

MEMO: “EPA Overreach and the Impact on New Hampshire Communities”

Committee on Oversight and Government Reform

Monday, June 4, 2012, at 9:00 A.M.

1. **The Environmental Protection Agency (EPA) recently issued controversial draft permits under the National Pollutant Discharge Elimination System (NPDES) program to regulate the level of nitrogen discharged into the Great Bay Estuary. The draft permits are extremely restrictive and costly, were imposed in a manner inconsistent with usual process, and may be based on questionable science.**
 - a. The Clean Water Act (CWA) was enacted “*to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.*”¹ To this end, the CWA prohibits the discharge of any pollutant into the waters of the United States from any point source, except as authorized by CWA’s specified permitting provisions.²
 - i. One such provision is § 402, which establishes the National Pollutant Discharge Elimination System (NPDES) program and authorizes the EPA or a delegated authority, such as a state, to issue permits regulating the discharge of pollutants into the waters of the United States, subject to certain conditions.³
 1. Each permit is effective for 5 years, at which point it must be renewed.⁴
 - b. To date, the EPA has issued draft renewal NPDES permits for three New Hampshire communities to limit nitrogen discharge purported to be significantly reducing eelgrass and oyster populations in the Great Bay Estuary.⁵
 - i. The permits propose limiting the amount of nitrogen released from the communities’ wastewater treatment plants to three milligrams per liter, down from the current amount of about 20 to 30 milligrams per liter.⁶
 - c. To implement the discharge of nitrogen to three milligrams per liter will be extremely costly for the communities.

¹ Clean Water Act, 33 U.S.C. §1251.

² *Id.*

³ Clean Water Act: National Pollutant Discharge Elimination System, 33 U.S.C. §1342.

⁴ 33 U.S.C. §1251.

⁵ Thus far, the cities of Exeter, New Market, and Dover have been issued these draft permits. There are a total of five New Hampshire communities, however, involved in the dispute: Exeter, Newmarket, Dover, Portsmouth, and Rochester. These communities, which lie in EPA Region 1, have come together to form the Great Bay Municipal Coalition in hopes of overturning this permit.

⁶ See EPA Region 1 Draft NPDES Permit to Discharge to Waters of the United States, Permit No. NH0101311, Public Notice No. NH-005-12; Dover City Council, “Dover NPDES Draft Permit” Presentation, available at http://www.dover.nh.gov/notices_out.htm?id=534; Aaron Davis, “Differences aired over nitrogen in Great Bay,” Seacoast Online (December 2, 2011), available at <http://www.seacoastonline.com/articles/20111202-NEWS-112020321?cid=sitesearch>.

- i. Collectively, it is estimated that to implement the proposed limits the communities could incur up to \$164 million in initial compliance costs and annual costs of up to \$25 million.⁷
 - ii. The annual cost represents an average of approximately \$675 per household served by the combined systems—nearly a 100% increase in current annual costs per household.

- 2. **New Hampshire’s state legislature has historically determined the applicable water quality standards (WQS) for the state.** However, because *the EPA has not delegated to New Hampshire the authority to administer the NPDES program*, parties seeking to discharge from a pipe or other point source must obtain a NPDES permit issued by the EPA and comply with the particular standards it sets forth.
 - a. The state of New Hampshire has, by statute, adopted a “narrative” standard for nutrient levels in the state’s waters, stating that “*waters shall contain no phosphorous or nitrogen in such concentrations that would impair any existing or designated uses.*”⁸ By adopting this narrative standard, the state legislature elected not to place a specific numeric threshold on nutrient levels.
 - i. Therefore, the recent numeric levels of nitrogen actually discharged in to the Great Bay estuary have traditionally varied between 20 and 30 milligrams per liter, depending on the community.⁹
 - b. Federal regulations state that each state shall review, modify, and adopt appropriate water quality standards, which are then approved by the EPA before becoming effective.¹⁰ *By including a numeric requirement in its draft NPDES permits for a state that has statutorily adopted a narrative standard, EPA has bypassed the state legislature and imposed its own requirement.*

- 3. EPA has **circumvented the state legislature and violated a number of standard processes** in its issuance of the Great Bay communities’ draft NPDES permits. **EPA has elected to use its authority to override New Hampshire’s statutory water quality standard and insert its own judgment for that of the state legislature.**
 - a. Federal regulations provide that when a state has not established a numeric water quality criterion for a nutrient in a concentration that “has a reasonable potential to cause a violation of narrative water quality standards,” EPA may then establish its own limitations.¹¹ *Although it is the role of the state to establish its own water quality standards, EPA utilized this authority to step in and impose its own stringent standards based on this loose and obscure regulatory language.* There is no concrete

⁷ Applied Economic Research, The Economics of Seacoast Nutrient Removal: Dover, Durham, Exeter, Newmarket, Portsmouth and Rochester NH (June 2011).

⁸ NH CODE OF ADMIN. R.: “Nutrients,” Env-Wq 1703.14(b).

⁹ See Dover City Council, “Dover NPDES Draft Permit” Presentation; see also Davis, “Differences aired over nitrogen in Great Bay.”

¹⁰ Procedures for Review and Revision of Water Quality Standards, 40 C.F.R. §131.20

¹¹ Establishing Limitations, Standards, and Other Permit Conditions, 40 C.F.R. § 122.44(d)(1)(vi)(A-C).

threshold beyond which nutrient levels begin to violate the state’s narrative standard; therefore, EPA should not step in and impose one.

- b. **The public was largely shut out of the permitting process** as EPA advanced its desired result in the face of criticism, opposition, counter-evidence, and repeated attempts to provide input.¹²
- i. *EPA ignored repeated requests for public involvement and a more open process*, and neglected to hold hearings or engage in a peer review process promulgated by EPA’s own policy.¹³ In the face of mounting criticism, EPA did initiate an “internal review,” but repeated requests to have public involvement in this process were ignored.¹⁴
 - ii. The New Hampshire Department of Environmental Services (DES) and EPA also ignored a Memorandum of Agreement they signed with the Great Bay Municipal Coalition communities to resolve many of the technical and scientific issues of concern.¹⁵
 - iii. When Coalition representatives met personally with EPA Region I officials to discuss concerns with the new standards, EPA disregarded the concerns, expressed a disinterest in scientific integrity and standard procedure, and moved forward with the permitting process.¹⁶ This conversation was recounted by a Coalition representative during a phone call with Committee staff.¹⁷
- c. The proposed nitrogen discharge limits are based on questionable science, as it is believed that less stringent nitrogen levels will solve any problems caused by nitrogen discharge.
- i. The draft NPDES permits are based on a study conducted by DES. The communities assert that the science was not peer reviewed, and was in no way endorsed by the state legislature.¹⁸
 1. ***Moreover, the Great Bay Municipal Coalition submitted numerous studies and pieces of evidence contradicting the science underlying the new standard, and the EPA ignored the information, without comment or response, and proceeded to draft the NPDES permits.***¹⁹

¹² John C. Hall on behalf of Great Bay Municipal Coalition, “Great Bay Nutrient Criteria and Permit Development – Documentation of Apparent Scientific Misconduct and Agency Bias; Request for Transfer of Matter to Independent Panel of Experts for Review” (May 4, 2012).

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ Phone Call with Peter Rice, City Engineer, City of Portsmouth (May 23, 2012).

¹⁷ *Id.*

¹⁸ Hall, “Great Bay Nutrient Criteria and Permit Development – Documentation of Apparent Scientific Misconduct and Agency Bias; Request for Transfer of Matter to Independent Panel of Experts for Review.”

¹⁹ *Id.* at 7.

d. **Internal communications and correspondence reveal that EPA was aware the science underlying the draft permit was suspect, but proceeded with the same stringent standards anyway.**

- i. EPA e-mails indicate knowledge that there was no cause and effect relationship present to warrant the nitrogen limits proposed in the draft permits.²⁰
- ii. An internal review document points out numerous scientific deficiencies underlying the studies that were used to determine the discharge limits. Yet, EPA still claims their findings are scientifically defensible.²¹

4. **The Great Bay Municipal Coalition has proposed a workable alternative to the proposed nitrogen limits that would limit the cost and reduce nitrogen in the estuary, but the EPA has not embraced this alternative.**

a. The Great Bay Municipal Coalition has offered an alternative Adaptive Management Plan (AMP), which embodies an aggressive but more incremental approach. Under the AMP, **the Coalition proposes an eight milligrams per liter standard which would remove 73% of nitrogen from area waters bringing nitrogen down to their 1980 levels.**²² **However, if the eight milligram per liter standard does not improve the estuary over time, the communities are willing to consider EPA's more stringent approach.**²³

b. Under the AMP the collective initial compliance cost for the communities would be cut in half from \$164 million to \$74 million.²⁴

To demonstrate the cost difference for one community, the initial cost to Dover would be reduced from \$25 million to \$10-\$12 million plus \$400,000 in operation costs.²⁵

c. The City Councils of Dover and Portsmouth have voted to support the less expensive AMP.²⁶

²⁰ *Id.* at 3.

²¹ *Id.* at 5.

²² Aaron Sandborn, "Battle brewing over Great Bay nitrogen level," Dec. 27, 2011.

²³ *Id.*

²⁴ Applied Economic Research, *The Economics of Seacoast Nutrient Removal: Dover, Durham, Exeter, Newmarket, Portsmouth and Rochester NH* (June 2011).

²⁵ City of Dover featuring Dean Peschel, Video: "New EPA permit could raise sewer rates significantly," City of Dover Website (accessed May 30, 2012), available at http://www.dover.nh.gov/notices_out.htm?id=534; Davis, "Differences aired over nitrogen in Great Bay."

²⁶ Aaron Sandborn, "Battle brewing over Great Bay nitrogen level," Dec. 27, 2011; City of Dover featuring Dean Peschel, Video: "New EPA permit could raise sewer rates significantly," City of Dover Website (accessed May 30, 2012).

5. The draft NPDES permit process for the Great Bay communities have been met with bipartisan concern and sparked litigation.

- a. A bipartisan group of New Hampshire representatives in Washington – Senator Jeanne Shaheen (D-NH), Senator Kelly Ayotte (R-NH), and Representative Frank Guinta (R-NH) – recently sent a joint letter to EPA Administrator Lisa Jackson urging them to grant the communities’ request to meet with Administrator Jackson regarding their allegations of scientific misconduct by Region I in drafting the permits and their request to transfer the matter to an independent board of experts for review.²⁷

The Great Bay Municipal Coalition has initiated litigation against the state and the state DES alleging that it violated the state rulemaking process by neglecting to conduct a formal and inclusive public rule-making process.²⁸

²⁷ Aaron Sandborn, “U.S. delegates put pressure on the EPA,” Seacoast Online (May 29, 2012), *available at* <http://www.seacoastonline.com/articles/20120529-NEWS-205290318>.

²⁸ Aaron Sandborn, “Great Bay Coalition files suit against state over nitrogen limits,” Seacoast Online (Mar. 24, 2012), *available at* <http://www.seacoastonline.com/articles/20120324-NEWS-203240314>.