

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

No. 217-2012-CV-00212

City of Dover, *et al.*

v.

N.H. Department of Environmental Services, *et al.*

MOTION TO INTERVENE OF CONSERVATION LAW FOUNDATION, INC.

NOW COMES Conservation Law Foundation, Inc. (“Conservation Law Foundation” or “CLF”) and respectfully moves pursuant to N.H. Superior Court Rule 139 to intervene in the above-captioned matter and, in support thereof, states as follows:

1. Growing problems in the Great Bay estuary associated with nitrogen pollution and the loss of eelgrass – a submerged aquatic vegetation that is the cornerstone of the estuary’s ecology – have prompted detailed analyses by the N.H. Department of Environmental Services (“NHDES”), as well as increasing regulatory attention by the U.S. Environmental Protection Agency (“USEPA”) under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.*, commonly referred to as the Clean Water Act. Such regulatory actions have included the USEPA’s approval of the designation of waters throughout the Great Bay estuary as being impaired, pursuant to Section 303(d) of the Clean Water Act. 33 U.S.C. § 1313(d).¹ Degradation of water quality and eelgrass habitat also have led USEPA, which has regulatory authority for issuing National Pollutant Discharge Elimination System (“NPDES”) permits under the federal Clean Water Act, to begin addressing total nitrogen discharges from point sources,

¹ Section 303(d) of the Clean Water Act requires states to identify waters that fail to satisfy water quality standards. 33 U.S.C. § 1313(d)(1)(A). These so-called “Section 303(d) lists” of impaired waters must be approved by USEPA. *Id.* § 1313(d)(2).

including but not limited to wastewater treatment facilities owned and operated by the Petitioners in this action.²

2. After years of analysis and ongoing dialogue about the problems of nitrogen pollution and eelgrass loss in the Great Bay estuary, including Petitioners' frequent and persistent criticisms of NHDES's nutrients analysis (criticisms directed at both NHDES and USEPA), Petitioners now seek to challenge – nearly three years later – a comprehensive nitrogen analysis published by NHDES in June 2009.

3. Despite the fact that NHDES's 2009 analysis contains *proposed* criteria that have been used as interpretative guidance for purposes of translating existing narrative water quality standards and determining when conditions in subject waters fail to meet such narrative standards, and despite the fact that such analysis is not directly binding on Petitioners, Petitioners seek to characterize the 2009 analysis as rules and, further, to challenge them as “invalid rules” because they have not been subject to rule-making. Petitioners further claim, incorrectly, that if the Court “grants the relief sought by the Petitioners, USEPA, as a matter of law, will be unable to rely on NHDES' invalid rules in pending and future POTW NPDES permit decisions.”³

Petition for Declaratory Judgment and Preliminary and Permanent Injunctive Relief at 5.

² Petitioners state: “NHDES is the State agency authorized to issue discharge permits to Petitioners' POTWs and/or collaborate with the United States Environmental Protection Agency . . . in the issuance of NPDES permits.” Petition for Declaratory and Preliminary and Permanent Injunctive Relief at 2. Unlike most states, New Hampshire *has not* been delegated authority under the Clean Water Act to issue NPDES permits. Rather, USEPA is the permitting authority for all NPDES permits in New Hampshire, including those for Petitioners' wastewater treatment facilities.

³ Contrary to this assertion, USEPA is in no way precluded from considering NHDES's 2009 analysis – whether for purposes of approving Section 303(d) impaired waters lists, or issuing NPDES permits – simply because the criteria contained therein have not been adopted as state rules. *See* 40 C.F.R. § 130.7 (requiring states to assemble and evaluate “all existing and readily available water quality-related data and information” for purposes of developing Section 303(d) impaired-waters lists); *Id.* § 122.44(d)(vi), stating for purposes of NPDES permitting:

Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority [*i.e.*, USEPA] must establish effluent limits using one or more of the following options: (A) Establish effluent limits using a calculated numeric water quality criterion for the pollutant which the

4. The Conservation Law Foundation has a strong and direct interest in the subject of this lawsuit. CLF is a not-for-profit corporation incorporated under the laws of the Commonwealth of Massachusetts and with a place of business at 27 North Main Street, Concord, New Hampshire, where it has maintained an advocacy center since 1997. For several years, CLF has played an active role in addressing water quality degradation and associated eelgrass loss in the Great Bay estuary, including, *inter alia*, legal advocacy under the federal Clean Water Act. CLF's legal advocacy addressing nitrogen problems in the Great Bay estuary includes, *inter alia*, the following:

A. In 2006 and 2007, CLF engaged in advocacy under the federal Clean Water Act resulting in USEPA's 2007 denial of a request from the City of Portsmouth, one of the Petitioners in this lawsuit, for a waiver from the Clean Water Act's secondary-treatment requirement for wastewater treatment facilities, thereby requiring the City of Portsmouth's Peirce Island wastewater treatment facility to upgrade to secondary treatment (a more protective level of treatment).

B. CLF's advocacy under the federal Clean Water Act in 2007 prompted USEPA to revise a draft NPDES permit for the Town of Exeter's wastewater treatment facility, to include a discharge limit for total nitrogen. USEPA issued the revised draft NPDES permit, finalization of which is pending, in 2011.

C. CLF's advocacy under the federal Clean Water Act in 2008 resulted in the recognition by NHDES that certain waters within the Great Bay estuary violated narrative

permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use. Such criterion may be derived using a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information which may include: EPA's Water Quality Standards Handbook, October 1983, risk assessment data, exposure data, information about the pollutant from the Food and Drug Administration, and current EPA criteria documents. . . ."

water quality standards relative to the loss of eelgrass and nitrogen, causing such waters to be included on the EPA-approved Section 303(d) list of impaired waters.

D. In 2011 and 2012, CLF actively participated in public hearings conducted by USEPA relative to draft NPDES permits for wastewater treatment facilities owned and operated by three of the Petitioners in this matter, the Towns of Exeter and Newmarket and the City of Dover.

In addition to the above, CLF participated on a technical advisory committee assembled by NHDES relative to the development of nutrients criteria for the Great Bay estuary.

5. CLF has members who have used and enjoyed waters within the Great Bay estuary, and whose use and enjoyment of those public waters have been and continue to be adversely affected as a result of water quality degradation, including nitrogen pollution and the loss of eelgrass.⁴ For example, CLF member Peter A. Whelan, a resident of Portsmouth who engages in recreational fishing, and who owns and operates a recreational-fishing charter business, has stopped fishing in Little Bay and Great Bay because, as a result of the loss of eelgrass habitat and the redistribution of species that rely on such habitat, it has become difficult to catch striped bass there. *See* Affidavit of Peter A. Whelan, appended as Exhibit A, ¶¶ 1 - 8. Thus, the degradation of water quality in the Great Bay estuary and loss of eelgrass have directly harmed and continue to directly harm Mr. Whelan by interfering with his recreational use and enjoyment of Little Bay and Great Bay, and by interfering with the operation of his charter business. *Id.* ¶¶ 1 - 10. Similarly, CLF member J Jeffrey Barnum has used and enjoyed waters within the Great Bay estuary for recreational fishing, with a focus on striped bass and bluefish. *See* Affidavit of J Jeffrey Barnum, appended as Exhibit B, ¶¶ 1, 3. Because the loss of eelgrass

⁴ CLF can rely upon the injury of its members for purposes of legal standing. *See Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000).

has adversely affected the presence and distribution of fish, he no longer engages in this activity in places where eelgrass has disappeared. *Id.* ¶¶ 4 - 6. Mr. Barnum, like Mr. Whelan, has suffered harm, and continues to suffer harm, as a result of water quality degradation and the loss of eelgrass. *Id.* ¶ 7, 9 – 12. Messrs. Whelan and Barnum are supportive of, and have a strong interest in, regulatory actions to rectify the harm they are suffering as a result of water quality degradation, nitrogen pollution and eelgrass loss, and will be harmed by Petitioners’ intent to delay regulatory actions that reduce nitrogen pollution in the estuary. Exhibit A at 3 (¶¶ 7, 13); Exhibit B, ¶ 12 – 13.

6. CLF has a direct interest in this lawsuit – including Petitioners’ misguided efforts to prevent or delay implementation of regulatory actions under the federal Clean Water Act, such as pending and future USEPA permit decisions pursuant to that federal law – and is entitled to intervene. *See* Super. Ct. R. 139 (“Any person shown to be interested may become a party to any proceeding in equity on his petition briefly setting forth his relation to the cause. . . .”); *Lamarche v. McCarthy*, 158 N.H. 197, 200 (“The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice”) (*quoting Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 446 (2002)).

7. CLF is aware of the May 7, 2012 temporary hearing scheduled in this matter, as well as other dates set forth in the Court’s March 28, 2012 Order of Notice. CLF also is aware of the parties’ agreed-upon briefing schedule in anticipation of the May 7 temporary hearing. CLF’s intervention will not interfere with any of these dates.

8. The defendants in this matter, the State of New Hampshire and the N.H. Department of Environmental Services, do not object to the relief requested herein. Counsel for Petitioner City of Portsmouth indicates that the City of Portsmouth objects. Undersigned counsel

has sought from counsel of record the positions of the other Petitioners but has not received responses.

WHEREFORE, the Conservation Law Foundation respectfully requests that this Honorable Court:

- A. Grant the instant motion and allow the Conservation Law Foundation to participate in this action as an intervener; and
- B. Grant such other relief as it deems just and appropriate.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By its Attorney,

Thomas F. Irwin

Date: _____

By: _____

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CERTIFICATION

I hereby certify that a copy of the foregoing Motion was this day forwarded via U.S. First Class Mail, postage pre-paid, to counsel of record for the Petitioners, John E. Peltonen, Esq., George Dana Bisbee, Esq., E. Tupper Kinder, Esq., and Andrew W. Serell, Esq., and to counsel for the Defendants, Evan J. Mulholland, Esq.

Date: _____

Thomas F. Irwin, Esq.