



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

FEB 22 2010

Via Electronic Submission

OFFICE OF THE
REGIONAL ADMINISTRATOR

U.S. Environmental Protection Agency
Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

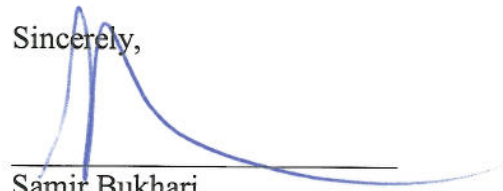
**Re: City of Marlborough, Massachusetts
Notice of Withdrawal and Motion to Dismiss
NPDES Permit No. MA0100480 Modification
NPDES Appeal Nos. 10-01, 10-02 and 10-03**

Dear Ms. Durr:

In connection with the above-referenced permit appeals, please find a *Notice of Withdrawal and Respondent Region 1's Motion to Dismiss as Moot the Petitions for Review of the Permit Modification*. Region 1 of the United States Environmental Protection Agency is filing these documents electronically in accordance with the Board's Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010).

If you have any questions, please contact me. Thank you for your attention to this matter.

Sincerely,



Samir Bukhari
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U.S. EPA - Region 1
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
In the Matter of:)	
City of Marlborough,)	NPDES Appeal Nos. 10-01 (Town of Stow, MA)
Massachusetts)	10-02 (City of Marlborough, MA)
_____)	10-03 (OAR)
NPDES Permit No. MA0100480)	
Modification)	
_____)	

**RESPONDENT REGION 1'S MOTION TO DISMISS AS MOOT
THE PETITIONS FOR REVIEW OF THE PERMIT MODIFICATION**

Region 1 of the United States Environmental Protection Agency moves the United States EPA Environmental Appeals Board ("Board") to dismiss as moot the petitions for review filed in connection with the modification of NPDES Permit No. MA0100480, for the reasons set forth below.

Background and Cause for Motion

1. On May 26, 2005, Region 1 reissued a final NPDES permit to the City of Marlborough, Massachusetts ("Permittee"), for discharges from the Marlborough Westerly Wastewater Treatment Facility. Following appeals of the permit, the Region issued a notice that identified the uncontested and severable portions of the permit and that placed them into effect as of November 25, 2005. Upon settlement of the appeals and subsequent dismissal of the petitions for review by

the Board, the Region issued a final permit decision placing all remaining portions of the permit into effect as of May 17, 2006.¹

2. Following a request for a permit modification from the Permittee, Region 1 issued a draft permit modification for public notice and comment on July 9, 2008. After consideration of the comments received on the draft modification, the Region issued a final permit modification on November 16, 2009.

3. The Permittee, the Town of Stow, Massachusetts and the Organization for the Assabet River timely petitioned the Board to review the final permit modification (“Petitions”). The petitioners’ request for Board review stayed the effective date of the permit modification. *See* 40 C.F.R. § 124.15(b)(2). The Region did not issue a notice of uncontested and severable conditions under 40 C.F.R. §§ 124.16 and 124.60. Therefore, no portion of the final permit modification went into effect.

4. Federal regulations governing the NPDES permitting program give EPA regional offices an absolute right to withdraw portions or all of a permit at any time prior to the Board’s rendering of a decision on a permit appeal. *See* 40 C.F.R. § 124.19(d); *In re Wash. Aqueduct Water Treatment Plant*, NPDES Appeal No. 03-07, slip op. at 2 (EAB, Dec. 15, 2003). After reviewing the petitions, the Region notified the Board and interested parties that it was withdrawing the permit modification in its entirety and would prepare a new draft permit in accordance with 40 C.F.R. § 124.6. *See Notice of Withdrawal of NPDES Permit No. MA0100480 Modification*, dated February 22, 2010.

¹ *See In re City of Marlborough Wastewater Treatment Facility*, NPDES Appeal No. 05-09, Order Dismissing Petition for Review (EAB, April 6, 2006) and *In re City of Marlborough Wastewater Treatment Facility*, NPDES Appeal No. 05-05, Order Dismissing Petition for Review (EAB, April 12, 2006).

5. The new draft permit will be subject to notice and comment, after which “the Regional Administrator shall issue a final permit decision.” 40 C.F.R. § 124.15(a). “[W]ithin 30 days after a...final permit decision...has been issued under 124.15 of this part, any person who filed comments on that [new] draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the [new] permit decision.” *Id.* at 124.19(a).

6. In proceedings under the part 124 rules, the Board is empowered to review conditions of a final permit decision. *See* 40 C.F.R. §§ 124.15(a) and 124.19(a). With the withdrawal of the entire permit modification—the sole object of the substantive and procedural arguments made in the Petitions—there are no longer any conditions of the final permit decision to contest or to review under § 124.19.

7. Moreover, the Petitions will not necessarily be relevant to any future final permit decision. The Region has not yet developed the new draft permit and, even if it had, the process of arriving at a new final permit decision will be further informed by public comment. Thus, Region 1 cannot now predict whether or in what way the new final permit decision will differ from the withdrawn permit modification. Maintenance on the Board’s docket of petitions for review of the withdrawn permit modification for an uncertain time period would not further the interests of administrative efficiency or judicial economy, especially where those petitions may, in whole or in part, be rendered obsolete.

8. Under these circumstances, the Petitions are moot. *In re City of Port St. Joe, Florida*, 5 E.A.D. 6, 9 (EAB 1994) (appeal mooted by Region’s withdrawal of permit under predecessor to 40 C.F.R. § 124.19(d)); *In re City of Haverhill Wastewater Treatment Facility*, NPDES Appeal

No. 08-01, at 2 (EAB, Feb. 28, 2008) (Order Dismissing Petition for Review) (appeal mooted by Region's withdrawal of sole contested condition under 40 C.F.R. § 124.19(d)); *In re Keene Wastewater Treatment Plant* (NPDES Appeal No. 07-18), Order Noticing Withdrawal of Permit and Dismissing Portions of Petition for Review as Moot (EAB, Dec. 5, 2007) (dismissing as moot portions of petition challenging permit limits after the permitting authority provided notice that it was withdrawing those limits and preparing a new draft permit addressing the limits so withdrawn).

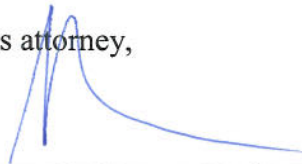
Relief Requested

For the foregoing reasons, the Board should dismiss the Petitions as moot.

Respectfully submitted,

EPA-REGION 1

By its attorney,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss as Moot the Petitions for Review of the Permit Modification were sent to the following persons in the manner indicated:

By Electronic Submission:

Eurika Durr
Clerk of the Board
United States Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

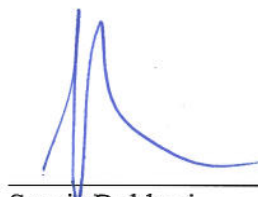
By First Class U.S. Mail:

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Dated: February 23, 2010



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