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STEPHEN D. ANDERSON
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January 23, 2006

Federal Express

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

RE: In the Matter of: City of Cambridge, DPW
NPDES Permit No. MA0101974
NPDES Appeal No.: 06-01

Dear Sir/Madam:

Enclosed for filing in this matter are the following pleadings:

1. Notice of Appearance; and
2. City of Cambridge's Motion to Intervene as Party Respondent.

Sincerely,



Stephen D. Anderson

SDA:lb
Enclosures

cc: Nancy Glowa, Esquire
Owen O'Riordan
Service List

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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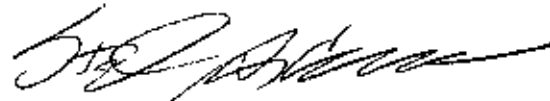
_____)	
In the Matter of:)	
)	
City of Cambridge, DPW)	NPDES Permit Appeal
)	Case No. 06-01
)	
NPDES Permit No. MA0101974)	
_____)	

NOTICE OF APPEARANCE

Please enter our appearance on behalf of the City of Cambridge in this matter.

Please serve us with copies of all pleadings and notices.

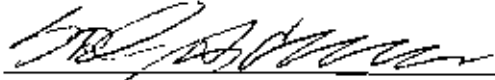
The City of Cambridge,
By its attorneys,



Stephen D. Anderson, Esq., BBO # 018700
Mary Liz Brenninkmeyer, BBO # 647342
ANDERSON & KREIGER LLP
43 Thorndike Street
Cambridge MA 02141
617-252-6575

CERTIFICATE OF SERVICE

I hereby certify that I have served of a copy of the foregoing on all parties by mailing a copy, first class mail, postage prepaid this 23rd day of January, 2006.



Stephen D. Anderson

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CAMB/NPDES/P/ArlNPDESAppealtoEPA_NoticeofAppearance

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
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In the Matter of:)

City of Cambridge, DPW)

NPDES Permit No. MA0101974)

Petitioner: Town of Arlington)

Respondent: EPA Region I)
_____)

NPDES Permit Appeal
Case No. 06-01

**CITY OF CAMBRIDGE'S MOTION TO
INTERVENE AS A PARTY RESPONDENT**

Pursuant to the Environmental Appeals Board ("EAB") *Practice Manual* at 26 (2004) and established EAB precedent, the permittee City of Cambridge, a Massachusetts municipal corporation with principal offices at City Hall, 795 Massachusetts Avenue, Cambridge, MA 02139 (the "City") moves to intervene in this action as a party respondent.

The grounds for this motion are as follows:

1. In this proceeding, the Town of Arlington, Massachusetts (the "Town") has filed a petition asking that EAB review a permit determination issued by the United States Environmental Protection Agency ("EPA"), Region I, concerning the re-issuance of the City's NPDES Permit MA0101974.

2. The petition names EPA Region I as the only respondent.

3. The Town seeks review of the following conditions contained in the City's Permit:

- Effluent limitations on fecal coliform bacteria: The Town seeks to add to the City's NPDES Permit an effluent limit for fecal coliform bacteria during CSO

discharges that is allegedly "more protective of public health" and to provide allegedly more rigorous control of odor and solids and floatable materials.

- Ultimate water quality designation for Alewife Brook: The Town seeks to modify the City's NPDES Permit to require the City to eliminate its CSO discharges to Alewife Brook or to achieve a Class B Water Quality Standard for its discharges.
- Potential Additional Loads: The Town seeks to modify the City's NPDES Permit to require the City to reduce I/I to the waste water system connected to discharge outfalls on Alewife Brook, and to restrict any additional hookups until the City ceases CSO's or meets Class B standards.
- Notification Requirements: The Town seeks to modify the City's NPDES Permit to require stricter notice requirements including modified warning signs along Alewife Brook, quarterly notices to affected residents in the Alewife Brook flood plain, and detailed CSO notices to the Town's health agent within twenty four hours of CSO discharge.
- Surface flooding studies within the Alewife Brook floodplain: The Town seeks to modify the City's NPDES Permit to require the City to provide a survey plan with flood elevations for the entire Alewife Brook flood plain and to evaluate the risk of CSO discharges to all properties within the flood plain.
- Process for determining whether additional CSO controls are necessary during the term of the NPDES Permit: The Town seeks to modify the City's NPDES Permit to require specific "trigger points" for determining when additional CSO controls will be appropriate for Alewife Brook, including their implementation and public participation plans.

4. "The current regulations governing NPDES permit appeals do not explicitly provide for intervention." *In re USGen New England, Inc.*, NPDES Appeal No. 03-12, at 7 n.13 (Feb. 20, 2004).¹ However, the EAB has discretion "to allow intervention and/or non-party briefing and [we] typically allow permittees to participate as intervenors when supported by an appropriate motion." *Id.* at 8 n.13, citing, *inter alia*, *In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, slip op. at 15 (EAB, May 21, 2002) (permittee's motion to intervene and file a response to the petition granted); *In re Aurora Energy, L.L.C.*, NPDES Appeal No. 03-11, at 1 (EAB, Oct. 21, 2003) (permittee's motion for leave to intervene granted); *In re Haw. Elec. Light*

¹ See *Rhode Island v. U.S.E.P.A.*, 378 F.3d 19, 21 (1st Cir. 2004)

Co. (“HELCO”), PSD Appeal Nos. 01-24 through 01-29, at 1 (EAB, Oct. 18, 2001) (permittee’s motion to intervene and file a response to petitions for review granted); *In re General Motors*, PSD Appeal No. 01-30, 10 EAD 360, 362 (Mar. 6, 2002) (permittee’s motion to intervene granted).

5. The City will be substantially and specifically affected by the results of this proceeding. As the permittee under the NPDES Permit at issue in this case, the City has a definite and unique interest in the validity of the permit and the outcome of this matter. Any relief afforded in this proceeding will directly and substantially affect the City by imposing new or modified legal obligations on the City under the NPDES Permit. If the relief requested is granted, the City will be forced to expend significant resources to comply with those new or modified legal obligations – in addition to the tens of millions of dollars that the City is already in the process of expending to implement CSO Control Projects in the City as noted in the federal litigation United States v. Metropolitan District Commission, Civil Action No. 85-0489-RGS (D. Mass.). See, e.g. Schedule Six Compliance Order Number 198 at 3-4 (January 18, 2006) (Exhibit A hereto).

6. The City is not a party to the United States’ enforcement action against greater Boston’s regional water and sewer authority (formerly the Metropolitan District Commission (“MDC”), now known as the Massachusetts Water Resources Authority (“MWRA”)). However, the appropriate level of combined sewer overflow (CSO) control and the recommended plans for the Charles River and the Alewife Brook/Upper Mystic River in the City of Cambridge derive from the enforcement orders in that litigation. See *U.S. v. Metropolitan Dist. Com’n*, 2005 WL 2542921, *1 (D.Mass.,2005) (“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.”)

7. This is the City’s NPDES Permit (and the related variance modifying water quality standards) that the Petitioner now seeks to challenge in this EAB proceeding.

8. Pursuant to a series of negotiated agreements with the MWRA, the City has made extensive efforts to implement these CSO Control Projects, as documented in numerous Compliance Orders issued by the federal Court in the enforcement litigation. As reflected in the most recent federal Court Compliance Orders, these Cambridge CSO Control Projects are already slated to cost \$72 million and are projected to increase to \$102 million *not including the additional costs to implement the relief requested by the petitioner in this appeal* (see the following Court Compliance Orders, listed in reverse chronological order):²

- *U.S. v. Metropolitan Dist. Com'n*, 2005 WL 2542921, *2 (D.Mass.,2005) (Cambridge Sewer Separation: “The MWRA reports that once a decision is rendered on the appeal [of a MA DEP Superseding Order of Conditions approving

² A Westlaw search for relevant court orders in this litigation (“Metropolitan District Commission” & MWRA & CSO & Cambridge) returned dozens of Court orders involving Cambridge CSO matters, the most recent of which are summarized in the orders referenced in the text.

Contract 12 for the City's work in certain wetlands], it will reopen discussions with the City of Cambridge in an effort to reach an agreement on the [increased CSO] project cost and a cost sharing agreement.”);

- *U.S. v. Metropolitan Dist. Com'n*, 2005 WL 1533107, *2 (D.Mass.,2005) (Cambridge Sewer Separation: “The MWRA reports that the City of Cambridge continues to finalize a Second Supplemental Preliminary Design Report for the recommended plan for the Alewife Brook and Upper Mystic River. In addition, the City continues design work on Contract 12. ... The MWRA reports that it has yet to reach an agreement with the City regarding the increased project cost (\$72 million to \$102 million) and the negotiation of a new cost sharing arrangement. The MWRA will continue its discussions with the City.”);
- *U.S. v. Metropolitan Dist. Com'n*, L 768498, *2 -3 (D.Mass.,2005) (Cambridge Sewer Separation: “Over the last quarter, the MWRA held meetings with the City of Cambridge in an effort to reach consensus on the elevated costs and a new cost sharing arrangement for what is now estimated to be a \$94 million to \$102 million project. ... According to the MWRA, the City has made considerable progress in the final design of Contract 12, a crucial project that must be completed before the bulk of the remaining Alewife Brook plan can be implemented.”);
- *U.S. v. Metropolitan Dist. Com'n* L 226170, *3 -4 (D.Mass.,2005) (Cambridge Sewer Separation: “The MWRA reports that it is gravely concerned by the preliminary cost information received from the City indicating that project costs now exceed by \$25 million the \$74 million estimate presented in the Final Variance Report. ... The MWRA reports that the City is making design progress on Contract 12 involving the proposed storm drain outfall and stormwater wetland in the Alewife Brook Reservation. The new basin and outfall are necessary to accommodate future sewer separation in the upstream CAM004 area and the eventual closure of the CAM004 regulator.”);
- *U.S. v. Metropolitan Dist. Com'n*, 2004 WL 2297875, *2 (D.Mass.,2004) (Cambridge Sewer Separation: “According to the Quarterly Report, the City of Cambridge is continuing final design work on the construction of the new storm drain outfall and stormwater wetland detention basin. Design work is now 75 percent complete, and the City has received an Order of Conditions from the Cambridge Conservation Commission. ... The MWRA reports that DEP has issued a three year extension to the Alewife Brook/Upper Mystic River Basin variance after determining that no feasible means to eliminate CSO discharges has been identified. The MWRA will continue its water quality monitoring program and will review the assessment reports by the Cities of Somerville and Cambridge to determine if there are any feasible, cost effective alternatives for CSO control measures.”)

9. The City's track record of taking significant affirmative steps to implement tens of millions of dollars of CSO Control Projects in the City underscores the justification for the City to intervene in this proceeding to protect its economic interests, its environmental interests, its institutional interests (*i.e.* its infrastructure planning, design and construction), and its due process interests to be heard in a matter directly and substantially affecting its legal rights.³

10. As a result, there is good cause to allow the City to intervene in this matter. Disposition of this matter without the City's involvement will, as a practical matter, impair the City's ability to protect its interests. The respondent EPA cannot be expected to represent the City's interests adequately in this proceeding, because, among other things, EPA is the permit-granting, regulatory and enforcement authority whose interests differ substantially from those of the City as the permittee. In any event, the City has valid defenses to the permit appeal, and intervention would promote a just resolution of this case.

11. The City's intervention in this matter is timely. This motion follows closely upon the commencement of this action, which was only just filed on January 4, 2006. No substantive proceedings have occurred in this case, and the City's participation will not delay this proceeding in any way.

12. Thus, by analogy to well established judicial principles for intervention, the City's motion satisfies both the "by right" and the "permissive" intervention requirements of Federal Rules of Civil Procedure Rule 24.⁴

³ In the circumstances of this case, the City believes that it is in fact a necessary party to this proceeding and that it should have been – but was not – named as a respondent in the original Petition.

⁴ Federal Rules of Civil Procedure Rule 24 provides as follows:

(a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant

13. Assuming it is allowed to intervene as a party respondent in this action, the City will defend the factual and legal integrity of NPDES Permit MA0101974 and the conditions imposed in the permit; the City will file timely and appropriate pleadings addressing procedural and substantive matters at issue in this proceeding; the City will oppose any effort by the Petitioner seeking to impose new or modified legal obligations on the City under the NPDES Permit; and the City will otherwise participate as a full party with all the rights of and subject to all limitations imposed upon a party.

14. Without limitation, the City is aware that, by letter dated January 9, 2006, the EAB has instructed EPA Region I staff to "prepare a response that addresses the petitioner's contentions and whether petitioner has satisfied the requirements for obtaining review under 40 CFR 124.19(a)."⁵ In the event the City's motion to intervene as a party respondent is allowed, the City is prepared to file a timely response by February 22, 2006, that addresses the petitioner's

is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

⁵ Pursuant to 40 CFR § 124.19(a), those requirements are as follows:

The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:

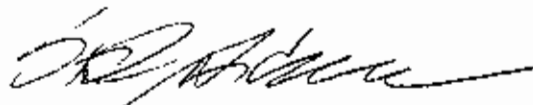
(1) A finding of fact or conclusion of law which is clearly erroneous, or

(2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

contentions and whether petitioner has satisfied the requirements for obtaining review under 40 CFR 124.19(a).⁶

For the foregoing reasons, the City's motion to intervene in this action as a party respondent should be allowed.

The City of Cambridge,
By its attorneys,

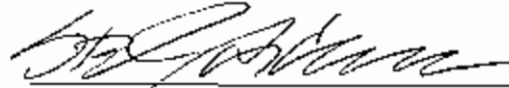


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⁶ In the event that, before ruling on the City's motion to intervene, EAB wants to receive the City's response addressing the petitioner's contentions and whether petitioner has satisfied the requirements for obtaining review under 40 CFR 124.19(a), then the City respectfully requests leave to submit that response by February 22, 2006.

CERTIFICATE OF SERVICE

I hereby certify that I have served of a copy of the foregoing on all parties by mailing a copy, first class mail, postage prepaid this 23rd day of January, 2006



Stephen D. Anderson

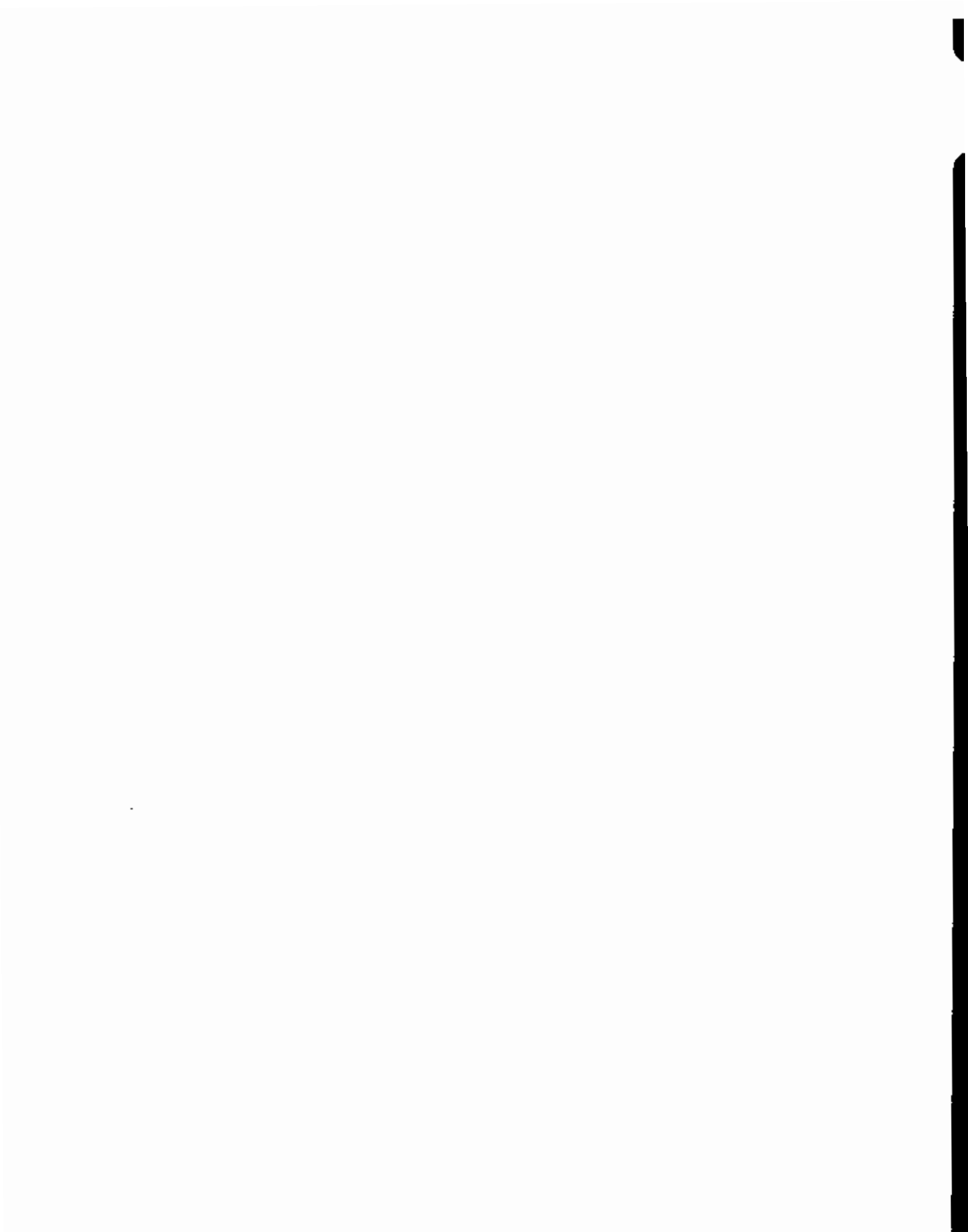
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 85-0489-RGS

UNITED STATES OF AMERICA,

Plaintiff,

v.

METROPOLITAN DISTRICT COMMISSION, et al.,

Defendants.

CIVIL ACTION NO. 83-1614-RGS

CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC.,

Plaintiff,

v.

METROPOLITAN DISTRICT COMMISSION,

Defendant.

SCHEDULE SIX COMPLIANCE ORDER NUMBER 198

January 18, 2006

STEARNS, D.J.

This is the one hundred and ninety-eighth Compliance Order that has issued in this litigation. On December 15, 2005, the Massachusetts Water Resources Authority (MWRA) filed its Quarterly Compliance and Progress Report (Quarterly Report). The Conservation Law Foundation (CLF) has filed a response. The United States has indicated that it has no objections or comments to make on the Quarterly Report. I accept the Report and

make the following findings.

I. Schedule Six

A. Activities Not Completed

A status report for the activities on the court's Schedule Six for September of 2005 was certified by Frederick Laskey, the Executive Director of the MWRA, on December 15, 2005. The report indicates that the MWRA was scheduled to complete the construction of interceptor relief for BOS 003-014, and to complete the construction of the detention and treatment facility at the Union Park Pump Station. As explained below, neither of these targets was achieved.

1. Union Park Detention and Treatment Facility

The MWRA reports that it was unable to meet the milestone for the completion of the Union Park facility. The construction has been delayed because of several factors noted in previous Quarterly Reports. The MWRA has granted the contractor an extension until September 23, 2006. Work is presently approximately 87 percent complete. The MWRA is considering a request for a further extension of the completion date to December 31, 2006.

2. Interceptor Relief for BOS003-014

The MWRA reports that it was unable to meet the milestone for the completion of the construction of the interceptor relief for BOS003-014. This was anticipated in light of the MWRA's suspension of final design work on two of the three related construction projects in 2002, for a reassessment of the project plan. The reassessment, which was completed in 2004, confirmed that the original interceptor relief project plan, at a cost of

\$68 million, was the most cost-effective solution, and would reduce combined sewer overflow (CSO) discharges at all of the East Boston CSO outfalls. This would insure that class SB water quality standards would be met more than 95 percent of the time. The MWRA has proposed revising the milestone for the interceptor relief project as part of its ongoing negotiations with the United States Department of Justice (DOJ), the United States Environmental Protection Agency (EPA), and the Massachusetts Department of Environmental Protection (DEP).

B. Quarterly Progress Report

1. Combined Sewer Overflow Program

(a) Long-Term CSO Control Plan

The MWRA continues to work with DOJ, EPA, and DEP towards the goal of reaching a final agreement on the appropriate level of CSO control and recommended plans for the Charles River, the Alewife Brook/Upper Mystic River, and East Boston. According to the MWRA, the parties have been able to resolve almost all of the major outstanding issues. A remaining item is the Prison Point facility, for which the MWRA has provided additional information requested by DOJ and EPA. The MWRA reports that it is optimistic that this issue will be promptly resolved, and that it will shortly thereafter file with the United States a joint motion to amend Schedule Six.

(b) Cambridge Sewer Separation

The MWRA reports that the Commonwealth's Division of Administrative Law Appeals held a prehearing conference on November 18, 2005, regarding the appeal of DEP's March 31, 2005 Superseding Order of Conditions approving Contract 12 work in

and near the associated wetlands. Hearing dates have been set for May 31, June 1, June 7, and June 8 of 2006. The current construction schedule for the Cambridge milestones (with the exception of three projects involving floatables control) is predicated upon receiving the necessary wetlands approvals in June of 2006. If the approvals are not in place by that date, the construction milestones for Contract 12 and the related sewer separation projects in Cambridge will be commensurately delayed.

(c) Quarterly CSO Progress Report

According to the MWRA's Quarterly CSO Progress Report, significant progress has been made on the North Dorchester Bay CSO Storage Tunnel and Facilities project. On October 12, 2005, the MWRA awarded the contract for Construction Management Services for the tunnel and related facilities at a cost of \$11.2 million. The 100 percent design submission was due by the end of December of 2005. The MWRA is presently obtaining necessary easements and permits. It expects to commence design services for the pump station and force main that will be used to dewater the tunnel after storms by September of 2006, in compliance with Schedule Six. In addition, the Pleasure Bay storm drain project is on schedule for completion in May of 2006, and the construction of the BOS019 CSO storage conduit is on schedule for completion in March of 2007.

Finally, the Report indicates that substantial progress is being made on the South Dorchester Bay, Fort Point Channel and Stony Brook sewer separation projects, as well as on the Morrissey Boulevard storm drain. In storms greater than the one-year storm, this storm drain will divert stormwater flows from the CSO storage tunnel to Savin Hill Cove and South Dorchester Bay. The construction is expected to be completed by December

of 2006, in compliance with Schedule Six.

II. Residuals Back-Up Plan

(a) Walpole Landfill Site

Pursuant to the court's Order, the MWRA is required to hold the Walpole site as a potential landfill through 2015, or until the completion of the final construction project under Schedule Six, whichever comes later. The Town of Walpole has expressed a desire to use part of the site as playing fields for youth sports. A bill has been submitted to the Legislature which would authorize the Commonwealth's Division of Capital Asset Management (DCAM) to convey a portion of the site to the Town. However, the deed to the Authority from the Commonwealth contains a reverter provision, mandated by the Legislature in chapter 41 of the Acts of 1991, which automatically reinvests the Commonwealth with title to the property if the site is put to any use other than as a landfill.

The MWRA is considering whether the locating of playing fields on the site could compromise the Authority's obligation to begin immediate landfill operations should it be required to do so under the court's Order. The MWRA's preliminary view is that the use proposed by the Town would not so interfere, as long as no permanent structures are erected or alterations made to the site. If no objections are interposed by the court or the interested parties, the MWRA believes that the Massachusetts Legislature and DCAM could agree to a plan whereby a legislative exception to the reverter clause would be enacted, any "change of use" issues under Article 97 would be legislatively resolved, all

with the understanding that the MWRA's compliance with the court's Order is a paramount consideration.

III. Comments

The CLF lauds the MWRA for the progress it has made on the North Dorchester Bay Tunnel and Facilities Plan. It notes, however, that the projected increase in stormwater discharges to Savin Hill Cove as a result of the Morrissey Boulevard storm drain has caused community concern. The CLF suggests several stormwater source control measures that could significantly reduce discharges into the Cove, such as the construction of road shoulders and parking areas using porous paving material. In addition, the CLF recommends bioretention measures such as vegetated swales, additional tree plantings, tree trenches to promote infiltration, and the building of wetlands. The CLF points out that the site in question includes boulevards with medians and shoulders, and adjacent open space, which are compatible with such stormwater management techniques. It also notes that the Secretary of Environmental Affairs, in her July 16, 2004 Certificate approving the MWRA's plan for North Dorchester Bay, recommended the inclusion of such measures in the project design. The CLF again urges the MWRA to consider these techniques in the design process and to implement them where appropriate.

IV. Conclusions

At this juncture, there is little need for comment from the court. Despite the failure to meet the milestones for the Union Park facility and Interceptor Relief for BOS003-014, consistent and satisfactory progress is being made on all current projects. The MWRA is

working closely with the United States to reach agreement on the long term CSO control plan. The court looks forward to receiving the parties' joint motion to amend Schedule Six once a final agreement is reached. The court, as a preliminary matter, has no objection to the Town of Walpole's proposal to install playing fields on the landfill site if the MWRA can reach an agreement with the Town, DCAM, and the Legislature along the lines that it suggests in its report. The court will reserve judgment, however, until an agreement is achieved that is consistent with the MWRA's obligations under the court's Order.

ORDER

The parties are ordered to report to the court as scheduled.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE

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43 Thorndike Street
Cambridge, MA 02141

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