



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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VIA ELECTRONIC FILING

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**RE: City of Marlborough Westerly Wastewater Treatment Facility
NPDES Permit No. MA0100480; NPDES Appeal No. 21-04
Notice of Permit Provision Withdrawal &
Notice of Uncontested and Severable Permit Conditions**

Dear Sir or Madam:

The Environmental Protection Agency, Region 1, (“EPA” or “Region”) reissued a final National Pollutant Discharge Elimination System (“NPDES”) Permit (“Final Permit”), No. MA0100480, to the City of Marlborough (“Permittee”) for its Westerly Wastewater Treatment Facility on October 25, 2021. EPA previously issued a permit to Permittee on May 26, 2005 (“Prior Permit”). On November 24, 2021, OARS, Inc., (“OARS”) filed a

timely Petition for Review (“Petition”) of the Final Permit with the Environmental Appeals Board (“EAB”). In accordance with 40 C.F.R. § 124.19(j), and as described below, EPA is providing notice that it is hereby withdrawing one of the permit provisions contested by OARS. Additionally, in accordance with 40 C.F.R. §§ 124.16 and 124.60, EPA is providing notice of uncontested and severable permit conditions in connection with all remaining provisions of the Final Permit.

OARS contested the following permit conditions in its Petition:

1. The total phosphorous monthly average limit in the “summer” from April 1 through October 31 each year (Permit at Part I.A.1);
2. The total phosphorous monthly average limit in the “winter” from November 1 through March 31 each year (Permit at Part I.A.1)

See Petition at 8-9. In particular, OARS objected to the use of load-based limits for total phosphorous, as opposed to concentration-based limits as was proposed in the Draft Permit and used in the Prior Permit. Petition at 15-16.

Permit Provision Withdrawal

Pursuant to 40 C.F.R. § 124.19(j), the Regional Administrator, at any time prior to 30 days after the Regional Administrator files its response to the petition for review, may, upon notification to the EAB and any interested parties, withdraw the permit or portions thereof, and prepare a new draft permit under 40 C.F.R. § 124.6 addressing the portions so withdrawn.

After due consideration of the Petition, pursuant to 40 C.F.R. § 124.19(j), EPA hereby withdraws the “summer” mass-based total phosphorus limit contained in the Final Permit at Part I.A.1. EPA intends to prepare a new draft permit under 40 C.F.R. § 124.6 addressing the portion so withdrawn and proposing to regulate Total Phosphorus limits in concentration-based form, an expression of the limits that is consistent with the 2020 draft permit and with NPDES permits for all other permittees on the Assabet River subject to the approved Assabet River Total Maximum Daily Load developed by the Massachusetts Department of Environmental Protection. The Region intends to propose to maintain Total Phosphorus limits in concentration-based form for all such permits moving forward. The new draft permit will be released for public notice and comment. Until such time as Region 1 issues a final permit pertaining to the withdrawn summer Total Phosphorus limit, the corresponding provisions of the Prior Permit shall remain in effect.¹ See *In re: City of Keene Wastewater Treatment Facility*, Order Noticing Partial Withdrawal of Permit and Dismissing Portion of Petition for Review as Moot, NPDES Appeal No. 07-18 (E.A.B. Dec. 2007).

Notice of Uncontested and Severable Conditions

¹ Please note, the Prior Permit contains two separate monthly periods (“April” and “May 1 – October 31”) that are covered by one “summer” period (April 1 – October 31) in the Final Permit. Because EPA is withdrawing the “summer” Total Phosphorus limit in the Final Permit, the two separate periods in the Prior Permit will remain in effect. Additionally, both the “April” and “May 1 – October 31” limits contain applicable footnotes (FN 13, 14) in the Prior Permit. Footnote 13 applies to a compliance schedule that is no longer in effect and thus the footnote is null. Footnote 14, however, will remain in effect. Additionally, the testing frequency for the “summer” limit contained in the Prior Permit, 3/week, will also remain in effect.

When a permit appeal is filed, EPA must issue a notification identifying which permit conditions are stayed as a result of the appeal and which permit conditions will go into effect. *See* 40 C.F.R. §§ 124.16(a)(2)(i) and (ii). While a permit appeal is pending, the contested permit conditions are stayed. *Id.* at § 124.16(a)(1). Uncontested permit conditions that are “inseverable” from contested conditions are also considered to be contested and are stayed. *Id.* at §§ 124.60(b)(4), 124.16(a)(2)(i). Uncontested permit conditions that are severable from contested conditions are not stayed and become enforceable conditions of the permit. *Id.* at §§ 124.16(a)(2)(i) and (ii).

Because EPA has withdrawn the contested “summer” Total Phosphorus limit, the sole remaining contested permit condition is the “winter” Total Phosphorus limit. However, concurrent with the filing of this Notice by EPA, OARS has filed a motion to voluntarily dismiss its petition for review in its entirety, pursuant to 40 C.F.R. § 124.19(k). Upon (1) the anticipated issuance of a Board order granting OARS’ requested relief and (2) the Regional Administrator’s issuance of a final permit decision under 40 C.F.R. § 124.19(l)(2), the winter Total Phosphorus limit will neither be contested nor stayed and will come into effect in accordance with and on the date set forth in the final permit decision. Until that time, as the holder of an existing, administratively-continued permit, the City must continue to comply with conditions of that permit that correspond to the stayed condition. *Id.* at § 124.16(c)(2). EPA has determined that all other conditions of the permit are uncontested and severable, and accordingly will become fully effective and enforceable on February 1, 2022.

If you have any questions regarding this notice, please contact Michael Knapp, Senior Assistant Regional Counsel, at 617-918-1053.

Sincerely,

Deborah Szaro
Acting Regional Administrator
US EPA-Region 1

cc: Lealdon Langley, MassDEP
Denny Dart, EPA