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ENVIR. APPEALS BOARD

Date: March 16, 2006

**U.S. Environmental Protection Agency
Office of Regional Counsel
One Congress Street, Suite 1100
Boston, MA 02114-2023
Phone: (617) 918-1148
Fax: (617) 918-1029**

PLEASE DELIVER TO:

**Eurika Durr
Clerk, EPA Environmental Appeals Board
(202) 233-0121**

**From: Samir Bukhari
Attorney, Office of Regional Counsel
EPA, Region 1**

Number of Pages to Follow:

Re:

**Status Report on Mediation and Permit Modification Proceedings
City of Marlborough, Marlborough Westerly Wastewater Treatment
Facility
NPDES Appeal Nos. 05-05 and 05-09
NPDES Permit No. MA0100480**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 1

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BOSTON, MASSACHUSETTS 02114-2023RECEIVED
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ENVIR. APPEALS BOARD

MAR 16 2006

VIA FAX AND EXPRESS MAIL

U.S. Environmental Protection Agency
Attn: Eureka Durr
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: Status Report

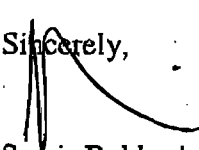
City of Marlborough Westerly Wastewater Treatment Facility
NPDES Permit No. MA0100480
Appeal Nos. NPDES 05-05 and 05-09

Dear Ms. Durr:

Enclosed are two (2) originals and five (5) copies of a Status Report on Mediation and Permit Modification Proceedings submitted by EPA-New England Region in the above-referenced NPDES permit appeals.

If you should have any questions, please do not hesitate to contact me at 617-918-1095.

Sincerely,



Samir Bukhari
Attorney Advisor
Office of Regional Counsel
US EPA-Region 1

Enclosure

cc: Donald Anglehart, Esq., City of Marlborough
Kenneth L. Kimmell, Esq., Organization for the Assabet River
Peter Shelley, Esq., John A. Pike, Esq. & John L. Davenport, Esq., CLF
Glenn Haas, DEP
Deirdre Desmond, Esq., DEP
Roger Janson, EPA-Region 1
Dave Pincumbe, EPA-Region 1
Carl Dierker, EPA-Region 1
Ann Williams, EPA-Region 1
Sheila Igoe, EPA-OGC

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BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

706 MAR 17 AM 8:48
ENVIR. APPEALS BOARD

In re

City of Marlborough Westerly Wastewater
Treatment Facility
Permit No. MA0100480

Appeal Nos. NPDES 05-05 and 05-09

STATUS REPORT ON MEDIATION AND PERMIT MODIFICATION PROCEEDINGS
RESPONSE TO OAR MOTION SEEKING COMPLIANCE WITH PERMIT MODIFICATION SCHEDULE

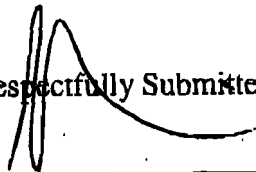
The United States Environmental Protection Agency, New England Region ("Region") respectfully submits this status report to the Environmental Appeals Board ("Board") with respect to the above-captioned matter in accordance with the Board's Order Staying Proceedings, dated November 22, 2005 ("Stay Order").

On March 16, 2006, the Region was informed by the City of Marlborough ("Marlborough") of its intent to withdraw its appeal of the Marlborough Westerly Wastewater Treatment Facility NPDES permit. The withdrawal will be contingent on the Organization for the Assabet River ("OAR") mutually withdrawing its pending appeal. The Region expects Marlborough to circulate a notice of withdrawal no later than Friday, March 24, 2006. The Region emphasizes that resolution of the pending appeals will immediately clear the way for a major construction upgrade of the Westerly facility without the costs, delays and uncertainties of multi-party litigation, a process that could extend over a period of years. In light of this significant development, the Region is hopeful that OAR will withdraw its appeal, as it has done with the Towns of Hudson, Maynard and Westborough.

As the Board is aware, the Region has delayed issuance of a draft modification to the permit for the past two and half months as it endeavored to settle the pending appeals

in a manner that balanced the competing needs of the all parties to the litigation. The Region has been under considerable pressure to move forward with the permit modification in order not to forestall environmental progress on the Assabet River, as well as under pressure to further delay the process to allow, in part, for a change in the Marlborough mayoral administration. See, OAR's "Motion Requesting Compliance with the EPA's Permit Modification Schedule" (March 6, 2006); see also, correspondence to Regional Administrator Robert W. Varney from state and federal elected officials (Attachment A) and the Region's response thereto (Attachment B). The Region believes that it would be reasonable for the Board to briefly forebear ruling on OAR's motion for approximately ten (10) days to allow the ongoing settlement efforts to finally conclude.

Respectfully Submitted,

A handwritten signature in black ink, consisting of a series of loops and a trailing line.

U.S. Environmental Protection Agency
New England Region

By its Counsel,
Samir Bukhari
Attorney Advisor
Office of Regional Counsel
U.S. Environmental Protection Agency
1 Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023
(617) 918-1095

Dated: March 16, 2006

Attachment A

Congress of the United States
Washington, DC 20515

February 28, 2006

Mr. Robert Varney
Regional Administrator
U.S. Environmental Protection Agency - Region 1
One Congress Street
Boston, MA 02114-2023

RE: City of Marlborough, Massachusetts
NPDES Permit for Westerly Wastewater Treatment Plant

Dear Mr. Varney:

We are writing to respectfully request the EPA delay the issuance of its modified National Pollution Discharge Elimination System (NPDES) permit for the City of Marlborough's Westerly Wastewater Treatment Plant until May 2006. Concurrently, we ask the EPA to join the City of Marlborough in petitioning the Environmental Appeals Board (EAB) for an extension of time sufficient to accommodate this delay.

Our request is based upon the sincere belief that the City of Marlborough has recently made significant progress toward resolving many of the outstanding issues presented by the NPDES permit. Staff members from our offices attended a meeting on January 17, 2006 with the newly-elected Mayor of Marlborough, Nancy Stevens, and officials from the Town of Northborough. It was evident at that meeting that Mayor Stevens is moving aggressively to reach agreement with the Town of Northborough for sharing the town's unused plant capacity on an interim basis. The City of Marlborough is also prepared to make upgrades to the Westerly Wastewater Treatment Plant but is currently awaiting the completion of the third phase of its Comprehensive Wastewater Management Plan (CWMP) which will identify the preferred alternative for treatment and plant upgrades. The City anticipates the completion of the CWMP by April 30th.

We feel strongly that Mayor Stevens and the City of Marlborough deserve the opportunity to review the results of the CWMP prior to responding to the issuance of a modified NPDES permit. While we appreciate the lengthy process that has taken place to date regarding this permit, we believe this is a fair and reasonable request in light of the recent progress that has been made. Accordingly, we hope you will act favorably upon this request and we ask that you contact our offices if you have any questions or concerns regarding this matter.

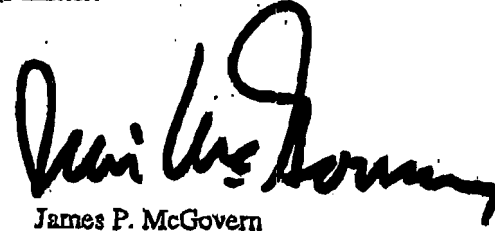
Sincerely,



Edward M. Kennedy,
U.S. Senator



John F. Kerry
U.S. Senator



James P. McGovern
Member of Congress



MASSACHUSETTS SENATE

STATE HOUSE, BOSTON 02133-1053

SENATOR PAMELA P. RESOR

MIDDLESEX AND WORCESTER

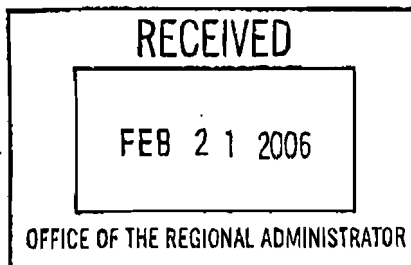
DISTRICT

ROOM 410

TEL. (617) 722-1120

FAX. (617) 722-1089

Mr. Robert Varney
Regional Administrator,
EPA Region 1
One Congress Street
Boston MA 02114-2023



DISTRICT OFFICE:

P.O. BOX 1110

MARLBOROUGH, MA 01752

TEL. (508) 786-3040

FAX. (508) 786-1989

COMMITTEES:

ENVIRONMENT, NATURAL RESOURCES
AND AGRICULTURE (CHAIR)

WAYS AND MEANS

LABOR AND WORKFORCE DEVELOPMENT, (VICE-CHAIR)

EDUCATION

CHILDREN & FAMILIES

TOURISM, ARTS AND CULTURAL DEVELOPMENT

Re: MARLBOROUGH-NORTHBOROUGH;
Westerly Wastewater Treatment Plant,
Interim NPDES Permit

Dear Mr. Varney,

We are writing to you as the elected State Senator and Representative for the City of Marlborough and Town of Northborough concerning EPA's (the Agency) pending plans to rescind the city's National Pollutant Discharge Elimination System (NPDES) permit for Marlborough's Westerly Wastewater Treatment Plant (West Plant) and re-issue a modified permit in its place.

We have learned that it is the Agency's intent to rescind the current NPDES permit for the West Plant and re-issue a modified permit with stricter permit limits. This action is apparently in response to pending appeals to the current permit taken by Marlborough and Northborough as well as the Organization for the Assabet River (OAR). Further, it is my understanding that the pending permit appeals reside at the Agency's Environmental Appeals Board (EAB).

City and town officials have informed us that they are merely a few months away from completing Phase 3 of their respective comprehensive wastewater management plans (CWMP) which upon completion will identify the preferred alternative for upgrades to the West Plant.

In the opinion of Mayor Stevens and city officials, it seems inherently unfair that the Agency would rescind the current permit and issue another with stricter limits before hearing arguments on the merits of the communities' appeals. This is especially true in light of the fact the Agency apparently has no intent to rescind the permits of the other 3 (three) wastewater treatment plants (Westborough, Hudson, and Maynard) which were issued concurrently with the Marlborough-Northborough permit and contain almost

identical permit limits. The Agency's motives for rescinding and re-issuing the NPDES permit for the West Plant have been questioned due in part to the fact that the communities (and OAR) have not been given an opportunity to argue the merits of their appeals to the current permit.

On behalf of both communities, we hereby request that the Agency stay any action it may be contemplating on the current NPDES permit for the West Plant, until such time as Marlborough and Northborough have completed their respective CWMP and defined the preferred alternative for upgrades to the plant.

Sincerely,



Pamela Resor
State Senator
Middlesex and Worcester



Stephen Leduc
State Representative
Fourth Middlesex

Attachment B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

March 7, 2006

OFFICE OF THE
REGIONAL ADMINISTRATOR

VIA FACSIMILE AND EXPRESS MAIL

The Honorable Edward M. Kennedy
United States Senate
317 Russell SOB
Washington, D.C. 20510

Re: NPDES Permit No. MA0100480
City of Marlborough Westerly Wastewater Treatment Plant

Dear Senator Kennedy:

I am writing in response to your recent correspondence in which you requested EPA Region I to delay modification of the National Pollutant Discharge Elimination System ("NPDES") permit issued to the City of Marlborough for discharges from its Westerly Wastewater Treatment Facility ("Westerly Facility") to the Assabet River. You also requested the Region to join the City in seeking a further stay of the proceedings pending before EPA's Environmental Appeals Board ("EAB") in the appeals filed by Marlborough and the Organization for the Assabet River ("OAR"). Currently the Region is subject to a schedule set by the EAB's stay order, which in turn is based on the Region completing the permit modification process by April 1, 2006. As evidenced by the enclosed Motion Requesting Compliance with EPA's Permit Modification Schedule, OAR has already objected to the Region's existing delay in issuing the permit modification and would almost certainly oppose any further extension. However, we believe a workable resolution of the permit appeal that would be consistent with Marlborough's flow requirements is possible without needing to seek a further stay in light of recent developments.

Since receiving your request, EPA has been informed by the Massachusetts Department of Environmental Protection ("DEP") of an encouraging development that would satisfy Marlborough's short term needs for additional flow capacity. Specifically, the Town of Northborough has now agreed to loan Marlborough up to 400,000 gallons per day of unused flow capacity. One hundred thousand (100,000) gallons of this capacity – an amount sufficient to accommodate Marlborough's immediate flow requirements – is available immediately. Furthermore, Northborough has indicated that it does not anticipate using the other 300,000 gallons per day until the Westerly Facility upgrade is completed. The permit's compliance schedule allots 54 months for completion of the upgrade, or 2010 at the earliest. Finally, it is important to note that Northborough has conditioned its offer on Marlborough's withdrawal of its permit appeal. A draft copy of the agreement has been enclosed for your review.

Marlborough's use of the flow capacity on loan from Northborough would be authorized by the current permit on appeal without the need for any permit modification, and the agreement with Northborough would satisfy Marlborough's flow capacity needs through the entire term of the permit. Therefore, we are hopeful that the agreement will result in Marlborough's decision to drop its pending appeal and resolve the pending litigation with OAR. It is our understanding that Marlborough is seriously considering this option. Dropping the appeal now would also make sense since, based on a legal review of Marlborough's appeal, our Office of Regional Counsel has concluded that Marlborough is unlikely to succeed in its efforts to secure a flow increase through its petition to the EAB. Even if our attorneys' appraisal is incorrect and the City prevails, the best Marlborough can hope for is a remand to EPA, additional delay and a cycle of further appeals of any modified permit.

Resolving the appeal now would not preclude the City from further pursuing options for meeting its longer term flow capacity needs. Both EPA and DEP have assured Mayor Nancy Stevens that the agencies will work collaboratively with her in this effort. It should be noted that a delay of two months to complete the CWMP will not materially advance Marlborough's efforts to secure a long term flow solution. The completion of the CWMP is only the first step in the process, which, depending on alternatives, may also involve the need to revise the Assabet River TMDL and/or evaluate state land application permitting requirements. A delay will also further reduce the prospect of OAR's withdrawal of its appeal. In the meantime, we believe it is in the interest of all parties to put the current permit into effect.

As you know the overall water quality in the Assabet River needs to be improved. We all share this goal. An improved discharge from the Westerly plant is a necessary prerequisite to achieving and maintaining improved water quality in the Assabet River as soon as possible.

We appreciate your interest in this matter. Please contact Linda Murphy, Director of the Office of Ecosystem Protection at (617) 918-1621 if you would like to discuss this further, or your staff may contact Michael Ochs in our Office of Public Affairs at (617) 918-1066.

Sincerely,



Robert W. Varney
Regional Administrator

Enclosure

cc: Senator John F. Kerry
Congressman James P. McGovern
State Senator Pamela P. Resor
Representative Stephen P. LeDuc
Robert W. Golledge, DEP
Glenn Haas, DEP

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Status Report on Mediation and Permit Modification Proceedings in the matter of City of Marlborough Westerly Wastewater Treatment Facility (Permit No. MA0100480), NPDES Appeal Nos. NPDES 05-05 and 05-09, were sent to the following persons in the manner indicated:

By First Class U.S. Mail:

Kenneth L. Kimmell, Esq.
Bernstein, Cushner & Kimmell, PC
585 Boylston Street, Suite 400
Boston, MA 02116

Donald Anglehart, Esq.
Gadsby Hannah LLP
225 Franklin Street
Boston, Massachusetts 02110

Peter Shelley, Esq., John A. Pike, Esq. and
John L. Davenport, Esq.
Conservation Law Foundation
62 Summer Street
Boston, MA 02110-1016

Deirdre Desmond, Esq. and Glenn Haas
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

By Facsimile and Federal Express:

U.S. Environmental Protection Agency
Environmental Appeals Board
Attn: Eurika Durr, Clerk of the Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Dated: MAR 16 2006



Samir Bukhari, Attorney
EPA - Region 1
Office of Regional Counsel