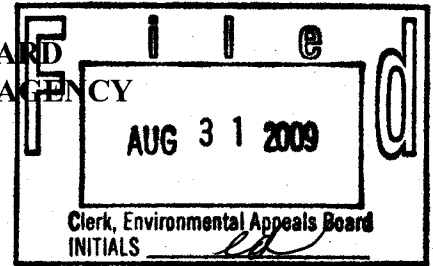


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re: _____)
)
Town of Wayland)
Wastewater Management)
)
Permit No. MA0039853)
_____)

NPDES Appeal Nos. 08-26 & 08-27

ORDER TO SHOW CAUSE WHY PETITIONS SHOULD NOT BE DISMISSED

On August 12, 2009, U.S. EPA Region 1 (“Region”), with the assent of the petitioners in this case, Thomas Arnold (NPDES Appeal No. 08-26) and the U.S. Department of the Interior (“DOI”) (NPDES Appeal No. 08-27), and intervenor the Town of Wayland Wastewater Management District Commission (“Town”), filed a fourth status report and a motion requesting a fifth stay of proceedings in the above-captioned matters. All parties executed a written Settlement Agreement, effective August 10, 2009, and the Region submitted a proposed permit modification for public notice on August 12, 2009. Fourth Status Report and Motion to Extend Stay of Proceedings (“Status Report”) at 1, 3 & Ex. 1 (“Settlement Agreement”).¹ The thirty-day public comment period for the proposed permit modification ends on September 10, 2009. See 40 C.F.R. § 124.10(b)(1). The Settlement Agreement states that the Region will work in good faith to issue a final permit modification within ninety days of submission of the proposed permit

¹ The Settlement Agreement details the substantive changes made in the draft permit modification issued on August 12, 2009, as compared to the permit issued on September 30, 2008. The proposed permit modification: (1) revises the phosphorous effluent limit; (2) adds monthly copper sampling; and (3) adds an in-stream monitoring program. Settlement Agreement at ¶¶ 6-7.

modification for public comment, and that notwithstanding contingencies such as extending the public comment period or conducting a public hearing, a final permit modification should issue by November 10, 2009. Settlement Agreement at ¶ 8; Status Report at 4-5.

Beyond the three months requested by the parties until November 10, 2009, the parties also seek an additional two months to allow: (1) both DOI and Mr. Arnold to dismiss their respective petitions; (2) for 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) for the Region, in consultation with the Town, DOI, and Mr. Arnold, to prepare a status report for the Board discussing whether DOI and Mr. Arnold have dismissed their appeals, and how to address any new petitions for review that arise. Status Report at 5.

On these representations by the parties, the Board is not persuaded that any additional time beyond the issuance of the proposed permit modification on August 12, 2009, is necessary to resolve the above-captioned matters. First, in their previous status report, the parties stated that the Region had issued a Notice of Withdrawal of Conditions Pursuant to 40 C.F.R. § 124.19(d) on July 9, 2009, withdrawing the permit's phosphorous effluent limits and indicating that the Region would propose revised phosphorous limits in a draft permit modification. Third Status Report and Motion to Extend Stay of Proceedings (July 9, 2009) at 4. Withdrawal of contested permit provisions renders a petition for review of those conditions before the Board moot. See *In re Cavenham Forest Industries*, 5 E.A.D. 722, 728 & n.10 (EAB 1995) (“[I]n addressing a claim of mootness, the Board looks to whether there remain any contested permit conditions - that is, conditions identified as objectionable in the petition for review - that the Regional Office has not undertaken to revise in the manner requested by the petitioner. If no

such challenged conditions remain, a petition under section 124.19 must be dismissed as moot, even if the parties continue to disagree over the meaning of the applicable legal principles.”); *see also In re City of Port St. Joe*, 5 E.A.D. 6, 9 (EAB 1994); *In re City of Haverhill Wastewater Treatment Facility*, NPDES Appeal No. 08-01, at 2 (EAB Feb. 28, 2008) (Order Dismissing Petition for Review). As of August 12, 2009, when the Region issued the draft permit modification for public comment, Mr. Arnold’s and the DOI’s petitions, to the extent they challenge the phosphorous effluent limits, appear moot.

Second, to the extent that the DOI and Mr. Arnold raise additional issues in their respective petitions for review, regarding, for example, in-stream monitoring protocols or relocation of outfall, the Settlement Agreement “constitutes the final and entire understanding of the Parties with respect to resolution of *all* issues regarding NPDES Appeal Nos. 08-26 and 08-27,” and all of these issues were represented by the parties to have been addressed in the proposed permit modification issued on August 12, 2009. Settlement Agreement ¶ 26 (emphasis added). Finally, the proposed permit modification is subject to a new public comment period, whereby any party dissatisfied with the Region’s issuance of the final permit modification under 40 C.F.R. § 124.15 may submit a petition for review before the Board.

40 C.F.R. § 124.19(a), (d).²

Before making a final decision, the Board has decided to provide the Region with the

² The Settlement Agreement provides that the Region is released from its obligations to, among other things, use good faith to issue a final permit modification within ninety days of the issuance of the draft permit modification, if any of the parties comment adversely on or request changes to the draft permit modification currently proceeding through the public comment period. Settlement Agreement ¶ 11. However, the Settlement Agreement also explicitly reserves all rights of the parties to reassert any objections raised in the appeals currently before the Board with respect to any modification or reissuance of the permit. Settlement Agreement ¶ 10.

opportunity to clarify why the current petitions before the Board are not moot, based on both the Region's issuance of the draft permit modification on August 12, 2009, and on the settlement agreement signed by all parties that resolves all issues in the petitions currently before the Board. The Region is hereby ordered to show cause by Tuesday, September 15, 2009, why Mr. Arnold's and the DOI's petitions for review currently before the Board should not be dismissed.³

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: Aug. 31, 2009

By: Charles J. Sheehan
Charles J. Sheehan
Environmental Appeals Judge

³ All parties are welcome to independently address the issues raised by this Order within the specified time frame, or to assent to the Region's response, at their discretion. However, the Region is not required to gain the assent of any other party before responding to this Order.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order to Show Cause Why Petitions Should not be Dismissed in the matter of Wayland Wastewater Management, NPDES Appeal Nos. 08-26 & 08-27, were sent to the following persons in the manner indicated:

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Dated: **SEP - 1 2009**


Annette Duncan
Secretary