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April 2, 2010

BY FEDERAL EXPRESS AND CDX

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

Re: City of Cambridge, DPW Combined Sewer Overflows (CSO)
NPDES Permit No. MA 0101974
NPDES Appeal No. 09-17

Dear Ms. Durr:

Enclosed for filing is the City of Cambridge's Response to Petition for Review, which the City is timely filing in response to the Petition for Review submitted by Stephen H. Kaiser in connection with EPA's re-issuance of the City's NPDES Permit MA0101974.

Thank you.

Sincerely,



Elizabeth F. Mason

Enclosures

cc: Amanda J. Helwig, Esq., EPA (by first-class mail)
Brian Pitt, EPA (by first-class mail)
Stephen H. Kaiser (by first-class mail)
Nancy E. Glowa, Esq., City of Cambridge (by e-mail)
Elizabeth A. Lashway, Esq., City of Cambridge (by e-mail)
Donald A. Drisdell, Esq., City of Cambridge (by e-mail)

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

_____)	
In the Matter of:)	
)	
City of Cambridge, DPW)	NPDES Appeal No. 09-17
Combined Sewer Overflows)	
)	
NPDES Permit No. MA 0101974)	
)	
_____)	

RESPONSE TO PETITION FOR REVIEW

INTRODUCTION

Pursuant to the Environmental Appeals Board's (the "Board's") December 9, 2009 order granting it leave to intervene as a party respondent in the above-captioned appeal, the permittee City of Cambridge, a Massachusetts municipal corporation with principal offices at City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139 (the "City"), provides this response to the Petition for Review (the "Petition") submitted by Stephen H. Kaiser (the "Petitioner") regarding National Pollutant Discharge Elimination System ("NPDES") Permit MA0101974, which Region 1 of the United States Environmental Protection Agency ("EPA") issued on September 30, 2009 (the "NPDES Permit").

The City respectfully asks the Board to dismiss the Petition for three primary reasons:

1. The Petition improperly asks the Board to rule on matters outside of the NPDES permitting process and therefore outside of the Board's jurisdiction and scope of review. The Petition does not contest any of the NPDES Permit conditions. Rather, under the guise of an alleged NPDES Permit challenge, the Petition seeks to stop a major drainage project of the City (the Cambridge Park Drainage Project, also known as Contract 12 (the "Project")), which has been extensively reviewed and approved in several different proceedings and which is associated with the federal court-ordered Massachusetts Water Resource Authority ("MWRA") Combined Sewer Overflow ("CSO") Long Term Control Plan ("LTCP") for Boston Harbor. As the Project is

outside the scope of the Petition and as the Petitioner has not contested any of the conditions of the NPDES Permit, the Board should dismiss the Petition.

2. The Petition fails to meet the Board's minimum standard of specificity because it merely repeats the Petitioner's unsupported August 22, 2009 comments on the draft NPDES Permit and fails to address EPA's responses to those comments. As a result, the Petition must be dismissed because it fails to demonstrate with specificity why EPA's September 30, 2009 Response to Comments addressing the Petitioner's comments on the draft NPDES Permit (the "Response to Comments") is clearly erroneous, an abuse of discretion, or otherwise warrants review.
3. The Petition fails to rebut the strong presumption of deference afforded to EPA on technical issues. EPA's Response to Comments gave due consideration to the Petitioner's comments on the draft NPDES Permit and is rational and supportable. Therefore, the Board should grant EPA the presumption of deference to which EPA is entitled, and dismiss the Petition.

ARGUMENT

I. The Petition Must Be Dismissed Because the Only Matters On Which It Asks the Board to Rule Are Outside of the Board's Jurisdiction.

The Board's jurisdiction under 40 C.F.R. § 124.19(a) is limited to issues related to the "conditions" of the NPDES permit that a petition claims are erroneous. See 40 C.F.R. § 124.19(a) ("Within 30 days after a [NPDES] final permit decision ... has been issued under Sec. 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any *condition* of the permit decision") (emphasis supplied). The Board does not have authority to rule on matters that are outside the NPDES permitting process. See, e.g., *In re Tondu Energy Co.*, 9 E.A.D. 710 (EAB 2001); *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722 (EAB 1997).

The Petition does not challenge any of the conditions contained in the NPDES Permit that EPA issued to the City. As the EPA Region 1 Regional Administrator has told the Board, "I find that none of the conditions in the Permit are contested. Rather, the Petitioner is contesting the absence of conditions related to CSO inflow and flood levels in Alewife Brook." See December

28, 2009 letter from H. Curtis Spalding, the EPA Region 1 Regional Administrator, to the Board and the City.¹ The Board does not have jurisdiction to hear any of the arguments in the Petition, as none of the conditions of the NPDES Permit is contested.

Instead of addressing any of the NPDES Permit conditions, the Petition is a misguided attempt to challenge the Project, which is outside the scope of the NPDES Permit and therefore is outside the scope of the Board's jurisdiction. The Project – which has been fully permitted as required under the state Wetlands Protection Act² – arises out of one of the United States' most significant environmental enforcement actions over the past 30 years, the ongoing litigation known as the Boston Harbor Cleanup litigation. See, e.g., *United States v. Metro. Dist. Comm'n*, Civil Action Nos. 85-0489-RGS and 83-1614-RGS (D. Mass.).

In the Boston Harbor Cleanup litigation, MWRA (as successor to the Metropolitan District Commission) accepted responsibility for reducing the volume and frequency of CSOs to receiving waters that drain to Boston Harbor, including water bodies such as the Little River and

¹ This letter is part of the administrative record in this matter, but is attached hereto as Exhibit 1 for the Board's convenience.

² The Cambridge Conservation Commission issued the City an Order of Conditions ("OOC") under the State Wetlands Protection Act for the Project on June 16, 2004. The Petitioner (Mr. Kaiser) and others (collectively the "Project Petitioners") sought a Superseding Order of Conditions ("SOC") from the Massachusetts Department of Environmental Protection ("DEP"). On March 31, 2005, DEP granted the City an SOC that wholly affirmed the Conservation Commission's original OOC. Over the next several years, the Project Petitioners, or a subset of them, continued to appeal the SOC (collectively, the "Project Appeal"), but the City and DEP won at every level of appeal. Finality regarding the Project Appeal came on May 5, 2009 when the Suffolk Superior Court dismissed a second notice of appeal that two of the Project Petitioners had filed on behalf of themselves. See *CambridgePark Ten Citizens Group v. Dep't of Env't'l Prot. and City of Cambridge*, Civil Action No. SUCV2007-05011-F (Suffolk Superior Court May 5, 2009) (attached hereto as Exhibit 2). Consequently, all rights to appeal the SOC have been exhausted, and the Project is proceeding with construction expected to begin this summer.

If and to the extent required, the City requests that the Board take "judicial notice" of this Massachusetts state court decision, as well as the four federal district court decisions and the other four Massachusetts state court and administrative decisions that the City has attached to this Response (these decisions are identified in the List of Exhibits attached hereto, respectively, as Exhibits 2 through 10). The City respectfully notes that it is not seeking to supplement the administrative record in this matter by providing copies of these nine documents, as it does not contend that any of these documents contains evidence that was inadvertently or improperly not included in the record. Rather, the City is providing these documents – which as issued judicial and administrative decisions are already in the public domain – solely for the Board's convenience.

Alewife Brook. See *United States v. Metro. Dist. Comm'n*, Nos. CIV.A.85-0489-RGS, CIV.A.83-1614-RGS, 2005 WL 2542921, *1 (D. Mass. Oct. 12, 2005) (attached hereto as Exhibit 3) (“The MWRA reported that it had reached an agreement in principle with the United States Department of Justice (DOJ), the Environmental Protection Agency (EPA), and the DEP on the appropriate level of combined sewer overflow (CSO) control and the recommended plans for the Charles River, the Alewife Brook/Upper Mystic River, and East Boston. In addition, the MWRA announced an agreement in principle with regard to the revised long-term CSO master control plan. The agreement is outlined as follows. With regard to the Charles River and Alewife Brook/Upper Mystic River plans, the DEP will issue five consecutive three-year variances modifying water quality standards through the year 2020. The Regional Administrator of the EPA will retroactively approve the variances that were issued by the DEP in 2004, and will approve the reissuance of the variances through 2020, subject to the required public notice period. The EPA will also issue National Pollutant Discharge Elimination System (NPDES) permits authorizing discharges from the CSO outfalls consistent with the variances.”). As a product of that litigation, the Project is aimed at significantly reducing the annual volume and frequency of CSO discharges in a residential Cambridge area located from east of Fresh Pond Reservation to the Alewife Brook. It involves the construction of a stormwater outfall and treatment system in the Alewife Reservation, as well as an extensive system of stormwater pollution control Best Management Practices (“BMPs”) along the length of the stormwater outfall pipe prior to discharge into the wetland treatment system.

To underline the fact that the Petition seeks relief that is beyond the Board’s scope, all aspects of the Boston Harbor Cleanup, including the Project, are extensively scrutinized on a regular basis by the United States District Court for the District of Massachusetts. The federal

judge supervising the cleanup, Judge Richard G. Stearns, has repeatedly expressed concern that citizen appeals have delayed the Project.³ The City asks the Board not to allow the Petition – which is outside its jurisdiction, has no material likelihood of success on the merits, and, in any event, would not result in any material environmental benefits – to proceed, but rather to dismiss the Petition in its entirety.

II. The Petition Must Be Dismissed Because It Fails to Meet the Board’s Minimum Standard of Specificity by Merely Repeating the Petitioner’s Comments on the Draft NPDES Permit and Failing to Address EPA’s Response to Comments.

The Petition should be dismissed because it merely repeats comments that the Petitioner previously made in his August 22, 2009 letter regarding the draft NPDES Permit – each of which EPA directly and sufficiently addressed in its Response to Comments. In fact, the Petition should be dismissed on the grounds that it does not address or even acknowledge EPA’s Response to Comments, as required. As the Board has stated:

Assuming that the issues have been preserved, the petitioner must state its objections to the permit and explain why the permit issuer’s previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review. A petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations.

In re: City of Attleborough, MA Dep’t of Wastewater, NPDES Appeals Nos. 08-08 and NPDES 08-09, slip op. at 11 (EAB, Sept. 15, 2009). That is, “a petitioner must demonstrate with specificity in the petition why the Region’s prior response to those objections is clearly

³ The Court issues quarterly compliance orders that often include comments on the progress of the Project. In Compliance Order Number 208, dated July 3, 2008, after learning that a citizen suit had been filed against EPA’s extension of the three-year variance for the Alewife Brook Project, the Court stated that it “remain[ed] concerned about the continued delay of the Cambridge Sewer Separation Project” *United States v. Metro. Dist. Comm’n*, Nos. CIV.A.85-0489-RGS, 83-1614-RGS, 2008 WL 2699771, *2 (D. Mass. July 3, 2008) (attached hereto as Exhibit 4). On January 8, 2009, after noting that “litigation delays” had already resulted in “a 27-month hold on progress,” the Court stated that it was “optimistic that the external impediments that have inhibited progress with the Cambridge sewer separation project will soon be dissolved.” *United States v. Metro. Dist. Comm’n*, Nos. CIV.A.85-0489-RGS, 83-1614-RGS, 2009 WL 57090, *1-2 (D. Mass. Jan. 8, 2009) (attached hereto as Exhibit 5). After the Project Appeal was finally dismissed, the Court stated that “it is especially gratifying to see the Alewife Brook

erroneous or otherwise merits review.” *In re Westborough and Westborough Treatment Plant Bd.*, 10 E.A.D. 297, 305 (EAB 2002). Moreover, “[s]uch demonstration must be specific and substantiated.” *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (EAB 2006) (citing *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 (EAB 2002); *In re Westborough*, 10 E.A.D. at 305; *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997); *In re Hadson Power 14 - Buena Vista*, 4 E.A.D. 258, 294 n54 (EAB 1992)).

The Petitioner lists four “claims for review” in the Petition. All of these “claims” either merely reiterate – almost word for word – his earlier comments on the draft NPDES Permit, to which EPA thoughtfully responded, or fail to establish how any of EPA’s responses was clearly erroneous.

In Claim 1, the Petitioner asserts that EPA has “failed to recognize how ... drainage modifications will result in increased local flooding and inflow into the sewer system, with likely increased SSO discharges at the MWRA pump station overflow downstream ...” Petition at 2-3. This argument is essentially the same as the Petitioner’s Comment C2, which stated that “[t]he drainage plan proposed by Cambridge will worsen flooding conditions generally in Alewife Brook, and will increase brook inflow into MWRA interceptor sewers during major storms, with SSO problems worsened downstream. Cambridge has adopted no mitigation plan.” See Petition, Exhibit 6 (the Petitioner’s August 22, 2009 comments on the draft NPDES Permit), at 4. EPA appropriately and substantively responded to the Petitioner’s Comment C2 that

[t]he Cambridge CSO permit does not address flood management issues in the watershed. ... As to flood impacts, the City has indicated ... that the drainage project will not result in any increase in flooding in the watershed, and that peak pre- and post-construction runoff rates will be the same. The project has been duly permitted by MassDEP under the Wetlands Protection Act.

project finally underway.” *United States v. Metro. Dist. Comm’n*, Nos. CIV.A.85-0489-RGS, 83-1614-RGS, 2009 WL 1941719, *2 (D. Mass. July 6, 2009) (attached hereto as Exhibit 6).

Response to Comments, Response to Comment C2, at 10. Consequently, Claim 1 does not meet the minimum standard of specificity.

In Claim 2, the Petitioner suggests that “an inflow problem statement [should] be included in the April 30, 2010 Annual Report, as a preliminary to the [inflow] study report next year.” Petition at 2. In making this suggestion, the Petitioner touches upon the inflow issue he previously raised in his Comment C2, but he does not say why EPA’s Response to Comment C2 was clearly erroneous. See Petition at 2; see also Response to Comments, Response to Comment C2, at 10. To the extent this suggestion that the NPDES Permit contain an “inflow problem statement” is newly offered, it was not previously raised by the Petitioner in these proceedings and cannot be raised for the first time now. See 40 C.F.R. § 124.13 (“All persons, including applicants, who believe any condition of a draft permit is inappropriate ... must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period”) (emphasis supplied); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. at 509 (“As a procedural matter, *in order to preserve an issue for appeal before the Board*, a petitioner must first demonstrate that all reasonably ascertainable issues and all reasonably available arguments supporting its position were raised by the close of the comment period as required by the NPDES procedural regulations”) (emphasis supplied); see also *In re Westborough and Westborough Treatment Plant Bd.*, 10 E.A.D. at 304 (“The purpose of [40 C.F.R. § 124.13] is to “ensure that the Region has an opportunity to address potential problems with the Draft Permit before the permit becomes final, thereby promoting the longstanding policy that most permit issues should be resolved at the Regional level, and to provide predictability and finality to the permitting process”).

In Claim 3, the Petitioner asserts that the “permit should have specified a schedule for flap gates or similar flow restrictions ...” and that “[s]uch a requirement would be conditional upon the results of the inflow study...” Petition at 3. This is the same argument that he made in his Comment C3 that flap gates are needed. Specifically, in his Comment C3 on the draft permit, the Petitioner stated that “[t]he failure to install flap gates on all remaining CSO pipes in Cambridge will result in no reduction in the brook flood inflow through CSO structures into MWRA interceptor sewers. Such flap gates are needed.” See Petition, Exhibit 6, at 4. EPA responded to this Comment C3 by stating that,

the final permit has been modified to incorporate a requirement to assess the potential for river inflow into the Cambridge combined sewer system in the Alewife Brook watershed and to assess the cost, feasibility, and effectiveness of installing inflow controls on the remaining CSO facilities. This information will be required in the second annual NMC report and could establish a solid basis for requiring inflow controls in the future.

Response to Comments, Response to Comment C3, at 10-11. In short, the Petitioner’s claim in the Petition regarding this issue is merely an unadorned restatement of his earlier comment that flap gates are needed. He has not explained why EPA’s response was erroneous.⁴

In Claim 4, the Petitioner suggests that “[t]he permit should have recognized the Cambridge monitoring gauges which have been in place since 2001 and should require data from these gauges be summarized in the Annual Reports to include wet weather conditions and especially major floods.” Petition at 3. Again, this claim is merely a reiteration of the Petitioner’s Comment C6, in which he stated in part that “Cambridge must calibrate and report regularly on data from their two existing stream monitors.” See Exhibit 6, at 5. EPA’s response

⁴ Moreover, it makes little sense to contend that a schedule for installing flap gates or other flow restriction mechanisms should be provided in the NPDES Permit when the NPDES Permit requires the City to undertake the analysis necessary to determine whether there is even a need for such additional control measures.

to that comment was in part that “[t]he reporting requirements contained in the draft permit contain sufficient detail to determine compliance with the permit and progress on implementing CSO controls.” Response to Comments, Response to Comment C6, at 11. The Petitioner’s Claim 4 does not provide any additional details to support his assertion or demonstrate that EPA’s response to that comment is clearly erroneous or otherwise merits review.

Consequently, the Petition should be dismissed because the Petitioner merely repeats his earlier comments and does not provide any information to support a determination contrary to the final NPDES Permit or demonstrate that EPA’s Response to Comments was clearly erroneous or otherwise merits review. The Petitioner has not met the minimum standard of specificity.

III. The Petition Should Be Dismissed Because It Fails to Rebut the Strong Presumption of Deference Given to EPA on Technical Issues.

The issues before the Board in this matter are technical in nature, and therefore, EPA’s technical determinations as set forth in the NPDES Permit, and as clearly explained in both the Fact Sheet that accompanied the draft Permit and EPA’s Response to Comments, should be given substantial deference. This is particularly true because the Petitioner has neither offered any credible technical support of his own for his positions nor pointed elsewhere in the record to any information provided by others for such support. According to the Board,

[t]he Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. ... When the Board is presented with technical issues we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record... . If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the Region’s position.

In re City of Moscow, Idaho, 10 E.A.D. 135, 142 (EAB 2001). See also *In re: City of Attleborough, MA Dep't of Wastewater*, NPDES Appeals Nos. 08-08 and NPDES 08-09, slip op. at 11 (“a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment”) (citations omitted).⁵ As EPA’s Response to Comments reveals, EPA gave “due consideration” to the Petitioner’s comments. As the final NPDES Permit is “rational and supportable,” the Board should dismiss the Petition.

The City understands that the Board will review the Petition by examining the documentary record on which the NPDES Permit is based, rather than by hearing from witnesses and weighing their credibility. Nonetheless, the City wishes the Board to have the benefit of findings, made by administrative law judges and other fact-finders in similar matters, that while the Petitioner held himself out in those matters as an expert, his testimony was not found to be sufficiently reliable to support his claims. Fact-finders in at least two cases in which the Petitioner was a party and/or a witness, including the Project Appeal, have explicitly found that the Petitioner was either not qualified as an expert (which resulted in the striking of his testimony) or that he did not provide “a foundation of established scientifically appropriate methods” for his testimony (which resulted in his testimony being deemed “not sufficiently reliable”). See *In the Matter of City of Cambridge Dep't of Pub. Works*, No. DEP-05-805, DEP File No. 123-175 Cambridge, (DALA Sept. 13, 2006) (Partial Summary Decision at 34)

⁵ In fact, Mr. Kaiser has not even satisfied the relaxed pleading standards that the Board applies to petitions for review by *pro se* litigants. See *In re: Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, NPDES Permit Appeal Nos. 08-02, NPDES 08-03, NPDES 08-04 and NPDES 08-05, slip op. at 7 (EAB, Jan. 14, 2009) (“While the Board does not expect or demand that such petitions will necessarily conform to the exacting and technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the [r]egion erred in the permit decision in order for the petitioner’s concerns to be meaningfully addressed by the Board.” Id. (citation omitted). Mr. Kaiser has not articulated *any* supportable reason why EPA erred in its permit decision.

(attached hereto as Exhibit 7); *In the Matter of Coal. to Preserve the Belmont Uplands*, No. 2008-069, DEP File No. JD07-2094 Belmont/Cambridge, (DEP May 28, 2009) (Recommended Final Decision at 21) (attached hereto as Exhibit 8).

In the Project Appeal, Administrative Magistrate Mark L. Silverstein of the Massachusetts Division of Administrative Law Appeals (“DALA”) determined:

It is clear from his resume and affidavits that Dr. Kaiser offers opinion testimony on engineering matters as an engineer—a civil engineer, mechanical engineer, “independent citizen engineer,” “traffic engineer,” “flooding and hydrology engineer,” or some combination of these—although not as a registered professional engineer, and the record contains no evidence that Dr. Kaiser is licensed to practice engineering in Massachusetts or in any other state.

In the Matter of City of Cambridge Dep’t of Pub. Works, No. DEP-05-805, DEP File No. 123-175 Cambridge, (DALA Sept. 13, 2006) (Partial Summary Decision at 34). Administrative Magistrate Silverstein concluded “that Dr. Kaiser cannot testify as an engineer. To the extent that his opinions are given as those of an engineer, I conclude, absent any authority to the contrary, that these opinions are neither competent nor admissible in Massachusetts courts.” *Id.* at 36. In her Final Decision on the Project Appeal, Acting DEP Commissioner Arleen O’Donnell determined that “some of the Administrative Magistrate’s recommendations as to a requirement for expert witnesses to hold professional licenses are overbroad,” yet after analyzing the evidence presented by the petitioners challenging the Project’s SOC, and by DPW and DEP, she too found for DPW and DEP on the merits and sustained the SOC. *See In the Matter of City of Cambridge Dep’t of Pub. Works*, No. DEP-05-805, DEP File No. 123-175 Cambridge, (DEP June 1, 2007) (Final Decision at 3, 9) (attached hereto as Exhibit 9).

More recently, the weight of the Petitioner’s opinion testimony was again questioned in the case of *In the Matter of Coal. to Preserve the Belmont Uplands*, No. 2008-069, DEP File No.

JD07-2094 Belmont/Cambridge, (DEP May 28, 2009) (Final Decision) (attached hereto as Exhibit 10). In that case, a citizen group challenged the issuance of DEP's negative determination of applicability relative to jurisdiction under M.G.L. c. 91 and 310 CMR 9.00 on certain property in Belmont and Cambridge that is near to and upstream of the Project site. The Petitioner was one of several "expert" witnesses who provided hearing testimony. DEP Presiding Officer Laurel A. Mackay found in her recommended final decision that:

Dr. Kaiser's analysis was not supported by sufficient evidence in the record or by a foundation of established scientifically appropriate methods. M.G.L. c. 30A, § 11 requires that evidence be reliable in order for it to be accepted and given weight in an adjudicatory proceeding. That statute provides: "[e]vidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." M.G.L. c. 30A, § 11. Dr. Kaiser's opinion is not sufficiently reliable to meet this evidentiary standard.

In the Matter of Coal. to Preserve the Belmont Uplands, No. 2008-069, DEP File No. JD07-2094 Belmont/Cambridge, (DEP May 28, 2009) (Recommended Final Decision at 21). Consequently, the Presiding Officer concluded in her recommended final decision in that case that DEP had "conducted a thorough investigation before reaching its conclusion" that "there is no jurisdiction under 310 CMR 9.00." *Id.* at 22.⁶

The proven unreliability of the Petitioner's opinions is compounded in this case because the Petitioner has erroneously relied on outdated information about the Project in his Petition. The Petitioner has incorrectly relied upon the Project's Notice of Project Change ("NPC"), as opposed to the Project's Notice of Intent ("NOI"), while the NPC predates the NOI and significant changes have been made to the Project since the NPC. See Correspondence from the Cambridge Department of Public Works to the Cambridge Conservation Commission dated

December 1, 2003, at 2 (cover letter submitting December 2003 NOI and noting that NPC was submitted in April 2001) (cover letter and NOI located on City of Cambridge web site at <http://www.cambridgema.gov/TheWorks/projects/pdfs/Notice%20of%20Intent%20%2012-00-03.pdf>)). On page 2, paragraph 3 of the Petition, the Petitioner has relied upon his Exhibit 5 entitled “Flood Analysis Presented in 2001 Notice of Project Change.” See Petition at 2. That exhibit purports to summarize information in the NPC in order to purportedly show “the extent of additional flooding in a ten year storm.” Similarly, in paragraph 5 of page 2 of his Petition, the Petitioner has again pointed to the NPC in suggesting that the Project (the “drainage relief plan”) will increase flooding and fail to replace original proposals for mitigation. See Petition at 2. In both of these instances, the Petitioner has misrepresented the Project by relying on outdated and inaccurate information. Therefore, the Petitioner’s opinions and conclusions in his Petition are unreliable, and his statements that rely upon the NPC should be stricken.

In any event, the Petitioner has failed to articulate any information sufficient to carry his “heavy burden to ... seek[] review of issues that are essentially technical in nature.” *In re City of Moscow, Idaho*, 10 E.A.D. 135, 142 (EAB 2001). Rather, the Board should give broad deference to EPA’s technical determinations because the record demonstrates that EPA duly considered the issues raised in the Petitioner’s comments, and that the approach ultimately adopted by EPA is rational in light of the information in the record. Id.

CONCLUSION

The Petition should be dismissed. The Petition improperly asks the Board to rule on matters that are outside of the NPDES permitting process and therefore outside of the Board’s scope of review. It is another attempt by the Petitioner to try to prevent the Project, which has

⁶ The final decision of Commissioner Laurie Burt dated June 22, 2009 adopted the recommended final decision in that case. See *In the Matter of Coal. to Preserve the Belmont Uplands*, No. 2008-069, DEP File No.

been fully permitted, from going forward. It fails either to meet the Board's minimum standard of specificity or to demonstrate why EPA's Response to Comments is clearly erroneous or otherwise merits review. In any event, the NPDES Permit is based on highly technical information, and EPA's technical determinations that are embodied in the final NPDES Permit should be given strong deference.

For the foregoing reasons, the Board should dismiss the Petition.

Respectfully submitted,
The City of Cambridge,
By its attorneys,



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Dated: April 2, 2010

LIST OF EXHIBITS

Exhibit 1: December 28, 2009 letter from H. Curtis Spalding, EPA Region 1 Regional Administrator, to the Board and the City.

Exhibit 2: *CambridgePark Ten Citizens Group v. Dep't of Env't'l Prot. and City of Cambridge*, Civil Action No. SUCV2007-05011-F (Suffolk Superior Court May 5, 2009).

Exhibit 3: *United States v. Metro. Dist. Comm'n*, Nos. CIV.A.85-0489-RGS, CIV.A.83-1614-RGS, 2005 WL 2542921 (D. Mass. Oct. 12, 2005)

Exhibit 4: *United States v. Metro. Dist. Comm'n*, Nos. CIV.A.85-0489-RGS, 83-1614-RGS, 2008 WL 2699771 (D. Mass. July 3, 2008).

Exhibit 5: *United States v. Metro. Dist. Comm'n*, Nos. CIV.A.85-0489-RGS, 83-1614-RGS, 2009 WL 57090 (D. Mass. Jan. 8, 2009).

Exhibit 6: *United States v. Metro. Dist. Comm'n*, Nos. CIV.A.85-0489-RGS, 83-1614-RGS, 2009 WL 1941719 (D. Mass. July 6, 2009).

Exhibit 7: *In the Matter of City of Cambridge Dep't of Pub. Works*, No. DEP-05-805, DEP File No. 123-175 Cambridge, (DALA Sept. 13, 2006) (Partial Summary Decision).

Exhibit 8: *In the Matter of Coal. to Preserve the Belmont Uplands*, No. 2008-069, DEP File No. JD07-2094 Belmont/Cambridge, (DEP May 28, 2009) (Recommended Final Decision).

Exhibit 9: *In the Matter of City of Cambridge Dep't of Pub. Works*, No. DEP-05-805, DEP File No. 123-175 Cambridge, (DEP June 1, 2007) (Final Decision).

Exhibit 10: *In the Matter of Coal. to Preserve the Belmont Uplands*, No. 2008-069, DEP File No. JD07-2094 Belmont/Cambridge, (DEP June 22, 2009) (Final Decision).

CERTIFICATE OF SERVICE

I hereby certify that I have served of a copy of the foregoing on all parties this second day of April, 2010 by the means listed below.



Elizabeth F. Mason

**Original by Federal Express
Copy by CDX**

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I certify that the foregoing Response to Petition for Review and the accompanying Exhibits provided herewith are identical copies of the Response to Petition for Review and the accompanying Exhibits electronically filed in this case with the Environmental Appeals Board on April 2, 2010.



Elizabeth F. Mason