

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

In re:)

Granite Shore Power Merrimack LLC)

NPDES Permit No. NH0001465)

NPDES Appeals No. 20-05, 20-06

**PERMITTEE GSP MERRIMACK LLC'S RESPONSE TO
EPA'S MOTION FOR PARTIAL VOLUNTARY REMAND
AND PARTIAL RE-CALENDARING OF ORAL ARGUMENT**

GSP Merrimack LLC (“GSP”), permittee for Permit No. NH0001465 (the “Permit”), respectfully files this response to the U.S. Environmental Protection Agency’s (“EPA”) Motion for Partial Voluntary Remand and Partial Re-Calendaring of Oral Argument, filed with the Board on June 4, 2021 (“Motion”). For the reasons discussed below, the Board should deny EPA’s motion for partial voluntary remand of the combustion residual leachate provision of Part I.A.4 of the Permit and grant EPA’s motion to remove the litigation from abeyance and re-calendar the oral argument.¹

I. The Board Should Deny EPA’s Motion for Partial Voluntary Remand of the Leachate Provisions

The Board should deny EPA’s motion for partial voluntary remand of the leachate provision of the Permit because EPA’s asserted basis for seeking remand is contrary to law, including Board precedent,² and EPA is not authorized to take the actions it is proposing on remand. EPA proposes a remand of Part I.A.4 of the Permit “to reconsider and re-propose leachate limits for the Permit

¹ GSP takes no position on EPA’s request that, should the Board grant voluntary remand of the leachate limits, it should also dismiss as moot Section VII.B of the Petition for Review in NPDES Appeal No. 20-05.

² See *In re Arizona Pub. Serv. Co.*, 18 E.A.D. 245, 293-94 (EAB 2020).

based on a revised interpretation of the applicable law.” Motion at 7. But, as GSP explained in its response brief filed with the Board on September 25, 2020 (“GSP Brief”), in Appeal No. 20-05, EPA has no authority to set more stringent limits for combustion residual leachate than the ones it included in Part I.A.4 of the Permit. GSP Brief at 52-56. That is because the currently-applicable National Effluent Limitation Guidelines (“NELGs”) at 40 C.F.R. § 423.12(b)(3) occupy the field and foreclose the development of case-by-case limits using best professional judgement (“BPJ”). *Id.*; *see also In re Arizona Pub. Serv. Co.*, 18 E.A.D. at 293-94 (confirming that, following the Fifth Circuit’s decision in *Southwestern Electric Power Co. v. EPA*, 920 F.3d 999 (5th Cir. 2019), permit writers are subject to the 1982 NELGs).

EPA’s motion for partial remand thus pre-supposes the correctness of its new “revised interpretation,” when that new interpretation is directly contrary to the Board’s prior decision in *In re Arizona Pub. Serv. Co.* Further, as relevant here, the correctness of that new legal interpretation, which is an issue that has been briefed to the Board (*see* GSP Brief at 52-56), is a prerequisite to any effort by EPA to propose and finalize any different leachate limits on remand. A remand for the Region to determine, propose, and finalize new leachate limits based on BPJ under EPA’s “revised interpretation” of law would thus be a waste of resources until the threshold legal issue of EPA’s authority is decided by the Board and there is the opportunity for judicial review on that issue. For these reasons, the leachate issue should proceed for argument and decision by the Board along with the other aspects of the appeals.

II. The Board Should Grant EPA's Motion to Lift the Abeyance and Re-Calendar Oral Argument

The Board should grant EPA's motion to remove the litigation from abeyance and re-calendar oral argument³ because the Agency has fully briefed the new Administration's leadership and completed its internal review of the Permit and determined "to continue to defend the Permit's thermal discharge and cooling water intake requirements." Motion at 10. GSP is prepared to present its merits arguments in Appeal No. 20-06 regarding the cooling water intake requirements to the Board. If Petitioners Sierra Club and Conservation Law Foundation ("CLF") wish to continue to challenge the Permit's thermal discharge limitations in Appeal No. 20-05, they should likewise present those arguments to the Board. No further delay or review by EPA is necessary.

The Board granted the Agency's motion to continue the previously-scheduled February 16, 2021 oral argument and to place these appeals in abeyance "so that the EPA leadership under the new Administration . . . 'can be briefed on the cases and the underlying action to determine the Agency's position going forward in this matter.'" Order Granting Motion for Continuance of Oral Argument Date and Abeyance at 1 (Feb. 9, 2021). The Board found that it was appropriate for the Agency to review the Permit under the agency review provisions of Executive Order No. 13,990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7,037 (Jan. 25, 2021). *Id.* at 2-3. Agency review under the Executive Order is to "be guided by the best science" in "promot[ing] and protect[ing] our public health and the environment." 86 Fed. Reg. at 7,037.

Pursuant to the Executive Order, the Region coordinated with "the Office of General Counsel and the Office of Water at EPA Headquarters to prepare briefings on this matter for senior leadership." EPA Region 1 Motion for Further Abeyance at 2 (Apr. 14, 2021). The Region sought

³ Counsel for the parties have discussed their upcoming conflicts and availability for oral argument, and, should the Board find it beneficial, counsel are prepared to meet and confer regarding the scheduling of argument and report to the Board for its consideration.

additional time from the Board (over GSP's objection) so that the new Administration may "be briefed, consider the issues, ask follow-up questions, if necessary, and receive answers to those questions." EPA Region 1 Reply to GSP Merrimack LLC's Response to the Region's Motion for Further Abeyance at 3 (Apr. 26, 2021).

After senior-level management's "adequate consideration of the issues at hand," *id.* at 3, the Agency has correctly "decided to continue to defend the Permit's thermal discharge . . . requirements" that CLF and Sierra Club are challenging in Appeal No. 20-05. Motion at 10. Therefore, because this matter has been fully briefed before the Board, and the Agency has given thorough consideration to the matter in light of Executive Order No. 13,990, there is no reason for any further delay in CLF's and Sierra Club's appeal. As the Region explained, "[t]aking reasonable steps to expedite resolution of the appeals . . . will best serve the [Clean Water] Act's environmental protection objectives." Motion at 12. Accordingly, the Board should proceed with the formal appeals process, allowing the parties to present their position to the Board at oral argument and then rendering its decision on the merits of their challenges.

Dated: June 11, 2021

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 Permittee GSP Merrimack LLC

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Response, including all relevant portions, contains fewer than 7,000 words, in accordance with 40 C.F.R. § 124.19(f)(5). Not including the caption, signature block, statement of compliance with the word limitation, and certification of service, this Response contains 1,080 words.

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

Date: June 11, 2021

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response were served by email on the following persons, this 11th day of June, 2021:

*For Sierra Club, Inc. and
Conservation Law Foundation*
Reed W. Super
Edan Rotenberg
Julia Muench
SUPER LAW GROUP, LLC
180 Maiden Lane, Suite 603
New York, NY 10038
212-242-2355, ext. 1
855-242-7956 (fax)
reed@superlawgroup.com
edan@superlawgroup.com
julia@superlawgroup.com

*For New Hampshire Department of Environmental
Services*
K. Allen Brooks, Senior Assistant Attorney
General
New Hampshire Department of Justice
33 Capitol Street
Concord, NH 03301
Allen.brooks@doj.nh.gov

For EPA
Mark Stein, Assistant Regional Counsel
U.S. EPA, Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912
stein.mark@epa.gov

Steve Neugeboren, Associate General
Counsel
James Curtin
Pooja Parikh
Jessica Zomer
Richard T. Witt
OGC-Water Law Office
1200 Pennsylvania Ave. NW
MC-2355A
Washington, DC 20460
neugeboren.steven@epa.gov
curtin.james@epa.gov
parikh.pooja@epa.gov
zomer.jessica@epa.gov
witt.richard@epa.gov

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

Date: June 11, 2021