



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
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BOSTON, MASSACHUSETTS 02114-2023

VIA FAX AND FIRST CLASS MAIL

Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: NPDES Appeal Nos. 08-26, 08-27
NPDES Permit No. MA0039853
Town of Wayland Wastewater Management District Commission

September 15, 2009

Dear Ms. Durr,

Enclosed please find the original of the Region's Response to Order to Show Cause Why Petitions Should Not Be Dismissed in the above-captioned case, with an attached certificate of service. The motion and the certificate of service have also been mailed to the Board and to counsel of record today. In lieu of five additional paper copies for the Board, an electronic copy has been posted to the CDX system.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Fein".

Ronald A. Fein, Assistant Regional Counsel
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cc: Adam P. Kahn, Esq.
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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re: Town of Wayland,)	
Wastewater Management District Commission)	
NPDES Permit No. MA0039853)	NPDES Appeal Nos.
)	08-26, 08-27

**RESPONSE TO ORDER TO SHOW CAUSE
WHY PETITIONS SHOULD NOT BE DISMISSED**

Region 1 of the U.S. Environmental Protection Agency (“Region”) hereby responds to the Environmental Appeals Board’s August 31, 2009 Order to Show Cause Why Petitions Should Not Be Dismissed in the above-captioned matter.

BACKGROUND

For the past several months, the parties have been engaged in complex settlement negotiations under the aegis of several Board orders staying proceedings in this matter. The proposed sequence of events negotiated in the settlement agreement and embodied in the Region’s assented-to Fourth Status Report and Motion to Extend Stay of Proceedings reflects the parties’ understanding of how the settlement would be implemented in light of the existing proceedings, is intrinsic to the structure of the overall settlement itself, and may be necessary to ensure its continuing viability. *See, e.g.*, Doc. No. 69.1, Fourth Status Report and Motion to Extend Stay of Proceedings (Aug. 12, 2009), Ex. 1 (Settlement Agreement), at 4 ¶ 12 (providing that petitioners will submit a notice to the Board dismissing their petitions after final permit modification issues).

During negotiations, petitioners were reluctant to abandon their petitions until after the Region had completed all of its commitments under the settlement agreement

and issued a final permit modification substantially similar to the negotiated draft permit modification. The Region understands that petitioners were concerned that certain arguments that they maintain were raised in their original petitions¹ might not be re-assertable in a petition for review of the permit modification, which has a limited scope. Petitioners also have expressed concern that the Region might frustrate the settlement in a manner that could evade Board review, and a preference for keeping the matter before the Board, as a neutral arbiter, until the Region has fulfilled its commitments under the settlement agreement.² Additionally, petitioner U.S. Department of the Interior has expressed unique institutional concerns that apparently make it more difficult for the Department to initiate new litigation than to maintain existing litigation.³

The Region agreed, as part of settlement discussions, to request that the Board stay, rather than dismiss, the petitions, pending the completion of the steps envisioned by the parties and the modification process. Staying the petitions would be consistent with the parties' understanding regarding implementation of the settlement agreement and how petitioners' litigation positions could be preserved pending completion of relevant steps of that agreement. Therefore, the Region has so far not sought, and does not now seek, dismissal of the petitions.

¹ The parties disagree on which arguments in the petitions were properly preserved, and which permit conditions have properly been contested. *See, e.g.*, Doc. No. 56, Transcript from Oral Argument (May 6, 2009), at 10, 12, 17 (statements of Ms. Menoyo and Ms. Lepore stating that they believed their petitions contested the entire permit). To facilitate settlement and avoid collateral disputes, the Region has not yet issued a notice of uncontested and severable conditions under 40 C.F.R. § 124.16(a)(2), and, assuming the settlement is implemented, it will not be necessary to litigate these questions before the Board. The Region intends to put the permit into effect at the time of the final permit modification.

² For example, the Department of the Interior expresses a concern that the Region might decide not to issue any final permit modification at all. *See* Doc. No. 73, Opposition of the Department of the Interior to the Premature Dismissal of this Appeal (Sept. 2, 2009), at 2.

³ *See id.*

**RESPONSE TO REQUEST TO SHOW CAUSE
WHY PETITIONS SHOULD NOT BE DISMISSED**

In some cases, dismissal of a petition may be appropriate if and when all contested conditions have been withdrawn. *See In re Cavenham Forest Indus.*, 5 E.A.D. 772, 728 & n.10 (EAB 1995) (after petitioner and Region 6 filed joint motion to remand permit, petitioner later sought to reinstate appeal, requesting “clarifying comments” regarding the applicability of several permit conditions that petitioner did not challenge in its original petition for review; Board declined to reinstate appeal since all contested conditions had been remanded, and no conditions remained for the Board to review); *In re City of Port St. Joe*, 5 E.A.D. 6, 9 (1994) (appeal mooted by Region 4’s withdrawal of permit under predecessor to 40 C.F.R. § 124.19(d), despite petitioner’s objection to the new draft permit proposed to replace it); *In re City of Haverhill Wastewater Treatment Facility*, NPDES Appeal No. 08-01, at 2 (EAB, Feb. 28, 2008) (Order Dismissing Petition for Review) (after Region 1 withdrew sole contested condition, Board granted Region’s assented-to motion to dismiss petition as moot). However, dismissal may not be appropriate in all cases, and this case is distinguishable from *Cavenham*, *City of Port St. Joe*, and *City of Haverhill* in several respects.

- A. Dismissal is inappropriate because the parties disagree as to whether all contested conditions have been withdrawn.

In this case, the Region believes that all properly contested conditions have been withdrawn, but petitioners have not conceded this point, and the parties do not agree which permit conditions the petitions actually contested.⁴ While the Region disagrees with petitioners’ analysis of their own petitions, if the Board were to agree with petitioners that the petitions effectively contested conditions other than those withdrawn

⁴ See *supra* note 1.

in the Region's July 9, 2009 Notice of Withdrawal of Conditions Pursuant to 40 C.F.R. § 124.19(d), then the petitions would not be entirely moot.⁵ Given the posture of settlement, the parties have not yet sought (and do not now seek) a Board decision on this question. Since the parties are resolving this matter by settlement, judicial economy counsels against resolving that dispute.

Neither *Cavenham, City of Port St. Joe*, nor *City of Haverhill* involved a dispute as to which conditions were contested. Consequently, this case is distinguishable.

B. Dismissal is prudentially inappropriate because of the parties' settlement.

The settlement agreement here was premised on, and petitioners entered into the agreement in reliance on, the Region fulfilling certain conditions before petitioners would withdraw their petitions. Under these circumstances, it is appropriate for the Board to refrain from dismissing the petitions at this time.

To be sure, the Board is not constrained by the parties' settlement agreement or the parties' understanding in reaching that agreement. Nevertheless, declining to dismiss the petitions now would effectuate the parties' understanding in reaching, with some

⁵ Indeed, while the issue is not squarely presented here, in some cases a petition can present a live controversy even if it does not contest *any* conditions of a permit. Petitions filed by parties other than the permittee (e.g., environmental or citizens' organizations) may include a combination of challenges to conditions that are actually in the final permit, and challenges to the Region's failure to include a requested condition in the final permit. In such cases, a petition may present a live controversy even after withdrawal of all contested conditions. Thus, strictly as a jurisdictional question, it is not necessarily the case that upon withdrawal of all contested conditions the petition is moot. For example, in *In re Boston & Maine Corporation*, the petition (filed by a nonprofit environmental organization) did not directly contest any conditions that the Region *did* include in the permit, but rather challenged the Region's decision *not* to include certain other conditions that the petitioner had requested. The Region's Notice of Uncontested and Severable Conditions stated that no permit conditions had been contested. The parties agreed to settle the appeal via a permit modification, and the Board granted the Region's request for a stay in order to modify the permit—despite the fact that no contested conditions were, or had ever been, before the Board. See *In re Boston & Maine Corp.*, NPDES Appeal No. 05-17, Doc. Nos. 1 (Petition for Review) (Oct. 27, 2005), 21 (Notice of Uncontested and Severable Conditions) (June 1, 2006), 22 (Status Report and Motion to Extend Stay of Proceedings) (June 6, 2006), 23 (Order Granting Motion for Stay of Proceedings) (June 7, 2006) (all available from the Board's web site at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Dockets/NPDES+05-17). While the precise posture of *Boston & Maine*—in which *no* conditions were contested—may be unusual, it may not be unique, and it illustrates that a live controversy may remain even when there are no contested conditions.

difficulty, a negotiated settlement, and would preserve the status quo without prejudicing any party. Declining to dismiss the petitions now for these reasons would be well within the Board's discretion. *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (“[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.”) (quoting *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764 (8th Cir. 1953)).

The Region does not necessarily endorse the specific concerns that motivated petitioners to insist upon the sequence of events specified in the settlement agreement, but does honor its agreement to undertake a process by which petitioners would not be forced to abandon their petitions at this point.⁶ Again, neither *Cavenham, City of Port St. Joe*, nor *City of Haverhill* involved a settlement agreement by which the Region agreed to seek a stay of proceedings pending future actions to be undertaken by the Region. Consequently, this case is distinguishable.

Moreover, the question of the relevance of a settlement agreement to whether a petition should be dismissed extends beyond this particular case. The Region has often settled permit appeals, with or (more often) without a separate written settlement agreement, by the Region modifying the challenged permit while the petition remains stayed. In the Region's experience, petitioners in such cases typically express a preference for keeping their petitions “alive” before the Board pending the Region's final action, for a variety of reasons. Some petitioners are concerned that the Region might

⁶ Indeed, it is possible that the parties here would not have reached a settlement agreement if petitioners had expected that their petitions would be dismissed upon withdrawal of the phosphorus effluent limits.

frustrate the settlement in a manner that might evade Board review, and prefer to keep the matter before the Board, as a neutral arbiter, until the Region has fulfilled its commitments under the settlement agreement.⁷ Some petitioners believe that, if the Region is required to file regular status reports before the Board and request additional extensions of the stay, this process will pressure the Region to move forward expeditiously with the permit modification, whereas without this requirement, the Region would experience less (or no) time pressure to complete its commitments under the settlement. Finally, notwithstanding assurances that any final permit modification can be challenged under 40 C.F.R. § 124.19, many petitioners are simply reluctant to abandon timely-filed petitions until the permitting authority has completed its obligations under the agreement, for fear that they may inadvertently forfeit arguments in the event that the settlement fails and future litigation is necessary. For these reasons, and perhaps others unknown to the Region, petitioners typically prefer to avoid any process by which their petitions would be dismissed until all steps of the settlement have been completed. *Cf. In re Seminole Elec. Coop. Inc.*, PSD Appeal No. 08-09, Doc. No. 38 (Sierra Club's Response to Seminole Electric Cooperative Inc.'s Motion to Dismiss Sierra Club's Appeal as Moot) (July 17, 2009).⁸

When agreeing to settle a permit appeal via a permit modification, in recognition (if not endorsement) of petitioners' concerns and to remove potential obstacles to settlement, the Region often accedes to a request, and sometimes proposes, that the

⁷ The Department of the Interior has expressed such concerns here. *See supra* note 2.

⁸ In the interest of conserving paper, the Region asks the Board to take judicial notice of filings in other proceedings before the Board. This document is available from the Board's web site at [http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/DD6FAA82F35CDB92852575F90052DFBE/\\$File/Dismiss%20Sierra%20as%20Moot...38.pdf](http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/DD6FAA82F35CDB92852575F90052DFBE/$File/Dismiss%20Sierra%20as%20Moot...38.pdf). The Region cites this third-party filing for the sole purpose of illustrating how a petitioner may fear premature dismissal.

parties seek a stay of proceedings pending completion of the permit modification process. The Region has in the past informed petitioners (in this and other cases) that, based on its experience, the Board has generally granted a joint or assented-to request for a stay of proceedings for the Region to process a permit modification that would resolve the appeal. For example, in *In re Belchertown Water Reclamation Facility*, the Region issued a combined Notice of Uncontested and Severable Conditions and Withdrawal of Certain Contested Conditions. The parties then jointly moved for, and received, a stay of proceedings while the Region modified the permit. See *In re Belchertown Water Reclamation Facility*, NPDES Appeal No. 06-15, Doc. Nos. 10 (Notice of Uncontested and Severable Conditions and Withdrawal of Certain Contested Conditions) (Sept. 29, 2005), 11 (Status Report and Joint Motion to Extend Stay of the Proceedings) (Sept. 29, 2005), 12 & 13 (Order Granting Joint Motion to Extend Stay of Proceedings) (Oct. 5, 2005);⁹ accord *In re Town of Marion*, NPDES Appeal No. 06-15, Doc. Nos. 10 (Joint Status Report and Second Motion for Stay of Proceedings) (Feb. 16, 2007) (requesting stay of proceedings so that the Region could withdraw certain contested conditions and issue a permit modification modifying those conditions), 11 (Order Granting Motion for Second Stay of Proceedings) (Feb. 20, 2007), 14 & 15 (Joint Status Report and Third Motion for Stay of the Proceedings) (May 21, 2007) (reporting that the Region had in fact withdrawn certain contested conditions and issued a draft permit modification, and jointly requesting a further stay), 16 (Order Granting Motion for Third Stay of Proceedings) (May 25, 2007);¹⁰ *In re Esleeck Mfg. Co.*, NPDES Appeal No. 01-01, Joint Motion for

⁹ All available from the Board's web site at http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Dockets/NPDES+05-10.

¹⁰ All available from the Board's web site at http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Dockets/NPDES+06-15.

Stay of the Proceedings (Feb. 2001) (reporting that Region intended to withdraw the sole contested condition and to propose a permit modification that would replace that condition with a different condition, and requesting a stay of proceedings to accomplish this), attached as Exhibit A.¹¹ These are all relatively recent Region 1 permit appeals, and are not intended to be an exhaustive list of appeals resolved by settlement with a stay of proceedings pending permit modification.

The Region does not suggest that the Board is constrained by its past practice in these cases, but they do illustrate the basis for the Region's reliance on past experience before the Board in advising petitioners interested in settlement that they may keep their petitions before the Board pending completion of the permit modification.

Moreover, there are prudential grounds against a policy of dismissing petitions upon withdrawal of contested conditions. As noted above, petitioners often express concern over lack of certainty and recourse if the Region fails to finalize an agreed-upon permit modification, and are assuaged by the option of keeping their petitions stayed pending completion of the permit modification. A rule requiring dismissal in such circumstances could impede the Region's ability to reach compromises on future appeals, which would result in more cases being litigated even where parties could potentially reach a consensual agreement.¹²

¹¹ Exhibit A is not a true, or even final, copy of this motion. Because of the age of *Esleek*, and pursuant to the applicable records retention schedule, the Region no longer maintains an on-site case file, nor does the Board's web site maintain a copy. The Region could not locate a true copy in time to file with this response. The Region requests that the Board take judicial notice of Exhibit A for the limited purpose of illustrating the basis for the Region's advice to petitioners that it is appropriate to request a stay of proceedings pending a permit modification, even where all contested conditions have been withdrawn. The Board's final order, which does not recount the aspect of the history for which the Region cites *Esleek*, is available from the Board's web site at <http://www.epa.gov/cab/orders/esleek.pdf>.

¹² See *supra* note 6.

PROPOSED ALTERNATIVE COURSE OF ACTION

If the Board declines to extend the stay of the petitions until January 2010 as requested in the Region's assented-to Fourth Status Report and Motion to Extend Stay of Proceedings, then the Region proposes in the alternative that the Board stay the petitions until October 15, 2009, and order the Region to submit a status report by that date. The Region has selected this date because the public comment period for the draft permit modification closed on September 10, 2009. The Region has not yet received any adverse comments, and with each passing day, the probability that timely-submitted comments will arrive in the mail diminishes. In all likelihood, the Region will be able to issue the final permit modification, and petitioners should be able to request dismissal of their petitions, by October 15. If, however, the Region has for any reason not issued the final permit modification by October 15, then the Region will advise the Board of its progress, plan, and projected schedule, and propose an appropriate course of action.

Alternatively, in light of the issues discussed above, the Board could hold its Order to Show Cause in abeyance, neither dismissing the petitions nor staying them, but rather keeping the question under advisement.

CONCLUSION

For the reasons above, dismissal would be inappropriate in this case at this point. The Region requests that the Board extend the stay until January 13, 2010, or, in the alternative, until October 15, 2009.

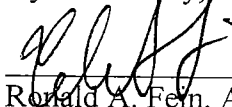
The Region's undersigned counsel also represents that the Region has consulted with the Office of Regional Counsel for Region 10 and the Office of General Counsel regarding the relationship between this case and *In re CH2M Hill Plateau Remediation*

Company, LLC, NPDES Appeal No. 09-08. *CH2M Hill* does not raise the particular concerns relevant here: a potential dispute regarding whether all contested conditions have in fact been withdrawn, and a settlement agreement requiring the Region to fulfill certain conditions before petitioners would withdraw their petitions. Consequently, the Agency views the two cases as distinguishable, and the appropriate result here may not apply to the particular facts and circumstances presented in *CH2M Hill*. Dismissal would be infelicitous here for reasons specific to this case.

Respectfully submitted,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1

By its attorney,



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Date: September 15, 2009

Of counsel:

Peter Ford, Assistant General Counsel
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Washington, D.C.

EXHIBIT A

**Joint Motion for Stay of the Proceedings
In re Esleck Manufacturing Co., Inc.
NPDES Appeal No. 01-01**

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

In the Matter of:)
)

Esleeck Manufacturing Co., Inc.)
)
_____)

NPDES Appeal No. 01-01

JOINT MOTION FOR STAY OF THE PROCEEDINGS

The New England Region of the Environmental Protection Agency (“EPA” or the “Region”) and Esleeck Manufacturing Co., Inc. (“Esleeck” or “Petitioner”) respectfully submit to the Environmental Appeals Board (“Board”) this joint motion for a stay of the proceedings in the above-referenced appeal. The basis for this motion is to allow the Parties to resolve the issue raised by Petitioner in its appeal, as discussed below.

BACKGROUND

On December 8, 2000, EPA reissued a National Pollutant Discharge Elimination System (“NPDES”) Permit, No. MA0005011, to Esleeck for its wastewater discharge. EPA sent the reissued permit to Esleeck on December 12, 2000. On January 5, 2001, Esleeck filed a petition for review by the Board contesting the permit’s maximum temperature limit on outfall 001. The Board received the petition on January 10, 2001, and directed the Region to submit a response by March 13, 2001 that addresses Esleeck’s contentions and whether Esleeck has satisfied the requirements for obtaining review.

GROUNDNS FOR STAY

The Region has evaluated Esleeck’s arguments in its petition and now agrees that the

maximum temperature limit on the discharge from outfall 001 is unnecessary. As stated in the Region's February 1, 2001 letter (Exhibit 1) to Esleeck and the Board which identifies the contested and uncontested conditions in the permit, the Region intends to withdraw the temperature limit after the permit goes into effect, and to propose a permit modification that would replace the temperature limit with a monitoring only requirement. Esleeck agrees that such a permit modification would address the concerns it raised in its petition.

The Region will withdraw the temperature limit and propose the permit modification shortly after the permit takes effect, which will occur on March 3, 2001, pursuant to 40 C.F.R. § 124.16(a)(2). Following public notice and comment, the Region will finalize the permit modification unless public comment raises significant issues that lead the Region to reconsider the modification. The Region expects to be able to complete the permit modification process by May 15, 2001.

REQUESTED RELIEF

Accordingly, the Parties request that this matter be stayed to allow the Parties to resolve the issue through the permit modification process. To do otherwise would require the Parties to divert their time and effort to the proceeding before this Board, when there is a substantial likelihood that the issue raised in the petition for review will be addressed through permit modification. Therefore, in an effort to conserve resources and to encourage efficiency and promote judicial economy, the Parties jointly request that these proceedings be stayed until June 1, 2001. At that time, the Parties would submit a status report regarding the status of the permit modification and whether it is appropriate to continue the stay, dismiss the Petition, or establish a

schedule for EPA's response to the Petition.

Respectfully submitted,

U.S. Environmental Protection Agency,
New England Region

Esleek Manufacturing Company, Inc.

By its Attorney,
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Dated: February __, 2001

Dated: February __, 2001

CERTIFICATE OF SERVICE

I, Ronald Fein, hereby certify that copies of the foregoing Response to Order to Show Cause Why Petitions Should Not Be Dismissed were sent on the 15th day of September 2009 to the following persons in the manner described below:

Original by first class mail
Copy by fax
Copy posted to CDX electronic system

Eurika Durr, Clerk of the Board
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Signed: September 15, 2009

