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

By Fax

August 3, 2004

Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Ariel Rios Building,
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: City of Newburyport Wastewater Treatment Facility
NPDES Appeal Nos. 04-05 and 04-06

Dear Ms. Durr:

Enclosed please find an original and five copies of Respondent's Motion to Renew Request to Consolidate Proceedings and Extend the Response Date in the above-captioned matter.

Please feel free to contact me at 617-918-1734, or by fax at 617-918-1809, if you need to discuss this filing. My e-mail address is bandrowicz.toni@epa.gov.

Sincerely,

Tonia Bandrowicz
Senior Enforcement Counsel

cc: Maria Eigerman
Barry P. Fogel, Esq.,

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

In the Matter of:	)	
City of Newburyport, Wastewater Treatment Facility	)	NPDES Appeal Nos. 04-05 and 04-06
Permit Number: MA0101427	)	

MOTION TO RENEW REQUEST TO CONSOLIDATE PROCEEDINGS AND EXTEND THE RESPONSE DATE

On July 16, 2004, Region I of the Environmental Protection Agency (the "Region"), Respondent, requested that the Environmental Appeals Board ("EAB") consolidate the proceedings in connection with Island Future Group, Inc.'s ("IFG") June 9, 2004 Petition for Review ("IFG Petition") and the City of Newburyport's ("City") June 7, 2004 Petition for Review ("City Petition"). The Region also moved to extend the date for the Region to file a response in connection with IFG's Petition in this case from July 30, 2004 to October 29, 2004.[1] Prior to filing its July 16, 2004 motion, counsel for the Region had contacted Ms. M. R.

[1] On July 7, 2004, the Board granted a joint motion of the City and Region to extend the deadline for the Region to respond to the City's Petition until October 29, 2004. On July 8, 2004, the City submitted a motion to intervene and grant the City all rights of a party, including specifically the right to file a response to the IFG Petition. This request was granted by the Board on July 19, 2004. On July 29, 2004, the Board granted the City an extension of time until August 6, 2004 in which to file a response to IFG's Petition pursuant to such intervention.

Eigerman, President of IFG, to inquire as to whether IFG would be willing to file a joint motion for a stay of the proceedings but did not hear back from her prior to filing such motion. On July 20, 2004, the Board granted the Region an extension until August 6, 2004 in which to file a response, but reserved ruling on the Region's request for consolidation or a further stay pending receipt of a reply from IFG. On July 30, 2004, in reply to the Board's July 20, 2004 Order, IFG opposed an additional extension for the Region to file a response, or consolidation if such consolidation involved additional delay.[2]

Despite IFG's opposition, the Region respectfully asks the Board to grant its earlier motion to consolidate the two petitions and establish a single date - October 29, 2004 - for the Region to respond to both of them. The Board has already granted an extension until October 29, 2004 for the Region to respond to the City's petition. Since the City and IFG have both challenged various aspects of the same permit's effluent limitations for total residual chlorine and fecal coliform bacteria, it does not seem to make sense to require the Region to rush out a response to IFG's criticisms of the permit by August 6th, while at the same time allowing a longer and more appropriate period of time until October 29th to respond to the City's challenge. Granting an extension until October 29, 2004 for the Region to respond to IFG's petition will ensure that the Region has enough time to respond fully and carefully to the issues raised by IFG and provide the Board with the Agency's considered views. It will also ensure that the Region and the City have sufficient time to explore possible settlement of part, if not all, of the issues raised by the City, thereby reducing the number of issues before the Board.

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[2] IFG indicated in its July 30, 2004 objection that it had not received the Region's motion but was replying to the Board's Order. A second copy will be mailed to IFG today.

IFG's July 30th arguments against consolidation and a longer extension are not persuasive. First, contrary to IFG's claim, the Region is not asking to "push[] the schedule for even beginning a consolidated proceeding into late October." The proceeding has already begun. The Region is merely asking that its response briefs answering both petitions be scheduled for the same time and far enough out so that Regional staff will be able to develop draft briefs responding to all the issues raised by IFG and the City, circulate the draft briefs to appropriate Regional and Headquarters personnel for review and comment, incorporate those comments into final briefs, and assemble the considerable administrative record in this matter. Nor, contrary to IFG's claim, will this relatively short extension of the briefing schedule allow the City to operate its plant "indefinitely" under the 1998 permit. The Region is seeking an extension of less than three months. Moreover, IFG's speculation about the effect a less than three-month extension might have on the City's or State's plans for increasing sewer capacity at a "procedurally unconnected" project hardly demonstrates that the requested consolidation and October 29th response date is "inimical to the public interest." This is especially so if, as we assume, the EAB does not intend to issue piecemeal rulings in this matter but will, instead, rule on IFG's petition only after briefing on the City's petition is complete.

Given IFG's position as set forth in its July 30, 2004 filing, the Region is actively preparing its response to the IFG Petition. However, in light of absences from the office of key personnel involved with the permit in July, as well as the disruption caused by having personnel working at alternative work stations during the week of the Democratic National Convention, together with the time EPA Regional staff need to develop a draft brief responding to the eight issues raised by IFG, circulate the draft brief to appropriate Regional and Headquarters personnel

for review and comment, incorporate the comments into a final brief, and assemble the considerable administrative record in this matter, the Region believes that, if the Board is not inclined to consolidate the petitions and establish a uniform October 29th briefing date, it needs at least an additional three weeks, until August 27, 2004, in which to submit its response. For the reasons already discussed, the Region believes that this short additional time period will not significantly affect the public interest as claimed by IFG in its July 30th letter.

Moreover, in opposing a further stay, IFG notes that it had commented extensively more than a year ago on the issues in its Petition, and met at length with Regional staff last August on these issues; however, some of the issues IFG now raises in its brief, if not entirely new, have been modified, and therefore need to be reevaluated and readdressed. In addition, some of the issues now raised by IFG have to be viewed in light of the changes that were made to the final permit (which was changed in response to some of IFG's earlier comments on the draft permit.)

Counsel for the Region called and left a voice-mail message for Ms. Eigerman yesterday but has not yet received a return phone call. As a result, Counsel for the Region has not been able to determine whether IFG would be amenable to a further extension.

Given that the petitions filed by the City and IFG involve the same NPDES permit and that the issues raised in the City's and IFG's petitions substantially affect each party, the Region reinstates its motion to have both petitions consolidated into one action, regardless of whether the time frames for filings remain different.

For the above reasons, the Region requests that the two petitions be consolidated and that the date for the Region to file a response to IFG's Petition be extended from August 6, 2004 to

October 29, 2004. In the alternative, the Region requests that the Board extend the date for filing the Region's brief responding to IFG's petition to August 27, 2004.

United States EPA/Region I

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Dated: August 3, 2004

In the Matter of:
City of Newburyport Wastewater Treatment Facility
NPDES Appeal Nos. 04-05 and 04-06

CERTIFICATE OF SERVICE

I, Sally Burt, hereby certify that one original and five copies of the foregoing Respondent's Motion to Renew Request to Consolidate Proceedings and Extend the Response Date were faxed and sent by overnight mail on this August 3rd, 2004 to the Environmental Appeals Board 1103B, Ariel Rios Building, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, and that a copy of the foregoing was faxed and sent by overnight mail, postage prepaid, to the following persons.

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Dated: 8/3/, 2004 Sally Burt