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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN RE)
)
City of Marlborough Westerly Wastewater)
Treatment Facility)
NPDES No. MA0100480)
Appeal Nos. NPDES 05-05 and 05-09)
)
Town of Maynard Water Pollution)
Control Facility)
NPDES No. MA0101001)
Appeal Nos. NPDES 05-06 and 05-12)
)
Town of Westborough Wastewater)
Treatment Plant)
NPDES No. MA0100412)
Appeal Nos. NPDES 05-07 and 05-08)
)
)

MOTION TO STAY PROCEEDINGS

The United States Environmental Protection Agency, New England Region ("Region") requests that the Environmental Appeals Board ("Board") stay the proceedings related to the petitions for review filed by the Town of Westborough, Town of Maynard, City of Marlborough and the Organization for the Assabet River ("OAR") (collectively, "Petitions" or "Petitioners," as the case may be) in the above-captioned matters.

BACKGROUND AND BASIS FOR STAY

The basis for this stay of the proceedings is to allow the parties the opportunity to resolve or narrow the contested issues raised in the Petitions through a process of neutral, third-party mediation.

On May 26, 2005, the Region issued final National Pollutant Discharge Elimination System permits under the Clean Water Act to the Westborough Wastewater Treatment Plant Board, Town of Maynard, Town of Hudson and City of Marlborough ("Permittees"). The Final Permits authorize discharges of treated wastewater effluent to the Assabet River in Massachusetts from four publicly owned treatment works operated by the Permittees.

Westborough, Marlborough and Maynard each timely filed petitions for review with the Board. In addition, OAR filed petitions for review of each of those Final Permits, as well as the Final Permit for the Town of Hudson.¹ Among other things, OAR specifically challenged whether the phosphorus limits in the Final Permits were sufficient to ensure compliance with water quality standards in the absence of any requirement to ensure that the non-point source (i.e., sediment) phosphorus reduction contemplated by the Assabet River TMDL would occur. The Board instructed the Region to file responses to all the Petitions by August 29, 2005.

On August 19, 2005, the Region filed a Motion for Extensions of Time to File Response Briefs in order to consider the legal and policy implications of the Board's August 11, 2005 decision in City of Marlborough Easterly Wastewater Treatment Facility, 12 E.A.D. ___, NPDES Appeal No. 04-13, on the pending appeals. The Board in City of Marlborough partially remanded an NPDES permit issued to Marlborough that authorized POTW discharges of treated wastewater effluent to the Hop Brook in Massachusetts on the basis that the Region had not demonstrated that the permit as written would ensure compliance with water quality standards. By order dated August 25, 2005, the Board granted the Region's motion and set a new filing deadline of October 29, 2005.

Upon reviewing City of Marlborough as well as the remaining issues in the Petitions, the Region believes that mediation could help resolve the dispute over some or all of the appealed issues more quickly and cost-effectively than a protracted

¹ By notices dated September 23 and September 30, 2005, OAR voluntarily dismissed its petition for review of the Hudson permit in its entirety and its petitions for review of the Marlborough, Maynard and Westborough permits as they relate to the calculation of the metals limits. The Board issued an Order Dismissing Petition for Review of the Hudson permit in its entirety on October 4, 2005.

administrative appeals process and/or litigation in the state and federal courts. To that end, the Region has retained a skilled mediator to serve as a neutral convener for the limited purpose of helping the parties explore the possibility of mediation. More specifically, the convening mediator's role would be to assist the parties in exploring, without commitment, whether mediation is feasible in this case. If the parties decide that mediation would not be viable, the mediation process ends. If the parties determine to pursue mediation, the parties will either retain the existing mediator or select a new one for these more extended efforts.

To date, Marlborough and Westborough have agreed to participate in the first stage of the mediation process, which the Region expects to complete by November 21, 2005. Maynard has opted not to participate in mediation and is instead separately considering a settlement offer earlier made by OAR to Maynard, Marlborough and Westborough, which is scheduled to expire on October 21, 2005. Maynard has agreed to meet with the Region to further discuss the concerns raised in its Petition. OAR has decided not to participate in mediation at this time, in light of its outstanding settlement offers. It also has informed the Region that it believes the likelihood of mediation resolving the outstanding issues in a manner acceptable to all parties' is small and, therefore, the delay entailed by mediation is unwarranted. The Region respectfully disagrees with OAR's assessment. The Region has extended an open offer to Maynard and OAR to enter mediation at any time they deem appropriate in the future and will keep the two parties updated on the proceedings.

The basis for this motion is to allow the parties sufficient time to conclude the first stage of mediation. The Region is optimistic that a full or partial resolution of the contested issues is possible through mediation, but even in the event the parties opt against pursuing the second phase of mediation, the parties will have had an opportunity to exchange views and more fully appreciate the relative strengths and weaknesses of their positions going forward. Absent a stay, the parties will be required to divert their time and effort from mediation to the proceeding before this Board. Therefore, in an effort to conserve resources and to encourage efficiency and promote judicial economy, the Region requests that these proceedings be stayed and that the Board establish November 21, 2005 as the date by which the Region will provide the Board with a report

on the status of the mediation proceedings. If the parties agree to move forward with the second stage of the mediation process, the Region will request a further limited stay of the proceedings to allow the parties sufficient time to conclude mediation. If the parties decide to end the mediation process, the Region will inform the Board of its intentions with respect to the Permits then under appeal and suggest a future course of action regarding a briefing schedule.

Westborough and Maynard have informed the Region of their assent to this motion. Marlborough has not yet responded to the Region's messages regarding the motion. OAR has informed the Region that it will oppose the motion.

CONCLUSION

For the reasons set forth above, the Region respectfully requests that the Board to the stay the proceedings and establish November 21, 2005 as the date for filing a status report.

Respectfully Submitted, ~

U.S. Environmental Protection Agency
New England Region

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