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GADSBY HANNAH LLP

June 30, 2005

VIA UPS AND EASTERN CONNECTION – OVERNIGHT

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, NW
Suite 600
Washington, D.C. 20005

Re: City of Marlborough, Massachusetts
Westerly Wastewater Treatment Facility
NPDES Permit MA 0100480
EAB Appeal No. _____

225 Franklin Street
Boston MA 02110
Tel 617 345 7000
Fax 617 345 7050
www.ghlaw.com

Dear Sir/Madam:

Enclosed for filing in connection with the above-captioned matter, please find the Petition for Review of the City of Marlborough and the Town of Northborough. I have enclosed one original and five copies of this filing.

Please note, to ensure receipt of this filing in a timely manner, I have mailed duplicate originals of the Petition via overnight mail with UPS and Eastern Connection.

Kindly contact me immediately if you have any questions or concerns regarding this filing. Thank you for your assistance in this matter

Very truly yours,

Donald L. Anglehart

DLA:tm
Enclosure

B0420412v1

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

In re:	EAB Appeal No. __ - _____
City of Marlborough, Massachusetts Westerly Wastewater Treatment Facility	
NPDES Permit MA 0100480	

PETITION FOR REVIEW

Donald L. Anglehart (BBO #019520)
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Date: June 30, 2005

Attorneys for Petitioners,
City of Marlborough, Massachusetts
Town of Northborough, Massachusetts

I. PRELIMINARY STATEMENT

The City of Marlborough ("the City" or "Marlborough"), and the Town of Northborough ("the Town" or "Northborough") as permittees of the Marlborough Westerly Wastewater Treatment Works, petition for review of NPDES Permit No. MA 0100480, which was issued by EPA Region I on May 27, 2005.

The renewal permit at issue authorizes Marlborough and Northborough to discharge from the Westerly facility. The challenged permit limits and conditions are based on clearly erroneous findings of fact and conclusions of law, are the product of illegal administrative processes, biased agency action, and arbitrary and capricious agency decisions which have not been made in accordance with law. Further, the petitioners, by its environmental engineers and attorneys, commented extensively on the matters appealed during the common period, as is established in the administrative record.

II. CHALLENGED PERMIT CONDITIONS

Specifically, the following permit conditions are challenged:

1. BOD: The City requested that November – March BOD be changed to CBOD. The DEP/EPA response stated that the change was incorporated into the permit, but the actual change was not done. The DEP/EPA response to CDM's comment 4 states: "The requested change has been made to the final permit."

2. pH Range: The pH lower limit has been raised from 6.0 to 6.5 and the monitoring frequency increased from one time per day to three times per day. The change in the lower limit could require more chemical dosing in the winter (the facility adjusts pH in the summer season). History shows that the pH doesn't fluctuate sufficiently to justify the three

times per day testing requirement.

3. Total Residual Chlorine: Monitoring frequency has been increased from one time per day to two times per day. The response to comments is incorrect in stating that it is the same as the previous permit. The previous permit was for testing one time per day.

4. Ammonia Limits: The permit limits for ammonia, for the period November through May inclusive, have not been derived in full consideration of the requirements of 314 CMR 4.00.

The ammonia limits for the period were derived based on the ammonia toxicity criteria (absence of early life stages), an assumed pH and temperature and a river flow from November of 2001 of 35.4 cfs. (Fact sheet, page 6). The fact sheet explains that the more stringent criteria for presence of early life stages applicable in April and May will be met because of the higher springtime river flows.

Under 314 CMR 4.03(3), the Massachusetts Department of Environmental Protection ("DEP") will determine the most severe hydrologic condition at which water quality criteria must be met. In general, the criteria must be met at seven day low flow conditions with a recurrence interval of once in ten years ("7Q10"). Since the criteria in question are not applicable to the period of 7Q10 flows, the Department should develop flows with a comparable level of risk. Unfortunately, the period of October and November of 2001 was the driest October and November in 103 years of record for a weather station located in Marlborough. Such an extreme low rainfall would likely lead to extreme low river flows. The flows used in the analysis were not appropriate for the calculations.

Also, if the Ammonia – Nitrogen system is upset for whatever reason, the treatment system will not re-start until warmer weather is encountered, since the system is bacteriologically driven and cold temperatures inhibit the growth of the nitrosonomas and nitrobacters.

Based on information available from gauge records, the flows in April and May have as much as 3 to 7 times as much dilution flow available as in November. Thus, the limitations could be between 2.5 and 5 times higher in April and May, even taking into account the more restrictive criterion in the springtime. Because the springtime conditions will require a greater expenditure to meet a 10 mg/L limit, as compared to a higher number which would also be protective of the receiving water quality, the springtime limitations should be recalculated.

5. Phosphorus limits: The winter time phosphorus limit of 1.0 mg/L is without basis. The logic used to establish this limit is contradictory and inconsistent with the TMDL for phosphorus.

The fact sheet accompanying the permit indicates that the "winter period limitation is necessary to ensure that higher levels of phosphorus discharged in the winter period do not result in the accumulation of phosphorus in the sediments. The limitation assumes that the vast majority of the phosphorus discharged will be in the dissolved fraction and that phosphorous will pass through the system given the short detention time of the impoundments and the lack of plant growth during the winter period. If future evaluations indicate that phosphorus may be accumulating in the impoundments, the winter period phosphorus limit may be reduced in future permit actions" (Fact Sheet, page 5).

However, the TMDL states " it is assumed that non-summer time POTW discharges during other seasons and particularly high flow months will not be retained in the system for use during the growing season. Therefore, only seasonal phosphorus removal at the POTWs is

warranted and effluent limits for total phosphorus will be applicable from April 1 through October 31; during the non-growing season, November 1 – March 31, effluent limits for phosphorus will not be in effect; however, due to concerns that particulate phosphorus, if discharged, may potentially settle in downstream impoundments during this timeframe, the POTWs will be required to optimize their treatment process to remove particulate phosphorus and conduct effluent monitoring for both total and dissolved phosphorus to support future permitting decisions". (ANTMDL, page 5 and 6). This position was taken, even though the EPA had commented on the draft TMDL on the possible need for a winter limit, and, in response, DEP had replied that such a limit was not warranted. DEP's position was that *"Although DEP understands EPA's concern, DEP also believes it is premature to set a winter limit at this time. There are several reasons for this. First, DEP does not have sufficient data during the winter to properly evaluate how much particulate phosphorus is actually discharged from the Assabet facilities. It is for this reason DEP has requested additional data collection and reporting so we can properly assess the potential for any impacts. Second, DEP is concerned that meeting a winter phosphorus limit may not be possible while the facilities are under construction for upgrades".* (ANTMDL, page 64).

In its letter approving the TMDL, EPA acknowledges that the TMDL says that winter phosphorus removal should be limited to an optimization requirement only. (EPA approval letter, Item 7, Seasonal Variation).

Likewise, the summer phosphorus limits are not justified. The TMDL study does not support a 0.1 mg/L total phosphorus limit at the Marlborough Westerly treatment facility. The TMDL indicated that if the Westborough-Shrewsbury plant discharges 0.1 mg/L total phosphorus and the remaining three POTWs discharge 0.2 mg/L total phosphorus, there is no

recognizable difference in water quality as compared to all four POTWs discharging 0.1 mg/L total phosphorus. In addition, the TMDL, a dynamic model, focused on the 7Q10 event, and not the summer season. River systems with long travel times, such as the Assabet River, respond to the pulse load of phosphorus from the last rain event. The biomass reduction in the river will be very small during an average summer, regardless of whether the POTWs discharge 0.1 or 0.2 mg/L total phosphorus, if the total phosphorus associated with the non-point sources can still support a large amount of aquatic plant growth.

The cost differential between achieving a 0.2 mg/L vs. 0.1 mg/L limit seasonally was not evaluated in the Phase II Comprehensive Wastewater Management Plan ("CWMP") but is expected to be on the order of millions of dollars (this is to be confirmed in the Phase III CWMP). The cost-benefit of the 0.1 mg/L phosphorus limit needs to be evaluated before such a significant investment is made, particularly where no water quality impact is expected.

Studies have shown that, at the low levels of total phosphorus being considered, there is a component of non-reactive phosphorus that will have no detrimental effect on the environment if discharged. At a level of 0.1 mg/L total phosphorus, the non-reactive P could be as high as 10 to 20 percent of the total P discharged. The total phosphorus limit should be increased by this percentage to account for the non-reactive phosphorus. In addition, back-up data from the TMDL study reflects POTW discharges in terms of orthophosphorus concentrations, which is a fraction of the total phosphorus. The TMDL report and the draft NPDES permit limits are based on total phosphorus. This is inconsistent and should be rectified.

Indirect environmental impacts of achieving the 0.1 mg/L permit limit also have not been considered by the agencies. These include increased chemical use at the plant, increased sludge production at the facility and decrease in sludge quality (in terms of dewaterablity and

percent inerts), and increased power use to process the wastewater to this level. All of these factors will be detrimental to the environment in their own way, (e.g., truck traffic, sludge disposal issues, air pollution) and cannot be overlooked.

Predicted in-stream phosphorus limits, predicted biomass (floating and rooted), and predicted duration of dissolved oxygen supersaturation are not governed by water quality standards. The one criterion that is governed by water quality standards is dissolved oxygen. Modeling has shown that when the Westerly treatment facility discharges 0.2 mg/L total phosphorus, in-stream dissolved oxygen concentration of 5.0 mg/L are met.

Further, the inclusion of dissolved orthophosphorus yields no beneficial information, and adds another step to the analytical process - such reporting should not be required.

The total phosphorus limit of 1.0, which footnote 15 of the permit makes effective within one year of issuance, should not be effective until plant upgrades are completed.

6. Total Aluminum of 218 ug/L: This either presents a conflicting treatment parameter, since alum is used to treat phosphorus, or the EPA is forcing the City into one treatment technology (CoMag). If the City uses any other technology, alum must be used in the process which may not be reduced to permit levels in the effluent. A review of the Co-Mag data suggests that even this treatment technology will have difficulty in achieving the permit limits. Information provided by the Concord Wastewater Facility concerning its testing of the CoMag technology indicates a lower aluminum influent concentration than the Westerly Plant experiences and a higher effluent concentration than that contained in the permit. Additionally, the Concord facility uses alum for the treatment of phosphorus, which will increase the aluminum concentration to be treated.

The inclusion, for the first time, of an aluminum limit is purportedly based on the available dilution in the receiving water, and the national ambient water quality criteria. The national ambient water quality criteria suggest that the aluminum criteria are suspect:

> There are three major reasons why the use of Water-Effect Ratios might be appropriate. (1) The value of 87 [u] g/L is based on a toxicity test with the striped bass in water with pH=6.5-6.6 and hardness,10 mg/L. Data in "Aluminum Water-Effect Ratio for the 3M Plant Effluent Discharge, Middleway, West Virginia" (May 1994) indicate that aluminum is substantially less toxic at higher pH and hardness, but the effects of pH and hardness are not well quantified at this time. (2) In tests with the brook trout at low pH and hardness, effects increased with increasing concentrations of total aluminum even though the concentration of dissolved aluminum was constant, indicating that total recoverable is a more appropriate measurement than dissolved, at least when particulate aluminum is primarily aluminum hydroxide particles. In surface waters, however, the total recoverable procedure might measure aluminum associated with aluminum hydroxide. (3) EPA is aware of field data indicating that many high quality waters in the U.S. contain more than 87 [u]g aluminum/L, when either total recoverable or dissolved is measured. See: *Footnote L to water quality criteria for non priority pollutants, see* http://epa.gov/waterscience/criteria/wqcriteria.html#G2.

The permit contains no schedule for compliance with this limit. The permit should be revised to afford the permittees the opportunity to conduct such testing, including the development of site specific water quality criteria, as are necessary to meet the appropriate criteria.

7. Total Copper Limit: Effluent limits for copper have been improperly calculated by the agencies. Copper effluent limits are dependent on the dilution in the receiving water, and the ambient water quality criteria, which is dependent on the hardness of the receiving waters. In computing the effluent limits, the agencies assumed a hardness in the receiving water of 50 mg/L, even though they have data sent to them on a regular basis showing that it is substantially higher than 50 mg/L. The data is included in the regular whole effluent toxicity testing

conducted on the plant effluent, which presents both the river hardness and the hardness of the plant effluent.

Plant and river data for flow and hardness from the last four whole effluent toxicity tests are shown in the attached table. (See "Attachment 1") This shows that the plant hardness varies by season – reflecting the fact that chemicals are added while the facility is nitrifying to maintain sufficient alkalinity in the process, which also adds hardness. For plant flow rates at or around the 7Q10 low flow (reflected by the September, 2004 data), the estimated river hardness is approximately 125 mg/L, as compared to the 50 mg/L used by the agencies. Substituting 125 mg/L hardness for the 50 mg/L, results in acute copper limits of 35 ug/L, and chronic criteria of 23.3 ug/L. The permit ought to be modified to reflect this error on the part of the agencies.

In addition, only one known treatment process is capable of achieving this limit (CoMag). It is violative of public procurement laws to force the permittees to contract with a sole source supplier. Also, neither copper or aluminum limits should be imposed until construction is complete.

8. Schedule: The schedule presented in the permit does not provide sufficient time for the communities to reasonably undertake the necessary planning, design, permitting, financing and construction necessary to achieve compliance with the limits. The response to comments suggests that the agencies believe that two years is adequate for the completion of planning and design of the necessary improvements, and that two and one half years is adequate for the construction, for a total of four and one half years. All dates start with the date of permit issuance, not the effective date of the permit. It is patently impermissible to commence the running of the compliance schedule before permit appeals have been exhausted.

The material accompanying the permit acknowledges that the communities are involved in a multipart planning study designed to identify the most cost effective approach to meeting the limitations contained in the permit. This step-wise process has been agreed to by all participants in the plans to clean up the Assabet, and must be followed to fully complete each municipality's obligations. The agencies are incorrect when they assert that "none of the requirements or schedules contained in the Final Permit are contingent upon the communities completing this process" (Response To Comments, page 29). In order for the communities to obtain construction financing through the Commonwealth's State Revolving Fund program, and to secure various permits, the communities must comply with the Massachusetts Environmental Policy Act Environmental Impact Review process. To date, only the Phase I – Needs Analysis and the Phase II – Development and Screening of Alternatives have been completed. The screening analysis performed under Phase II was based on achieving a Total Phosphorus limit of 0.2 mg/L. The Phase III/IV – Evaluation of Most Feasible Options and Presentation of the Recommended Plan - must expand on the Phase II report and assess treatment technologies to achieve 0.1 mg/L TP, and a winter-time ammonia limit. Once potentially feasible technologies are established it is standard practice to perform, at a minimum, bench-scale testing of the alternative technologies, or more appropriately, side-by-side comparisons of trailer-mounted pilot units, since consistently achieving this total phosphorus limit with available technologies is still uncertain. Only subsequent to this testing can a recommended plan be established and preliminary design commence. Entering into design without fully analyzing the present worth costs, the feasibility and the reliability of the available treatment technologies would be foolhardy. Twelve months to complete the planning and eighteen months to complete the design is a more reasonable planning and design schedule. The response to comments claims that the agencies believe that "24 months

for completing planning and design is reasonable" and that the communities have currently completed Phase II of the four phase CWMP process, and are awaiting comments on the scope of the next phases from the Massachusetts Environmental Protection Act (MEPA) Office prior to beginning the next phases. Notwithstanding the objections of the communities, the MEPA Office has recently, and unilaterally, extended the deadline for submission of comments on the scope of the next phases, thereby cascading the dates by which the communities might begin the next phase further into the future.

9. Flow Volume: The permittees object to the 2.89 mgd limit. What is the technical rationale, and the legal authority, for capping the plant discharge at 2.89 mgd? The Assabet River TMDL suggests that increased flow would be beneficial, so what is the basis for the arbitrary restriction?

DEP asserts that any increase must first pass anti-degradation policy that no alternative exists. That policy does not apply here: both 4.4 and 2.89 mgd produce the same ambient water quality. That being the case, how is there "degradation"? Also, the regulations and policy describe the anti-degradation policy as applying to various special classes of water like "high quality waters" and "Outstanding Resource Waters". The Assabet is not classified below the Westborough Treatment Plant.

The City requests a flow limit of 4.4 mgd.

10. Sampling: The requirement for documentation each month of any deviation to the routine sampling and testing program restricts operator flexibility and also will increase paperwork, thereby impacting plant performance by taking personnel away from other work. The City objects to that requirement.

11. The City also appeals the manner in which the water quality certification was handled in connection with water quality issues. The process followed by EPA and DEP with respect to water quality certification violates state and federal statutes and regulations.

12. On June 29, 2005, the City and Town filed with DEP a state administrative appeal of the permit and of the Water Quality certification that is the basis of the joint state/federal permit. EPA may not abrogate the petitioner's state-law appeal rights concerning the water quality certification. The appealed water quality certification, on which EPA Region I relies for justifying the limits challenged both here and in the state proceeding, must be resolved through the state permit appeals process before the Region bases its permit limits on that state certification. Further, there can be no alleged "waiver" of the water quality certification, because petitioners timely have filed appeals of that certification with DEP, pursuant to state law.

13. The City notes that this Board has recently ruled, in connection with a petition for review filed by the City with respect to an NPDES permit appeal for its other, Easterly, wastewater treatment facility, that:

> The NPDES regulations expressly provide that "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures" established in the federal regulations.

In re City of Marlborough, Easterly Facility, NPDES Appeal No. 4-12 (March 11, 2005), at p. 9.

If the EAB lacks authority to review limits and conditions attributable to state water quality certification, and permittees timely exercise state-provided permit appeal rights to resolve the legality and appropriateness of such water quality certification, how can the Region claim to rely on the state water quality certification? There is no final state water quality certification until the state water quality appeal process is exhausted. The EAB was wrong to deny the City's

petition to review with respect to its Easterly wastewater facility, and it would be wrong to deny this petition for review concerning its Westerly facility. If the EAB feels it is without authority to resolve state water quality issues, it should grant this petition for review, have the issue briefed, and then stay its proceedings until the state permit appeals process is resolved. Failing that, and at a minimum, the EAB should stay a ruling on this petition for review until the state appeals process is completed.

14. The EAB should be especially deferential to the state permit appeals process where, as here, serious issues have been raised concerning the manner in which permit decisions are being made by the Massachusetts DEP.

In January 2004, five former Administrative Law Judges of the DEP Office of Administrative Appeals were transferred, by action of the Massachusetts legislature, to the Massachusetts Division of Administrative Law Appeals ("DALA"), see, St. 2003, c. 41, and the FY 2004 Budget, line item 2000-0500.[1] The Massachusetts legislature transferred the five DEP administrative law judges in the FY 2004 budget following several years of conflict over DEP control of the administrative appeals process, and interference by DEP employees with the ALJ's impartial decision making. For background and commentary on this conflict see Cella, *Administrative Law and Practice (38 Mass. Practice)*, §344 (2005 Pocket Part, at 92-94) (appended hereto as "Attachment 2"). Of particular interest is the testimony of two of the former DEP ALJs, who spoke in favor of their transfer from DEP to DALA:

> In 1999 and 2000, we [the judges] found ourselves increasingly pressured to rewrite decisions to favor the Department. Refusal by an ALJ [administrative law judge] to change a decision often resulted in a decision being held hostage by the General Counsel for months on end. Finally,

[1] The FY 2005 budget likewise provided funding for the five judges, and left them at DALA through fiscal year 2005.

> this conduct came to a head in two cases in which I was the presiding administrative law judge. In the first, I was summoned to a meeting with top management. There, I was subjected to unrelenting pressure to change the outcome of a decision in which I ruled against the Department. At no time did anyone attempt to engage me in a reasoned discussion of the law or regulations. I was simply told that the result was unacceptable. I refused to change the decision and a stalemate ensued. A few months later, I again drafted a decision in which the Department did not prevail. Again, I was told that the result was unacceptable. This time, however, management went further. I was told that my job was in jeopardy if I continued to refuse to change my decision. At this point, not knowing what else to do, I filed a grievance with my union, NAGE
>
> * * * *
>
> There has been grumbling within the Department over the years about our loyalty, about whether we are team players, about what business "those ALJs" have pretending to judge the Department that employs them.
>
> Cella, *Administrative Law and Practice (38 Mass. Practice),* §(2005 Pocket Part, at 92-93).

The point here is not that all DEP employees are biased, unfair or unprofessional. The point is that the state permit appeals process provided under Massachusetts law serves a purpose: it is intended to keep the public officials who make critical decisions accountable. The public must have confidence that the decisions of public officials, including those of related to water quality certification, are fairly and rationally made (i.e. not arbitrary). In Massachusetts, the assurance of that accountability is the state administrative appeals process. The EAB should not violate the City's state permit appeal rights, which apply to the water quality certification, as well as to the permit itself, by pretending that EPA may move forward on a permit based on a challenged water quality certification.

Again, there is no <u>final</u> water quality certification until the state permit appeal process is exhausted. Therefore, the Region cannot rely on the state water quality

certification to justify its water quality based limitations or conditions in the federal NPDES permit, and the Region cannot claim that the Commonwealth has waived the certification requirement.

III. GENERAL OBJECTIONS

A. The responses to comments provided by the agencies did not adequately address the comments submitted on behalf of the permittees; those earlier comments are incorporated.

B. Certain responses to comments are inconsistent with the language included in the permit.

C. DEP lacked substantial evidence with respect to the challenged permit limits and conditions.

D. DEP routinely and improperly defers to EPA judgment with respect to state water quality standards and the certification process.

E. EPA Region I lacks the authority to render an interpretation of Massachusetts water quality standards.

F. EPA and DEP were arbitrary and capricious with respect to the issuance of the challenged permit limits and conditions.

G. The challenged permit limits and conditions are not necessary to meet water quality standards.

H. EPA and DEP repeatedly have abused the administrative process through their coordinated attempts to impose ultra vires obligations on the permittees.

I. DEP and EPA have failed to follow TMDL requirements and regulations.

J. The "joint permit" procedures employed by DEP and EPA have resulted in procedural irregularities in the implementation of the Massachusetts and Federal Clean Water

Acts, and are violative of fundamental state and federal administrative law, federalism, home rule, due process, and constitutional principles.

K. EPA has endeavored to force its interpretation of water quality standards on DEP, and has consistently ignored and devalued DEP's interpretation of water quality regulations. Through an abusive interpretation and application of its water quality certification and waiver regulations, EPA purports to have the power to dictate to permit applicants and the Commonwealth how DEP's state water quality regulations are to be interpreted and implemented.

L. DEP and EPA have consistently failed to adequately explain how it derived the limits and conditions challenged by the permittees.

M. The "dual permitting" approach followed by DEP and EPA violates federal and state procedural requirements.

N. DEP and EPA have failed to appropriately consider the costs associated with the challenged limits and conditions, and such costs are patently unreasonable.

O. DEP's and EPA's arbitrary attempt to force the City and Town to needlessly expend millions of dollars violates the doctrine of separation of powers.

P. DEP and EPA are attempting to impose permit conditions for which no statutory or regulatory standards exist; the attempted imposition of such permit conditions constitutes an impermissible exercise of uncontrolled and untrammeled discretionary authority to engage in lawmaking.

Q. EPA's actions in connection with the permit conditions to which the City objects constitute ultra vires acts.

R. EPA's actions in connection with the permit conditions to which the City objects

constitute violations of the doctrine of nondelegation.

S. EPA's attempt to impose permit conditions that arbitrarily would force the City to spend millions of dollars against its will constitutes an illegal effort to impose a tax or financial burden on the City. It is an unfunded mandate.

T. The actions taken by EPA employees to cause the issuance of those permit conditions to which the City objects constitutes impermissible subdelegations of authority.

U. EPA's issuance of the permit conditions to which the City objects under the circumstances here violates procedural due process requirements.

V. EPA, in the issuance of the permit limits and conditions to which the City objects, relied on evidence lacking indicia of reliability and probative value.

W. EPA has articulated no intelligible principles to explain how it arrived at the challenged limits and conditions in the final permit.

X. The challenged limitations and conditions appear to represent an attempt by EPA and DEP to arrive at an impermissible political compromise.

Y. The failure by DEP and EPA to identify and explain the basis of the technical reports relied upon and the use of unacknowledged information raises questions of fundamental fairness and seriously undermines the integrity of the permitting process. This is especially so where, as here, the unnecessary expenditure of tens of millions of dollars is at stake.

Z. EPA and DEP are undermining a fair adjudicatory appeals process by seeking to rely on recently promulgated administrative appeals regulations that are violative of the Massachusetts Administrative Procedure Act, M.G.L. c. 30A, and regulations promulgated by the Division of Administrative Law Appeals. DEP is attempting to violate legislative directives meant to ensure a fair hearing process by limiting the proper role of the DALA administrative

magistrates.

IV. RELIEF REQUESTED

For the foregoing reasons, the Permittees request:

1. that the Board grant this Petition For Review;

2. that the effective date of the permit be stayed pending the outcome of this and the related state administrative proceedings;

3. that the EPA be ordered to modify the permit by deleting those provisions, limitations, and conditions to which the petitioners have objected, and by substituting permit provisions, limitations, and conditions proposed by the petitioners;

4. that the contested portions of the permit and water quality certification be stricken as unenforceable and void, where appropriate;

5. a declaration that the contested portions of the permit and water quality certification are unenforceable by EPA;

6. such interim relief as may be appropriate under the circumstances, including orders requiring further development by EPA of the administrative record, remand to Region I for further permitting procedures, the removal from consideration of objectionable materials and other like interim relief;

7. that during the pendency of this appeal, the currently effective permit, will continue to apply;

8. that the City and Town be granted a full evidentiary hearing;

9. such other relief as appears appropriate as a result of further proceedings.

Respectfully submitted:

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Fax: (617) 204-8073

Dated: June 30, 2005

Attorney for Petitioners City of Marlborough and Town of Northborough

ATTACHMENT 1

	Plant		River Upstream			River Downstream			
Date	Flow, mgd	Hardness, mg/l	River Flow, cfs at Maynard Gage	River Flow, area adjusted, in mgd	River Hardness, mg/lHardness	plant hardness, lbs	river hardness, lbs	Total	River Hardness, mg/l
6/7/2005	2.69	216	174	31.2	84	4,846	21,875	26,721	94
6/9/2005	2.81	204	354	66.2	84	4,781	46,370	51,151	89
6/11/2005	2.42	180	309	57.8	84	3,633	40,498	44,131	88
3/8/2005	3.2	132	249	45.3	76	3,523	28,734	32,257	80
3/10/2005	3.3	112	320	59.1	76	3,082	37,442	40,525	78
3/12/2005	2.86	124	255	46.8	76	2,958	29,691	32,649	79
12/7/2004	2.92	136	251	46.0	64	3,312	24,555	27,867	68
12/9/2004	2.98	124	410	76.9	56	3,082	35,932	39,013	59
12/11/2004	3.4	120	493	92.7	52	3,403	40,199	43,602	54
9/14/2004	2.01	252	61	9.9	100	4,224	8,240	12,464	126
9/16/2004	2.05	238	50	7.7	104	4,069	6,675	10,744	132
9/18/2004	2.9	240	218	39.6	112	5,805	36,981	42,786	121
						Average of September low flow conditions. Use 125 mg/l			126

MASSACHUSETTS PRACTICE SERIES™

Volume 38

Administrative Law and Practice

By

ALEXANDER J. CELLA

2005 Pocket Part

By

ROBERT F. FITZPATRICK, JR.
of the Massachusetts Bar

and

GERALD A. McDONOUGH
of the Massachusetts Bar

Sections 1 to 500

Replacing prior Pocket Part in the back of Volume

THOMSON
WEST

ATTACHMENT 2

§ 343. Hearing Officers in Massachusetts—(1) The Designation of a Member of a Collegial Body to Conduct a Hearing by Himself in Place of the Agency, Board, or Commission

[Insert at end of paragraph 6 in footnote 8]

8. See, also, Matter of Saab, 406 Mass. 315, 547 N.E.2d 919 (1989); D'Amour v. Board of Registration in Dentistry, 409 Mass. 572, 567 N.E.2d 1226 (1991).

§ 344. Hearing Officers in Massachusetts—(2) The Agency Staff and Internal Separation Approach

[Insert new text at the end of the section]

Nearly all environmental appeals involving state regulation fall within the jurisdiction of the Department of Environmental Protection, Office of Administrative Appeals ("OAA"). In recent months, five of six administrative law judges in OAA have testified to a legislative committee about deep flaws in the Department's appeal process. They claim that these flaws undermine the impartiality of that process, and "undercut[] [their] ability to be fair, impartial and professional, no matter how hard [they] try." One judge offered the following startling testimony:

> "In 1999 and 2000, we [the judges] found ourselves increasingly pressured to rewrite decisions to favor the Department. Refusal by an ALJ [administrative law judge] to change a decision often resulted in a decision being held hostage by the General Counsel for months on end. Finally, this conduct came to a head in two cases in which I was the presiding administrative law judge. In the first, I was summoned to a meeting with top management. There, I was subjected to unrelenting pressure to change the outcome of a decision in which I ruled against the Department. At no time did anyone attempt to engage me in a reasoned discussion of the law or regulations. I was simply told that the result was unacceptable. I refused to change the decision and a stalemate ensued. A few months later, I again drafted a decision in which the Department did not prevail. Again, I was told that the result was unacceptable. This time, however, management went further. I was told that my job was in jeopardy if I continued to refuse to change my decision. At this point, not knowing what else to do, I filed a grievance with my union, NAGE."

The root cause of the problem appears to be the "tethering" of OAA to the Department. OAA is under the Department's management, and is dependent upon the Department for its resources. The judges share office space, computer resources, elevators and rest rooms with the persons that represent the Department in administrative appeals. As one judge testified:

> "We rub elbows with the staff who litigate and testify before us; in fact, we are located on the same floor as Department counsel, and we pass them in the corridors several times each day. The closeness is discomforting; more than that, it has invited attempts at ex parte communications in the hallways, on the elevator, in the restroom, on the interoffice telephone and in interoffice e-mail. It can also be intimidating. There has been grumbling within the Department over the years about our loyalty, about whether we are team players, about what business 'those ALJs' have pretending to judge the Department that employs them."

The Department has taken steps to address the concerns of the judges—action that appears to be motivated, at least in part, by grievances filed by two of the judges. On November 8, 2000, the Commissioner issued a directive "Concerning Adjudicatory Proceedings Conducted Pursuant to M.G.L. c. 30A." Under that Directive, organizational responsibility for OAA was shifted from the Department's Office of General Counsel to the Department's Deputy Commissioner for Administration. The Directive also mandated that "DEP not establish quotas or similar expectations for any ALJ that relate in any way to whether the ALJ's ruling, decisions or other actions favor or disfavor the agency or the Commonwealth" and it proscribed ex parte communications with judges, among other things.

There are doubts about whether the Department-proposed reforms go far enough. The Directive is but a fiat that can be undone on a moments notice. More to the point, however, is whether the shift in organizational responsibility for OAA from the Office of General Counsel to the Deputy Commissioner for Administration assures administrative law judges the independence necessary to safeguard the impartiality (and the appearance of impartiality) of the appeal process. Five judges and several commentators do not think so. As one group of commentators concisely phrased it, "We doubt that it is possible to craft a Directive that eliminates all the subtle and indirect ways that can be used to try to influence ALJ decision making, as long as their office remains within the Department."

Pending legislation promises a more fundamental structural reform. Under Senate Bill No. 1082, OAA would be replaced by an environmental appeals board within the Executive Office of Environmental Affairs. The Department and the Secretary of Environmental Affairs have opposed this bill maintaining that it is premature, i.e., the Commissioner's Directive may address satisfactorily the concerns of the five judges. On July 23, 2001, the Committee on Natural Resources and Agriculture favorably reported a slightly amended bill [House Bill No. 4378], which was referred to the Committee on Ways and Means.

Notwithstanding disagreement about the kind of change necessary to safeguard the impartiality of the environmental appeals process, there appears to be no dispute that impartial adjudication was at least at risk before the Commissioner issued her Directive. This unsettling conclusion seems to call for a more sweeping remedy rather than a narrowly

tailored one. For the Department must safeguard the impartiality of the process and also guard against the appearance of undue influence and partiality. It is in this latter respect that the Department's Directive does not go far enough. Questions of partiality will exist as long as the Department's administrative law judges remain "tethered" to the Department, which is a party to all appeals that the judges must decide.

§ 348. Administrative Court Proposals in Massachusetts—The Judicialization of the Agency Adjudicatory Process

[Insert at end of 5th paragraph of footnote 36]

36. 5 U.S.C.A. § 575 has been redesignated section 595 of this Title by P.L. 102-354, § 2(2), August 26, 1992, 106 Stat. 944.

§ 349. Traditional Relationship of Hearing Officer to Agency, Board, or Commission

3. See, also, Boston Police Superior Officers Federation v. City of Boston, 414 Mass. 458, 608 N.E.2d 1023 (1993) (citing treatise) (Labor Relations Commission may delegate to a hearing officer the authority to deal with issues pertaining to subpoenas but the Commission itself retains the ultimate authority to make an independent determination of the issues).

6. See, also, Boston Police Superior Officers Federation v. City of Boston, 414 Mass. 458, 608 N.E.2d 1023 (1993) (citing treatise).

8. See, also, Morris v. Board of Registration in Medicine, 405 Mass. 103, 110, 539 N.E.2d 50, 53–54 (1989) (citing treatise), cert. denied 493 U.S. 977, 110 S.Ct. 503, 107 L.Ed.2d 506 (1989) where the Supreme Judicial Court stated that they have never held that the administrative agency responsible for making the final decision may not revise or reject the finding of a hearing officer on conflicting evidence.

§ 350. The Hearing Officer's Report—Generally

In David v. Commissioner of Insurance,[6] George David claimed that the Division of Insurance's decision revoking his insurance licenses was invalid because the Commissioner decided his appeal without "waiting for a statement of grounds." Mr. David noted that the presiding officer's decision "made reference to the Commissioner's order of affirmance." Rejecting Mr. David's claim, the court wrote that "[i]n other circumstances, this fact may cast doubt on the validity of the division's decision; however, the presiding officer's findings and conclusions of law here are based on record evidence and reflect the officer's independent and comprehensive evaluation of that evidence."

3. See, also, Morris v. Board of Registration in Medicine, 405 Mass. 103, 539 N.E.2d 50 (1989), cert. denied 493 U.S. 977, 110 S.Ct. 503, 107 L.Ed.2d 506 (1989).

5. Lisbon v. Contributory Retirement N.E.2d 392 (1996); Weiner v. Board of Registration of Psychologists, 416 Mass 675, 681, 624 N.E.2d 955, 959 (1993).

6. 53 Mass.App.Ct 162, 164 & n. 3, 757 N.E.2d 748, 750 & n. 3 (2001).

§ 351. The Hearing Officer's Report—An Essential Part of the Entire Proceedings or Record in an Adjudicatory Proceeding

[Insert new text at the end of the section]

In Fox v. Commissioner of Revenue,[15] the Appeals Court considered whether a decision of the Appellate Tax Board should stand where the Board member who heard the evidence and conducted the hearing did not participate in the Board's decision. Vacating the Board's decision, the Appeals Court held that such participation is required when the credibility of witnesses is at issue. The Court wrote:

> "In reaching this result, we do not mean to imply that the member of the board presiding at a hearing must author the board's decision or that each member of the board personally must observe the witnesses' conduct and demeanor. On the contrary, in general we perceive no difficulty when an individual or group other than the hearing officer prepares finding provided it also appears either that (a) the hearing officer participated in the board's deliberations in a meaningful manner, or (b) credibility or evidentiary weight determination are inessential to the board's decision." [citations omitted.]

14. See, also, Beyer Corp. v. Commissioner of Revenue, 436 Mass. 302, 763 N.E.2d 1100 (2002); City of Salem v. M.C.A.D., 404 Mass. 170, 534 N.E.2d 283 (1989) (Commissioner who heard witnesses died before making decision; decision on printed record by another commissioner not permissible where testimony conflicted on material issues).

15. 51 Mass.App.Ct. 336, 746 N.E.2d 154 (2001).

§ 352. The Hearing Officer's Report—Weight to Be Given Report by Reviewing Court

7. See §§ 244-247, supra (discussing the substantial evidence rule). See, also, Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530, 517 N.E.2d 830, 832 (1988) (Court will not disturb commission's findings unless review of the record as a whole fails to disclose substantial evidence to support it).

15. See §§ 244-247, supra (discussing the substantial evidence rule). See, also, Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530, 517 N.E.2d 830, 832 (1988) (Court will not disturb commission's findings unless review of record as a whole fails to disclose substantial evidence to support it).

21. See §§ 244-247, supra (discussing the substantial evidence rule). See, also, erages Control Commission, 401 Mass. 526, 530, 517 N.E.2d 830, 832 (1988) (Court will not disturb commission's findings unless review of record as a whole fails to disclose substantial evidence to support it).

23. See, also, Morris v. Board of Registration in Medicine, 405 Mass. 103, 111, 539 N.E.2d 50, 54 (1989) (citing treatise), cert. denied 493 U.S. 977, 110 S.Ct. 503, 107 L.Ed.2d 506 (1989).

26. Lisbon v. Contributory Retirement Appeal Board, 41 Mass.App.Ct. 246, 670 N.E.2d 392 (1996); Weiner v. Board of Registration of Psychologists, 416 Mass. 675, 681, 624 N.E.2d 955, 959 (1993); See, also, Morris v. Board of Registration in Medicine, 405 Mass. 103, 111, 539 N.E.2d 50, 54 (1989), cert. denied 493 U.S. 977, 110 S.Ct.