



CONSERVATION LAW FOUNDATION

November 23, 2005

Vertical stamp: RECEIVED NOV 23 2005 U.S. ENVIRONMENTAL PROTECTION AGENCY

Ms. Erica Durr, Clerk
Environmental Appeal Board
U.S. Environmental Protection Agency
Ariel Ross Building
1200 Pennsylvania Avenue
Washington, DC 20460-0001

Re: NPDES Appeal Nos. 05-07 and 05-08

Dear Ms. Durr:

Enclosed for filing are the original and five copies of our Response to the Westborough Treatment Plant Board's Motion to Reconsider the Board's Order Allowing Submission of Amicus Brief by the Conservation Law Foundation and Motion to Strike the Amicus Brief.

Very truly yours,

John L. Davenport
John L. Davenport

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10/13/05

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

10/13/05

In re: City of Westborough)
Waste Treatment Works)
NPDES Permit No. MA0100412)

APPEAL NOS:
NPDES 05-07
NPDES 05-08

**CONSERVATION LAW FOUNDATION'S RESPONSE TO
WESTBOROUGH TREATMENT PLANT BOARD'S MOTION
TO RECONSIDER ORDER ALLOWING SUBMISSION
OF AMICUS BRIEF BY CONSERVATION LAW FOUNDATION
AND MOTION TO STRIKE AMICUS BRIEF**

BACKGROUND

By motion filed with the Environmental Appeals Board on October 17, 2005, the Conservation Law Foundation ("CLF") sought leave to intervene in the above captioned appeals, as well as in the appeals of the Marlborough Westerly Wastewater Treatment Facility's NPDES Permit No. MA0100480 (Appeal Nos. 05-05 and 05-09) and the now withdrawn appeals of the Maynard Water Pollution Control Facility's NPDES Permit No. MA0101001. On October 24, 2005 the Westborough Treatment Plant Board (the "Westborough Board") filed with the EAB its Opposition to CLF's motion for leave to intervene. By Order dated October 18, 2005, the EAB denied CLF's request for intervenor status but allowed CLF, no later than November 4, 2005, to submit a brief in support of its position and participate as *amicus curiae* in these matters. CLF accordingly filed its amicus brief with the EAB on November 4, 2005. The Westborough Board,

by motion dated November 9, 2005, now requests EAB to reconsider its October 18, 2005 order allowing CLF to submit its amicus brief and to strike its brief from the record. CLF respectfully opposes such request.

ARGUMENT

The Westborough Board grounds its assertion that CLF should not be allowed to file an amicus brief primarily on 40 C.F.R. §124.19(c). That provision, however, states only that, after the EAB grants review of an NPDES permit, the public notice of that grant shall state that “any interested person may file an amicus brief”. Nothing in §124.19(c) prohibits the EAB, before granting or denying review, from exercising its discretion to allow an interested person¹, even though not entitled under 40 C.F.R. §124.19(a) to petition for review, to submit an amicus brief setting forth the reasons why it believes the EAB should grant or deny another party’s petition for review. If the EAB denies review, the permit becomes final and the administrative proceedings are ended. At that point it is futile and pointless for a party urging review to file an amicus brief.

In its January 10, 2005 Order in In re City of Marlborough, Massachusetts, Easterly Wastewater Treatment Facility, NPDES Appeal No. 04-13, EAB, August 11, 2005 (the “Hop Brook case”), the EAB, prior to its decision granting review, allowed CLF to participate as amicus curiae and respond to the petitions for review, even though it was not entitled under 40 C.F.R. §124.19(a) to petition for review because of lack of timeliness. The procedural posture of these appeals at this point in time is identical to that of the Hop Brook case on January 10. There

¹ CLF’s interest in these appeals is set forth in full on pages 8 and 9 of its memorandum of law in support of its motion for leave to intervene filed on October 17, 2005.

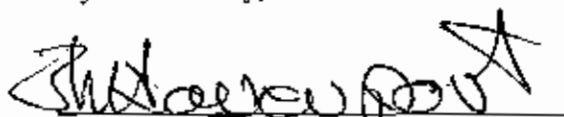
is no rationale basis for granting CLF the right to participate as amicus curiae in the Hop Brook case and denying it in this case.

The Westborough Board suggests that the EAB's order granting amicus status should be reversed and its brief stricken because of "CLF's failure to appropriately participate in the public process leading up to the issuance of this permit". As noted above, while failure to file comments on the draft permit or participate in the public hearings may disqualify a person from petitioning the EAB to review an NPDES permit under 40 C.F.R. §124.19(a), it does not prevent the EAB from exercising discretion to allow an interested party to submit its views on whether or not the EAB should grant another's petition for review.

For the above reasons, the Westborough Board's motion to reconsider and strike CLF's amicus curiae brief should be denied.

Respectfully submitted,

CONSERVATION LAW FOUNDATION
By Its Attorney,



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Dated: November 23, 2005

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to the Westborough Treatment Plant Board's Motion to Reconsider Order Allowing Submission of Amicus Brief by the Conservation Law Foundation and Motion to Strike Amicus Brief were served by United States First Class Mail on the following persons, this 23rd day of November, 2005:

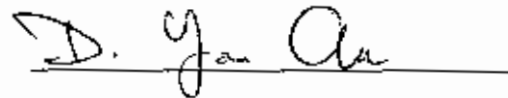
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A handwritten signature in black ink, appearing to read "D. Varney", is written over a horizontal line.

Dated: November 23, 2005