

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

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Boston, MA 02109-3912



VIA ELECTRONIC FILING AND CERTIFIED MAIL

JUL 22 2015

Ms. Sheila Spellman
Senior Property Manager First Realty Management Corp.
151 Tremont Street, PH1
Boston, MA 02111

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

**RE: Battle Road Farm Condominium Trust
Notice of Partial Withdrawal and Notice of Uncontested and Severable Conditions
NPDES Permit Appeal No. 15-09; NPDES Permit No. MA0031658**

Dear Ms. Spellman and Ms. Durr:

In connection with Battle Road Condominium Trust's Petition for Review of National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0031658, reissued to the Battle Road Farm Wastewater Treatment Facility on June 2, 2015, Region 1 of the United States Environmental Protection Agency ("EPA") is providing notice of partial withdrawal pursuant to 40 C.F.R. § 124.19(j), and notice of uncontested and severable permit conditions in accordance with 40 C.F.R. §§ 124.16 and 124.60.

1. Notice of Withdrawal

On July 6, 2015, Petitioner timely petitioned EPA's Environmental Appeals Board ("EAB") for review of the permit. Petitioner specifically contested:

- (1) the monthly average total phosphorus limit of 0.1 mg/1, effective between April 1 and October 31;
- (2) the absence of a compliance schedule to achieve the total cadmium limit of 0.13 ug/1; and

- (3) the absence of a compliance schedule to achieve the total lead limit of 0.86 ug/l.

See Petition at 1. These conditions are collectively referred to as the “Contested Conditions.” Under regulations governing the EAB appeals process, the Regional Administrator may withdraw portions of a contested permit and prepare a new draft permit under 40 C.F.R. § 124.6 addressing the portions so withdrawn at any time prior to thirty (30) days after filing the response to the petition. 40 C.F.R. § 124.19(j). The Region has decided to exercise that right by withdrawing the total phosphorus limit in its entirety, as well as the total cadmium and total lead limits insofar as they are not subject to schedules of compliance. The Region will commence new draft permit proceedings to address the issues so withdrawn.

2. Notice of Uncontested and Severable Conditions

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.* § 124.16(a)(1). Uncontested permit conditions that are “inseverable” from contested conditions are also considered to be contested and are stayed. *Id.* §§ 124.60(b)(4), 124.16(a)(2)(i). To the extent conditions of the permit are stayed, existing permit holders must comply with the conditions of the existing permit that correspond to the stayed conditions. *Id.* § 124.16(c)(2). Uncontested permit conditions that are severable from contested conditions are not stayed and become enforceable conditions of the permit. *Id.* § 124.16(a)(2)(i) and (ii).

Other than the Contested Conditions, which have in any event been withdrawn, EPA has determined that the other conditions of the permit are uncontested and severable, and accordingly will become fully effective and enforceable thirty (30) days from receipt of this notice, *provided, however*, that the total cadmium limit of 0.13 ug/l and the total lead limit of 0.86 ug/l will become effective at a later date in accordance with Section 2.a below.

The Region disagrees with the assertion made by Petitioner that the entire Permit should be stayed “given the interdependent relationship of these provisions to all remaining non-contested provisions.” Petition at 8. This statement was not accompanied by any analysis or substantiation, and EPA finds no merit in it.¹ The standard under NPDES regulations for placing permit conditions into effect turns on ‘severability’ not ‘interdependence.’ Most, if not all conditions of a permit are interdependent in some sense, as they form part of a single, integrated legal instrument. Indeed, under 40 C.F.R. § 124.60(b)(6), conditions that are clearly *interdependent* (*i.e.*, preliminary design and engineering studies; construction activities that would partially meet the final permit conditions, etc.) may still be placed into effect prior to resolution of the appeal. Severability on the other hand is a different concept and defined as capable of being “separable into distinct, independent obligations,” *see Webster New World Dictionary* (3rd College Edition, 1988), which the above conditions identified by the Region clearly

¹ Petitioner cites *Friends of Pinto Creek v. United States EPA*, 504 F.3d 1007, 1010 (9th Cir. 2007) in support of their request to stay the permit in its entirety. While the permit that was the subject of that appeal was in fact stayed, the decision does not address the circumstances under which a stay of the entire permit, where only a portion of the permit has been appealed, is appropriate under NPDES regulations.

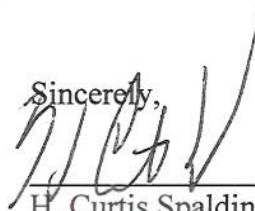
are. The decision to place the uncontested portions of the permit into effect without waiting for final disposition of the appeal by the Board is consistent with NPDES regulations, which require the Regional Administrator to provide notification of the uncontested (and severable) conditions "as soon as possible after receiving notification from the EAB of the filing of a petition for review[.]" 40 C.F.R. § 124.16(2)(ii). This spirit of expedition is in keeping with the overall objectives of the Act, and is appropriate under the circumstances here, given the five-year term of the discharger's prior permit has long since expired. In light of the foregoing, it would be inappropriate to forestall imposition of uncontested permit requirements that EPA determined to be necessary to comply with the Act during the permit renewal process.

a. Stay and Effective Date of Lead and Cadmium Limits

Even though the underlying substantive limitations for total cadmium and lead were not contested in the Petition, and are not being withdrawn, the Region agrees with Petitioner that the limits for total cadmium and lead should not become effective until reasonable compliance schedules are established pursuant to 40 C.F.R. § 122.47. Accordingly, the Region has determined that these two limits will remain stayed until the date the new compliance schedules proposed for these limits become final, effective conditions of the permit following conclusion of the permit proceedings described in Section 1 above. The Region will consult with the permittee when developing the new schedules, and the permittee will of course have the opportunity to comment on whatever schedules are contained in the new draft permit.

If you have any questions regarding this notice, please contact Samir Bukhari of the Office of Regional Counsel at (617) 918-1095.

Sincerely,



H. Curtis Spalding
Regional Administrator
US EPA-Region 1

cc:

William E. Taylor, Esq.