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

VIA FAX AND VIA FIRST CLASS MAIL

Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: NPDES Appeal Nos. 08-26, 08-27
NPDES Permit No. MA0039853
Town of Wayland Wastewater Management District Commission

July 9, 2009

Dear Ms. Durr,

Enclosed please find the original of the Region's Third Status Report and Motion to Extend Stay of Proceedings in the above-captioned case, with an attached certificate of service. The motion and the certificate of service have also been mailed to the Board and to counsel of record today. In lieu of five additional paper copies for the Board, an electronic copy has been posted to the CDX system.

Sincerely,

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
617-918-1040
Fax: 617-918-0040

cc: Adam P. Kahn, Esq.
Robin Lepore, Esq.
Deirdre C. Menoyo, Esq.

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

In re: Town of Wayland, Wastewater Management District Commission NPDES Permit No. MA0039853	))))))	NPDES Appeal Nos. 08-26, 08-27

THIRD STATUS REPORT AND
MOTION TO EXTEND STAY OF PROCEEDINGS

Respondent Region 1 of the U.S. Environmental Protection Agency ("Region"), with the assent of the Town of Wayland Wastewater Management District Commission ("Town"), Thomas Arnold ("Arnold") (the Petitioner in NPDES Appeal No. 08-26), and the U.S. Department of the Interior ("DOI") (the Petitioner in NPDES Appeal No. 08-27), respectfully requests that the Environmental Appeals Board ("Board") extend the stay of proceedings as indicated below to 1) allow the Region to modify the appealed NPDES permit, 2) allow for continuation of settlement negotiations between Petitioner Arnold and the other parties, and 3) allow for the formalization of a settlement agreement reached between the DOI, the Region, and the Town on June 8, 2009.

BACKGROUND

The Region reissued NPDES Permit No. MA0039853 ("Permit") to the Town of Wayland Wastewater Management District Commission on September 30, 2008. In November 2008, Thomas Arnold filed initial and supplemental Petitions for Review contesting certain conditions of the Permit (Appeal No. 08-26). The U.S. Department of

the Interior filed a Petition for Review dated November 14, 2008, also contesting certain conditions of the Permit (Appeal No. 08-27).

On December 10, 2008, the Region and both Petitioners filed a joint motion requesting that both proceedings be stayed so that the parties could explore resolution through settlement, that the two proceedings be consolidated, and that certain supplemental materials be allowed before the Board. On December 24, 2008, the Board stayed both proceedings until April 8, 2009, but reserved decision on consolidation and the other requested relief. *See In re Town of Wayland Wastewater Dist. Mgmt. Comm'n,* NPDES Appeal Nos. 08-26, 08-27 (EAB, Dec. 24, 2008) (Order Granting Joint Motion to Stay the Petition). On February 6, 2009, the Board granted the Town's motion to intervene, file a response to the petitions, and participate as a party in these appeals. *See In re Town of Wayland Wastewater Dist. Mgmt. Comm'n,* NPDES Appeal Nos. 08-26, 08-27 (EAB, Feb. 6, 2009) (Order Granting Motion to Intervene).

On May 7, 2009 the Board granted the parties' request to extend the stay of proceedings. *See In re Town of Wayland Wastewater Dist. Mgmt. Comm'n,* NPDES Appeal Nos. 08-26, 08-27 (EAB, May 7, 2009) (Order Granting Motion to Extend Stay of Proceedings). On June 10, 2009 the Region filed an assented-to Second Status Report and Motion to Extend Stay of Proceedings, in which the Region stated that it had reached an agreement in concept with DOI and the Town, and set forth a process for further negotiations with Petitioner Arnold and the other three parties by which this agreement could potentially be revised to the satisfaction of all four parties. *See* Doc. No. 58 at 3-4. The Region projected that an agreement—with or without Petitioner Arnold—would be formalized by July 10, 2009. *See id.* at 3-6.

On June 15, 2009 the Board granted the Region's motion in part, and stayed the proceedings in both petitions until July 10, 2009. *See In re Town of Wayland Wastewater Dist. Mgmt. Comm'n,* NPDES Appeal Nos. 08-26, 08-27 (EAB, June 15, 2009) (Order Granting Motion to Extend Stay of Proceedings) ("June 15 Order"), at 2. The Board ordered the parties to file a joint status report and, if a final agreement was reached between all or some of the parties, to "include a detailed summary of the projected time frame for full resolution of the issues, including a schedule listing the activities that encompass the permit modification process and the time frame in which each of those activities is expected to be completed." *Id.* at 2-3.

STATUS REPORT

1. Status

Since the issuance of the June 15 Order, the four parties involved in these proceedings (the Region, the Town, the DOI and Petitioner Arnold) have engaged in substantive, good-faith discussions. Moreover, three of the parties (the Region, the Town, and DOI) have drafted a written three-party settlement agreement ("Agreement"), and are in substantial agreement regarding most of the provisions, but continue to exchange suggestions and text concerning some sections of the draft Agreement. The Agreement includes a number of the terms of a draft permit modification to which the parties have agreed, and provides that the Region will modify the NPDES Permit pursuant to 40 C.F.R. part 124. The Agreement also provides, *inter alia*, that the Town and DOI agree not to comment adversely on the draft permit modification assuming it conforms to the Agreement, and that DOI will, upon finalization of a permit modification substantially similar to the anticipated agreed-to draft permit modification, withdraw its appeal.

The Region, the Town, and DOI have not yet formally concluded the written settlement agreement, but continue to work diligently to achieve full agreement.

The parties have also been engaged in extensive discussions involving an as-yet-unresolved matter regarding amending the terms of a monitoring protocol. Discussions on this matter have entailed meetings and extensive technical discussions with representatives of the Massachusetts Department of Environmental Protection and other technical experts, as well as the legal representatives of the parties. If all four parties (the Region, DOI, Petitioner Arnold, and the Town) can reach agreement on a revised monitoring protocol, then settlement of Petitioner Arnold's appeal will be possible. The parties believe that they have made substantial progress in this direction, and that further discussions between the parties offer a substantial possibility of reaching a four-way agreement. The parties agree that the terms of any agreed-upon revised monitoring protocol can be included in the draft permit modification, as appropriate, if final agreement is achieved.

Based on the progress achieved to date, the issues remaining, and the benefits of the Region's moving forward with a draft permit modification even though some issues have not yet been fully resolved, the parties agree that the best course of action is for the Region to proceed to develop the draft permit modification in parallel with continued discussions over the text of the written settlement agreement. Toward this end, on July 9, 2009 the Region issued a Notice of Withdrawal of Conditions Pursuant to 40 C.F.R. § 124.19(d), withdrawing the Permit's phosphorus effluent limits and advising the Board and the parties that the Region intends to propose revised phosphorus permit conditions in a draft permit modification to be submitted for public notice in the near future.

2. Projected schedule

Under the Agreement's schedule, the Region will use good faith efforts to issue a draft permit modification within 45 days of the Agreement's effective date. The Region will then conduct a public comment period of at least 30 days. *See* 40 C.F.R. § 124.10(b)(1). However, a commenter may request a longer comment period in order to have a reasonable opportunity to comply with the obligation to raise issues and provide information during the public comment period, and if such a request is made, the Region must grant additional time to the extent that the requestor demonstrates the need for such time. *See id.* § 124.13. Moreover, the regulations also provide that any interested person may request a public hearing, *see id.* § 124.11, and if the Region decides to grant any such request, it must give public notice of such a hearing at least 30 days in advance, *see id.* § 124.10(b)(2). Thus, it is conceivable that the comment period could last 60 days or longer, depending on the nature and timing of requests received.

The Agreement provides that the Region will use good faith efforts to issue a final permit modification within 90 days after the issuance of the draft permit modification, with the explicit proviso that this timeframe may need to be extended based on the volume or nature of public comments received, any requests for extension of the comment period, or any requests for a public hearing. Notwithstanding this possibility of extension, the timeframes provided by the Agreement envision that a final permit modification would be issued within 135 days of the Agreement's effective date.

Although a final four-party agreement has not yet been reached concerning a revised monitoring protocol, such a protocol can be incorporated into the timeframe described above if final agreement is achieved. Thus, the projected schedule is

approximately 135 days total whether or not a final four-party agreement is reached on a revised monitoring protocol.

REQUESTED RELIEF AND GROUNDS FOR SUCH RELIEF

The Region, with the assent of the Town, Petitioner DOI, and Petitioner Arnold, respectfully requests that the Board extend the stay of the proceedings for both Appeal Nos. 08-26 and 08-27 by approximately six months, to January 13, 2010. This term includes: (1) four and one half months (i.e., the approximately 135 days described above) for the Region to prepare and submit for public notice a draft permit modification based on the Agreement, to receive and respond to public comments, and to issue a final permit modification after consideration of such comments, (2) one month for DOI to dismiss its existing appeal and for any parties that adversely comment on the draft permit modification to file petitions for review of the final permit modification pursuant to 40 C.F.R. § 124.19, and (3) three weeks for the Region, in consultation with the Town and DOI, to prepare a status report advising the Board on whether DOI has dismissed its appeal, and to propose a course of action for addressing any new petitions for review.

The Region proposes to submit a status report to the Board no later than January 13, 2010, advising the Board regarding the status of the permit modification, whether DOI has dismissed its appeal, whether Petitioner Arnold has dismissed his appeal, whether the Region has received any petitions for review of the final permit modification, and how best to consolidate any new petitions with any remaining existing petitions. The Region has selected January 13, 2010 because it is approximately three weeks after the estimated late December close of the appeal period for the final permit modification, and this interval (given two intervening federal holidays and common vacation times) is necessary to allow

the Region, in consultation with the existing parties, adequate time to attempt to formulate an assented-to status report.

For the reasons stated above, the Region, with the assent of the Town and Petitioners DOI and Arnold, respectfully requests that the Board extend the stay of the proceedings for both appeals to January 13, 2010.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1

By its attorney,

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 1
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114
617-918-1040
Date: July 9, 2009

CERTIFICATE OF SERVICE

I, Ronald A. Fern, hereby certify that copies of the foregoing Third Status Report and Motion to Extend Stay of Proceedings were sent on the 9th day of July 2009 to the following persons in the manner described below:

Original by first class mail Copy by fax Copy posted to CDX electronic system	Eurika Durr, Clerk of the Board Environmental Appeals Board (MC 1103B) U.S. Environmental Protection Agency Ariel Rios Building 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20460-0001 Fax: 202-233-0121
Copy by fax Copy by first class mail Copy by e-mail	Deidre C. Menoyo, Esq. 388 Willis Road Sudbury, MA 01776 Fax: 978-440-9692
Copy by fax Copy by first class mail Copy by e-mail	Robin Lepore, Esq. Office of the Regional Solicitor Department of Interior One Gateway Center, Suite 612 Newton, MA 02458 Fax: 617-527-6848
Copy by fax Copy by first class mail Copy by e-mail	Adam P. Kahn, Esq. Foley Hoag, LLP 155 Seaport Blvd. Boston, MA 02210 Fax: 617-832-7000

Signed: July 9, 2009