

**Capital Reporting Company**

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

----- :  
In re: :  
 :  
Town of Wayland :NPDES Appeal  
Wastewater Management :Nos. 08-26 &  
 :08-27  
 :  
Permit No. MA0039853 :  
 :  
----- :

Washington, D.C.  
Wednesday, May 6, 2009

The following teleconference was held, pursuant to notice, before the Honorable Judge Charles Sheehan, at the U.S. Environmental Protection Agency, 1201 Constitution Avenue, Northwest, Washington, D.C. 20004, before Terri L. Hamilton, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at 2:01 p.m., when were present on behalf of the respective parties:

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1 On behalf of The Town of Wayland:  
2 ADAM KAHN, ESQUIRE -- via teleconference  
3 REBECCA PUSKAS, ESQUIRE -- via teleconference  
4 Foley Hoag, L.L.P.  
5 155 Seaport Boulevard  
6 Boston, Massachusetts 02210  
7 (617) 832-1000

8 On behalf of Thomas Arnold:  
9 DEIRDRE MENOYO, ESQUIRE -- via telephonically  
10 Attorney at Law  
11 388 Willis Road  
12 Sudbury, Massachusetts 01776  
13 (978) 440-9690

14 On behalf of Department of Interior:  
15 ROBIN LEPORE, ESQUIRE -- via teleconference  
16 Office of the Regional Solicitor  
17 One Gateway Center, Suite 612  
18 Newton, Massachusetts 02458  
19 (617) 527-3400

20 On behalf of Environmental Protection Agency:  
21 RONALD FEIN, ESQUIRE -- via teleconference  
22 EPA Region I  
One Congress Street, Suite 1100  
Boston, Massachusetts 02114  
(617) 918-1040

ALSO PRESENT:  
Eurika Durr, Clerk of the Board  
Nivea Berrios, Senior Counsel  
Bryan Pitt  
Anne Williams  
Carl Gerber  
Lynne Hamjian

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1 PROCEEDINGS  
2 MS. EURIKA: The United States  
3 Environmental Protection Agency is now in session  
4 for status conference, In re: Town of Wayland  
5 Waste Water Management District Commission  
6 Treatment Plant. Permit number MA0039853. NPDES  
7 appeal numbers 08-26 and 08-27. The Honorable  
8 Charles Sheehan residing.  
9 THE COURT: Good afternoon everyone. Let  
10 me begin by asking counsel to identify themselves,  
11 and let's go in the order of Mr. Arnold's counsel,  
12 DOI's counsel, the Region's counsel, and any other  
13 participants from the region.  
14 MS. MENOYO: My name is Deirdre Menoyo.  
15 I represent --  
16 THE COURT: We're only hearing about  
17 every other word. Could you try to get closer  
18 perhaps to the mike and see if that works.  
19 MS. MENOYO: I'm here. I'm using an old  
20 fashioned telephone, Your Honor, and I changed it.  
21 Does this work better, Your Honor?  
22 THE COURT: That's better. Thank you.

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1 MS. MENOYO: Okay.  
2 THE COURT: Could you repeat your  
3 introduction?  
4 MS. MENOYO: My name is Deirdre Menoyo,  
5 M-E-N-O-Y-O. I represent petitioner, Tom Arnold.  
6 THE COURT: Thank you. DOI?  
7 MS. LEPORE: My name is Robin Lepore and  
8 I represent the Department of the Interior and two  
9 agencies within that, the United States Fish and  
10 Wildlife Service and the National Park Service.  
11 THE COURT: Thank you. The Region?  
12 MR. FEIN: Thank you, Your Honor. Ronald  
13 Fein, regional counsel for Region 1. With me are  
14 Bryan Pitt, who's the permit writer for this permit  
15 and is a team leader within the Office of U.S.  
16 Protection. Also with me are Anne Williams, senior  
17 assistant regional counsel who is the practice  
18 group leader for the water practice group of  
19 regional counsel. To Ms. Williams' left is Carl  
20 Gerber, regional counsel for Region 1, and to  
21 Mr. Gerber's left is Lynne Hamjian, L-Y-N-N-E,  
22 H-A-M-J-I-A-N, who's the acting deputy director of

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1 the office which is the (unintelligible.)  
2 THE COURT: Thank you. And the Town of  
3 Wayland?  
4 MR. KAHN: Good afternoon. My name is  
5 Adam Kahn and with me is my colleague, Rebecca  
6 Puskas.  
7 THE COURT: And a couple of other  
8 preliminaries. With me at the bench is Nivea  
9 Berrios, our senior counsel. And also I'd like to  
10 ask on behalf of the court reporter that before  
11 people speak, they identify themselves so that the  
12 record is clear on who's speaking.  
13 In the Board's order of December 20th,  
14 2008, what was requested was a fairly simple  
15 statement of events to be filed by the Court on  
16 April the 7th. That was to be a "detailed summary"  
17 of three categories of information. Those  
18 categories were "issues resolved, remaining issues,  
19 and projected time frame for resolution or  
20 litigation." What we received on April the 7th was  
21 something I think otherwise. It was not to our  
22 view anyhow a very detailed summary, and it didn't

2 (Pages 2 to 5)

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1 really get into the three categories of information  
2 that we had requested specific information on; the  
3 result, the remaining issues, and the time frame.  
4 So it's difficult for the Court to make an informed  
5 assessment of the need for more time, more space  
6 when the true status of the negotiations is still  
7 somewhat unclear.

8 The petition was originally filed, the  
9 first petition almost six months ago, so I think  
10 probably it would be appropriate at this point to  
11 go into some detail in this call about where  
12 everything stands in negotiations so that the Board  
13 can decide the next steps. So without further  
14 ado -- and also one more point. I understand from  
15 group one in the status report that Mass DEP might  
16 also be required to settle, so I'd like to hear  
17 people as we proceed here talk about the role of  
18 DEP, if any, in further proceedings here.

19 So perhaps with that beginning I will ask  
20 Region 1, Mr. Fein, if he can take the lead on this  
21 please to tell us what issues have been resolved,  
22 if any, which remain, and make it clear exactly

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1 where things stand with some exactitude at this  
2 time.

3 MR. FEIN: Thank you, Your Honor. This  
4 is Mr. Fein. In response to Your Honor's question  
5 the good news is that in the months since the  
6 status report was filed, substantial progress has  
7 been made as between EPA, the Town and the  
8 Department of Interior, and issues that had not yet  
9 been resolved at that point are now close to  
10 resolution and some issues that remain are no  
11 longer remaining.

12 I will give some detail on that in a  
13 moment, but I should note that Mr. Arnold is not  
14 yet in agreement on these points, but we do have a  
15 plan for moving forward if we can't reach an  
16 agreement with Mr. Arnold. With respect to the  
17 issues, as Your Honor knows, this is a somewhat  
18 complex petition in that we had two separate  
19 petitioners, one of which is a federal agency, and  
20 that's made a resolution more complex than  
21 ordinarily would be. The good news is as of Monday  
22 we now have a framework for agreeing with the

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1 principal, which I've been authorized by both the  
2 Town and Department of Interior to disclose.

3 The Town has offered and EPA and Interior  
4 agreed to a settlement by which the Town would  
5 agree to a mid-use modification that would impose a  
6 more stringent phosphorus limit than the original  
7 permit. The Town has also agreed to non-point  
8 source reductions of phosphorous, and furthermore  
9 the Town agreed to certain changes in the location  
10 and design of a proposed waterfall that would be  
11 acceptable to the Department of Interior. These  
12 would need to be substantiated through documents  
13 that have not yet been drafted, but the major  
14 points have all been agreed to by EPA, Interior and  
15 the Town.

16 As I said, Mr. Arnold has not yet agreed  
17 to these, and although that's not something I'm  
18 going to explain the basis for, the settlement  
19 discussions have been complicated by the fact that  
20 some of Mr. Arnold's settlement requests appear to  
21 be on the scope of an in-use permit or in the EPA  
22 case, authority under the habeas corpus. That

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1 said, we would like to try to reach an agreement  
2 that reaches all petitioners, not just the  
3 Interior, and for that reason we have an EDR  
4 neutral at the EPA's expense. We secured funding  
5 from the Office of General Counsel for that person.  
6 Our regional ADR coordinator has contacted all the  
7 parties with proposed names and is beginning to  
8 engage in that process, and we are hoping that in  
9 one more month we will be able to either reach an  
10 agreement that pleases Mr. Arnold or if we conclude  
11 that such an agreement can't be reached.

12 With respect to time frame, it largely  
13 depends on whether we're settling with just the  
14 Town and Interior and not Mr. Arnold or whether  
15 Mr. Arnold is also in agreement. At this point I  
16 think it would be very difficult to forecast the  
17 timeframe for resolution without knowing whether we  
18 have an agreement with all petitioners or whether  
19 we're going to be dealing with an appeal at the  
20 same time that we're settling with some.

21 THE COURT: Thank you. Let's go with  
22 that in the direction to Ms. Menoyo. Could you

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1 please address your view of the plan?  
2 MS. MENOYO: Your Honor, Mr. Arnold's  
3 concern has been with the release of phosphorous to  
4 a degraded water and (unintelligible). We believe  
5 that the limits that DOI has agreed to here, .1  
6 year round, is not adequate to protect the river  
7 and we know that it's possible to achieve much  
8 lower levels of phosphorous. So we contest the  
9 existence of the permit in the first place.  
10 There is no -- the use of this permit,  
11 who will be using this permit is now unknown. It  
12 was for a big development that has now declared  
13 itself to be not going to happen, so there's not a  
14 clear need for this sarcasity (ph) of flow.  
15 There should be an alternative analysis  
16 to see if you need to put more phosphorous into the  
17 river in any event. My position is that it will  
18 preclude allowing this charge of phosphorous into  
19 the river, but there are things my client would  
20 accept. My client would accept a lower  
21 phosphorous. For instance, in the Town of Concord  
22 they have a contract, a manufacturer guarantee that

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1 their treatment system can achieve from the same  
2 river system of .05 milliliter per liter  
3 phosphorous limit. I think that working for that  
4 kind of limit would involve Mr. Arnold.  
5 We also do think that the parties have it  
6 within their power to arrange to set a TMBL for the  
7 phosphorous in the system, and even if they feel  
8 that he needs to be as a party to make that happen,  
9 federal regulations demand that EPA set that limit  
10 if the TMBL has not been created. The reduction of  
11 phosphorous that the Town has proposed is not very  
12 viable. They're proposing to use less phosphorous  
13 dependent fertilizers, and my understanding is the  
14 county (unintelligible), which has fertilizers  
15 right now. We would want something more structural  
16 that produce phosphorus.  
17 So I'm saying that there is room for  
18 negotiation on a limit. We would even be open to a  
19 definite commitment to reach a lower limit and with  
20 a schedule for reaching a PMZ for this.  
21 THE COURT: Let me ask if I can, the  
22 status report filed in early April referred to two

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1 specific issues. Phosphorous and the out-call and  
2 then there was a reference at the bottom of page  
3 two I believe to "other issues." In this  
4 conversation today we have heard about the  
5 phosphorous issue and the out-call issue. Are  
6 there other issues as determined was used in the  
7 status report that haven't been mentioned in this  
8 status call yet today that are also out there? Go  
9 ahead.  
10 MS. MENOYO: Your Honor, this is Deirdre  
11 Menoyo. Mr. Arnold objected in the first place to  
12 the issuance of a phos permit itself and nothing  
13 has changed as to that. If we were able to achieve  
14 movement in the issues that I just recommended for  
15 the association, that would become less of a  
16 problem, but as of our appeal end now, we think the  
17 permit was wrongly issued in 1998 and in 2003 and  
18 in 2008.  
19 THE COURT: Let me ask for the Town of  
20 Wayland, Mr. Kahn or Ms. Puskas, about your view of  
21 how things stand and what the issues are and what  
22 the status is at this point.

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1 MR. KAHN: This is Adam Kahn. We went  
2 with Mr. Fein's description of the settlement  
3 principal. Perhaps in response to some of the  
4 comments raised by Ms. Menoyo I could put it in  
5 context. The Town's agreement is an approximately  
6 85 percent reduction over currently allowed limits.  
7 MS. MENOYO: Excuse me, Your Honor --  
8 THE COURT: Ms. Menoyo, please let  
9 Mr. Kahn proceed.  
10 MS. MENOYO: Sir, I can't hear him at  
11 all. Are you characterizing my position?  
12 THE COURT: Mr. Kahn, could you try  
13 speaking maybe closer to the mike or do something.  
14 MS. MENOYO: Or slowly.  
15 MR. KAHN: I'm not exactly sure where --  
16 okay, the mike is above me. I know where we are  
17 now. The Town agrees with Mr. Fein's  
18 characterization of the settlement. The  
19 phosphorous limit discussed and conceptually due to  
20 by the Town, DOI and the EPA is the value requested  
21 by the Department of Interior. It is an 85 percent  
22 reduction from the existing balance. There is no

4 (Pages 10 to 13)

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1 lower limit on any waste water treatment plant in  
2 the river basin. It also allows a grand total of  
3 16 pounds of phosphorous per year to be discharged  
4 into the river. It may not be apparent from the  
5 papers how small a plant this is. It's  
6 approximately 50,000 gallons a day.

7 The difference in phosphorous between the  
8 value that Ms. Menoyo suggested and the value  
9 that's been reached by the other parties represents  
10 an aggregate of 8 pounds of phosphorous per year.  
11 This represents --

12 THE COURT: Mr. Kahn, if I can interrupt.  
13 I appreciate the detail. I'm not sure we need that  
14 much on exactly what the specifics here are where  
15 things stand for your position. Could you address  
16 more generally perhaps the point made by Mr. Fein  
17 about substantial profits being made and the Town  
18 and DOI and Region 1 being generally close on the  
19 issues, with Mr. Arnold perhaps not being so close,  
20 and just perhaps the general overview of things in  
21 a more accurate sort of way.

22 MR. KAHN: Okay, I apologize. I agree

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1 with Mr. Fein. We are in substantial agreement.  
2 The parties held a conference call on Monday where  
3 the effectual provisions of the settlement were  
4 discussed and it is my belief that with the  
5 exception of Mr. Arnold, the three other parties  
6 were in agreement as to those terms, and with one  
7 additional month we should have an agreement that  
8 should be able to be signed by each of those  
9 parties, assuming nothing unusual comes up and then  
10 sort of hammering out the details of the agreement.  
11 I don't expect that.

12 As for Mr. Arnold's position, I guess I'm  
13 less optimistic in that the Town is not able to  
14 agree to the request and in some cases it will be  
15 the requests are outside of the scope of this  
16 proceeding, but really we have a team that we could  
17 measure. We are willing to explore through a  
18 neutral recommended by Region 1 opportunities for  
19 resolution, but I would suggest that we'll know one  
20 way or another a month from now whether those  
21 discussions are successful. And so the Town did  
22 not join the motion for an extension a month ago

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1 when it was filed because of some inconsistencies  
2 about where things stand. At this stage I think  
3 that inability is considerably reduced, such as the  
4 Town is comfortable at this time agreeing with the  
5 motion filed in April that an additional month of  
6 extension would be appropriate if they find a  
7 resolution.

8 THE COURT: Thank you.  
9 MR. KAHN: If it cannot --

10 THE COURT: Thank you. Ms. Lepore, could  
11 you please give us your assessment?

12 MS. LEPORE: Just as Mr. Fein and  
13 Mr. Kahn had indicated, the Department of Interior  
14 at this point is in substantial agreement with the  
15 other two parties on the question of the .1  
16 phosphorous limit and the concept of relocating the  
17 pipeline at fault. That has been a major issue  
18 with us. We had site visits to look at it and we  
19 got more information from the Town's engineer about  
20 approaches that could be used, if the PA could be  
21 placed somewhere where it would not visible to  
22 canoeist, recreationists and other kinds of

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1 concerns there could be on the scenic river, and we  
2 are probably completely okay, but we only had some  
3 contaminants and probable information given to us  
4 quite recently so we believe that that's not going  
5 the present a technical issue. I suspect that I'm  
6 not incorrectly representing that we think it's  
7 addressable, but there still are some questions  
8 remaining on that point, which we're going to work  
9 out with EPA's technical people and the Town's  
10 technical people.

11 The other issues that the Interior had  
12 raised initially was the underlying question about  
13 the validity of the permit and what we have worked  
14 out is that we are not going to challenge that at  
15 present. We will accept the 52,000 gallons a day,  
16 but should the Town request permit level increases  
17 above that, we reserve the right to raise what our  
18 concerns were about improperly reactivating this  
19 permit when it had lapsed and other sorts of  
20 things, but essentially accepting the status quo is  
21 something that the Department of Interior has  
22 decided to not pursue unless the Town pursues

5 (Pages 14 to 17)

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1 upholding that decree in the future.  
2 THE COURT: Thank you very much. Back to  
3 Mr. Kahn for a moment. Would you speak about the  
4 role of your counter-party Mass DEP that was  
5 alluded to in the status report just to get a sense  
6 of whether or not that is a rock hard that needs to  
7 be considered here?  
8 MR. KAHN: Yes, Your Honor. I obviously  
9 forgot to mention that when I spoke previously,  
10 DEP co-issues the permits with EPA. In this case,  
11 the petitioners filled the EPA permit but not the  
12 DEP permit, which means that the DEP permit has to  
13 in affect and the Town's term is subject to the DEP  
14 permit, which is identical to the appeal permit  
15 except only enforceable under state law. In order  
16 to effectuate settlement, we need to modify the EPA  
17 permit and the DEP permit as well.  
18 A DEP surface water permit program  
19 representative has attended all the settlement  
20 discussions that we've had with the other parties  
21 despite the fact that DEP's permit was not appealed  
22 and we do not anticipate any difficulties in

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1 getting DEP to co-issue with us a permit  
2 modification that would effectuate a settlement  
3 that we reach with the Town and DOI, with or  
4 without Mr. Arnold.  
5 THE COURT: Thank you. Could you also,  
6 while you have the floor, clarify when the next  
7 meeting of all parties is planned, if one is  
8 planned.  
9 MR. KAHN: Your Honor, actually the most  
10 recent conversation that we had with all parties  
11 was just this past Monday at which we reached  
12 settlement in principal that would discuss the  
13 date. At this point we don't actually have the  
14 next meeting scheduled, and part of that has been  
15 because of the uncertainty of the schedule. I  
16 assume that we can get an extension of the  
17 litigation time frame and we will endeavor to meet  
18 in person as necessary or rapidly, with or without  
19 the assistance of a neutral, to finalize the  
20 documents and cross the T's between the EPA, the  
21 Interior, and the Town and to attempt to bridge any  
22 remaining gaps with Mr. Arnold, but we don't have a

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1 meeting scheduled.  
2 THE COURT: Thank you. Let me ask --  
3 pardon me?  
4 MR. FEIN: I'm sorry, I said we will do  
5 that quickly.  
6 THE COURT: Thank you.  
7 MS. LEPORE: I'm sorry, Your Honor. I do  
8 have one other point.  
9 THE COURT: Could you introduce yourself  
10 for the record?  
11 MS. LEPORE: Robin Lepore for DOI. In my  
12 summation of the role of the state I didn't cover,  
13 and that was amongst our original concerns in the  
14 appeal, was having the rivers at the YMC (ph) River  
15 be designated as an outstanding resource water and  
16 to have a TMBL for the phosphorous impairment  
17 issues, and we recognize that those are not  
18 strictly within the gamut of the EPS permit action.  
19 We were hoping that through this process there  
20 might be a little more bigger on the part of the  
21 state to be able to help forward some of those  
22 actions, and we are working with them perhaps that

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1 they also come out of the ADR, but as a formal  
2 issue for the appeal, we recognize that that's not  
3 part of the jurisdiction in this process.  
4 THE COURT: Thank you. Back to Ms.  
5 Menoyo for a moment. Can you hear me?  
6 MS. MENOYO: Yes, Your Honor.  
7 THE COURT: Could you tell us whether or  
8 not if an extension is granted and there is time  
9 for atleast one additional meeting with all the  
10 parties, that would include Mr. Arnold?  
11 MS. MENOYO: We would definitely meet  
12 with all the parties.  
13 THE COURT: Okay. Does anyone else have  
14 anything that they would wish to add that has not  
15 been asked or said?  
16 With that then the Board will issue an  
17 order within the next few days in response to all  
18 the input, the very useful input for which I thank  
19 you for today. Obviously settlement is the outcome  
20 that we wish. We hope that it's possible, but we  
21 need to keep the docket moving and it looks like  
22 settlement is not possible, but it certainly seems

6 (Pages 18 to 21)

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1 warranted that there be some additional time to try  
2 to make that happen. One moment while I consult  
3 with Ms. Berrios.  
4 One additional question. Would the June  
5 I believe 7th, early June deadline that's  
6 requested, would that still work for the parties  
7 given the present state of events? I'll begin with  
8 Mr. Fein's view on that.  
9 MR. FEIN: Yes, Your Honor, I believe it  
10 was June 10th that we requested, but I would say  
11 that June 10th is still a date that which we can  
12 submit a status report. I know we could settle  
13 with all the parties before that date in June.  
14 THE COURT: Ms. Lepore, do you agree with  
15 that?  
16 MS. LEPORE: Yes, Your Honor.  
17 THE COURT: Mr. Kahn?  
18 MR. KAHN: I agree.  
19 THE COURT: Ms. Menoyo?  
20 MS. MENOYO: Well, we will know by then.  
21 I think we could know by then.  
22 THE COURT: Okay. Well, thank you very

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1 much. Unless anyone has anything further to add at  
2 the last moment, I believe we are concluded and an  
3 order will issue shortly. Thank you very much for  
4 your time and help. We stand adjourned.  
5 (Whereupon, at 2:26 p.m., the  
6 teleconference hearing was concluded.)  
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1 CERTIFICATE OF NOTARY PUBLIC  
2 I, TERRI L. HAMILTON, the officer before whom  
3 the foregoing proceedings were transcribed, do  
4 hereby certify that the transcription of the  
5 foregoing pages was taken by me in stenotypy and  
6 thereafter reduced to typewriting; that said  
7 transcription is a true record of the proceedings;  
8 that I am neither counsel for, related to, nor  
9 employed by any of the parties to this action; and,  
10 further, that I am not a relative or employee of  
11 any counsel or attorney employed by the parties  
12 hereto, nor financially or otherwise interested in  
13 the outcome of this action.  
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TERRI L. HAMILTON  
Notary Public in and for the  
District of Columbia

My commission expires:  
May 15, 2014

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CERTIFICATE OF NOTARY PUBLIC

I, TERRI L. HAMILTON, the officer before whom  
the foregoing proceedings were transcribed, do  
hereby certify that the transcription of the  
foregoing pages was taken by me in stenotypy and  
thereafter reduced to typewriting; that said  
transcription is a true record of the proceedings;  
that I am neither counsel for, related to, nor  
employed by any of the parties to this action; and,  
further, that I am not a relative or employee of  
any counsel or attorney employed by the parties  
hereto, nor financially or otherwise interested in  
the outcome of this action.

  
TERRI L. HAMILTON

Notary Public in and for the  
District of Columbia

My commission expires:  
May 15, 2014



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