

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

In re:)	
)	
Granite Shore Power Merrimack LLC)	NPDES Appeal No. 20-05
)	
NPDES Permit No. NH0001465)	
)	

**AMICUS BRIEF OF THE N.H. DEPARTMENT OF
ENVIRONMENTAL SERVICES**

The New Hampshire Department of Environmental Services (“NHDES”) respectfully submits this amicus curiae brief pursuant to 40 C.F.R. §124.19(e).

Many of the appellants’ arguments in this case focus on thermal discharges and related impacts to fish and wildlife. NHDES will not address all of these issues as they have been fully briefed by the parties; however, the arguments raised may implicate concomitant issues with similar State water quality standards. For this reason, NHDES wishes to make the Court aware that it issued a 401 Certificate for the permit at issue on May 21, 2020. AR-1811.

Pursuant to what is now section 401 of the Clean Water Act, a federal permit for a project cannot be issued unless the state certifies “that it will not violate certain water quality standards, including those set by the State’s own laws.” *S.D. Warren Co. v. Maine Bd. of Env’tl. Prot.*, 547 U.S. 370, 374 (2006). Challenges to

the substance of that certification occur in the appropriate state forum according to state law. *Alcoa Power Generating Inc. v. F.E.R.C.*, 643 F.3d 963, 971 (D.C. Cir. 2011) (“For this reason, a State’s decision on a request for Section 401 certification is generally reviewable only in State court....”).

NHDES reviewed the permit at issue in this case, including the changes that the appellants’ claim to be substantively infirm. After doing so, NHDES found the following:

After appropriate staff review of the Draft Permit, Fact Sheet, Statement, public comments, and EPA’s response to comments, State Certification is hereby granted pursuant to Section 401 of the Clean Water Act. The permit will ensure that the requirements of Title 50 RSA 485-A, and administrative rule Env-Wq 1700 (Surface Water Quality Regulations) are met.

AR-1811. By certifying that this project met the requirements of “Title 50 RSA 485-A,” NHDES determined that it met, among other things, the requirements in N.H. RSA 485-A:8, VIII. This paragraph states:

VIII. In prescribing minimum treatment provisions for thermal wastes discharged to interstate waters, the department shall adhere to the water quality requirements and recommendations of the New Hampshire fish and game department, the New England Interstate Water Pollution Control Commission, or the United States Environmental Protection Agency, whichever requirements and recommendations provide the most effective level of thermal pollution control.

N.H. RSA 485-A:8, VIII. Pursuant to this paragraph, thermal requirements must meet the most effective of those proposed by either the N.H. Fish and Game

Department, the New England Interstate Water Pollution Control Commission, or the United States Environmental Protection Agency (“U.S. EPA”). *Id.* NHDES is aware of nothing in the record indicating that the N.H. Fish and Game Department recommended any limit different than that proposed by the U.S. EPA. Had the State, in this case acting through the N.H. Fish and Game Department, determined that a different limit was necessary to protect fish and wildlife, it could have so indicated and NHDES would have included such limit in the 401 Certificate. This did not occur.

An appeal of such certification must occur pursuant to N.H. RSA 21-O:7 and N.H. Admin. R. Env-Wc 100 et seq. There is no record of this 401 Certificate being appealed by any party.¹ Therefore, NHDES asserts that this finding is definitive with respect to whether or not this project has met State water quality standards and asks that the Court be aware of this fact to the extent that any argument could be viewed as a collateral attack on the NHDES findings.

¹ N.H. Admin. R. Env-WC 203.01 states that an appeal must be filed “within 30 days of the date the decision being appealed was issued.”

Dated: October 9, 2020

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Amicus Brief in connection with the matter of Granite Shore Power Merrimack, LLC, NPDES Appeal No. 20-05, were served on the following persons in the manner indicated:

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