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EPA New England

November 14, 2005

U.S. Environmental Protection Agency
Office of Regional Counsel
One Congress Street, Suite 1100
Boston, MA 02114-2023
Phone: (617) 918-1148
Fax: (617) 918-1029

PLEASE DELIVER TO:

Eurika Durr
Clerk of Board, Environmental Appeals Board
FAX (202) 233-0121

From:
Samir Bukhari
Office of Regional Counsel
US EPA, Region 1
(617) 918-1095

Number of Pages to Follow: 7

In Re

NPDES Appeal Nos. 05-05 and 05-09 (City of Marlborough Westerly Wastewater Treatment Facility)
NPDES Appeal Nos. 05-07 and 05-08 (Town of Westborough Wastewater Treatment Plant)

Faxed copy of Motion to Stay Proceedings Pending Partial Withdrawal and Modification of the Permits in the above-referenced matters. The originals will follow via express mail.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

November 14, 2005

VIA FAX AND EXPRESS MAIL

U.S. Environmental Protection Agency
Attn: Eurika Durr
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: Motions to Stay Proceedings

City of Marlborough Westerly Wastewater Treatment Facility
Appeal Nos. NPDES 05-05 and 05-09
Town of Westborough Wastewater Treatment Plant
Appeal Nos. NPDES 05-07 and 05-08

Dear Ms. Durr:

Please find four (4) originally executed Motions to Stay Proceedings Pending Withdrawal and Partial Modification of the Permits and five (5) copies submitted by EPA-New England Region in the above-referenced NPDES permit appeals.

If you should have any questions, please do not hesitate to contact me at 617-918-1095.

Sincerely,

Samir Bukhari
Attorney Advisor
Office of Regional Counsel
US EPA-Region 1

Enclosure

cc: Joseph M. Hamilton, Esq., Town of Westborough
Donald Anglehart, Esq., City of Marlborough
Kenneth L. Kimmell, Esq., Organization for the Assabet River
John L. Davenport, Esq., Conservation Law Foundation
Sheila Igoe, EPA-OGC
Linda Murphy, EPA-Region 1
Roger Janson, EPA-Region 1
Carl Dierker, EPA-Region 1
Ann Williams, EPA-Region 1

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 Westborough Wastewater Treatment Plant	)
NPDES No. MA0100412	)
Appeal Nos. NPDES 05-07 and 05-08	)
	)

MOTION TO STAY PROCEEDINGS PENDING PARTIAL WITHDRAWAL AND MODIFICATION OF THE PERMITS

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

BACKGROUND AND BASIS FOR STAY

The basis for this stay of the proceedings is to allow the Region to partially withdraw and modify certain contested portions of the permits in light of the Board's decision in City of Marlborough Easterly Wastewater Treatment Facility, 12 E.A.D. ___, NPDES Appeal No. 04-13 (August 11, 2005).

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. The 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] 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 City of Marlborough on the pending appeals. By order dated August 25, 2005, the Board granted the Region's motion and set a new filing deadline of October 29, 2005.

On October 19, 2005, the Region filed a Motion to Stay Proceedings until November 21, 2005 to allow for resolution of some or all of the issues raised in the Petitions through a process of neutral third party mediation. To that end, the Region retained a skilled mediator to serve as a neutral convener for the limited purpose of helping the parties explore the possibility of mediation. OAR filed a Motion in Opposition to Stay Proceedings on October 20, 2005.

By order dated October 25, 2005, the Board denied the stay request because not all parties had agreed to participate in the mediation assessment, the participating parties had not yet agreed that mediation was appropriate, and the Board had not been informed of the outcome of OAR's outstanding settlement offers. The Board extended the time in which to file responses to all Petitions, as well to any amicus brief filed by the Conservation Law Foundation, until November 28, 2005. (Subsequent to the Board's order, the Town of Maynard informed the Region that its Board of Selectmen had voted to withdraw the Town's Petition for Review, that it had provided notice of voluntary dismissal to the Board on or about November 10, 2005 and that it is proceeding with the

[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.

facility upgrade. OAR has informed the Region that it plans to withdraw its Petition for Review of the Maynard permit as well).

The Region has now determined to withdraw, at a minimum, the compliance schedules of the Marlborough and Westborough permits pursuant to 40 C.F.R. § 124.19(d) and to propose permit modifications.[2] The modified compliance schedules will take into account the Board's decision in City of Marlborough. Specifically, the modifications will address the 0.1 mg/l seasonal phosphorus effluent limits currently in the Marlborough and Westborough permits.

Pending completion of the modification process, the Region respectfully requests that the Board stay the proceedings, or in the alternative, extend the date for the Region to file its responses, to allow the Region to respond to all outstanding petitions for review of the Marlborough and Westborough permits as well any appeals of the modifications at the same time. To do otherwise would carry a substantial risk of confusion and waste of judicial and administrative resources. Specifically, the Region will not be able to determine with accuracy how a variety of issues raised in the Petitions will be implicated by the modifications prior to knowing the final form of the modifications. For instance, Marlborough and OAR have each broadly contested the adequacy of the phosphorus effluent limits, which will be materially impacted by the contemplated compliance schedule modifications. Westborough, for its part, references the current compliance schedule in its challenges to the interim pH limit, total copper limit, winter phosphorus limit and the ammonia-nitrogen limit. The substance of the final modifications, however, will not be known until the draft modifications have been prepared, public comments have been considered and the final modifications have been issued in accordance with 40 C.F.R. §§ 124.19(d) and 124.6. The Region believes that the substantial potential for confusion can be cured by the filing of a single brief to defend the permits as modified at the conclusion of the permit modification process.

Absent a stay or extension of the filing deadline, the Region will also be required to respond to, and the EAB to consider, issues potentially mooted by the subsequent modifications of the permits. For example, in their Petitions, Marlborough and

[2] In the meantime, efforts to resolve the dispute through neutral mediation will proceed. The neutral convener is scheduled to meet with Marlborough and Westborough next week.

Westborough have contested the compliance schedules of their respective permits and OAR has contested the schedules of both permits. The Region believes that the modified permits could adequately address the concerns raised by OAR. There is, conversely, a significant possibility that the modified permits will be appealed by one or more of the permittees and that, moreover, the nature of such challenges will differ from those contained in the Petitions. As the Region will ultimately defend the permits in their modified form, and because of the interrelation between the modified permit and the issues raised in the Petitions, the Region respectfully submits that the interests of judicial economy and administrative efficiency would not be served by responding to the Petitions prior to the modifications.

The Region will withdraw the compliance schedules and propose the permit modifications shortly after the permits take effect, which will occur on November 26, 2005 in the case of Westborough and December 3, 2005 in the case of Marlborough, pursuant to 40 C.F.R. § 124.16(a)(2). The Region will propose the draft modifications as soon as possible thereafter but in no event later than December 15, 2005. Following public notice and comment, the Region will finalize the permit modifications unless public comment raises significant issues that lead the Region to reconsider the modifications. The Region expects to be able to complete the entire permit modification process no later than April 1, 2006, which allows for approximately (i) 45 days for public notice and comment, including a public hearing, pursuant to 40 C.F.R. §§ 124.10 and 124.12, (ii) 30 days for the Region to draft its response to comments and issue the final permit modification, and (iii) 30 days for the parties to file their appeals to the extent of the modification. By May 1, 2006 the Region will file its responses to both the outstanding permit appeals and the permit modification appeals, if any (the Region will, upon notice by EAB of modification appeals, motion to consolidate each outstanding permit appeal with the corresponding permit modification appeal).

CONCLUSION

For the reasons set forth above, the Region respectfully requests that the Board stay the proceedings, or in the alternative, extend the filing deadline for the Region's

responses, until May 1, 2006 in order to allow the Region to complete the permit modification process.

Respectfully Submitted,

U.S. Environmental Protection Agency
New England Region

By its Counsel,
Samir Bukhari
Attorney Advisor
Office of Regional Counsel
U.S. Environmental Protection Agency
1 Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023
(617) 918-1095

Of Counsel,

Jim Curtin
Water Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dated: November 14, 2005