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December 3, 2009

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

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ENVIR. APPEALS BOARD

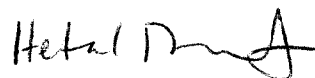
Re: City of Cambridge, DPW Combined Sewer Overflows (CSO)  
NPDES Permit No. MA 0101974  
NPDES Appeal No. 09-17

Dear Sir/Madam:

Enclosed for filing is the City of Cambridge's Motion to Intervene as a Party Respondent.

Thank you.

Sincerely,



Hetal S. Dhagat

Enclosure

C: Carl Dierker, Esq.  
Roger Janson  
Stephen S. Perkins  
Stephen H. Kaiser  
Nancy E. Glowa, Esq. (by email)  
Donald A. Drisdell, Esq. (by email)

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

\_\_\_\_\_) )  
In the Matter of: ) )  
 ) )  
City of Cambridge, DPW ) NPDES Appeal No. 09-17  
Combined Sewer Overflows (CSO) ) )  
 ) )  
NPDES Permit No. MA 0101974 ) )  
 ) )  
Petitioner: Stephen H. Kaiser ) )  
Respondent: EPA Region I ) )  
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**CITY OF CAMBRIDGE'S MOTION TO  
INTERVENE AS A PARTY RESPONDENT**

Pursuant to the Environmental Appeals Board ("EAB") *Practice Manual* at 30-31 (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, an individual Stephen H. Kaiser has filed a petition asking that EAB review a permit determination issued jointly by the United States Environmental Protection Agency ("EPA"), Region I, and the Massachusetts Department of Environmental Protection concerning the re-issuance of the City's NPDES Permit MA0101974 (the "NPDES Permit").
2. The petition does not specifically name any respondent.
3. Mr. Kaiser claims that various conditions contained within or omitted from the City's NPDES Permit do not adequately address the "interaction of CSO and SSO overflows

during wet weather conditions” at the Alewife Brook. Petition at p.2. The Petition does not raise any concerns with respect to the Charles River portions of the NPDES Permit.

4. Mr. Kaiser seeks to stop a drainage project planned by the City (Contract 12) that is associated with the Massachusetts Water Resource Authority CSO Control Plan for Boston Harbor and to impose numerous other onerous reporting requirements on the City through the NPDES Permit. Any such modifications have the potential to affect whether or not the City can and will comply with the NPDES Permit over time.

5. “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).<sup>1</sup> 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 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); *In re Seminole Electric Coop., Inc.*, PSD Appeal No. 08-09, slip op. at 13, n.16 (EAB, Sept. 22, 2009) (permittee’s motion to intervene granted).

6. 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 NPDES Permit and the outcome of this matter.

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

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 may 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 combined sewer overflow (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 ¶ 11 below.

7. 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 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.”).

8. The City’s NPDES Permit has been issued in compliance with “Final Determination to Extend Variance For Combined Sewer Overflow Discharges To Lower Charles River /Charles Basin,” valid until October 2010, and with “Final Determination to Extend Variance for Combined Sewer Overflow Discharges To Alewife Brook/Upper Mystic River,” valid until September 1, 2010. Both Variances are attached as exhibits to the 2009 NPDES Permit.

9. This is the City’s NPDES Permit that the Petitioner now seeks to challenge in this EAB proceeding.

10. Pursuant to a series of negotiated agreements with the MWRA, the City has made extensive efforts to implement these CSO Control Projects. Most recently, the MWRA reached an agreement with the City as to a cost-sharing arrangement to implement the various CSO Control Projects, with the total cost over time estimated at \$117.4 million, *not including any additional costs to implement the relief requested by the petitioner in this appeal*. MWRA’s cost share is estimated at approximately 52%, and the City’s share is estimated at approximately 48%.

11. As documented in numerous Compliance Orders issued by the federal Court in the enforcement litigation, these Cambridge CSO Control Projects – and the delays in their implementation being caused by third party citizen appeals - are being closely monitored by the United States District Court Judge overseeing the enforcement litigation (see numerous Court Compliance Orders in *U.S. v. Metropolitan Dist. Com’n* in the District Court of Massachusetts).<sup>2</sup>

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<sup>2</sup> 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.

12. 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.<sup>3</sup>

13. 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.

14. 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 November 3, 2009. No substantive proceedings have occurred in this case, and the City's participation will not delay this proceeding in any way.

15. 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.<sup>4</sup>

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<sup>3</sup> 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.

<sup>4</sup> 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

16. 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 stricter 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.

17. Without limitation, the City is aware that, by letter dated November 6, 2009, 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).”<sup>5</sup> 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 December 22, 2009, that addresses the

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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.

<sup>5</sup> 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.

petitioner's contentions and whether petitioner has satisfied the requirements for obtaining review under 40 CFR 124.19(a).<sup>6</sup>

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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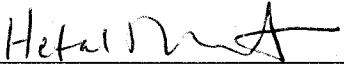
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<sup>6</sup> In the event that, before ruling on the City's motion to intervene, EAB wants to receive the City's response addressing the petitioner's contentions and whether petitioner has satisfied the requirements for obtaining review under 40 CFR 124.19(a), then the City respectfully requests leave to submit that response by December 22, 2009.



**CERTIFICATE OF SERVICE**

I hereby certify that I have served of a copy of the foregoing on all parties by first class mail, postage prepaid this 2<sup>nd</sup> day of December, 2009.

  
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