



CONSERVATION LAW FOUNDATION

October 12, 2005

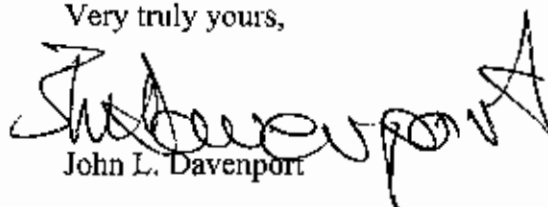
Ms. Erica Durr  
U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board (MC 1103B)  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Re: NPDES Appeal Nos. 05-05, 05-06, 05-07, 05-08, 05-09 and 05-12  
NPDES Permit Nos. MA0100480, MA0100412 and MA0101001

Dear Ms. Durr:

Enclosed for filing are the original and five copies of the Conservation Law Foundation's Motion for Leave to Intervene in the above captioned appeals, together with its Memorandum of Law in support thereof and the Certificate of Service. (The issues raised in these papers are identical with respect to all of the captioned appeals and NPDES permits, and Ms. Cheryl McCoy of the EAB accordingly advised that only one set of filings would be required).

Very truly yours,

  
John L. Davenport

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

In re: City of Marlborough Westerly )  
Waste Treatment Works )  
)  
NPDES Permit No. MA0100480 )  
\_\_\_\_\_ )

APPEAL Nos.:  
NPDES 05-05  
NPDES 05-06  
NPDES 05-07  
NPDES 05-08  
NPDES 05-09  
NPDES 05-12

In re: City of Westborough Wastewater )  
Treatment Plant )  
)  
NPDES Permit No. MA0100412 )  
\_\_\_\_\_ )

In re: Town of Maynard Water Pollution )  
Control Facility )  
)  
NPDES Permit No. MA0101001 )  
\_\_\_\_\_ )

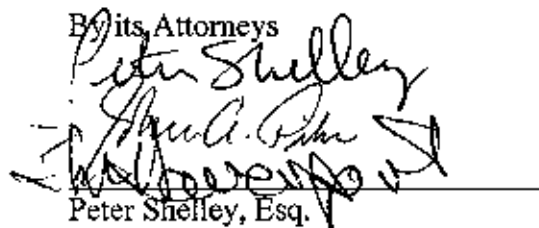
**CONSERVATION LAW FOUNDATION'S  
MOTION FOR LEAVE TO INTERVENE**

The Conservation Law Foundation hereby moves for leave to intervene in connection with the Petitions of the Cities of Westborough and Marlborough and the Town of Maynard, Massachusetts and the Organization for the Assabet River for Review of NPDES Permit Nos. MA0100480, MA0100412 and MA010001 issued on May 26, 2005 by Region 1 of the U.S. Department of Environmental Protection authorizing the above captioned wastewater treatment facilities to discharge into the Assabet River.

A supporting Memorandum is filed herewith.

CONSERVATION LAW FOUNDATION

By its Attorneys

Three handwritten signatures are stacked vertically. The top signature is 'Peter Shelley', the middle is 'John A. Pike', and the bottom is 'John L. Davenport'. A horizontal line is drawn across the bottom of the signatures.

Peter Shelley, Esq.

John A. Pike, Esq.

John L. Davenport, Esq.

Conservation Law Foundation

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Dated:           October 11, 2005

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

In re: City of Marlborough Westerly )  
Waste Treatment Works )  
 )  
NPDES Permit No. MA0100480 )  
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APPEAL Nos.:  
NPDES 05-05  
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In re: City of Westborough Wastewater )  
Treatment Plant )  
 )  
NPDES Permit No. MA0100412 )  
 )

In re: Town of Maynard Water Pollution )  
Control Facility )  
 )  
NPDES Permit No. MA0101001 )  
 )

**MEMORANDUM OF LAW IN SUPPORT OF  
CONSERVATION LAW FOUNDATION'S MOTION  
FOR LEAVE TO INTERVENE**

**1. Background**

Each of the three captioned NPDES Permits (the "Permits"), all issued on May 26, 2005 by the United States Environmental Protection Agency ("EPA") and the Massachusetts Department of Environmental Protection ("MADEP") pursuant to the Federal Clean Water Act, 33 U.S.C. §§1251 et seq. (the "CWA") and the Massachusetts Clean Waters Act, M.G.L. c. 21,

§§26-53<sup>1</sup>, authorizes the wastewater treatment facility (the “WWTF”) operated by its Permittee to discharge into the Assabet River<sup>2</sup>. Each Permit contains substantially similar, and, in the case of phosphorous, identical, limitations and conditions<sup>3</sup>.

The Administrative Record<sup>4</sup> in the proceedings leading up to the issuance of the Permits shows that (i) the eutrophic conditions in the Assabet River and its impoundments cause it to fail by a wide margin to meet the water quality standards designated for those waters by the Commonwealth of Massachusetts<sup>5</sup>, (ii) those eutrophic conditions are caused by phosphorous in the River and in the sediments on its bottom, and (iii) the majority of the phosphorous entering the River is from the four WWTFs<sup>6</sup>. Most importantly, the Assabet River Total Maximum Daily Load for Total Phosphorous, Report No. MA82B-01-2004-01, Control No. CN 201.0 (the “TMDL Report”) conclusively shows that the Permits’ new 0.1 mg/l summertime phosphorous limit will not result in the attainment of the designated water quality standards unless 90% of the phosphorous that recirculates into the water column from the bottom sediments is removed. If the phosphorous flux is reduced by only 75%, substantially lower effluent limits, - 0.05 or 0.025

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<sup>1</sup> The Organization for the Assabet River appealed a fourth such permit, - NPDES Permit No. MA0101788 issued to the Town of Hudson, Massachusetts, - but subsequently withdrew that appeal. Since Hudson had not appealed that Permit, it is no longer under appeal and is currently in effect.

<sup>2</sup> The Assabet River rises in Westborough, Massachusetts and flows northeast for 31 miles through Marlborough, Northborough, Berlin, Hudson, Stow, Maynard, Acton and Concord before joining the Sudbury River to form the Concord River, which empties into the Merrimack River, which ultimately empties into the Atlantic Ocean on the northeast coast of Massachusetts. The last four miles of the Assabet were designated by Congress in 1999 as “Wild and Scenic”.

<sup>3</sup> The phosphorous limit from May 1 to October 31 is an average monthly concentration limit of 0.1 mg/l, based on a 60-day rolling average. The limit for April is a median of 0.1 mg/l, with a 0.2 mg/l daily maximum. These new 0.1 mg/l limits are to be complied with over a 54-month schedule. In the interim the limit is 0.75 mg/l. The limit from November 1 to March 31 is 1.0 mg/l, to be complied with within one year of the effective date of the Permits.

<sup>4</sup> See, e.g., the Fact Sheets accompanying the draft Permits; Assabet River Total Maximum Daily Load for Phosphorous, Report No. MA82B-01-2004-01.

<sup>5</sup> The Assabet River is designated as a Class B water under the Massachusetts water quality standards, 314 CMR 4.05(3)b. As such, it should be capable of providing and supporting habitat for fish and other aquatic wildlife, and for primary and secondary contact recreation, in addition to meeting aesthetic criteria. However, for many years it has been designated under §303(d) of the Clean Water Act as impaired for nutrients (primarily phosphorous) and for organic enrichment and low dissolved oxygen.

mg/l, - would be required. Without any reduction of the flux, even if the phosphorous effluent limit were reduced to zero, the applicable water quality standards would not be achieved for many years.

Notwithstanding the TMDL Report's clear conclusions as to the necessity of a 90% reduction in the phosphorous flux in combination with the summertime 0.10 mg/l effluent limitation (or, in the alternative, a substantially lower effluent limitation in the event the flux is reduced by a lesser percentage), the Permits neither mandate such flux reduction nor the necessary lower effluent limitation in the event that such reduction is for any reason not achieved.

40 CFR §122.4(d) provides that:

"No [NPDES] permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States (emphasis added).

By failing to mandate conditions that the TMDL Report states are required for the achievement of the State's water quality standards, the Permits on their face fail to "ensure" compliance with those standards and therefore violate the prohibition of 40 CFR §122.4(d)<sup>7</sup>. EPA Region 1's suggestion in its Response to Comments that more stringent effluent limits may be imposed in the next renewal of the Permits if the 90% flux reduction is not achieved does not "ensure" anything.

The recent decision of the Environmental Appeals Board in its Order Denying Petition for Review in Part and Remanding in Part, In re City of Marlborough, Massachusetts, Easterly

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<sup>6</sup> At 7Q10 flows 80% of the Assabet is effluent from the four WWTFs and will be 100% effluent when the WWTFs reach their design flows. Point sources (principally the four WWTFs) are the source of 88% to 98% of the biologically available phosphorous load in the Assabet (TMDL Report, page 5).

<sup>7</sup> The standard NPDES permit condition that the discharge "shall not cause a violation of the water quality standards of the receiving waters" (Part I.A.1.a of the Permits) does not cure this defect. See Hop Brook Decision, *infra*, at page 21. In fact, the Permits' failure to mandate effluent limits and other conditions required for the attainment of the water quality standards will result in the breach of this condition.

Wastewater Treatment Facility, NPDES Appeal No. 04-13, EAB, August 11, 2005 (the “Hop Brook Decision”)<sup>8</sup> compels a remand of the Permits to cure these defects. The permit conditions and underlying facts involved in the Hop Brook Decision with regard to phosphorous are virtually identical to those involved here. The receiving waters in that case are failing by a wide margin to meet the applicable water quality standards for the same reason, - eutrophication caused almost entirely by the wastewater treatment facility’s phosphorous discharge. Although no TMDL study of Hop Brook and the ponds through which it flows has been done, there is ample evidence in the record that the permit’s new 0.10 mg/l summertime phosphorous effluent limitation would not result in the attainment of the water quality standards without adaptive management measures to reduce phosphorous recycling from the bottom of Hop Brook and its ponds. While EPA Region 1 in its response to comments and in the Fact Sheet accompanying the draft permit recommended such adaptive management measures and suggested that a more stringent effluent limitation may be imposed in the next renewal permit if the new 0.10 mg/l limitation does not result in attainment of the water quality standards, the permit failed to mandate either such measures or such more stringent limitation. Finding that Region 1 had failed to demonstrate that the permit will “ensure” compliance with the applicable water quality standards, and notwithstanding MADEP’s certification of the permit under §401(a) of the CWA<sup>9</sup>, the EAB remanded the permit, directing the Region either to demonstrate that the permit as written will ensure such compliance, or make appropriate modifications to it.

“Based on the record before us, it is unclear whether the Permit complies with the regulatory prohibition on issuing a permit ‘when imposition of conditions cannot *ensure*

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<sup>8</sup> The Conservation Law Foundation moved to intervene in the petitions to review the Hop Brook NPDES permit filed by the Permittee and the Town of Sudbury, and the EAB by order dated January 10, 2005 granted CLF’s motion “to the extent that CLF seeks leave to participate as amicus curiae and respond to the petitions for review or to other submissions filed in this proceeding.”

<sup>9</sup> “. . . when the Region reasonably believes that a state water quality standard requires a more stringent limitation than that reflected in a state certification, the Region has an independent duty under section 301(b)(1)(C), 33 U.S.C. §1311(b)(1)(C), to include more stringent limitations”. (citations omitted). Hop Brook Decision, footnote 22.

compliance with applicable water quality requirements.' 40 C.F.R. §122.4(d) (emphasis in the original). . . . the record does not indicate whether the Permit's 0.1 mg/l phosphorous limitation, by itself, will meet the state's water quality standards. With regard to the likelihood that imposition of the 0.1 mg/l phosphorous limitation will be sufficient to meet water quality standards, the Region states that such a result may be possible, but a mere possibility of compliance does not 'ensure' compliance." (pgs 21-22)

"Without further explanation, [the Region's statements in the Fact Sheet and responses to comments] would suggest that the Region harbors concern that a discharge limitation, by itself, may not be sufficient to meet water quality standards. Nevertheless, the Permit does not contain any provisions requiring that Marlborough study or otherwise address the potential for phosphorous releases from the sediment in the Hop Brook ponds during the term of this Permit; nor does the Permit contain any provisions requiring further action, evaluation, or modification in the event that water quality standards are not achieved despite compliance with the 0.1 mg/l phosphorous limitation." (pg 22)

Given the TMDL Report on the Assabet, the case for remanding the Assabet Permits on these same grounds is at least as strong as was the case with the Hop Brook Decision.

Region 1 is apparently concerned that the EPA may not have jurisdiction under the CWA to require phosphorous sediment flux reduction because it is uncertain that the sediments themselves are "point sources". The EAB in the Hop Brook Decision exhibited no such concern, remanding the permit specifically for its failure to require the permittee to "address the potential for phosphorous releases from the sediment" (supra).

Because of the substantial possibility that a 90% flux reduction will not be feasible and that a substantially more stringent phosphorous effluent limitation will therefore be required, the Permits should also require that the Permittees, in upgrading their WWTFs to meet the new 0.1 mg/l limit, adopt "scalable" technology that can more readily be adapted to meet such more stringent limit. If the WWTFs were to install non-scalable technology incapable of doing better than 0.1 mg/l, the Permittees would be forced to make further, duplicative expenditures to meet a lower limit.



**2. CLF's Interests Are Significantly Affected by the Permits and Are Not Adequately Protected by EPA Region I**

Because the Permits as currently written will not result in the Assabet River's attainment of the water quality standards designated for it by the Commonwealth of Massachusetts, CLF's organizational interests and the interests of its members would be significantly and adversely affected by the Permits' becoming final in their current form, and would be even more so if the EAB were to adopt the arguments set forth in the Petitions of Marlborough, Westborough and Maynard and weaken the Permits. CLF's interests in stricter limitations than Region I included in the Permit and in mandatory measures to deal with the sediment problems differ from and are not adequately represented by Region I.

Founded in 1966, the Conservation Law Foundation is a nonprofit, member-supported public interest advocacy organization. CLF is dedicated to solving environmental problems that threaten the people, communities, and natural resources of New England, including Massachusetts.

To further these goals, CLF undertakes litigation and other legal advocacy on behalf of its members' interests, and promotes public awareness, education, and citizen involvement in conserving natural resources, protecting public health, and promoting vital communities in the region. CLF has an unparalleled record of expertise and advocacy to protect the region's air quality, water quality, and marine resources.

CLF has a substantial organizational interest in restoration and protection of New England's precious waters. This interest is reflected in CLF's staunch advocacy of appropriate implementation of the Clean Water Act throughout New England and of the Water Management and Interbasin Transfer Acts in Massachusetts. CLF has addressed numerous water pollution problems through active involvement in every aspect of Clean Water Act implementation, and is

involved in several appeals of water withdrawal permits affecting stressed river basins in Massachusetts. It brought the lawsuit that led to the Boston harbor clean-up project.

Lastly, CLF has thousands of members throughout New England, approximately 2,700 of whom reside in Massachusetts, including over 50 residing in cities and towns through which the Assabet flows. The eutrophic conditions caused by the WWTFs' phosphorous emissions are preventing those members from enjoying the designated uses of the Assabet and the ponds through which it flows, namely fishing, swimming and boating, and are materially diminishing their scenic and aesthetic enjoyment of those waters. An EAB decision upholding the Permit as written, or, even worse, weakening it as urged by the Permittees' Petitions, will only ensure the continuation or worsening of these degraded conditions and will directly and significantly impair the interests of CLF and its members. Such an outcome violates the clear provisions of the CWA.

This EAB proceeding considers issues that have an enormous impact on the water quality of the Assabet River, - issues that in fact will determine whether or not the River will ever achieve its water quality standards.

CLF requests the opportunity to protect its interest in ensuring inclusion of conditions and limitations necessary to stop the WWTF's contribution to violations of water quality standards and the severe degradation of the Assabet River.

### **3. CLF's Participation Will Facilitate the Efficient Disposition of this Matter.**

All of the issues raised herein are fully within the scope of the Petitions for Review filed by the Marlborough, Westborough and Maynard and by the Organization for the Assabet River ("OAR"). CLF's intervention will neither delay the EAB proceedings, nor prejudice any party,

including the petitioning Permittees. If accepted for review, the Permittees' and OAR's Petitions will trigger a broad review of the conditions in the Permits, - particularly those pertaining to phosphorous, - and their underlying basis. CLF's involvement will facilitate the efficient completion of this EAB proceeding by providing timely analysis of the facts and law. CLF seeks to participate in order to make factual and legal arguments to support strengthening the Permits and oppose the petitioning Permittees' proposals to weaken them. CLF is particularly interested in establishing that, under the CWA, NPDES permits must impose numeric effluent limitations sufficiently stringent to ensure attainment of the applicable narrative as well as numeric water quality standards.

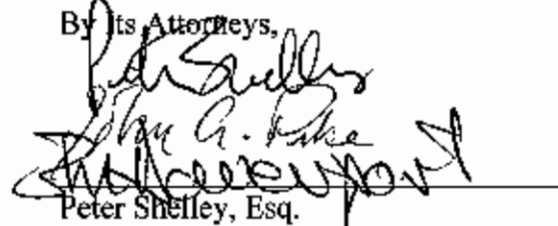
**Relief Requested**

For all of the foregoing reasons, CLF requests that the Board grant its motion for leave to intervene giving CLF a full right to participate in EAB proceedings concerning the Petitions of OAR and Marlborough, Westborough and Maynard. CLF further requests that the Board determine that Region I is required to include all conditions and limitations necessary to ensure that the applicable water quality standards will be met.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

By Its Attorneys,



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John A. Pike, Esq.

John L. Davenport, Esq.

Conservation Law Foundation

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Dated: October 11, 2005

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Motion of the Conservation Law Foundation For Leave To Intervene in the matter of the Petitions for Review of the above captioned NPDES Permits and of the Memorandum of Law in Support thereof were served by United States First Class Mail on the following persons, this 12th day of October, 2005:

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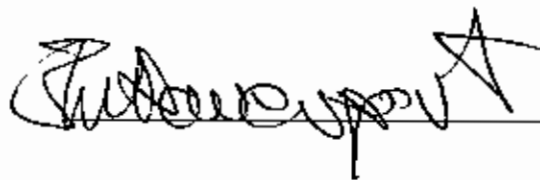
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Dated: October 12, 2005