

Received 7/6/09

United States Court of Appeals For the First Circuit

No. 09-1879
Agency No. 08-19

CITY OF PITTSFIELD

Petitioner

v.

ENVIRONMENTAL APPEALS BOARD

Respondent

CASE OPENING NOTICE

Issued: July 1, 2009

A petition for review was received on June 29, 2009 and docketed as of today by the clerk of the court of appeals in compliance with Fed. R. App. P. 15. A copy of the petition is being transmitted to counsel for the respondent with this notice.

The administrative record, or certified list of all documents, must be filed by **August 10, 2009**. Fed. R. App. P. 17.

A notice advising you of the due date for filing your brief, and, if necessary, an appendix, will be sent upon the filing of the administrative record, or certified list, in this court.

An appearance form should be completed and returned immediately by any attorney who wishes to file pleadings in this court. 1st Cir. R. 12.0(a) and 46.0(a)(2). Petitioner must file an appearance form by **July 15, 2009** in order for it to be deemed timely filed. *Pro se* parties are not required to file an appearance form. Any attorney who has not been admitted to practice before the First Circuit Court of Appeals must submit an application and fee for admission with the appearance form. 1st Cir. R. 46.0(a)(2).

Dockets, opinions, rules, forms, attorney admission applications, the court calendar and general notices can be obtained from the court's website at www.ca1.uscourts.gov. Your attention is called specifically to the notices listed below:

- Notice to Counsel and Pro Se Litigants
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If you wish to inquire about your case by telephone, please contact the case manager at the direct extension listed below.

Richard Cushing Donovan, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

John Joseph Moakley

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1 Courthouse Way, Suite 2500

Boston, MA 02210

Case Manager: George - (617) 748-9055

United States Court of Appeals For the First Circuit

NOTICE OF ELECTRONIC AVAILABILITY OF CASE INFORMATION

The First Circuit has implemented the Case Management portion of the Federal Judiciary's Case Management/Electronic Case Files ("CM/ECF") computer system. As of March 31, 2008, any new court generated document (e.g., notices, orders, opinions, and judgments) will be attached to the docket. The court has not yet put into place that part of CM/ECF which allows attorneys to file documents electronically. However, the court has begun attaching public briefs and petitions for rehearing/rehearing en banc to the docket. The court may also attach other filings. Therefore, parties should not include in their public filings information that is too private or sensitive to be posted on the internet. In immigration and social security cases, the Court's docket, orders, and opinions are available via remote electronic access but party filings are not remotely available to the general public.

Specifically, recent amendments to Fed. R. App. P. 25, and new Fed. R. Bank. P. 9037, ed. R. Civ. P. 5.2 and Fed. R. Cr. P. 49.1 require that parties not include, or partially redact where inclusion is necessary, the following personal data identifiers from documents filed with the court unless an exemption applies:

- **Social Security or Taxpayer Identification Numbers.** If an individual's social security or taxpayer identification number must be included, only the last four digits of that number should be used.
- **Names of Minor Children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- **Dates of Birth.** If an individual's date of birth must be included, only the year should be used.
- **Financial Account Numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
- **Home Addresses in Criminal Cases.** If a home address must be included, only the city and state should be listed.

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend caption to redact the identifier.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, national security information, and sensitive security information as described in 49 U.S.C. § 114.

Attorneys are urged to share this notice with their clients so that an informed decision

can be made about inclusion of sensitive information. The clerk will not review filings for redaction. For further information, including a list of exemptions from the redaction requirement, see <http://www.privacy.uscourts.gov/>.

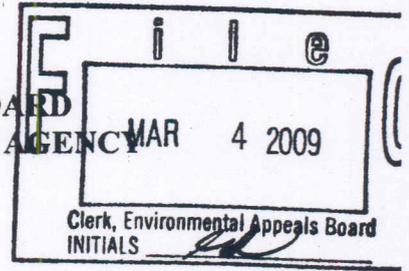
cc:

Donald L. Anglehart

Eurika Durr

Ann H. Williams

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



In re:)

City of Pittsfield, Massachusetts)

NPDES Permit No. MA0101681)

NPDES Appeal No. 08-19

ORDER DENYING REVIEW

On September 29, 2008, the City of Pittsfield, Massachusetts (“City”), filed a petition with the Environmental Appeals Board (“Board”) contesting several provisions of National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA0101681 (“Final Permit”) issued to it by the United States Environmental Protection Agency (“EPA”), Region 1 (“Region”) pursuant to section 402 of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1342. *See* Petition at 1. In a response filed November 19, 2008, the Region argues, among other things, that the Board should deny review because the Petition fails to demonstrate that the Region committed any clear error of fact or law or otherwise abused its discretion in issuing the Final Permit.¹ Response to Petition for Review at 2. For the reasons stated below, we deny the City’s Petition.

¹ The Region notes, however, that with respect to copper effluent limits, it has reevaluated them and determined they were erroneously calculated. Resp. at 15-16; *see infra* note 9. Accordingly, the Region has stated that it intends to withdraw them. *See* Region 1, U.S. EPA, *Notice of Contested and Uncontested Conditions of NPDES Permit No. MA0101681*, at 3 (Dec. 30, 2008).

I. BACKGROUND

A. Statutory and Regulatory Background

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). The CWA makes it unlawful for any person to discharge any pollutant into the waters of the United States from any point source, except as authorized by specified permitting provisions. CWA §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a). One such provision is section 402, 33 U.S.C. § 1342, which establishes one of the Act’s principal permitting programs, the National Pollutant Discharge Elimination System. *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 497 (EAB 2006); *In re City of Moscow*, 10 E.A.D. 135, 137 n.1 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 662 n.1 (EAB 2001). Under this section of the Act, EPA may “issue a permit for the discharge of any pollutant, or combination of pollutants” in accordance with certain statutory and regulatory conditions. CWA § 402, 33 U.S.C. § 1342(a); *see also* 40 C.F.R. parts 122-25, 136 (containing the majority of the NPDES implementing regulations). In general, NPDES permits are issued for up to five years, contain discharge limitations, and establish related monitoring and reporting requirements. CWA § 402(a)(1)-(2), (b), 33 U.S.C. § 1342(a)(1)-(2), (b); 40 C.F.R. §§ 122.45, .46(a), .48; *see also Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs.*, 528 U.S. 167, 174 (2000); *Dominion*, 12 E.A.D. at 497.

B. Factual and Procedural Background

The City owns and operates the Pittsfield Wastewater Treatment Plant (“WWTP”), which discharges treated wastewater into the Housatonic River. Resp. at 7; *see also* Final Permit at 1; Administrative Record (“A.R.”) 9, at 3 (U.S. EPA Region 1, Fact Sheet, NPDES Permit No. MA0101681 (2007)) [hereinafter Fact Sheet]. Several other towns own and operate wastewater collection systems that contribute flow to the WWTP.² Final Permit at 1. Consequently, the Final Permit includes these towns as co-permittees in the section dealing with operation and maintenance of the sewer system and in the section concerning unauthorized discharges. *Id.* at 1, 10-12; Fact Sheet at 3.

In 2000, the Region had issued the City an earlier NPDES permit for the WWTP. Fact Sheet at 3; Resp. at 7. That permit had been scheduled to expire on December 5, 2005. Fact Sheet at 3; Resp. at 7. Following the City’s timely request for re-issuance of its NPDES permit in June of 2005, the Region issued a new, draft permit for comment on December 28, 2007.³ *See* Fact Sheet at 1; *see also* A.R. 8, at 1 (U.S. EPA Region 1, Draft NPDES Permit No. MA0101681, 2007 Reissuance (Dec. 28, 2007)). The City, among others, submitted comments

² In particular, the Towns of Dalton, Lenox, Hinsdale, and Lanesborough all own and operate infrastructure, such as sewers, pipes, and other conveyances, that contributes flow to the WWTP. Resp. at 7; A.R. 16 at 10-11.

³ Because the Region determined that the City submitted a complete and timely application for re-issuance of its permit, *see* Resp. at 7, the conditions of its expired 2000 permit continue in force, pursuant to NPDES regulations, until the effective date of the new permit. *See* 40 C.F.R. § 122.6(a).

on the draft permit. *See* Pet. at 1; A.R. 18 (Letter from Bruce I. Collingwood, P.E., Commissioner, City of Pittsfield, to Meredith Decelle, Office of Ecosystem Protection, EPA Region 1 (Feb. 5, 2008)) [hereinafter City Comments on Draft Permit]; A.R. 16, at 1 (U.S. EPA Region 1, Response to Comments, NPDES Permit No. MA0101681, Pittsfield Wastewater Treatment Plant, 2008 Reissuance (Aug. 22, 2008)) [hereinafter RTC].

On August 22, 2008, the Region issued the Final Permit to the City and co-permittees and simultaneously issued a document that addressed each of the comments received from the City on the draft permit. *See generally* Final Permit at 1; RTC at 1-37. The Final Permit was issued jointly with the Massachusetts Department of Environmental Protection (“MADEP”).⁴ *See* Final Permit at 1, 15.

⁴ Because the Commonwealth of Massachusetts has not been authorized to administer the NPDES program, EPA (in particular, Region 1) issues NPDES permits within the state pursuant to section 402(a). *See* 33 U.S.C. § 1342(a); *In re USGen New England, Inc.*, 11 E.A.D. 525, 526 n.1 (EAB 2004), *dismissed for want of juris.*, No. 04-12225 (D. Mass. Oct. 22, 2004), *aff’d sub. nom Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. Mar. 30, 2006); Resp. at 3. Massachusetts, however, maintains separate, independent permitting authority over surface waters under its own law, the Massachusetts Clean Waters Act. *See* Mass. Gen. Laws ch. 21, § 43 (2009); Mass. Regs. Code tit. 314 (2009). Typically, when the Region issues an NPDES permit in Massachusetts, MADEP simultaneously issues an identical permit under State law. Resp. at 3. The two permitting authorities coordinate them by cosigning a single permit document, as in this case. *Id.*; Fact Sheet at 27; *see also In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 497 n.5 (EAB 2006) (explaining joint federal-Massachusetts permit process). The appeal before the Board is limited to the City’s challenge to the federal permit. *See Dominion*, 12 E.A.D. at 497 n.5; *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 704 (EAB 1996).

The City appealed the Final Permit to the Board on September 29, 2008.⁵ Its Petition consists of one paragraph, plus an attached copy of the City's comments on the draft permit. *See* Pet. & Attach. The City asserts that, despite its comments on the draft version, the Region issued the Final Permit "without any significant modification." *Id.* at 1. The City claims that the new terms and conditions are "unachievable" and will be "an enormous financial burden to the users of the wastewater system." *Id.*

II. DISCUSSION

A. Standard of Review: Burden on Petitioner to Provide Clear Identification and Explanation of Basis for Challenge

The scope of Board review is governed by 40 C.F.R. § 124.19(a). The Board will generally grant review only if certain rather stringent conditions are first satisfied: the petition demonstrates a clearly erroneous finding of fact or conclusion of law by the permitting authority or an exercise of discretion or an important policy consideration which the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *accord In re Town of Westborough*, 10 E.A.D. 297, 303 (EAB 2002); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 666-67 (EAB 2001); *In re Envotech, L.P.*, 6 E.A.D. 260, 267-68 (EAB 1996); *In re LCP Chems.*, 4 E.A.D. 661, 664 (EAB 1993). Guided by the preamble to the part 124 regulations, the Board thus exercises its powers of review "only sparingly," recognizing that "most permit conditions

⁵ Because the Region mailed the Final Permit to the City on August 28, 2008, *see* Resp. at 8, the City's petition was timely filed with the Board.

should be finally determined at the Regional level.” Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); accord *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 717 (EAB), appeal dismissed per stipulation, No. 06-1817 (1st Cir. 2006); *In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). Accordingly, the burden of demonstrating that review is warranted rests squarely on the petitioner. E.g., *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 573 (EAB 2004); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 392 (EAB 1997); *LCP Chems.*, 4 E.A.D. at 663, 665.

The Board has interpreted 40 C.F.R. § 124.19(a) to require a petitioner to clearly identify the conditions in the permit at issue and to present argument why review of those conditions is warranted. *In re Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, NPDES Appeal Nos. 08-02 to -05, slip op. at 9 (EAB Jan. 14, 2009), 14 E.A.D. ___ (quoting *Envotech*, 6 E.A.D. at 267-68); *Wash. Aqueduct*, 11 E.A.D. at 591-92; *In re Puna Geothermal Venture*, 9 E.A.D. 243, 274 (EAB 2000); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 18 (EAB 1994); *LCP Chems.*, 4 E.A.D. at 664. Simply raising generalized objections to the permit or making vague and unsubstantiated arguments falls short. *Town of Westborough*, 10 E.A.D. at 311 (“‘[M]ere allegations of error’ are insufficient to support review.”); *City of Moscow*, 10 E.A.D. at 172 (same); *Hadson Power*, 4 E.A.D. 258, 295 n.54 (EAB 1992) (same). Rather, the petitioner must provide specific and substantiated reasons justifying Board review. E.g., *In re Avon Custom Mixing Servs., Inc.* 10 E.A.D. 700, 708 (EAB 2002); *In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001); *In re Zion Energy, L.L.C.*, 9 E.A.D. 701, 705 (EAB 2001); *Envotech*, 6 E.A.D. at 267-69.

Based on these principles, a long and consistent line of Board authority has required that petitioners do more than cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. They must instead *explain why* the Region's response to those comments is clearly erroneous or otherwise warrants review. *E.g., Hadson Power 14*, 4 E.A.D. at 294-95 (denying review where petitioners merely reiterated comments on draft permit and attached a copy of its comments without addressing permit issuer's responses to comments); *see also In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) ("[P]etitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations."); *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 472-73 (EAB 2004) (same); *In re City of Irving*, 10 E.A.D. 111, 129 (EAB 2001) (same), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). The Sixth Circuit has upheld this unflinching Board standard: "[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review." *Mich. Dep't Envtl. Quality v. U.S. EPA*, 318 F.3d 705, 708 (6th Cir. 2003), *aff'g In re Wastewater Treatment Facility of Union Township*, NPDES Permit No. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *see also LeBlanc v. EPA*, No. 08-3049, at 9 (6th Cir. Feb. 12, 2009) (concluding that Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances" without offering reasons why Region's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review).

As recently stated by the Board, "[b]y choosing to simply repeat its comments on the permit without addressing the Region's responses to those comments, the City failed to present the sufficiently specific and persuasive evidence and argument needed to cast doubt on the thoroughness and rationality of the Region's technical evaluations and conclusions." *In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18, at 18 (EAB Mar. 19, 2008), *appeal docketed*, No. 08-2020 (1st Cir. Dec. 12, 2008); *see also Town of Westborough*, 10 E.A.D. at 311-12 ("[D]eclin[ing] to second-guess the Region's technical judgments and explanations for rejecting [petitioner's] alternate approach" where petitioner failed to address Region's substantive responses to comments on these technical issues); *Town of Ashland*, 9 E.A.D. at 670 ("[A]bsent a meaningful rebuttal of the serious questions raised by the Region regarding the Town's [technical approach], we are left with a record that generally supports the Region's approach.").

otherwise review the matter, bear marked similarities to the present case. *See, e.g., Envotech*, 6 E.A.D. at 268-69 (dismissing petitions consisting solely of copies of comments previously submitted during comment period and providing no discussion why Region's response to those objections was erroneous or otherwise warranted review); *Beckman*, 5 E.A.D. at 18-19 (denying review of one-page letter petitions generally against issuance of permit and referring to previous comments but not including any supportable reason why Region erred in its final permit decision); *In re Genesee Power Station*, 4 E.A.D. 832, 866-67 (EAB 1993) (denying review of petition consisting of cover letter and attachments where cover letter raised no new issues for review and attachments were merely copies of previously submitted comments and administrative record documents); *see also Peabody*, 12 E.A.D. at 46 & n.58 (denying review of issue where petitioner failed to address Region's substantive responses to issue); *Wash. Aqueduct*, 11 E.A.D. at 591-92 (same); *Teck Cominco*, 11 E.A.D. at 494-95 (noting review inappropriate where petitioner simply restated comments submitted during comment period without explaining why Region's responses to comments were erroneous and "wholly fail[ed] to even mention the Region's extensive response to public comments discussing" issue in question); *Zion Energy*, 9 E.A.D. at 707 (same); *Town of Ashland*, 9 E.A.D. at 670 (same); *In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 726-28 (EAB 2000) (same), *appeal dismissed per stipulation*, No. 00-1580 (1st Cir. 2001); *In re Austin Powder Co.*, 6 E.A.D. 713, 721 (EAB 1997) (same); *Hadson Power*, 4 E.A.D. at 294-95 (same).

are unable to comply with the reissued 2003 NPDES permit.

Pet. at 1. Stripped of procedural history, the Petition yields up a lone claim: “unachievable” permit limits. *Id.* The Petition does not attempt to identify what particular limits are “unachievable,” or why, what limits are clearly erroneous, or what important policy considerations should otherwise spur the Board to assume jurisdiction – unguided by Petitioner’s specific explanations of technical or other deficiencies – and review a 115-page record.⁷ The burden is Petitioner’s. Petitioner has failed to meet it.⁸

⁷ While the City does not even identify the particular Final Permit conditions that it now challenges, the Region nonetheless appears to have granted the City’s request in full or in part for at least two conditions the City questioned in its comments on the draft permit, *see* RTC at 23 (reducing WET testing frequency); *see also id.* at 22-23 (reducing certain monitoring frequencies), and clarified other conditions based on the City’s comments, *e.g., id.* at 10-11, 26, 27 (amending permit to clarify co-permittees’ responsibilities); *see also id.* at 25 (clarifying that the “alarm system” is not a continuous residual chlorination system). The Region also acknowledged that, for one of the “new” Final Permit conditions – the requirement of a routine sampling program – the City already has such a program in place, thereby seemingly rendering this a “new” requirement in name only. *See id.* at 24. These apparent accommodations by the Region to various City comments highlight the deficiency of the Petition. Because the City makes such a wholesale, undifferentiated permit appeal, we have no way of discerning whether the City has continuing objections to conditions the Region has already addressed.

⁸ Moreover, most conditions still unchanged from the draft permit, and about which the City submitted comments to the Region, relate to technical or scientific issues, *see, e.g.,* City Comments on Draft Permit at 2-3, 5 (questioning the new phosphorus and aluminum limits, the appropriate indicator organism for pathogenic bacteria, and the dilution methodology), all of which the Region substantively addressed in its Response to Comments document, *see* RTC at 11-22, 29 (Responses B.2.a.1-3, B.2.a.2, B.2.c, B.15). As we noted above in Part II.A, petitioners have a particularly heavy burden when seeking review of technically or scientifically based issues, because the Board accords heightened deference to the Region’s technical judgments in these matters. *E.g., Peabody*, 12 E.A.D. at 46-47; *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 517-19 (EAB 2002); *Ash Grove*, 7 E.A.D. at 404, 406-07.

In sum, the City has failed to establish any clear error or abuse of discretion by the Region in establishing the Final Permit conditions. Nor do we find any issue that otherwise warrants our review. We therefore deny review of the City's Petition.⁹

III. CONCLUSION

For the reasons stated above, the City's Petition for Review of the Final Permit is DENIED in all respects.

So ordered.¹⁰

ENVIRONMENTAL APPEALS BOARD

Dated: *March 4, 2009*

By: *Charles J. Sheehan*

Charles J. Sheehan
Environmental Appeals Judge

⁹ Although the City has failed to demonstrate that Board review is warranted, the Region has admitted in its Response to mistakenly calculating limits with respect to one condition in the Final Permit – the copper limits – but on different grounds than raised by the City in its comments. Resp. at 16. The Region has begun the process of remedying this error by withdrawing the copper limits. See Region 1, U.S. EPA, *Notice of Contested and Uncontested Conditions of NPDES Permit No. MA0101681*, at 3 (Dec. 30, 2008). Based on the Region's initiation of a permit modification for the copper limits, we also deny review of this issue and direct the Region to continue making necessary changes. See, e.g., *City of Irving*, 10 E.A.D. at 129 (denying review where Region admits error and avers that it will make necessary modifications to remedy problem).

¹⁰ The panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of City of Pittsfield, Massachusetts, NPDES Appeal No. 08-19, were sent to the following persons in the manner indicated:

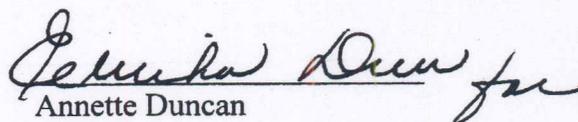
By Pouch Mail and FAX:

Ann H. Williams
Senior Assistant Regional Counsel
U.S. EPA Region 1 (RAA)
One Congress Street, Suite 1100
Boston, MA 02114-2023
Fax: (617) 918-0097

By First Class Mail and FAX:

Bruce I. Collingwood, P.E.
Commissioner, City of Pittsfield
Department of Public Works & Utilities
City Hall
70 Allen Street
Pittsfield, MA 01201
Fax: (603) 628-6234

Dated: 3/4/2009


Annette Duncan
Secretary

CERTIFICATE OF SERVICE

I, Donald L. Anglehart, hereby certify that on June 29, 2009, I served copies of the foregoing Petition for Review, Notice of Appearance, and Change of Address form on the following persons in the manner indicated:

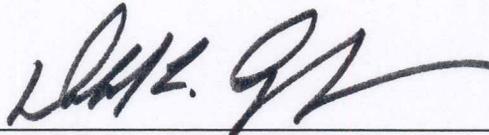
By Hand and by First Class Mail:

Ann H. Williams
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1 (RAA)
One Congress Street, Suite 1100
Boston, MA 02114-2023

By First Class Mail:

Office of General Counsel
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Date: June 29, 2009



Donald L. Anglehart
(C.A. Bar No. 16066)*
(BBO No. 01952)
Law Office of Donald L. Anglehart, LLC
One Broadway, 14th Floor
Cambridge, MA 02142
Telephone: 617-401-3350
Email: don@anglehart.com
* Please note new address and firm

Attorney for Petitioner,
City of Pittsfield, Massachusetts