provision applicable to thermal discharges from the facility and the negotiation of that provision are also unavailing and immaterial. *See* EPA Resp. at 16, 26 n.6, 29 n.9. It is an "apples to oranges" comparison, because the relevant periods and averaging times are different. *Compare* Permit at Part I.A.11 (including an optional 45-day rolling average capacity factor applicable May 1 through September 30); *with* AR-1885 at III-114 (identifying "mid-May to mid-June" as the "period[] of higher entrainment densities").

[8] EPA's unilateral decisions in the final permit regarding impingement mortality compliance methods for Merrimack Station further highlight the fact that the agency does not need a specific proposal or

Nevertheless, a review of the administrative record makes clear that this issue was squarely presented and evaluated. In fact, EPA's argument is wrong—GSP did provide EPA with a *specific proposal* for the §316(b) provisions (AR-1684), which EPA indicated would be acceptable. EPA Resp. at 17. EPA separately concedes that the prior permit holder had commented that "'EPA cannot reasonably classify [CWWS] as BTA for entrainment at Merrimack Station' because [CWWS] do not 'satisfy EPA's cost-benefit standards.'" AR-1885 at III-108. And EPA itself considered in November 2018 whether "a weekly flow limit" based on "the three most recent years of available data" could form the basis for BTA, AR-1753 at 5, but it failed to follow through with that analysis. Thus, the record contained (and contains) all of the information that EPA needs to correctly determine the BTA under §316(b)—the only problem is that EPA failed to account for it. That was clear error.

In its final decision on §316(b) compliance, EPA reversed course on its initial concurrence with GSP's specific proposal (AR-1684) and erroneously concluded the proposal would be "contrary to EPA regulations." EPA Resp. at 32. That conclusion is an error of law. EPA repeatedly references the 2014 Final Rule's edict that permits issued after July 14, 2018, include permit conditions that require compliance with impingement and entrainment standards "as soon as practicable" to defend the agency's decision to not include a flow reduction (in whole or in part) compliance option in the final permit. *See, e.g.*, *id.* at 5, 17, 36-37. Yet, the agency fails to explain in any detail why the inclusion of this compliance method would run afoul of these regulatory requirements. In actual fact, it would not. In addition to establishing the specific entrainment technology the agency deemed necessary to

---

submission from a permittee prior to incorporating it in a permit. Remarkably, EPA's 2014 Final Rule specifically provides the permittee the explicit right to "[c]ho[ose its] [m]ethod(s) of [c]ompliance with [the] [i]mpingement [m]ortality [s]tandard." *See, e.g.*, 40 C.F.R. §122.21(r)(6). GSP was never provided this opportunity. Instead, EPA self-selected the impingement mortality compliance methods included in the final permit without any input from the company. Given EPA did not solicit the permittee's "[c]hosen [m]ethod(s) of [c]ompliance" when it is specifically mandated by the 2014 Final Rule, it is disingenuous for the agency to cite the lack of a specific proposal from GSP regarding entrainment compliance to justify its failure to incorporate that flow reduction methodology into the final permit.

satisfy BTA and the associated, detailed compliance schedule to install that technology at Merrimack Station, EPA could have easily included the percent entrainment reduction necessary to satisfy the §316(b) standard and provided GSP an option to develop and comply with an alternative compliance approach. And, so long as compliance with this alternative approach was achieved prior to when the CWWS would have been installed and operational, the "as soon as practicable" directive of the 2014 Final Rule would also be satisfied. In fact, compliance with such an alternative approach premised in whole or in part on flow reductions could likely occur sooner than the minimum 2+ years the final permit's compliance schedule allots to install the full array of CWWS required by the final permit. Thus, although EPA ultimately determined it could not forego including a BTA determination in the final permit, the agency erroneously concluded without adequate explanation that this decision foreclosed upon its ability to provide GSP flexibility to satisfy the entrainment reduction standard through alternative means. This is a clearly erroneous conclusion of law that was insufficiently rationalized by EPA. *See, e.g.*, *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997) (remand because permitting authority's rationale for certain permit conditions was not clear and therefore did not reflect "considered judgment" required by regulations); *In re Carolina Power & Light Co.*, 1 E.A.D. 448, 451 (Acting Adm'r 1978) (finding EPA "must articulate with reasonable clarity the reasons for [its] conclusions and the significance of the crucial facts in reaching those conclusions").

EPA's repeated references to GSP being able to submit a new application to modify the permit to request an alternative §316(b) compliance method does not negate or render harmless EPA's clear errors on this issue. *See, e.g.*, AR-1885 at III-35, -208; EPA Resp. at 17, 18, 23, 38. A permit modification application is an arduous process that includes completing and filing a new application, additional fees for processing the application, a new draft permit, another public comment period,

and responding to comments received, among other things.[9] Issuing a final, modified permit would likely take nine months—at a minimum—to complete. Moreover, that modified permit could be appealed to this Board and the contested provisions stayed pending resolution of that appeal. And, until the permit modification is completely processed and resolved, GSP would be required to take meaningful and expensive steps toward installing CWWS at the facility, pursuant to the compliance schedule in the final permit. GSP should not be subjected to this separate administrative process due to EPA's clear error. The agency's references to the possibility of a permit modification are therefore unavailing and should be disregarded by the Board.

Lastly, EPA's attempt to marginalize GSP's requested flow reduction entrainment compliance option by calling into question how the company would comply with the §316(b) impingement mortality standard should be completely ignored by the Board. *See* EPA Resp. at 38-39. As indicated in footnote 8, *supra*, EPA's 2014 §316(b) Final Rule provides GSP the right to select one of seven pre-approved impingement mortality reduction compliance options. *See* 40 C.F.R. §122.21(r)(6); *see also id.* at §125.94(c) (setting out the seven options). Merrimack Station's final permit incorporates two of those seven options. *See* Permit at Parts I.E.2 & 3. In its response, EPA references only the 0.5 fps through-screen velocity option that would be applicable to the facility annually from April 1 through August 15, in conjunction with CWWS operations. *See* EPA Resp. at 39; Permit at Parts I.E.1 & 2. The agency selectively ignores that the final permit also includes a "system of technologies" impingement compliance requirement that is applicable to the facility from August 16 through March 31. *See* Permit at Part I.E.3. This "system of technologies" compliance option could easily be optimized to apply throughout each year, or GSP could elect to comply with one of the other pre-

[9] This assumes EPA would timely act on the permit modification application, which is not guaranteed. *See, e.g.*, AR-846 at 125 (referencing the agency's refusal to process PSNH's permit modification application to incorporate certain, new wastewater discharges from Merrimack Station).

approved technologies for this annual time period (or throughout each year, in lieu of the "system of technologies" option), such as the "[m]odified traveling screens" or "[i]mpingement mortality performance standard" options. *See* 40 C.F.R. §125.94(c)(5), (7). GSP's focus in this appeal is to reverse EPA's erroneous conclusion that CWWS are necessary to satisfy entrainment standards established under §316(b). The company is fully aware that it must comply with one of the seven pre-approved impingement mortality standards throughout each year and it is improper to insinuate to the Board that GSP is seeking to skirt that mandatory requirement by and through its challenge to the agency's conclusions on entrainment. GSP intends no such thing.[10]

II. The Unit 2 Outage Requirement Compounds EPA's Clear Error.

The requirement to schedule the Unit 2 outage during the entrainment period (May 15-June 15)—in addition to installing $10+ million CWWS—only compounds the error in EPA's §316(b) analysis.[11] Unit 2 is the larger of the two generating units at Merrimack Station, with a rating of 330 megawatts (MW) as compared to 108 MW for Unit 1, and thus utilizes the majority of the Station's cooling water. There is no justification for EPA's decision to require the Station to install CWWS at a cost of $10+ million in order to reduce entrainment while the units are operating, and then to also require that the Station take its outage and not operate Unit 2 during the peak entrainment period (when the CWWS would have the most impact). Under EPA's approach, the CWWS for the Unit 2 intake would not operate—and thus would provide no benefit whatsoever—during the critical early summer weeks when entrainment is a concern. It would be money wasted.

[10] Notably, EPA did not justify CWWS on the basis of impingement benefits—it relied solely on the alleged entrainment benefits. AR-1885 at III-100 n.56 ("Consistent with the Final Rule, EPA focuses here on available technologies for entrainment."). Thus, this impingement argument does not and cannot save the agency's erroneous BTA determinations.

[11] The outage requirement is in Part I.G.3 of the Permit.

This approach means that EPA's §316(b) analysis *double counts* benefits and *overstates* the entrainment reduction benefits of the $10+ million CWWS because EPA counted the benefits of CWWS as if the Station were *not* in outage in May or June. AR-1885 at III-111. EPA estimated the entrainment reduction of CWWS as 89% and used this estimate to justify its selection of CWWS as BTA.[12] *Id.* But EPA elsewhere acknowledged that "rescheduling the Unit 2 maintenance outage to occur from mid-May to mid-June (to coincide with periods of higher entrainment densities) would *by itself* reduce total entrainment at the facility by about 34%." *Id.* at III-114 (emphasis added). Thus, it is simply not valid for EPA to conclude as it did that the CWWS requirement—as implemented in the Permit—would achieve an 89% reduction benefit when a significant amount of that reduction will be achieved without the CWWS because Unit 2 would be in outage and not withdrawing any water at all. This was clear error.

EPA's response brief fails to confront the obvious error in the agency's double counting, choosing instead to divert attention from it by mischaracterizing GSP's argument. GSP did *not* argue in its Petition that "EPA may only select one technology or measure as the BTA" as a "legal" matter, as EPA's brief claims. EPA Resp. at 30. Instead, GSP's Petition argues that it was a clear factual error for EPA to "double count[]" the benefits of CWWS and outage re-scheduling when determining BTA. Pet. at 22. Indeed, GSP agrees with EPA that it may and should utilize a combination of operational and technological measures as BTA where the record supports it. Pet. at 5 n.14. The problem here is that EPA failed to justify the combination of measures it selected.[13] EPA justified the costs of CWWS

[12] Again, the data in the record do not demonstrate that CWWS would achieve an 89% reduction *under the Station's current reduced operations*. *See supra* note 5.

[13] EPA repeatedly references that PSNH proposed the annual maintenance outage requirement. *See* EPA Resp. at 31-32. The fact that PSNH proposed outages as a compliance option is immaterial. To GSP's knowledge, the former permittee never endorsed this compliance path *and* CWWS to address entrainment. *See* AR-1885 at III-64-67. A review of PSNH's 2012 and 2017 public comments confirms that the company never advanced both outages and CWWS together as BTA for entrainment. *See generally* AR-846, AR-1548. In fact, in one moment of clarity, EPA acknowledges that the former

as BTA *in isolation* as if the outage provision did not exist, and then it added the Unit 2 outage rescheduling provision as some sort of additional buffer. This was clear error. The Board should remand the §316(b) provisions of the Permit so that EPA may properly determine, based on the most recent and best data and without double counting, what combination of measures constitutes BTA for entrainment at Merrimack Station.

III. The Permit's Six-Month Construction Schedule for Fish Return Systems Is Not Supported by the Record.

EPA's response fails to explain how it determined six months was all that is necessary to install new fish return systems at Merrimack Station.[14] Instead of articulating a reasonable basis for its conclusion, the agency leans heavily on a handful of schedules prepared over a decade ago for the prior owner of the Station that make passing, vague references to the "construction phase" of the schedule and the amount of time estimated to "construct fish return troughs" or "upgrade [the] fish return system." *See* EPA Resp. at 42 (citing AR-4 at 87-91 & att. B at 5-6, 7).[15] It was clear error for EPA to rely on this partial estimate of on-the-ground construction time to support a six-month schedule in the Permit for the design, review, permitting, construction, and tie-in of new fish return systems.

Nowhere does EPA explain (in the record or in its brief) how it calculated a six-month schedule and what activities are accounted for in that schedule. The schedules cited by EPA do not

---

permittee advanced rescheduled annual outages—and only such outages—as BTA for entrainment at the facility. EPA Resp. at 31 (citing AR-1885 at III-25-28, III-64-66). Thus, if anything, PSNH's proposal supports GSP's allegations of error in this proceeding insofar as EPA requires both an annual outage requirement (which PSNH thought was alone sufficient) and CWWS to satisfy BTA for entrainment.

[14] The six-month compliance schedule requirement is in Part I.E.7.d. of the Permit.

[15] The two separate citations in EPA's response to specific pages in AR-4 (*i.e.*, 87-91 in one instance, and "att. B at 5-6, 7" in the other) are duplicative. Pages 5 and 6 of Attachment B in AR-4 are pages 90 and 91 of the pdf file of the document. GSP hereinafter cites to the pdf page numbers in AR-4.

account for the entire undertaking. Instead, they suggest anywhere from 14 to 42 days (sometimes staggered for the separate construction at Unit 1 and Unit 2) as the time necessary only to "construct fish return troughs" or "upgrade [the] fish return system." *See* AR-4 at 87-93. Surely EPA did not think (as the agency now seems to suggest in its response, EPA Resp. at 41) that this represented the entire time needed to design, procure, permit, construct, and tie-in the new fish return systems for the two units. The only logical answer is that the agency knew more time was needed and that the estimates set out in the consultant's draft schedules were not "turn-key" for the fish return systems. Yet, EPA did not explain why six months was chosen or why that time is reasonable, nor does the Permit contain any benchmarks or milestone to indicate how long each step in the process should take. This is clear error. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."); *see also U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000) (adding that an agency's explanation "must be sufficient to enable us to conclude that the [agency's action] was the product of reasoned decisionmaking" (internal quotation marks omitted)).

The record is clear, and EPA is fully aware, that GSP will need to obtain permits from other regulatory agencies to complete these fish return systems and other §316(b) work. *See* EPA Resp. at 40 (acknowledging and not refuting GSP's need to obtain additional permits); *see also generally, e.g.*, AR-4 (repeatedly referencing that permit consultations will be necessary under the various proposed compliance options and that permit costs are not included in the provided estimates). Even if the applications for those permits are submitted in a timely manner, the time needed for issuance of them is outside of the company's control.[16] For this reason, too, EPA's six-month absolute deadline, which

[16] These permitting delays are why GSP cannot "say how much time would be enough." EPA Resp. at 40. A reasonable schedule would include accommodation for permitting activities and not simply a hard six-month deadline.

includes no accommodation for delays in permitting, is clear error. Notably, the agency recognized and accounted for this issue in creating the compliance schedule for the CWWS. *See* Permit at Part I.E.7.b. Yet, the agency—without explanation—failed to do so for the fish return system installations. This discrepancy in the compliance schedules on the same regulatory issue underscores EPA's error.

EPA discounts the obvious fact that winter conditions in New Hampshire present an additional variable that would complicate compliance with a six-month schedule. But this complicating factor exists for any construction project in New England that requires earthwork and/or work within a watercourse—given that the ground and river will likely be frozen for extended periods of time. To support its position, EPA cites to the same stale construction schedules in the record to argue that GSP's assertions are controverted because those schedules propose construction of "fish return troughs" in December, January and February. *See* EPA Resp. at 42 (citing AR-4, att. B at 5-6, 7). Yet, contrary to EPA's argument, the "upgrade[d] fish return system[s]" component associated with the schedule for installing CWWS does not propose work in these months. *See* AR-4 at 87 (proposing construction start dates in March). And it is unremarkable that *troughs* (*i.e.*, the buckets or containers used to collect fish impinged on the intake screens) could be installed in two weeks during winter months, but that entire fish return systems that require expansive earthwork and work within a watercourse could not.[17] A close review of these prior estimates does not justify EPA's six-month schedule.

[17] EPA's attempt to describe the fish return construction project as consisting of nothing more than adding a pipe is also inaccurate. EPA Resp. at 44 n.17. The final permit requires a low-pressure spray wash to remove fish from the intake screens and controlled water flows, among other things. *See* Permit at I.E.3. These aspects of the system will require new equipment, including additional electrical connections, pumps, and redundancies to assure the system is "operational at all times." *See id.* And, EPA's characterization of the construction project as "straightforward[]" (EPA Resp. at 44 n.17) further ignores the geotechnical and materials evaluations GSP and its consultants will have to undertake to ensure the return system is structurally sound and capable of withstanding the harsh, natural conditions over multiple years.

Finally, EPA's claims that the current fish return systems are deficient (EPA Resp. at 40-41) and its position that GSP, as a result of this appeal, "will now have significantly more time to install the new returns" (*id.* at 40 n.14) both miss the mark and do not save EPA's clear error in setting the six-month schedule. As to the first point, few, if any, fish are actually impinged at Merrimack Station each year. *See, e.g.*, AR-1729 (GSP's most recent annual impingement monitoring report showing that ***zero*** fish were impinged during the monitoring period in 2018). As to the second, GSP is not required, nor is it prudent, to undertake work on the fish return systems during this appeal while the other equipment at the same intakes (CWWS) is in dispute. EPA claims that CWWS and the fish return systems are not "linked," as GSP contends. *See* EPA Resp. at 43 (citing Pet. at 23 n.83).[18] The agency largely misconstrues GSP's assertion as an argument that the infrastructure for the two technological components is, in fact, physically connected. *See id.* That is not what GSP said. The company clearly articulated that the issues in question for the two technological components are linked insofar as "[t]he configuration, scope, and overall design of the fish sluices will differ depending upon the installation and utilization of full-scale CWWS *or other screens* at Merrimack Station." Pet. at 23 n.83.[19] In other words, if GSP is successful in its appeal of the CWWS (which EPA also asserts address impingement, EPA Resp. at 38-39), it is the company's position that BTA—properly taking into account the costs and benefits of CWWS based on the Station's current operations—is *not* determined. As GSP has explained, BTA on remand could be determined to be "other screens" besides CWWS (or, as discussed

[18] EPA correctly acknowledges that the 2014 Final Rule specifically authorizes the alignment of compliance deadlines for technologies designed to address impingement and entrainment, as necessary. EPA Resp. at 41 (citing 40 C.F.R. §125.94(b)(1)). Thus, in its Response, the agency only disputes whether such alignment is factually warranted in this instance.

[19] The fact that the construction schedules in the record refer to only "construct[ing] fish return troughs" in some instances versus "upgrad[ing the] fish return system" in others, depending on the associated screens being installed on the intake structures, provides additional support that there is a "link" between aspects of the fish return system and other technologies that may be installed to comply with §316(b). *See* AR-4 at 87-93.

above, no new technology at all), and therefore "GSP could not have completed the design of the new sluices upon issuance of the Permit; nor can [it] take steps to install the fish sluices until the CWWS issues raised [in this proceeding] are fully resolved." *See* Pet. at 23 n.83. EPA does not meaningfully critique these assertions. Accordingly, GSP's appeal of this issue is not "mooted by the appeal itself," as EPA believes. EPA Resp. at 42 n.16.[20] Further, should the Board agree with GSP that EPA's six-month schedule is clear error, it should remand to the agency to determine a new schedule that properly accounts for all aspects of the fish return system project (accounting for weather and permitting contingencies) and that begins on the effective date of the new revised permit.

CONCLUSION

For the reasons stated herein, Petitioner asks this Board to remand Parts I.E.1, 2, 4, and 7.a.-7.c., I.G.3, and I.E.3 and 7.d. of the Permit.

Dated: October 26, 2020

Respectfully submitted,
s/ P. Stephen Gidiere III

P. Stephen Gidiere III
sgidiere@balch.com
Thomas G. DeLawrence
tdelawrence@balch.com
Julia B. Barber
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 Petitioner GSP Merrimack LLC

[20] Interestingly, EPA asserts this mootness argument in addressing GSP's concerns with the compliance schedule coinciding with winter. *See* EPA Resp. at 42 n.16. To the extent the agency is alleging that this issue is moot because this permit appeal may not be resolved until after the 2020-21 winter season has passed, that is invalid. Future winters will need to be avoided or properly accounted for in any new, reasoned compliance schedule.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Reply in Support of Petition for Review, including all relevant portions, contains fewer than 7,000 words, in accordance with 40 C.F.R. §124.19(d)(3). Not including the transmittal letter, caption, table of contents, table of authorities, signature block, statement of compliance with the word limitation, and certification of service, this Petition contains 5,979 words.

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

Date: October 26, 2020

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in Support of Petition for Review were served by email on the following persons, this 26th day of October, 2020:

Michael Curley, Assistant Regional Counsel
Cayleigh Eckhardt, Assistant Regional Counsel
Mark Stein, Assistant Regional Counsel
U.S. EPA, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912
curley.michael@epa.gov
eckhardt.cayleigh@epa.gov
stein.mark@epa.gov

Richard T. Witt
U.S. Environmental Protection Agency
Water Law Office, Office of General Counsel
Mail Code 2355A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
witt.richard@epa.gov

Steve Neugeboren
Associate General Counsel
OGC-Water Law Office
1200 Pennsylvania Ave. NW
MC-2355A
Washington, DC 20460
neugeboren.steven@epa.gov

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

Date: October 26, 2020