3. *The Region Did Not Clearly Err or Abuse its Discretion in Determining That a Permit Effluent Limitation for TN of 3.0 mg/l TN is Necessary to Achieve the Instream Water Quality Target of 0.3 mg/l TN*

a. *The Region Did Not Clearly Err in Selecting a Numeric Limit of 3.0 mg/l for TN*

The final step in the Region's decisionmaking process for the nitrogen limit for the Newmarket Plant is the determination of the specific numeric effluent limit that is "necessary to achieve" the applicable water quality criteria. 40 C.F.R. § 122.44(d)(1). The Region selected a numeric limit of 3.0 mg/l TN, which the parties appear to agree is the current limit of technology.[24] Fact Sheet at 29; Petition at 96. The Region explained that the 3.0 mg/l TN limit will ensure that the plant's effluent (after dilution) is below the water quality target of 0.3 mg/l TN, based on the following calculation:

> At the proposed total nitrogen effluent limit of 3 mg/l, the estimated increase in receiving water concentration at the point of discharge would be 0.05 mg/l (3/55) [the effluent limit divided by the dilution factor of 55], which is less than the proposed total nitrogen instream target of 0.3 mg/l.

Fact Sheet at 28.

The Coalition does not present a clear argument that the Region erred in this final step of selecting the 3 mg/l TN numeric effluent limit for the Newmarket Plant. There appears to be no dispute that 3 mg/l is the current limit of available technology for nitrogen removal. Although not entirely clear from the Petition, the Coalition's objections to the

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[24] The Region explained that "[t]echnology thresholds for nitrogen treatment are typically considered to be 8.0 mg/l total nitrogen for a basic denitrification process, 5.0 mg/l for intermediate levels of denitrification and 3.0 mg/l for advanced levels of denitrification; the limit of technology for nitrogen treatment is often considered to be 3.0 mg/l." Fact Sheet at 29 (citations omitted).

Region's selection of the 3.0 mg/l TN limit appear to relate to the Coalition's broader assertions regarding the alleged flawed science underlying the need for nitrogen reductions and the uncertainties regarding the cause of impairments to the Lamprey River and the Great Bay. These objections pertain more to the Region's selection of the 0.3 mg/l TN water quality target, which the Board addressed in Part VII.A.1, than to the final step of establishing the 3.0 mg/l TN effluent limit.

The Coalition suggests that a more lenient effluent limit of 8 mg/l TN would be more appropriate for the Newmarket Plant in light of the scientific errors and uncertainties alleged in the Petition. Petition at 13, 27 n.30, 82. The Coalition does not demonstrate, however – or even argue – that an effluent limit of 8 mg/l TN would be adequate to meet the 0.3 mg/l TN water quality target. The Region explained clearly in its Response to Comments why it found the suggested 8 mg/l TN effluent limit unacceptable:

> While the Permittee, the Coalition and others differ with EPA over the precise level of nitrogen control necessary to address the water quality impairments in the receiving water, EPA has not been persuaded by arguments made for imposing a less stringent limit than 3.0 mg/l. In citing to the reasonableness of a limit of 8 mg/l, the Permittee and Coalition have relied in large part on the existence of scientific uncertainty; the need for further study; the costs associated with upgrading treatment facilities to achieve lower limits; and the fact that non[point] sources contribute the majority of nitrogen loading to the receiving waters. EPA does not find the rationales underlying the approach advocated by the Permittee and Coalition to be compelling in light of the severe nutrient-related impacts in the receiving waters, and the [Newmarket] Facility's significant contribution to such impacts, and because such reduced level of nitrogen control would require even greater nonpoint source controls, which are less predictable and certain to achieve. Additionally, while EPA recognizes that the

> majority of total nitrogen loading is coming from nonpoint sources, wastewater treatment plants like Newmarket discharge the majority of the dissolved inorganic nitrogen (DIN) load, which is the most bioreactive component of total nitrogen. As the preferential form of nitrogen for algae growth, DIN is therefore the highest priority for reductions as part of a comprehensive approach to reducing total nitrogen levels as stringent as necessary to comply with water quality standards. During the critical season for algae growth, the point source contribution is even more significant given the reduced rate of nonpoint source contributions during this period. Nitrogen removal at the treatment plants is thus also the most predictable and effective way to control the impacts of the most harmful component of total nitrogen on the receiving waters. ***More fundamentally, the * * * Coalition's proposed course does not provide a discernable pathway to achieve water quality standards,*** opting instead to temporize based largely on factors that have little purchase - scientific uncertainty and cost - in the context of *establishing* a water quality-based effluent limitation, especially in the context of a long-expired permit and a pressing environmental harm.

RTC at 17, 21 (emphasis added) (citations omitted).[25]

The Coalition fails to address the Region's response or to explain why it is erroneous. The Board finds that the Region's response is well-explained and reasonable, and declines to review the Region's determination that a permit effluent limitation of 8.0 mg/l TN is unacceptable for the Newmarket Plant. *See* 40 C.F.R. § 124.19(a); *see also, e.g., In re Pio Pico Energy Ctr.*, PSD Appeal Nos. 12-04 through12-06, slip op. at 11-12 (EAB Aug. 2, 2013), 16 E.A.D. ___

[25] Although the Permittee, the Town of Newmarket, also suggested the 8 mg/l permit limit in its public comments, the Town did not object to the final permit.

(explaining that petitioners must address a permit issuer's response to its comments and demonstrate that the response is clearly erroneous).[26]

The Board concludes that the Coalition has failed to demonstrate that the Region clearly erred or abused its discretion in determining that an effluent limitation of 3.0 mg/l TN in the Newmarket permit is necessary to meet the State's water quality standards.

b. *The Region Did Not Clearly Err When it Declined to Adhere to the Memorandum of Agreement Signed by NHDES and the Coalition*

The Coalition next argues that the Region violated 40 C.F.R. § 122.44(d) by declining to adhere to the provisions contained in a memorandum of agreement ("MOA") executed between the Coalition and NHDES after NHDES issued the *Great Bay Nutrient Report*. *See* Petition at 82-84 (citing Memorandum of Agreement between the Coalition and NHDES relative to Reducing Uncertainty in Nutrient Criteria for the Great Bay/Piscataqua River Estuary (Apr. 2011)

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[26] As a final argument, the Coalition suddenly reverses course and suggests that the 3.0 mg/l TN permit limit is not strict enough to meet water quality standards. Petition at 95. Among other things, the Coalition alleges that the Newmarket permit limit for nitrogen will not ensure achievement of water quality standards because it is unlikely that sufficient nonpoint source controls will be implemented to attain 0.3 mg/l TN water quality objective upstream of the Newmarket Plant. *Id.* The Coalition did not demonstrate that this issue was raised during the public comment period. Therefore, the Board finds that it was not preserved for review. 40 C.F.R. §§ 124.13, .19; *see Pio Pico*, slip op. at 11, 16 E.A.D. at ___ (explaining that petitioner must demonstrate that any issues and arguments it raises on appeal were raised during the public comment period or public hearing on the draft permit, unless the issues or arguments were not reasonably ascertainable at the time); *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10, 58-59 (EAB Sept. 15, 2009), 14 E.A.D. __. Even if this argument had been preserved for review, the assertion is based on pure speculation that the state and local governments will be unable to reduce nonpoint sources of nitrogen sufficiently to meet water quality standards. Such speculation is insufficient to support Board review. *See In re Prairie State Generating Co.*, 13 E.A.D. 1, 61 (EAB 2006) ("The Board will not overturn a permit provision based on speculative arguments.") (quoting *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 58 (EAB 2001)).

(A.R. H.69)). The Coalition asserts that "the MOA concluded that until such time as more detailed information could be developed to support the need for more stringent reductions, limitations more restrictive than 8 mg/l TN should not be imposed." *Id.* at 82. The Coalition argues that this is a "state regulatory interpretation regarding narrative criteria compliance [that] need[s] to be respected (unless obviously incorrect)." *Id.* at 83.

NHDES Commissioner Thomas Burack and representatives of the five municipalities that constituted the Coalition signed the MOA in April 2011.[27] MOA at 3. The MOA acknowledges a measure of scientific uncertainty in the *Great Bay Nutrient Report* and reflects an intent to allow some limited time for the Coalition to conduct additional monitoring and modeling, starting with the Squamscott River, which was to be substantially completed by January 2012. *Id.* at 1-2; RTC at 54, 66 n.31. In its Response to Comments on the Newmarket permit, the Region noted that the Coalition provided to EPA only limited results from monitoring conducted pursuant to the MOA and explained that "those results are consistent with multiple previous data sets." RTC at 66 n.31. The Region further noted that, following data collection, the Coalition decided not to develop a water quality model for the Squamscott River. *Id.*; *see also* Region's Response at 92-93, 95. Nevertheless, the Region indicated that it would "consider any significant findings" that result from the further monitoring conducted pursuant to the MOA, "although EPA did not concur with the conclusions that formed the basis for the MOA and was not a party to the MOA." RTC at 54.

The Board agrees with the Region that EPA is not obligated by the terms of the MOA to limit the nitrogen effluent limit for the Newmarket Plant to a level no more restrictive than 8 mg/l TN. The MOA does not purport to be a "state regulatory interpretation of narrative criteria" and the State of New Hampshire has not treated it as such. The MOA is simply a negotiated agreement between NHDES and the Coalition to

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[27] Of the five municipalities that signed the MOA, only the Cities of Dover and Rochester filed the petition for review in this matter.

cooperate for a period of time to collect more data in an effort to diminish the inherent scientific uncertainty associated with establishing water quality limits for nutrients. Unlike the *Great Bay Nutrient Report* (which expressly states NHDES' intent to use its proposed nutrient thresholds to interpret state narrative water quality criteria for purposes of impairment listings), the MOA contains no language purporting to set forth proposed state water quality criteria or interpretations. Further, EPA did not sign the MOA and is not bound by its terms.

The Region also points out that NHDES has continued to stand by the science and proposed criteria of its *Great Bay Nutrient Report* after signing the MOA with the Coalition. *See id.* at 66-67; Region's Response at 92-93. In letters sent subsequent to the MOA's execution, NHDES stood by the proposed nutrient criteria for the estuary but nonetheless agreed to sign the MOA in an effort to "reduc[e] the uncertainties in the data and analyses as they pertain to specific sections of tidal rivers." Letter from Thomas S. Burack, Comm'r, NHDES, to Cosmas Iocovozzi, Chairman, Bd. of Selectman, & Jane Hislop, Co-Chair, Conservation Comm'n, Town of Newington at 1 (June 8, 2011) (A.R. H.73); Letter from Thomas S. Burack, Comm'r, NHDES, to Tom Irwin, CLF, Mitch Kalter, Great Bay Trout Unlimited, & Derek Durbin, NH Coastal Prot. P'ship at 2 (June 8, 2011) (A.R. H.74).

The Coalition counters that the letters sent by NHDES Commissioner Burack subsequent to the signing of the MOA were "sent to non-MOA signatory communities" and concludes, without analysis, that "those letters do not refute the MOA." Petition at 83. The Coalition fails to explain why it matters who received the letters sent by NHDES, and the Board finds no significance in this distinction. Further, the State of New Hampshire's *amicus* brief filed in this appeal plainly states that "NHDES stands by the thresholds [in the *Great Bay Nutrient Report*] and the scientific evidence that supports them and will continue to use them in developing the list of impaired waters for the Great Bay Estuary." NHDES Amicus Brief at 3. Thus, the Coalition has failed to persuade the Board that NHDES intended the MOA to change its interpretation of its narrative water quality standards or its proposed nutrient threshold

levels for the Great Bay Estuary reflected in the *Great Bay Nutrient Report.*

In any event, regardless of NHDES' intent in entering into the MOA with the Coalition, EPA cannot ignore its independent obligation under CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), to ensure that the Newmarket permit complies with applicable water quality standards. As the Board has previously recognized, the Agency has an independent duty under CWA § 301(b)(1)(C) to include a more stringent permit limitation than that specified by a state if the Region reasonably believes it is necessary to achieve a state water quality standard. *See, e.g.*, *In re San Jacinto River Auth.*, NPDES Appeal No. 09-09, slip op. at 11 (EAB July 16, 2010), 14 E.A.D. ___; *In re City of Moscow*, 10 E.A.D. 135, 151 (EAB 2001) (citing *In re City of Jacksonville*, 4 E.A.D. 150, 158 (EAB 1992), and 40 C.F.R. § 122.44 (d)(1), (5)); *see also In re Gen. Elec. Co.*, 4 E.A.D. 358, 364-65 (EAB 1992) (recognizing EPA's nondiscretionary duty to implement the Hazardous Solid Waste Amendments and affirming that in fulfilling its duty the Agency cannot be bound by state regulatory programs).

The Coalition has failed to demonstrate that the Region clearly erred by declining to give effect to the terms of the MOA when it established a nitrogen effluent limitation for the Newmarket permit that is more restrictive than 8 mg/l TN.

B. *The Region Did Not Apply the State's 0.3 mg/l Water Quality Threshold as a Revised Water Quality Standard or Violate Rulemaking Requirements*

The Coalition argues that the Region, "in deciding that a 0.3 mg/l TN criteria must be met throughout the Great Bay Estuary to protect eelgrass," is illegally applying an unadopted numeric criterion when developing effluent limitations. Petition at 46-49. The Petition specifically alleges that the Region's application of this criterion to find waters to be nutrient impaired and to establish permit effluent limits constitutes "the illegal application of a new unadopted numeric [water

quality] standard under 40 C.F.R. § 131.21." *Id.*[28] The Board finds that this argument is not supported by either the facts or the applicable law in this case.

First, the Petition fails to demonstrate that EPA has made any decision "that a 0.3 mg/l TN criteria must be met throughout the Great Bay Estuary." The Region's decision at issue here is limited to the determination of effluent limits for the Newmarket Plant's NPDES permit. Further, in its Response to Comments, the Region specifically stated that:

> EPA does not intend to impose LOT [a reference to the 3.0 mg/l TN limit-of-technology effluent limitation] on all [publically owned treatment works] discharging in the watershed. EPA will instead impose limits on a case-by-case basis, determined in large part by the size and location of the facility and other site-specific factors.

RTC at 82.

Second, the Petition fails to show that EPA's selection of the 0.3 mg/l TN water quality target for the Newmarket permit violated any requirement of law. The Coalition cites 40 C.F.R. § 131.21 as the applicable law which the Region allegedly violated. *See* Petition at 48. That section, however, is not applicable to EPA's permitting action at issue in this case. Rather, section 131.21 directs EPA to review and approve or disapprove "officially adopted" state water quality standards and revisions thereto, within certain time frames. *See* 40 C.F.R. § 131.21(a). The nutrient criteria proposed in the State's *Great Bay Nutrient Report*, including the 0.25-0.30 mg/l TN criterion proposed for the protection of eelgrass habitat, are not officially adopted state water

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[28] The Petition also argues that it was illegal for EPA to use this threshold in finding the waters of the Great Bay and the Lamprey River to be nutrient impaired. Petition at 48. EPA's acceptance of the State of New Hampshire's impairment listings for the Great Bay estuary is a separate agency action that is not before the Board in this case.

quality standards. *City of Dover v. U.S. EPA*, No. 12-CV-01994-JDB (D.D.C. July 30, 2013) ("Because the 2009 Document was never enacted into state law[,] * * * it is not a water quality standard at all, and cannot be a revised water quality standard under the [CWA]. Accordingly, EPA's duty to review revised water quality standards was not triggered by the publication of the Document.").

Finally, as explained in Part VII.A.1.a, the Region's consideration of the State's proposed nutrient criteria, along with other available information, in selecting instream water quality targets and effluent limitations for the Newmarket permit was expressly permitted under EPA regulations. The Board finds that the Coalition has failed to demonstrate that the Region violated rulemaking requirements or made any other clear error of law in selecting the 0.3 mg/l TN instream water quality target for the Newmarket permit.

C. *The Region Did Not Err in Considering the Contributions of Nonpoint Sources in Determining the Newmarket Permit Conditions*

The Coalition contends that the Region's permit decision for the Newmarket Plant effectively modifies EPA's interpretation of the NPDES permitting regulations at 40 C.F.R. § 122.44(d) by unfairly penalizing point sources "with more restrictive requirements where nonpoint sources are the clearly controlling load influencing ambient pollutant concentrations." Petition at 49-50. The Coalition points out that the nitrogen load from the Newmarket Plant is a relatively small portion of the overall load of nitrogen to the Lamprey River from all sources and that nonpoint sources contribute the predominant load. *Id.* at 49. The Region does not dispute that characterization, but emphasizes that the Newmarket Plant contributes a significant portion of the "controllable" load of nitrogen and that the type of effluent contributed by the plant (with a high dissolved inorganic nitrogen content) contributes disproportionately to algae growth in the receiving waters. *See* RTC at 21.

The Board finds no indication that the Region adopted a new interpretation of the applicable regulations in selecting the 3.0 mg/l TN effluent limit for the Newmarket Plant. The record does not contain any statement by the Region purporting to set forth a new interpretation of EPA regulations. To the contrary, the Region specifically stated that its effluent limitation for the Newmarket Plant is a site-specific determination and does not reflect an EPA decision to impose this limitation on all similar sources in the watershed. *See id.* at 82. As the Region explained and demonstrated at considerable length in the record, its determination of the effluent limit for the Newmarket Plant is specific to the plant and the particular needs of the watershed involved in this case. *See id.* at 17-21; Fact Sheet at 10-31. The statute and the regulations require EPA to set permit effluent limits for each point source at the level that is necessary to meet the state's water quality standards. There is nothing new about the Region's straightforward application of those requirements in this case.

Further, the Coalition has failed to demonstrate any basis in applicable law or policy for its contention that effluent limits must be allocated proportionately among point and nonpoint sources based on their relative contributions to the overall load of a pollutant in a waterbody. As the Coalition acknowledges, the NPDES permit regulation at 40 C.F.R. § 122.44(d) "does not specify how an agency may balance pollutant reduction requirements when point sources are the minor component contributing to an alleged impairment." Petition at 49. The Coalition suggests, but fails to show, that prior EPA interpretations of the permitting regulations call for allocating effluent limits in proportion to each source's input loading. The Petition cites only a graph from a regulatory preamble and a technical support document pertaining to control of toxic pollutants. *See id.* Neither of these documents provides relevant guidance for this case. Both pertain only to toxic pollutants, which are not at issue here, and neither addresses the allocation of pollutant loads among point and nonpoint sources. Further, the cited technical manual merely mentions proportionality as one of 19 potential allocation methods that states or EPA regions may use to allocate toxic wasteloads among point sources. This does not indicate that EPA has required or suggested that permitting authorities must use

a "proportionality" approach to determine permit effluent limitations for point sources where pollutants are discharged by both point and nonpoint sources.[29]

The Coalition further argues that the Region's approach to the Newmarket permit is inconsistent with the U.S. Supreme Court's mandate that "fair apportionment" is appropriate in situations "where joint and several liability would ordinarily be imposed." *Id.* at 52 (citing *Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 613-15 (2009); *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989); and Restatement (Second) of Torts § 443A(1)(b) (1976)). This argument was reasonably ascertainable during the public comment period on the draft permit, but the Coalition did not raise it; accordingly, the argument has not been preserved for review. *See* 40 C.F.R. §§ 124.13, .19(a). In any event, this case law addresses an entirely different legal issue, involving statutory liability under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601-9675, and the liability of joint tortfeasors under common law. This law is inapplicable to the determination of permit effluent limitations under the CWA, which is governed by the statutory and regulatory provisions described above.

The Board concludes that the Coalition has failed to demonstrate that the Region clearly erred or abused its discretion with regard to considering the contribution of nonpoint sources to nitrogen discharges into the Lamprey River in determining the appropriate effluent limitation for nitrogen in the Newmarket permit.

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[29] The CWA and EPA regulations and guidance provide some mechanisms for allocating pollutant loads among various contributing sources. *See, e.g.*, the "Total Maximum Daily Load" (TMDL) provisions of CWA Section 303(d), 33 U.S.C. §1313(d), and 40 C.F.R. § 130.7. EPA's TMDL regulations and guidance call upon states to develop wasteload allocations (for point sources) and load allocations (for nonpoint sources) that contribute pollutants to an impaired waterbody. These provisions do not apply to this case, however, as New Hampshire has not developed and sought EPA approval of a TMDL or wasteload allocations for nitrogen in the Lamprey River watershed. *See* Region's Response at 88 n.54.

D. *The Coalition Has Not Demonstrated That the Region Violated Applicable Procedural Requirements in Issuing the Newmarket Permit*

In addition to its substantive challenges to the Permit, the Coalition alleges that the Region failed to adhere to various procedural requirements during the permit proceeding. For the reasons explained below, the Board finds that the Coalition has failed to demonstrate that the Region violated procedural requirements, clearly erred, or abused its discretion.

1. *The Region Did Not Impermissibly Exclude Information From the Record*

The Petition asserts that the Region impermissibly excluded the Coalition's supplemental comments, submitted after the close of the public comment period but before the issuance of the final permit, from the record in this case. Petition at 27-33. The Petition notes that "none of the Coalition's supplemental comments actually raised new comment issues. The Coalition was simply providing supplemental information with respect to *issues previously raised in the Coalition's original, timely filed comments*." *Id.* at 29 (underline in original) (emphasis added). The Coalition further avers that the Region's decision to reject the Coalition's late-filed comments as untimely and not respond to them, while simultaneously including information and analyses in the record from other sources after the comment period ended, was arbitrary and capricious and warrants a remand of the permit. *See id.* at 28-29.

The Board finds that the Coalition's objection is not supported by the facts in the record of this proceeding or by applicable law. First, the Coalition is mistaken in alleging that the Region excluded the Coalition's late-filed comments from the record. Subsequent to the close of the public comment period on December 16, 2011, the Coalition submitted supplemental comments on nine separate occasions over the course of an eleven-month period, including dozens of attachments containing scientific data, deposition transcripts, letters, and photographs. *See* RTC at 2 n.1; Region's Response at 78. In fact, the Region included these

submissions in the administrative record. *See* A.R. C.3, D.1 to D.12; Certified Index to the Administrative Record, As Corrected at 3-8 (included in the EAB's electronic docket as Filing No. 48). Further, the Region states that it considered this information in making its final permitting decision. Region's Response at 78 ("EPA did include the supplemental comments as part of the administrative record and did consider them.").

Under the governing procedural regulations set forth at 40 C.F.R. part 124, the Region had discretion to accept these late-filed comments, but was not required to respond to them in its response to public comments.[30] The applicable regulation provides, in relevant part, that:

> (a) At the time that any final permit decision is issued under § 124.15, the Director shall issue a response to comments. * * * This response shall:
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> * * * *
>
> (2) Briefly describe and respond to all significant comments on the draft permit * * * raised *during* the public comment period, or during any hearing.
>
> (b) For EPA-issued permits, any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in § 124.18. *If new points are raised or new material supplied during the public comment period, EPA may document its response to*

[30] Throughout its argument that the Region violated procedural rules regarding the administrative record, the Coalition never cites to 40 C.F.R. part 124. The only prior Board precedent the Coalition cites discusses issue preservation, *see* Petition at 30 n.31, a threshold procedural requirement that is not at issue here because all of the late-filed comments the Coalition submitted were directly related to issues the Coalition previously raised in timely-filed comments, and thus the issues were properly preserved for appeal. *See id* at 29; *see also* Region's Response at 78-80 & n.46 (observing that the Coalition appears to conflate the issues of timeliness and issue preservation).

> *those matters by adding new materials to the administrative record.*

40 C.F.R. § 124.17(a)-(b) (emphasis added); *see also id.* § 124.18(b) (providing that the administrative record for a final permit includes comments received *during* the public comment period, the response to comments required by section 124.17, and any new material placed in the record under section 124.17).

The plain language of the regulations makes clear that the permit issuer's obligation to include comments in the record and respond to them applies only to timely-filed comments. *See id.* §§ 124.11, 124.18(b)(1)-(3). Nonetheless, the Region maintains discretion "to consider and rely upon information, including comments, received after the close of public comment and is not required to reopen the public comment period except where the Region determines in its discretion that the new information it relies upon raises substantial new questions." *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 10-09 through 10-12, slip op. at 22 (EAB Mar. 30, 2011), 15 E.A.D. __, *aff'd*, Nos. 11-1474 & 11-1610 (1st Cir. Aug. 3, 2012), *cert. denied*, 133 S. Ct. 2382 (May 13, 2013). As the Coalition itself pointed out, the late-submitted material did not raise new questions, but simply amplified on comments that were submitted during the public comment period. The Region responded to those comments at length, as described above.[31]

Finally, the Coalition's claim that the Region erred by supplementing the administrative record in order to respond to public comments must fail. *See* Petition at 28-29. The plain language of 40 C.F.R. § 124.17(b) recited above, which authorizes the permit issuer to add new information to the record in response to public comments, contravenes the Coalition's assertion. The Board finds that the Coalition

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[31] The Board has previously stated that the permit issuer's response need not be of the same length or level of detail as the comment, nor does the permit issuer need to address each and every point made in the comments. *E.g.*, *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 30 (EAB Sept. 15, 2009), 14 E.A.D. ___.

has failed to demonstrate procedural error in the Region's handling of its late-filed comments and materials.

2. *The Coalition Has Failed to Demonstrate That the Region Changed Its Rationale for the Newmarket Permit Effluent Limit After the Close of the Public Comment Period*

The Coalition asserts that the Newmarket permit must be republished and reopened for public comments because the Region, in responding to public comments on the draft permit, changed its rationale for the nitrogen effluent limit. Petition at 33-35, 52-54. In particular, the Coalition argues that the Region's rationale for the nitrogen limits changed from "the need to improve transparency throughout the system to ensure eelgrass restoration" in the draft permit to the need to address "the demonstrated macroalgae problem" in the Region's response to comments. *See id.* at 52.

The record does not a reflect a change in the Region's basis for the permit's nitrogen limit that would warrant reopening of the comment period. Rather, as stated in the Fact Sheet accompanying the draft permit, impairments to the Great Bay are the result of multiple factors including both transparency and macroalgae. *See, e.g.*, Fact Sheet at 13 ("Increased nutrient inputs promote a progression of symptoms beginning with excessive plant growth of phytoplankton and macroalgae to the point where grazers cannot control growth."), 14 ("[L]osses of submerged aquatic vegetation (SAV), such as eelgrass, occur when light is decreased due to turbid water associated with overgrowth of algae * * *."), 20 ("With increasing algal blooms the clarity of the water decreases and this can promote the growth of epiphytes and microalgae species on and around eelgrass."). Contrary to the Coalition's assertion, the Region's Response to comments does not reflect a change in this position, but reiterates that both transparency and macroalgae growth, among other things, are of concern in the Great Bay. *See, e.g.*, RTC at 42-44, 97, 100. Thus, the Coalition's assertion that there has been a "switch" in the Region's basis for the permit's TN limitation

necessitating a reopening of the public comment period is unsupported by the administrative record.[32]

The Coalition also asserts that in the Burack Letter,[33] referenced in Part VII.A.1.f above, NHDES acknowledged that "nitrogen removal will not materially affect transparency in Great Bay is not a transparency limited system [sic]" and "concurs that transparency should not be the focus of the analysis." Petition at 53. According to the Coalition, the "admissions" in the Burack letter undermine the Region's initial justification for the permit's nitrogen limitations. The Coalition mischaracterizes the Burack Letter. The letter specifically rejects the assertion that nitrogen could not have caused changes in transparency and that reducing nitrogen inputs would not improve transparency. *See* Burack Letter at 3-4. The letter states further that "reduced TN levels can only help to improve the light available to eelgrass, reduce the growth of macroalgae, and reduce direct nitrogen toxicity to submerged aquatic plants." *Id.* at 4.

The Board concludes that the Coalition has failed to demonstrate that the Region changed its rationale for the Newmarket permit effluent limit for nitrogen, and declines to require a reopening of the public comment period.

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[32] Under the applicable regulations, the Region may, in its discretion, reopen the comment period on a permit where "substantial new questions" arise during the pubic comment period. *See* 40 C.F.R. § 124.14(b). For the reasons stated above, however, the Coalition has failed to demonstrate any basis for reopening the comment period in this matter.

[33] *See* Letter from Thomas S. Burack, Comm'r, NHDES, to Thomas J. Jean, Mayor, City of Rochester, et al. (Oct. 19, 2012) (A.R. H.43).

3. *The Coalition Has Failed to Demonstrate That the Region Clearly Erred or Violated the Coalition's Due Process Rights in Conducting the Peer Review of the* Great Bay Nutrient Report

The Coalition next argues that the Region violated procedural requirements by declining to allow the Coalition to participate in the peer review of the *Great Bay Nutrient Report.*[34] Petition at 87-88. In particular, the Coalition asserts that despite its repeated requests to be a part of the peer review process and "ensure that appropriate technical questions prepared by the Coalition were addressed," EPA refused to submit the Coalition's questions to the peer reviewers and refused to consider the Coalition's objections to the scope and content of the peer review in violation of section 101(e) of the CWA, 33 U.S.C. § 1251(e). *Id.* at 37, 87. Section 101(e) encourages the Administrator to promulgate regulations specifying minimum guidelines for public participation in the development of any regulation, effluent limit, standard, plan, or program established pursuant to the Act.

The Region's Response to Comments thoroughly explained that the Region is not required to include the public in the peer review process, although it may do so at its discretion. RTC at 62. The Region cites to both the EPA Peer Review Policy and the Office of Management and Budget's ("OMB") Final Information Quality Bulletin for Peer Review to support its position, stating in relevant part:

> The peer review conducted through N-STEPs on the proposed numeric thresholds was consistent with EPA's Peer Review policy (EPA, 2006), which was developed to be consistent with [the] OMB Peer Review Bulletin (OMB,

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[34] As explained above, the *Great Bay Nutrient Report* was peer reviewed by two independent experts in the field of estuarine science. The peer review was funded by EPA and administered through the Nutrient Scientific Technical Exchange Partnership Support (N-STEPS) program, a "partnership between academic, state, and federal agencies to provide technical information to States and Tribes in developing nutrient criteria." RTC at 62.

> 2005).[35] *There is no requirement for a peer review process to include public participation.* As stated in the OMB Peer Review Bulletin, *a peer review process should not be confused with a public review process.* The peer review process should be transparent and available to the public but it is a review by independent technical experts and, consistent with the guidance, *it should not allow parties supporting the proposed criteria or opposing the proposed criteria to influence the process.* The peer review process is designed to draw on "independent, expert information and in-depth analyses" regarding limited "specified technical issues," while public comment is open to any interested party who wishes to comment on any issue. (EPA, 2006 at 14). *EPA may, at its discretion, choose whether or not to include a public participation component within the peer review process.* (OMB, 2005 at 2670). EPA is not required to include any stakeholder input on the charge to the peer reviewers, and only where the Agency chooses to include stakeholder input need it ensure that such input is from both sides of an issue. (EPA, 2006 at 58). Still, the material provided to the peer reviewers by EPA included copies of comments received by NHDES on the proposed numeric thresholds document. EPA thus finds no merit in the assertion that the Coalition and the impacted communities were excluded from Regional Office peer review of the proposed state nutrient thresholds.

Id. (emphases added).

The Region also points out that, in fact, it went beyond its legal obligations by voluntarily providing the peer reviewers with the

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[35] EPA's Peer Review Policy and accompanying Peer Review Handbook are available at www.epa.gov/peerreview (click on "Peer Review Handbook, 3rd Edition") (A.R. M.9) ("EPA Peer Review Handbook"). The OMB's Final Information Quality Bulletin for Peer Review is in the Federal Register, 70 Fed. Reg. 2664, 2670 (Jan. 14, 2005) (A.R. M.22) ("OMB Peer Review Bulletin").

comments submitted by the Coalition during the public comment period on the NHDES draft nitrogen threshold from the *Great Bay Nutrient Report*. Region's Response at 74-75. The Region also considered, and found to be unpersuasive, several documents the Coalition cited as supporting a need for additional peer review. *See id.* at 76 (referencing technical reports prepared by Hydroqual and/or John C. Hall & Associates dated June 30, 2010, and January 10, 2011).

The Coalition neither acknowledges nor substantively confronts the Region's responses in its petition for review. As explained above, *see* Part III.B, under the Board's threshold procedural requirements for obtaining review, a petitioner must explain with specificity *why* the permit issuer's previous response to the petitioner's comments is clearly erroneous or otherwise warrants review. The Coalition has failed to meet this procedural requirement for the Board's review of this issue.

Further, the Coalition has failed to demonstrate that the Region abused its discretion in declining to allow the Coalition to participate in the peer review of the State's *Great Bay Nutrient Report*. As the Region correctly noted, it has discretion to decide whether to permit public participation in a peer review process. *See generally* EPA Peer Review Handbook. The Board will uphold a permitting authority's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *See supra* Part III.A. The Board finds that the Region provided a reasonable explanation for its decision not to include the Coalition in the peer review process for the *Great Bay Nutrient Report*, noting, among other things, that "a peer review process should not be confused with a public review process" and that a peer review process "is a review by independent technical experts and, consistent with the guidance, it should not allow parties supporting the proposed criteria or opposing the proposed criteria to influence the process." RTC at 62. Under the circumstances presented in this case, the Region reasonably decided to protect the integrity of the peer review process by declining to allow direct public participation in that process, while providing copies of the public comments on the *Great Bay Nutrient Report* to the peer reviewers. The Coalition has failed to demonstrate that this exercise of the Region's discretion was unreasonable.

The Coalition has also failed to demonstrate that the Region's decision not to allow public participation in the peer review process for the *Great Bay Nutrient Report* violated section 101(e) of the Clean Water Act, as alleged in the Petition. As noted above, section 101(e) simply encourages the Administrator to promulgate regulations specifying minimum guidelines for public participation in the development of any regulation, effluent limit, standard, plan, or program established pursuant to the Clean Water Act. As the U.S. District Court for the District of Columbia recently explained in a civil action filed by the Coalition, "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." *City of Dover v. U.S. EPA*, No. 12-CV-01994-JDB, at 18 (Memorandum Opinion) (D.D.C. July 30, 2013).

The Petition also asserts "due process violations" based on the Coalition's perception that it was excluded from participating in the peer review process and from submitting "supplemental comments outlining the data and analyses applying to [EPA's] new primary rationale" for imposing more stringent nitrogen limits. *See* Petition at 33-34, 37, 87. The Coalition has not explained what due process rights it believes it has or how such rights were allegedly violated, or cited any legal authority to support its argument. The Board finds the Coalition's due process allegations to be vague and unsupported, and declines to review the Region's decision based on those allegations.

The Board concludes that the Coalition has failed to demonstrate that the Region clearly erred or abused its discretion with regard to the conduct of the peer review of the *Great Bay Nutrient Report*.

E. *The Board Denies the Coalition's Motions to Supplement the Administrative Record*

The Coalition submitted two motions to supplement the administrative record in this case on March 7, 2013, and September 23, 2013. *See* Petitioner's Motion to Supplement the Administrative Record

and to Depose the Experts Relied on by EPA (Mar. 7, 2013) ("March Motion"); Petitioner's Motion Requesting Leave to File a Supplement to the Administrative Record and Notice of Supplemental Authority (Sept. 23, 2013) ("September Motion"). These motions seek (1) to supplement the record with numerous additional documents, collectively comprising several hundred pages,[36] and (2) to allow the Coalition to take depositions of the experts who reviewed the State's *Great Bay Nutrient Report* and of EPA employees. March Motion at 23. The Coalition also suggests that the Board should strike the peer reviews of the *Great Bay Nutrient Report* from the record, alleging bias on the part of one of the peer reviewers. September Motion at 12. For the reasons explained below, the Board denies the March and September Motions in their entirety.

1. *The Board Denies the Coalition's Motion to Add Documents to the Administrative Record*

The Coalition's proposed supplemental documents for the administrative record generally consist of e-mails, letters, memoranda, reports, affidavits, a recent draft permit for a wastewater treatment facility in Massachusetts, and a recent EPA guidance on development of nutrient criteria. Many of these documents postdate the Region's November 16, 2012 decision on the Newmarket permit that is under review in this case. The two affidavits and a declaration, March Motion, Supp. Exs. 19-21, were written by the Coalition's consultants and expert after this appeal was filed, and offer additional opinions supporting the Coalition's views concerning the role of nitrogen in the impairment of the waters of the Great Bay Estuary and the scientific validity of the State's *Great Bay Nutrient Report.*

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[36] Collectively, the March and September Motions attach a total of thirty-two exhibits, several of which include multiple documents and long strings of e-mail messages, proposed for inclusion in the administrative record. The motions refer to these documents as "Supplemental Exhibits," and they are cited in this decision as either March Motion, Supp. Ex. __ or September Motion, Supp. Ex. __.

The Coalition argues that these additional documents should be added to the administrative record because they "(1) were received and considered by EPA in advance of the Newmarket NPDES permit issuance; (2) depict EPA's involvement in critical regulatory decisions preceding the Newmarket NPDES permit and the rationale for such decisions; (3) were not reasonably ascertainable during the public comment period; (4) confirm specific facts or scientific positions in the Newmarket NPDES permit are in error, using the most reliable source; (5) support the Coalition's claims of bad faith; (6) are necessary to determine whether EPA considered all of the relevant factors; and/or (7) explain technical terms and complex subject matter before the Board." March Motion at 1; *see also* September Motion at 5 (proposed supplemental materials "are relevant to the scientific validity of the Agency's actions"), and 6 ("[T]he Coalition has shown with particularity that the Agency is acting in bad faith and falsely representing its position before the Board.").

The Coalition's arguments reflect a flawed understanding of the basic principles of administrative record review and the limited instances in which an administrative record may be supplemented on appeal. The Coalition presents an overly broad view of when it is appropriate to supplement an administrative record, seemingly making little distinction between administrative appellate practice and the broad discovery practices that are permitted in federal court litigation. It is not sufficient to simply allege, as the Coalition does, that these materials "are relevant." September Motion at 5. As the Board explained at length in *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 511-534 (EAB 2006) ("*Dominion I*"), well-established principles of administrative law and the EPA regulations governing permit proceedings significantly limit the materials that may be considered part of the administrative record. The part 124 regulations governing this permit proceeding specify the documents that must be included in the administrative record[37] and expressly provide that the "record shall be

[37] The administrative record for any final permit shall consist of the administrative record for the draft permit and:

(continued...)

complete on the date the final permit is issued." 40 C.F.R. § 124.18(c). Consistent with that regulation and general principles of administrative law, the Board, like the courts, is reluctant to include in an administrative record materials that were not actually before the decisionmaker at the time he or she made the decision that is under review. *See Dominion I*, 12 E.A.D. at 516-19 and cases cited therein.

As the Board stated in *Dominion I*, "many courts have explained that the complete or official administrative record for an agency decision includes all documents, materials, and information that the agency relied on directly or indirectly in making its decision." *Id.* at 519 (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) and *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). The Coalition must meet a high threshold to demonstrate that the Region improperly excluded documents from the administrative record. *See Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 155-56 (D.D.C. 2012) (explaining that to overcome the presumption that an

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[37](...continued)

(1) All comments received during the public comment period provided under § 124.10 (including any extension or reopening under § 124.14);

(2) The tape or transcript of any hearing(s) held under § 124.12;

(3) Any written materials submitted at such a hearing;

(4) The response to comments required by § 124.17 and any new material placed in the record under that section;

(5) For NPDES new source permits only, final environmental impact statement and any supplement to the final EIS;

(6) Other documents contained in the supporting file for the permit; and

(7) The final permit.

40 C.F.R. § 124.18(b).

agency properly designated the administrative record, "[c]onclusory statements will not suffice; rather, the [petitioner] must identify reasonable, non-speculative grounds for its belief that the documents were considered by the agency and not included in the record") (citations omitted).

The Coalition has not demonstrated, or attempted to demonstrate, that the Region relied on or considered any of the supplemental documents the Coalition proposes to add to the record. Rather, the Coalition argues the opposite, suggesting that the Region "cherry picked" the record and ignored documents that did not support its determination. *See* March Motion at 3. In other words, the Coalition argues that the Region *should have*, but did not, consider this additional information. The Board does not agree that the Region should have considered these documents.

First, as detailed below, many of the documents were created *after* the Region's November 16, 2012 decision on the Newmarket permit, so the Region could not possibly have considered them in its decision-making. Second, some of the documents were communications among other parties that were not available to EPA (e.g., e-mails and correspondence between the State and the Coalition). Finally, none of these documents provide information of such significance that their inclusion in the record is important to reasoned decisionmaking on the Newmarket permit. Many of the documents are tangentially relevant at best (e.g., e-mails between the State and the Coalition about meetings or the drafting of their Memorandum of Agreement). Other documents, notably the affidavits and declaration of the Coalition's consultants, *see* March Motion, Supp. Exs. 19-21, simply rehash arguments or offer additional opinions about scientific issues that are already covered at great length in the record. Substantively, the Board finds these documents to be unnecessarily cumulative of an already exhaustive administrative record, argumentative, and unhelpful to the resolution of the issues presented in this case.

The Coalition also has failed to demonstrate that the supplemental materials should be admitted because the Region engaged in improper

behavior or acted in bad faith in this matter. *See* March Motion at 7-11, 16; September Motion at 5-6. The standard for establishing bad faith or bias in decisionmaking is very high. Anyone alleging such behavior must "overcom[e] the presumption of honesty and integrity attaching to the actions of government decisionmakers." *Dominion I*, 12 E.A.D. at 532 (quoting *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 788-89 (EAB 1995)). The Coalition alleges that EPA employees acted in bad faith by intentionally excluding relevant information from the administrative record and making misleading statements. *See* March Motion at 9-11.

The documents cited, however, do not support these allegations. *See id.* & Supp. Exs. 2,7,9,10-11, 20, 21. The Coalition takes statements out of context, exaggerates their significance, and unjustifiably ascribes improper intentions to EPA and State employees. For example, the Coalition argues that the postdecisional February 25, 2013 Affidavit of Dean Peschel, a consultant to the Coalition, should be added to the record because it demonstrates that the Agency is "purposefully attempting to conceal a lack of scientific foundation for its regulatory approach to Great Bay permitting." March Motion at 16. The Coalition cites Mr. Peschel's statement that an EPA employee told him that EPA had done an "independent" analysis and was not solely relying on the *Great Bay Nutrient Report* in reaching its conclusion that a 3 mg/l TN effluent limit is necessary for the Newmarket permit. According to Mr. Peschel, EPA could not produce the alleged "independent analysis." The Coalition contends that this demonstrates that EPA made an untrue statement. This conclusion is not justified, even if Mr. Peschel's version of the facts were accepted (a question the Board does not reach). As the Region explained repeatedly in the record, it reviewed the *Great Bay Nutrient Report* and other available evidence and used its own scientific judgment to reach its conclusions for the Newmarket permit. The Coalition's conclusion that this does not constitute an "independent analysis" is merely an argumentative statement of its own views, not a demonstration of a false statement by EPA. The Board concludes that the Coalition has failed to support its allegations that EPA employees acted in bad faith by making false or misleading staements.

In light of the general rule that the record is closed at the time the Region's permitting decision is made, the Board considers the Coalition's specific proposed supplemental documents in two groups: (a) documents that postdated the Region's November 16, 2012, decision on the Newmarket permit and (b) documents that predate that decision.

a. *Postdecisional Documents*

As explained above and in *Dominion I*, under general principles of administrative law, the Board, like the courts, is reluctant to include in an administrative record materials that were not actually before the decisionmaker at the time it made its decision. *See Dominion I*, 12 E.A.D. at 519 (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review more than the information before the [agency] at the time [the] decision was made risks * * * requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations.")).

All of the documents submitted with the Coalition's September Motion[38] and several of the documents submitted with its March Motion postdate the Region's November 16, 2012, decision on the Newmarket permit.[39] The Board declines to add any of these documents to the administrative record in this case. As the Board has previously stated, to accept new information after the permit is issued "would be to invite unlimited attempts by [petitioners] to reopen and supplement the

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[38] *See* September Motion, Supp. Exs. 24-33 (all dated subsequent to the Region issuing the final permit).

[39] *See* March Motion, Supp. Exs. 10-11 (letter correspondence between mayors of Portsmouth, Dover, and Rochester and University of New Hampshire professors dated January 1 and February 19, 2013); *id.*, Supp, Exs. 14-16 (Freedom of Information Act request dated December 20, 2012, and EPA responses dated November 30, 2012 (Office of Water), and January 25, 2013 (Region 1)); *id.*, Supp. Ex. 17 (2013 PREP Report); *id.*, Supp. Exs. 19-21 (affidavits of Dean Peschel and Thomas Gallagher, dated March 6 and February 27, 2013, respectively, and declaration of Steven C. Chapra dated February 27, 2013).

administrative record after the period for submission of comments has expired." *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 418 (EAB 2007) ("*Dominion II*") (quoting *In re Gen. Motors Corp.*, 5 E.A.D. 400, 405 (EAB 1994)). Further, the Board finds that these documents simply reiterate arguments that the Coalition has made previously through the numerous opportunities afforded by the Agency's public comment processes and this appeal. None present any material that would add significantly to the Board's understanding or consideration of this matter.[40]

b. *Predecisional Documents*

The Coalition fails to explain why it did not submit the documents that predate the Region's November 16, 2012 Newmarket permit decision to the Region before the record closed. The public comment process for the Newmarket permit offered ample opportunity to do so. Failing to raise an issue during the public comment period prevents the permit issuer from addressing it. In order to consider this issue on appeal, the Board would need to either become the first-level decision maker (contrary to the expectation that most permit decisions be finally determined at the Regional level), or remand the permit for consideration of that issue, which "would undermine the efficiency, predictability, and finality of the permitting process." *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 through 08-18 & 09-06 (EAB May 28, 2010), 14 E.A.D. ___ (quoting *In re BP Cherry Point*, 12 E.A.D. 209, 219-20 (EAB 2005)).

Additionally, the Board finds that many of the predecisional documents referenced in the March Motion simply reiterate arguments

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[40] The Board further notes that the Coalition's September Motion was filed in contravention of the Board's February 27, 2013 order stating "[n]o further briefing will be permitted in this matter" outside of the briefs specified in that order. Feb. 27, 2013 Order at 7 (allowing for Coalition's supplemental brief and Region's response regarding administrative record issues, and for the Coalition to file a consolidated response to *amici* briefs). The Coalition's disregard of the Board's order caused unnecessary further delay in the resolution of this matter. The Board denies the Coalition's September 23, 2013 Motion Requesting Leave to File a Supplement to the Administrative Record.

that the Coalition has presented to the Agency previously through the numerous opportunities afforded by the Agency's public comment processes and this appeal. None present any material that would add significantly to the Board's consideration of this matter. Accordingly, the Board denies the March Motion to add documents dated before November 16, 2012.[41]

2. *The Board Denies the Coalition's Request to Depose Agency Employees and Experts*

In addition, the Coalition's March Motion requests permission to depose three scientists who conducted peer reviews of the *Great Bay Nutrient Report* and five members of the Region's staff who helped develop the Newmarket permit, in order to demonstrate that the Agency has acted in bad faith. March Motion at 23-24. Neither permit nor enforcement proceedings before the Board contemplate discovery. *In re*

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[41] This includes the predecisional proposed supplemental exhibits referenced in the March Motion. *See* March Motion, Supp. Exs. 3-9 (email correspondence); *id.*, Supp. Exs. 12-13 (letters from the mayors of Rochester, Dover, and Portsmouth to Thomas Burack, NHDES Commissioner); *id.*, Supp. Ex. 23 (e-mail correspondence between John C. Hall and NHDES staff). The motion to supplement the record is moot with respect to exhibits 2 and 22. Administrative record document H.77 encompasses all of exhibit 2 to the March Motion, and administrative record documents K.7, K.8, and K.40 comprise exhibit 22 to the March Motion. *Compare* Certified Index to the Record, As Corrected at 15, 29 & 32 (Mar. 15, 2013) *with* March Motion, Supp. Exs. 2 & 22.

The Board also denies the Coalition's request to require EPA to obtain and add to the record "all analyses and aerial photographs relied upon" in creating Dr. Fred Short's one-page eelgrass survey that is included in the administrative record as A.R. K.29. March Motion, Supp. Ex. 1 at 3 (listing and briefly describing all proposed exhibits). No such records accompanied Dr. Short's survey when he sent it to EPA. Respondent Region 1's Opposition to the Motion to Supplement the Administrative Record and Depose Experts at 13-14. The Coalition filed a Freedom of Information Act ("FOIA") request with EPA for "records regarding Dr. Fred Short's 2012 eelgrass survey including any and all communications between EPA Region 1 and any other party." *See* March Motion, Supp. Ex. 16 (containing Agency's FOIA response to the Coalition on this issue, consisting of the report that is already listed at A.R. K.29). The Coalition has not demonstrated that the Region relied on or considered any other information supporting A.R. K.29, or that this information was essential. Thus, the motion to supplement the record is denied with respect to supplemental exhibit 18.

Chippewa Hazardous Waste Remediation & Energy, Inc., 12 E.A.D. 346, 368 (EAB 2005) (noting that in administrative hearings, parties "do not have a constitutional right to take depositions" or conduct discovery absent a showing of prejudice, "denying the party due process," citing *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir 1979), which states that "the Administrative Procedure Act fails to expressly provide for discovery" and explains that agencies have the discretion to adopt their own rules)); *see also In re Katzson Bros.*, 2 E.A.D. 111, 114 (CJO 1985) ("Administrative agencies are not bound by the standards of the Federal Rules of Civil Procedure."). The Coalition has failed to demonstrate prejudice or a denial of due process that would justify its unusual request to take depositions in this appellate administrative proceeding. The administrative process prescribed by regulation has provided more than ample opportunity for the Coalition to comment on the *Great Bay Nutrient Report* and the peer review reports. The Coalition has taken full advantage of those opportunities through the public comment process and through its multiple submissions on this appeal.

3. *The Board Denies the Coalition's Motion to Strike the Peer Review Reports of the 2009* Great Bay Nutrient Report *from the Record*

The Coalition's September Motion suggests that the Board should strike the peer review reports of Drs. Boynton and Howarth on the State's *Great Bay Nutrient Report* from the record, alleging that one of the peer reviewers, as well as EPA employees, demonstrated bias in their evaluations of that report. September Motion at 11. As explained in Part VII.D.1 above, the Board finds that the Coalition has failed to demonstrate bias on the part of EPA employees. The Board also finds that the Coalition failed to demonstrate bias on the part of the peer reviewers. The Coalition alleges personal bias on the part of Dr. Howarth, one of the peer reviewers, based on a single comment he made in an e-mail to his contracting official when the City of Portsmouth

attempted to contact him directly after the peer review was completed.[42] *See id.*, Supp. Ex. 27, at 2-6 (including June 2010 e-mails between Dr. Howarth and the contractor who managed the peer review contract). Dr. Howarth simply opined that it was "sad" to see the comments coming from the City when its citizens are wealthy and "can probably afford to pay to clean up their discharge." *Id.* at 11. This single comment, made after the peer review report was completed, is insufficient to establish that Dr. Howarth's peer review was biased. It has no bearing on at all on Dr. Boynton's peer review. The Board declines the Coalition's suggestion to strike the peer review reports from the record.

4. *Conclusion*

For the reasons explained above, the Board denies the Coalition's March and September Motions in their entirety.

VIII. *CONCLUSION AND ORDER*

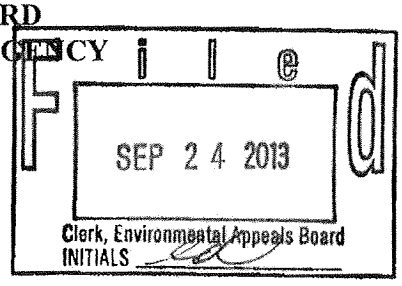
The Board concludes that the Region has complied with the applicable provisions of the Clean Water Act and its implementing regulations, and has acted well within the scope of its discretion in making the scientific judgment that a permit effluent limitation of 3.0 mg/l TN is necessary to achieve New Hampshire water quality standards. The Region's conclusion is amply supported by the administrative record in this case. The Coalition has failed to show that the Region clearly erred or abused its discretion. For all the reasons explained above, the Coalition's petition for review of the NPDES permit issued by the Region to the Town of Newmarket, New Hampshire, reauthorizing discharges to the Lamprey River from the

[42] The Coalition has failed to demonstrate that the Region relied on these e-mail exchanges in issuing the Newmarket permit. Further, these e-mail exchanges were reasonably ascertainable to the Coalition during the public comment period, *see* September Motion, Supp. Ex. 27, at 4 (reflecting that the Coalition's attorney John Hall was copied on part of the June 2010 e-mail exchange), and the Coalition has offered no plausible reason for not submitting them earlier for inclusion in the record.

Town's wastewater treatment facility, NPDES Permit No. NH0100196, is denied.

So ordered.

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



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

ORDER DENYING MOTION TO DISMISS

On August 28, 2013, the Great Bay Municipal Coalition ("Coalition"), representing the municipalities of Dover and Rochester, NH, filed a Motion to Dismiss this petition, citing plans for a new peer review of a 2009 New Hampshire Department of Environmental Services ("NHDES") report titled: "Numeric Nutrient Criteria for the Great Bay Estuary" (June 2009) ("2009 Great Bay Nutrient Report") (A.R. K.14) to be conducted by the Coalition and NHDES. The Coalition notes that "the key scientific and factual disputes underlying the appeal all relate to whether or how nutrients have adversely impacted the Great Bay system" and that the 2009 *Great Bay Nutrient Report* is "at the heart of the dispute." Petitioner's Motion to Dismiss the Petition for Review of the Town of Newmarket NPDES Permit ("Motion to Dismiss") at 1. According to the Coalition, the new peer review will "cover the central regulatory, scientific and factual disputes of this permit appeal" and will "render moot the legal and factual issues surrounding the prior limited peer review conducted by [the U.S. Environmental Protection Agency ("EPA")] which excluded participation by the Coalition." *Id.* The Coalition further

contends that EPA Regional Administrator Spaulding agreed at a recent meeting to consider the outcome of the new peer review in issuing any further National Pollutant Discharge Elimination System ("NPDES") permits to Great Bay communities. *Id.*

The Region opposes the Coalition's Motion to Dismiss and objects to the Coalition's characterization of Regional Administrator Spaulding's statement, to the extent that it suggests that EPA will delay issuing NPDES permits to other Great Bay communities until the new peer review is completed. Region 1's Response to Petitioner's Motion to Dismiss ("Region 1's Response") (Aug. 28, 2013). According to the Region, the new peer review "is still in its very early stages, so it is uncertain when the peer review will be completed and what useful information it will provide." *Id.* at 2. Further, the Region emphasizes that the issues in this case have been fully briefed for months and are poised for decision following an extensive commitment of resources by all parties. The Region disputes that the issues of statutory and regulatory interpretation will be mooted by the further peer review, and notes that "[t]hese issues will only have to be relitigated in the future, which would be a waste of scarce administrative and judicial resources." *Id.* at 3.

Conservation Law Foundation ("CLF"), participating as *amicus curiae*, also opposes the Coalition's Motion to Dismiss.[1] Non-Party Amicus Filing of [CLF] in Response to Petitioner's Motion to Dismiss ("CLF Response") (Aug. 30, 2013). CLF contends that the Coalition's plan for a new peer review of the 2009 *Great Bay Nutrient Report* "simply has no bearing on this appeal, which is premised on, and limited to, an established administrative record." *Id.* at 2.

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[1] The Board hereby grants CLF's August 30, 2013, request for leave to file its Response to Petitioner's Motion to Dismiss.

CLF also points out that significant resources already have been invested in this pending appeal and that "[a] dismissal at this eleventh hour * * * will only open the door for matters that already have been fully litigated to be *re*-litigated in upcoming NPDES permits anticipated to be issued by EPA (particularly permits to be issued to the Cities of Dover and Rochester, the municipalities which brought this appeal in the first place)." *Id.* CLF argues that "[i]n addition to greatly undermining the efficiency of the administrative and adjudicative process and further burdening administrative and judicial resources, such a result will result in delayed implementation of necessary and well-supported Clean Water Act protections in the Great Bay estuary, to the detriment of the estuary's health." *Id.* at 2-3. CLF also states that it "has been greatly troubled by the multi-pronged strategy of delay employed by the Petitioner as a means to slow the regulatory process as it relates to nitrogen pollution in the Great Bay estuary – a strategy that has included, but is not limited to, federal litigation against [EPA] (recently dismissed by the U.S. District Court for the District of Columbia), state-level litigation against [NHDES] (dismissed by the N.H. Superior Court and currently pending on appeal in the N.H. Supreme Court), and this appeal." CLF Response at 1-2 (footnote omitted).

In its Reply to the Responses from Region 1 and CLF, the Coalition "acknowledge[s] that Administrator Spalding did not agree to delay the Dover permitting process." Petitioner's Reply to Region 1's Response to Petitioner's Motion to Dismiss and Conservation Law Foundation's Motion for Leave to Submit a Non-Party Amicus Filing (Sept. 9, 2013) ("Reply") at 1. However, the Coalition asserts that its peer review process is likely to be completed by early January 2014 at the latest and that the Dover permit is not likely to be finalized until after the end of 2013. Therefore, the Coalition contends, "EPA's primary concern is misplaced." *Id.* at 1. The

Coalition further asserts that a possible outcome of its peer review is a conclusion that "(1) nutrients are not the likely cause of periodic low dissolved oxygen and eelgrass population decline within the Great Bay system and/or (2) the 2009 Numeric Nutrient Criteria are not based on reliable scientific analysis." *Id.* at 2. Finally, the Coalition asserts that "[a]n adverse decision for Petitioners [in this case] would cause the Coalition to file an appeal to the First Circuit resulting in 'further delay' of the implementation of the Newmarket permit." *Id.* at 2-3

The Environmental Appeals Board ("Board") finds considerable lack of clarity in the Coalition's position as to its plans for further litigation in this matter if the Board were to grant its motion to dismiss. Its statement in its Reply that it will appeal any adverse decision issued by the Board, causing further delay in the Newmarket permit, is inconsistent with the usual posture of a petitioner who wishes to end all litigation of a matter.[2] Further, the Coalition appears to be placing considerable reliance on the expectation that its new peer review of the 2009 *Great Bay Nutrient Report* will be completed before further Great Bay NPDES permits are issued, that the new peer review will change the scientific conclusions from that Report, and that the new peer review will lead to a different result for future permits (most notably, the City of Dover's permit). If all those expectations are not met, as appears quite possible, the Coalition is clearly signaling its intention to continue to litigate what it has identified as the key issue involved in this case –

[2] To the extent that the Coalition is suggesting that the Newmarket permit would not become final in the event of a judicial appeal, it is incorrect. The permit decision becomes final agency action, and goes into effect immediately, upon completion of administrative proceedings and issuance of the final permit by the Regional Administrator following action by the Board. 40 C.F.R. § 124.19(*l*)(2). It is unclear whether the Coalition's implied threat to continue to delay the Newmarket permit reflects an intent to seek a stay of the permit on appeal.

the scientific defensibility of the 2009 *Great Bay Nutrient Report* and the scope of EPA's legal authority and discretion to consider that Report in setting nitrogen limits in NPDES permits.[3]

The cities represented by the Coalition in this matter (Dover and Rochester) have demonstrated their resolve to continue litigation of these issues by seeking to reopen their federal district court litigation, *City of Dover v. U.S. Environmental Protection Agency*, No. 12-CV-01994 (D.D.C., July 30, 2013), following the recent dismissal of that action. The cities' proposed amended complaint seeks judicial review of the scientific defensibility of the 2009 *Great Bay Nutrient Report* and the scope of EPA's authority and discretion to rely on that Report in making permitting decisions. Further, the proposed amended complaint requests an injunction against EPA's ability to issue *or enforce* permit limits relying on the 2009 Report, *and specifically lists the Newmarket permit* among the NPDES permits at issue. *See* Proposed Am. Compl. at ¶ 68, D, H, at 15, 23. In addition, the Coalition cities are continuing to pursue their state court challenge to the 2009 *Great Bay Nutrient Report* on appeal to the New Hampshire Supreme Court, following dismissal by the N.H. Superior Court for lack of justiciability. *City of Dover. v. NHDES*, No. 2012-CV-00212 (N.H. Super. Ct., Nov. 7, 2012), *appeal docketed*, No. 2013-0119 (N.H. July 16, 2013).

These actions make it abundantly clear that the Coalition plans to continue to litigate the key issues that it has raised to the Board in this matter. Petitioner's Motion to Dismiss does not reflect a decision to cease and withdraw from litigation, but simply a desire to move the Coalition's challenge to a different forum and/or to delay the Board's ability to review the key

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[3] *See, e.g.*, *City of Dover v. EPA*, No. 12-CV-01994 (D.D.C., July 30, 2013), Proposed Am. Compl. ¶¶ 5, 10, D, H., at 2-3, 4-5, 23.

issues that the Coalition has raised in this matter. Under these circumstances, the Board cannot conclude that the controversy over the key issues that the Coalition has raised in this matter is resolved or that the issues are mooted by the Coalition's request to withdraw its petition.

Under the governing regulations, it is within the Board's discretion to grant or deny a petitioner's motion to dismiss a petition. There is no unilateral right to withdraw a petition. *See* 40 C.F.R. § 124.19(k) (providing that "Petitioner, by motion, *may* request to have the Environmental Appeals Board dismiss its appeal.").[4] The rule does not require the Board to grant that request. Moreover, the Board has full authority and discretion to manage its docket. *See* 40 C.F.R. § 124.19(n).[5] While the Board generally will grant requests for voluntary

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[4] The EAB recently revised its regulations governing permit appeals before the Board, 40 C.F.R. § 124.19, and the provisions of the revised rule took effect on March 26, 2013, and are applicable to any document filed with the Board on or after that date, including the Coalition's Motion to Dismiss.

[5] *See In re Peabody Western Coal Co.*, CAA Appeal No. 10-01 (EAB Aug. 13, 2010) (Order Granting Motion for Voluntary Remand) (articulating Board's inherent authority to rule on motions and fill other "gaps" in its procedural rules); *see also, e.g., In re MGP Ingredients of Illinois, Inc.*, PSD Appeal No. 09-03 (EAB Jan. 8, 2010) (Order Imposing Sanctions, Setting Final Deadline for Filing Response and Scheduling Status Conference) (imposing page-limit sanction against permit issuer and ordering appearance at a status conference in response to "systematic failure to timely assemble the administrative record, provide representation and defend a permit issued"); *In re Desert Rock Energy Co.*, LLC, PSD Appeal Nos. 08-03 to 08-06 (EAB May 21, 2009) (Order Denying Motion to Participate) (initially denying amici's motion to participate filed two months after the deadline for submission without explanation or justification). Further support for the Board's inherent authority to manage its docket may be found in general and well-established principles of administrative law. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543-44 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."); *see also American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (explaining that it is "always within the discretion of * * * an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.").

dismissal, in the interests of efficiency and justice, there may be circumstances under which it is appropriate to decline to do so. *See, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06,, *slip op.* at 17 (Sept. 24, 2009), 14 E.A.D.__. In *Desert Rock*, the Board explained the requirement that permit issuers must seek Board permission to withdraw a permit when a petition for review of that permit has been under Board review for some time:

> It allows the Board to decide whether, after the Board has granted review and performed a substantial review of the case, it would be more appropriate for the Board to issue a final decision on the merits or grant the voluntary remand request. Thus, for example, in cases where significant time has passed following the submission of final briefs by all the parties, the Board may be in a position to issue a final decision at the time of a request for voluntary remand. *See Indeck-Elwood* 2004 Stay Order at 9 and n.16 (noting that a stay – rather than a remand – was appropriate where the Board has already "made considerable headway in its examination of the record").

Id.

Similarly, in the federal courts, a motion by an appellant to dismiss an appeal "is generally granted, but may be denied in the interest of justice or fairness." See Fed. R. App. P. 42(b); *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004) (stating that "[d]oubtless there is a presumption in favor of dismissal but the procedure is not automatic," and denying plaintiff's motion to dismiss where plaintiff's counsel was seeking to gain a litigation advantage in future cases by avoiding adverse precedent); *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't. of Env'l. Prot.*, 31 F.3d 18, 22 (1st Cir. 1994) (allowing dismissal under the facts of that case, but noting that dismissal may not be warranted in some circumstances, such as an attempt to evade appellate review or to frustrate orders governing the conduct of appeal); *Twp. of Benton. v. Cty. of Berrien*, 570 F.2d 114, 118-19 (6th Cir. 1978) (denying plaintiff's motion to dismiss where the court would have to address the relevant issues in any event due to co-appellants' intent to continue

their appeals); *Ford v. Strickland,* 696 F.2d 804, 807 (11th Cir.), *cert. denied*, 464 U.S. 865 (1983) (denying late request for voluntary dismissal from a death row inmate, in part, because the case involved issues that repeatedly occur in capital cases); *see also Suntharalinkam v. Keisler*, 506 F.3d 822, 823 (9th Cir. 2007) (Kozinski, J., dissenting) (arguing that the majority's dismissal of the appeal in that case upon appellant's motion made after oral argument threatened the integrity of the appellate process based on the conclusion that appellant's counsel's motivation was to evade appellate determination of questions that could undermine present and future petitions of his other clients).

The Board will consider similar factors to those considered by the federal courts to determine whether to exercise its discretion to grant or deny the Petitioner's motion to dismiss in this case, including whether the motion is opposed, whether it is untimely in light of the stage of the proceedings, whether the Board is likely to have to address the issues presented in any event, whether Petitioner may be seeking dismissal for improper purposes such as evading Board review or improperly attempting to manipulate the administrative and judicial review system, and other factors as justice may require. As noted above, both the Region and CLF oppose Petitioner's motion to dismiss, on various grounds, including the concern that the issues of statutory and regulatory interpretation raised in the petition will not be mooted by further peer review and will have to be relitigated in the future, causing further delay. The Board agrees with the Region that this would be a waste of scarce administrative and judicial resources. On the issue of timeliness, the Board notes that Petitioner's motion to dismiss was filed eight months after the filing of the petition and five months after the completion of extensive briefing (including multiple replies, sur-replies and motions filed by Petitioner). The Board already has

invested considerable resources in reviewing the myriad legal and factual arguments raised by Petitioner and an extensive and complicated administrative and scientific record, and expects to issue a final decision on the merits in the near term.

While these factors alone would not dissuade the Board from dismissing a case if dismissal would finally resolve all issues, that does not appear to be the case under the unusual circumstances presented here. In this case, the Coalition and the cities it represents have made clear their intent to continue litigating the key issues they have raised to the Board, either in the judicial forum or in future permit appeals to the Board, or both.

Petitioner's motion to dismiss this case cites its plans for a new peer review of the 2009 *Great Bay Nutrient Report* as its reason for seeking dismissal. Petitioner contends that the new peer review will "cover the central regulatory, scientific and factual disputes of this permit appeal" and will "render moot the legal and factual issues surrounding the prior limited peer review conducted by EPA which excluded participation by the Coalition." Motion to Dismiss at 1. This claim is, at best, highly speculative. The record shows that there already were two peer reviews of the 2009 Report by nationally-recognized experts. Additional peer reviews, even if they support the Coalition's views as the Coalition seems to expect, would not "moot" the prior reviews. New and conflicting scientific opinions would set up a "battle of the experts," requiring additional review and evaluation by the Region and the State to determine whether their prior assessments of the reliability of the 2009 Report should be changed. This could be a complex and time-consuming process, and its outcome is unpredictable.

The Board must consider the potential effect on other parties and the public of granting or denying Petitioner's motion to dismiss at this late stage of the proceedings. Certainly dismissal

of this petition with prejudice would have the beneficial effect of providing certainty and finality for the permittee, the Town of Newmarket, by allowing its NPDES permit to become immediately final and precluding Petitioner's threatened judicial appeal.[6] That certainty is clouded, however, by the Coalition cities' continuing federal district court litigation, which includes a request for an injunction against issuance or enforcement of the Newmarket NPDES permit. *See, e.g., City of Dover v. EPA*, No. 12-CV-01994 (D.D.C., July 30, 2013), Proposed Am. Compl. ¶¶ 68, D, H., at 15, 23. Newmarket's permit also will become final if the Board denies Petitioner's motion to dismiss and affirms the Region's permitting decision. *See* 40 C.F.R. § 124.19(k)(2).[7] In that event, however, Newmarket would continue to be subject to some future uncertainty in light of Petitioner's threat to appeal an adverse decision by the Board.[8]

Immediate dismissal of the petition also could have a beneficial environmental effect if it would expedite implementation of nitrogen controls on the Newmarket plant's discharges. Given the late stage of the proceedings before the Board in this matter, however, it is not at all apparent that there would be any significant difference in this respect between an immediate dismissal of the petition and issuance of an affirming decision on the merits.

A Board decision on the merits of the key issues raised by the Coalition could provide some guidance and lessen uncertainty as to how EPA will proceed for other Great Bay

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[6] If this appeal is dismissed without a decision on the merits, the Coalition would not have exhausted its administrative remedies, which is a prerequisite for seeking judicial review. *See* 40 C.F.R. § 124.19(*l*).

[7] The Coalition is incorrect in suggesting in its Reply that Newmarket's permit will not become final if the Coalition appeals an adverse Board decision in this matter. *See* Reply at 3.

[8] While the permit would remain final pending appeal, absent a stay, there would remain some risk of an adverse decision on appeal and remand that could change the terms of the permit.

communities whose NPDES permits could be affected by the Coalition's continuing litigation over the Region's use of the 2009 *Great Bay Nutrient Report.* While EPA decisions on all permits are made on a case-specific and site-specific basis, the scientific defensibility of the 2009 *Great Bay Nutrient Report* could be a key common issue for many permits. A Board decision on that issue would, at a minimum, provide EPA's final position with respect to whether the existing administrative record supports the scientific validity of that Report and the Region's consideration of that Report in determining permit limits. In addition, a Board decision could provide helpful analysis for the courts' review of these complex scientific issues in the likely event that the Coalition continues to bring this issue to the courts for resolution.

On balance, under the circumstances presented in this unusual case, the Board concludes that justice will be best served by denying Petitioner's belated motion to dismiss this action. In light of Petitioner's continuing litigation of the key issue it has raised to the Board, the important public interest in resolving this controversy as soon as possible to protect the health of the Great Bay Estuary, and the significant loss of efficiency and scarce administrative resources that would result if the Board were to set aside this complex matter, only to have to take it up again in the future, the Board will exercise its discretion to manage its docket by completing its consideration of the key issues raised by Petitioner in this matter.

Accordingly, Petitioner's Motion to Dismiss is DENIED.

Dated:
Sept. 24, 2013

ENVIRONMENTAL APPEALS BOARD

By: _____
Catherine R. McCabe
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Motion to Dismiss 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
CLF New Hampshire
Conservation Law foundation
27 North Main Street
Concord, NH 03301
Fax No. (603) 225-3059

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: SEP 24 2013

Annette Duncan
Secretary

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review 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:

By First Class Mail Return Receipt Requested:

John C. Hall
1620 I Street, NW
Suite 701
Washington, D.C. 20006

Evan J. Mulholland
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol St.
Concord, NH 03301

Thomas F. Irwin
CLF New Hampshire
Conservation Law foundation
27 North Main Street
Concord, NH 03301

By EPA Pouch Mail:

Samir Bukhari (ORA 18-1)
U.S. EPA, Region 1
Office of Regional Counsel
5 Post Office Square - Suite 100
Boston, MA 02109-3912

Dated: DEC - 2 2013

Annette Duncan
Secretary