

LEONARD KOPELMAN
DONALD G. PAIGE
ELIZABETH A. LANE
JOYCE FRANK
JOHN W. GIORGIO
JOEL B. BARD
JOSEPH L. TEHAN, JR.
THERESA M. DOWDY
DEBORAH A. ELIASON
RICHARD BOWEN
DAVID J. DONESKI
JUDITH C. CUTLER
KATHLEEN E. CONNOLLY
DAVID C. JENKINS
MARK R. REICH
BRIAN W. RILEY
DARREN R. KLEIN
JONATHAN M. SILVERSTEIN
ANNE-MARIE M. HYLAND
GEORGE X. PUCCI
WILLIAM HEWIG III
JEANNE S. MCKNIGHT
LAUREN F. GOLDBERG
MICHELE E. RANDAZZO
ILANA M. QUIRK

JANET HETHERWICK PUMPHREY
DIRECTOR WESTERN OFFICE

KOPELMAN AND PAIGE, P. C.

ATTORNEYS AT LAW

101 ARCH STREET
BOSTON, MA 02110-1109

(617) 556-0007
FAX (617) 654-1735

LENOX OFFICE
(413) 637-4300

NORTHAMPTON OFFICE
(413) 585-8632

WORCESTER OFFICE
(508) 752-0203

RECEIVED
U.S. E.P.A.

2006 NOV -3 PM 2:54

ENVIR. APPEALS BOARD

KATHLEEN M. O'DONNELL
PATRICIA A. CANTOR
THOMAS P. LANE, JR.
MARY L. GIORGIO
THOMAS W. MCENANEY
KATHARINE I. DOYLE
JEFFREY A. HONIG
GREGORY CORBO
DANIEL T. HOLLAND
ELIZABETH R. CORBO
KATHARINE LORD KLEIN
MARIA C. ROTA
VICKI S. MARSH
JOHN J. GOLDROSEN
SHIRIN EVERETT
JONATHAN D. EICHMAN
JOSEPH S. FAIR
LAURA H. PAWLE
CAROLYN M. MURRAY
JACKIE COWIN
JEFFREY T. BLAKE
BRIAN M. MASER
BRIAN J. WINNER
ROBERT H. MCKERTICH
ANNE C. ROSENBERG
KATHERINE D. LAUGHMAN
JEFFERY D. UGINO
MATTHEW R. KIROUAC
MICHAEL B. CABRAL

November 3, 2006

BY HAND

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

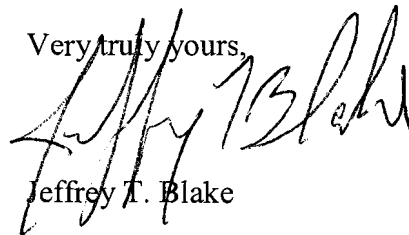
Re: Leominster (Massachusetts) Water Pollution Control Facility
NPDES Permit No. MA0100617

Dear Sir/Madam:

Enclosed herewith, please find one (1) original and five (5) copies of the City of Leominster's Petition for Review for filing and consideration.

Please contact me with any questions that you may have.

Very truly yours,



Jeffrey T. Blake

JTB/jmb

Enc.

cc: Mayor
DPW Director
John Gall, CDM
Tonia Bandrowicz, Esq., U.S. Environmental Protection Agency
Glen Haas, MA Department of Environmental Protection

297458/LEOM/0513

RECEIVED
U.S. E.P.A.

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

NOV -3 PM 2: 57

ENVIR. APPEALS BOARD
NPDES Appeal No. _____

In re:

LEOMINSTER WATER POLLUTION
CONTROL FACILITY

NPDES Permit No. MA0100617

PETITION FOR REVIEW

I. INTRODUCTION

Now come the City of Leominster and the Leominster Water Pollution Control Facility (“the City” or “Leominster”) and, pursuant to 40 CFR 124.19(a) hereby petition for review of National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA0100617 (the “New Permit”) dated September 28, 2006. (A copy of the Permit and the cover letter accompanying the same are attached hereto as Exhibit A). The Permit authorizes the City to discharge to the North Nashua River (MA-81)(“the River”) which eventually flows though Pepperell Pond, an artificial impoundment created by Pepperell Dam.

As discussed in greater detail below, the City asserts that because certain conditions of the New Permit are based upon clearly erroneous findings of fact and errors of law this Board should grant review. Further, review of this matter is particularly apt where, as here, the EPA has set nutrient limits based, in part, on information that is not available to the City despite the City’s numerous request for said documentation. The EPA’s failure to disclose the data upon which it purportedly relies is particularly egregious where, as here, it is readily apparent that EPA has mischaracterized and

exaggerated the conditions of the receiving waters, ignoring published data that directly contradicts its conclusion and clearly shows that there was no need to modify the 2000 Permit. Specifically, the Fact Sheet contained in the Draft Permit alludes to a model and TMDL being developed by the Massachusetts Department of Environmental Protection (“DEP”); however, the DEP has not released the model or TMDL nor has the City been able to obtain any preliminary results. Moreover, the most recent data available demonstrates that there is no need for more stringent permit limits on phosphorus, where sampling has conclusively established that the receiving waters are mesotrophic. Finally, the EPA relies on purported Massachusetts Water Quality Standards which, as a matter of law, do not apply to the receiving water of the City’s discharge.

Specifically, the City contends that the Board should grant review because:

- 1) EPA has incorrectly interpreted the Commonwealth’s Water Quality Standards, thus EPA’s reliance on the Water Quality Standards in setting limits are a clearly erroneous application of the applicable law;
- 2) EPA failed to comply with 40 CFR 124.11 when it based the New Permit limitations on information not available to the City, thus depriving the City of a meaningful opportunity to comment on the New Permit limitations;
- 3) The EPA has mischaracterized and exaggerated the conditions of the receiving waters, ignoring published data that directly contradicts its conclusion and clearly shows that there was no need to modify the 2000 Permit;
- 4) The phosphorus limits contained in the New Permit are arbitrary and capricious because they are based on an incomplete post hoc rationalization of the permit limits; and
- 5) The fact that there is no record evidence to support more stringent phosphorus limits and compliance with the New Permit’s more stringent levels will cost the City \$15,000,000 represents an important policy consideration that warrants review by the Board.

For further reasons therefor, the City relies upon the following.

II. RELEVANT FACTS

1. The City of Leominster is a political subdivision of the Commonwealth of Massachusetts.
2. The City is the owner and operator of a certain wastewater disposal plant known as the Leominster Water Pollution Control Facility (“the Facility”). The Facility has an address of 436 Mechanic Street, Leominster, MA 01453.
3. Pursuant to the Federal Clean Water Act, the City is authorized to discharge from the Facility to the River pursuant to the terms of an NPDES permit issued on July 28, 2000 (“the 2000 Permit”). (A copy of the 2000 Permit is attached hereto as Exhibit C).
4. The 2000 Permit is still in effect since the City has applied for its renewal and that process is still ongoing.
5. Subsequent to the issuance of the 2000 Permit, the DEP published the Nashua River Basin, 1998 Water Quality Assessment Report (“DEP Document”). As Appendix D to that report, (a true and accurate copy of Appendix D is attached hereto as Exhibit F), DEP included a comprehensive analysis of the nutrient levels in the receiving waters (Pepperell Pond). Significantly, this study revealed that phosphorus discharges were not causing cultural eutrophication in the receiving waters.
6. The City submitted a permit renewal application to the Environmental Protection Agency (“EPA”) for the reissuance of the 2000 Permit to discharge treated domestic sewerage effluent to the River.
7. From April 20, 2006 to May 19, 2006, the EPA and the DEP solicited public comments on a draft NPDES permit developed pursuant to the permit renewal

application from the City. (A true and accurate copy of the Draft Permit is attached hereto as Exhibit B). Notwithstanding the above reference DEP Document, the Draft Permit contained phosphorus limits that are significantly more stringent than the 2000 Permit.

8. The Draft Permit included a Fact Sheet which purportedly set forth the EPA's justification for the limitations and conditions contained in the Draft Permit.

9. Among the justifications cited were: (1) the Massachusetts Water Quality Standards at 314 CMR 4.404(5); (2) a draft TMDL that is yet to be completed on the River; and (3) the Nashua River Basin, 1998 Water Quality Assessment Report.

10. The engineering firm of Camp, Dresser and McKee submitted comments on behalf of the City. (The Comments and EPA's response thereto are attached to the New Permit at Ex. A).

11. As part of its Comments the City noted that the draft TMDL was not available and requested an opportunity to review the document; however, as of the date of the New Permit, the City has not seen the draft TMDL. The City also referenced the DEP Document.

12. The following additional parties submitted comments as well: Cindy Delpapa of the MA Riverways Program; and Elizabeth Ainsley Campbell, Executive Director and Martha S. Morgan, Water Resources Advisor, Nashua River Watershed Association. (See Ex. A).

13. On September 28, 2006 the EPA responded to Comments on the draft permit and issued NPDES Permit No. MA0100617, the New Permit, to the City. (See Ex. A.)

14. The New Permit did not address to the satisfaction of the City, any of the comments submitted by the City's consultant. Indeed, based on review of the conditions contained in the New Permit and EPA's responses to the City's Comments on said proposed conditions, the City has determined that the factual and legal basis cited by the EPA for its issuance of certain conditions of the New Permit are clearly erroneous and in some cases based on significant misinterpretations of the Massachusetts Water Quality Standards.

15. Moreover, it is apparent that the EPA has relied upon a draft model and TMDL of the River that was not made available to the City for review before, during or after the Comment period. Pursuant to 40 CFR §124.11, the City is, by right, given a meaningful opportunity to comment on the proposed draft permit. However, as outlined in the City's Comment # 2, the data relied upon the EPA in drafting the permit was not made available to the City. Without this data, the City was denied a meaningful opportunity to Comment on the more stringent limits contained in the draft permit and subsequently contained in the New Permit.

16. The City appeals the New Permit with respect to the new conditions/changes contained in the New Permit and requests that the more stringent limit on the discharge of phosphorus be stricken and returned to the levels contained in the 2000 Permit.

III. ARGUMENT

A. STANDARD OF REVIEW

In proceedings under 40 C.F.R. §124.19(a), the Environmental Appeals Board ("the Board" or "EAB") should review EPA's decision on an NPDES permit when the petition for review establishes that the permit condition in question is based on a clearly

erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. §124.19(a); In re: Gov't of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323, 333 (EAB 2000).

In this matter, the 2000 Permit issued to the City required the Facility to meet an effluent phosphorus limit of 1.0mg/l as a monthly average between May and October of each year. (See Ex. C). However, in the New Permit, EPA has significantly reduced the phosphorus limit to 0.2mg/l. This significant reduction is based on an erroneous interpretation of the Massachusetts Water Quality Standards at 314 CMR 4.04(5). Specifically, in the Fact Sheet and response to comments for the New Permit the EPA justifies the new limit as follows: 1) the limit is required to meet the Massachusetts Water Quality Standards as set forth in 314 CMR 4.00; and 2) “MassDEP has recently completed modeling which will serve as the basis for the Total Maximum Daily Load Study of the Nashua and North Nashua Rivers. The preliminary model results indicate the proposed seasonal total phosphorus limit of 0.2 mg/l to be appropriate.” (See Ex. B at Fact Sheet p. 7.). For the detailed reasons set forth below, the significantly more stringent conditions contained in the New Permit are based on clearly erroneous findings of fact and conclusions of law thus warranting review by this Board.

B. EPA incorrectly interpreted the Commonwealth's Water Quality Standards

In the Fact Sheet, EPA states that the “narrative criteria for nutrients are found at 314 CMR §4.04(5)(c), which states that nutrients ‘shall not exceed the site specific limits necessary to control accelerated or cultural eutrophication.’” (Ex. B at Fact Sheet p. 6). The Standards also require that “any existing point source discharge containing nutrients

in concentrations which encourage eutrophication or growth of weeds or algae shall be provided with the highest and best practicable treatment to remove such nutrients.” (See Ex. A Fact Sheet p. 6). Mistakenly believing that 314 CMR §4.04(5) required the highest and best practical treatment to remove phosphorus from the City’s discharge, EPA, proposed new more stringent phosphorus limits.

Comments submitted by the City in response to the Draft Permit state, in summary, that the EPA erroneously interpreted the Massachusetts Water Quality Standard for phosphorous as applying to a stream that does not flow into either a lake or pond. (See Ex. A at City’s Comments 5-6). In its Response to the City’s Comments, EPA asserts that the Commonwealth’s Water Quality Standards at 314 CMR § 4.04(5) require the imposition of Highest and Best Practical Treatment for phosphorus for any discharge, not just discharges to lakes and ponds as justification for the increase. (Ex. A at Response to City’s Comment 5).

The relevant language of the current water quality standards is as follows:

(5) Control of Eutrophication. From and after the date 314 CMR 4.00 become effective there shall be no new or increased point source discharge of nutrients, primarily phosphorus and nitrogen, directly to lakes and ponds. There shall be no new or increased point source discharge to tributaries of lakes or ponds that would encourage cultural eutrophication or the growth of weeds or algae in these lakes or ponds. *Any existing point source discharge containing nutrients in concentrations which encourage eutrophication or growth of weeds or algae shall be provided with the highest and best practical treatment to remove such nutrients.* Activities which result in the nonpoint source discharge of nutrients to lakes and ponds shall be provided with all reasonable best management practices for nonpoint source control. 314 CMR 4.04(5) (emphasis supplied).

EPA is erroneous in its conclusion that the above quoted provision of the Massachusetts Water Quality Standards compels the highest and best practicable treatment to remove phosphorus from Leominster’s discharge. Indeed, the entire above

quoted paragraph discusses the control of eutrophication in lakes and ponds and tributaries thereof. The City, however, does not discharge to a lake, pond or tributary thereof. Since the City's discharge is to a river that is not a tributary to a lake or pond, the paragraph does not apply. EPA's assertion that regardless of the context of the paragraph, the italicized sentence applies to all discharges, not just those to lakes and ponds is a clearly erroneous conclusion of law.

Indeed, contrary to EPA's position, it is well-settled that "the plain meaning of statutory language, as derived from the whole of the statute, including its overall policy and purpose, controls." Rolland v. Romney, 318 F.3d 42, 48 (1st Cir. 2003)(emphasis supplied). Thus, "[r]ather than culling selected words [or sentences] from a statute's text and inserting them in an antiseptic laboratory setting, [an agency] engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure and purpose, as well as to aggregate language." Cable Vision of Boston, Inc. v. Public Improvement Commission of Boston, 184 F.3d 88, 101 (1st Cir. 1999)(quoting O'Connell v. Shalala, 79 F.3d 170, 178 (1st Cir. 1996).

In this matter, the EPA cherry picked a single sentence and applied it out of context so as to achieve the result it desired. When read as a whole, it is clear that 314 CMR 4.04(5) was intended to control eutrophication in lakes, ponds and tributaries thereof, and there is no language in said section to suggest that it is intended to apply to rivers and streams (other than tributaries to lakes and ponds).

As the City pointed out in its Comments (Ex. A Comments p. 9-10), the DEP has acknowledged that the existing language only applies to lakes, ponds and tributaries thereof. The Department has promulgated new, proposed water quality standards which

are not yet adopted and approved by EPA. In describing these new standards, the

Department clearly states as follows:

Nutrients/Control of Eutrophication 314 CMR 4.05(5)(c): Cultural eutrophication now is addressed in the narrative nutrient criteria. *The resulting provision is expanded to ensure that all surface waters, not just lakes and ponds, are protected from excessive nutrients.* (See Massachusetts Department of Environmental Protection, Proposed Water Quality Standards Improvements, attached hereto as Exhibit D)(emphasis supplied).

Obviously, an agency's interpretation of regulations it is authorized to promulgate is given great deference. South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 97 (1st Cir.2002) ("Courts withhold such deference only when the agency's interpretation of its regulation is plainly erroneous or inconsistent with its language"); see also Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)("[w]here Congress has entrusted rulemaking and administrative authority to an agency, courts normally accord the agency particular deference in respect to the interpretation of regulations promulgated under that authority). Here, DEP has acknowledged that the existing regulations apply only to lakes, ponds, and tributaries thereof not to discharges to streams. Accordingly, EPA's position that 314 CMR 4.04(5) applies to all sources is based on a clearly erroneous conclusion of law.

EPA attempts to dismiss this significant misinterpretation of the DEP regulations by suggesting that the "revised language is for the purpose of clarifying the existing standards." (Ex. A at Response to Comments p.10). But the plain language of the proposed revision clearly indicates that the revision, when adopted, will expand the requirement beyond lakes and ponds to include all surface waters. Logic dictates that until the change is made, the applicable state requirement applies only to lakes and ponds.

Christensen v. Harris County, 529 U.S. 576, 588 (2000)(agency cannot under guise of interpretation create a new regulation).

The Facility discharges directly to the River which eventually flows through Pepperell Pond, an artificial impoundment created by the Pepperell Dam. Although EPA has not attempted to classify this impoundment as a “pond” for purposes of complying with 310 CMR 4.04(5), any such attempt would be unavailing as a matter of law because pursuant to 314 CMR 4.02 Pepperell Pond is a river impoundment with flowing water and thus not classified as a pond.¹

Because the City’s discharge is to a River, the existing water quality standards cited by the EPA do not apply to the discharge, and EPA’s reliance on 314 CMR § 4.04(5) as a basis for establishing a more stringent phosphorus limit is clearly erroneous as a matter of law. Therefore, the phosphorus limit of the New Permit should be stricken, and the limit set forth in the 2000 Permit should remain in effect.

C. The phosphorus limit in the New Permit is based on clearly erroneous findings of fact and conclusions of law

In its Comment # 2 the City observed that the permit was written in part based on a draft TMDL that was supposed to be completed in early 2006. The City commented that although the time for issuance of the TMDL had passed, as of that date of the New Permit, the TMDL had not been completed. EPA’s purported reliance on this incomplete

¹ 314 CMR 4.02 defines Lakes and Ponds as follows:

“Waterbodies situated in a topographic depression or a dammed river channel with water usually not flowing and an area greater than 20 acres; or less than 20 acres if the water depth in the deepest part of the basin exceeds two meters (6.6 feet) or if a discrete shoreline makes up all or part of the boundary. *Exceptions include* impervious man-made retention basins; *river impoundments with flowing water*; and harbors and bays which have year round navigable access to the ocean. (emphasis supplied).

draft was wholly inappropriate, particularly where the City was not given the opportunity to see the data relied upon by EPA.

EPA responded by claiming that “the TMDL was not the basis for the proposed limits” and that state water quality standards at 314 CMR 4.04(5) require the imposition of the more stringent permit limits. EPA’s assertions are belied by other statements contained in the Fact Sheet and, as discussed in detail above, based on clearly erroneous interpretations of DEP regulations. Therefore, any permit limits based on the preliminary TMDL or EPA’s misinterpretation of the Water Quality Standards are clearly erroneous.

1. EPA’s Reliance on the Modeling and Draft TMDL Conducted by the DEP Without Allowing the City to Review the Modeling and Draft TMDL has Deprived the City of a Meaningful Opportunity to Comment on the New Permit

Contrary to its self serving denials, it is clear that the EPA relied upon the unfinished TMDL in establishing the phosphorus limits in the New Permit. As such the EPA has failed to comply with 40 CFR §124.11 by issuing a final permit without allowing the City a meaningful opportunity to review data it relied upon in setting the New Permit limits. (See Ex. B at Fact Sheet p. 7). The Fact Sheet accompanying the permit alludes to a Model and TMDL being developed by the DEP and suggests that the yet to be released model and TMDL support the phosphorus limits contained in the draft permit and the New Permit. Notwithstanding the EPA’s denial of any reliance on the Model and TMDL currently being developed by the DEP, the Fact Sheet belies EPA’s position. Page 7 of the Fact Sheet clearly demonstrates that, at a minimum, EPA took into account the preliminary model results in setting the phosphorus limit of 0.2 mg/l.

The Fact Sheet at page 7 states in relevant part:

MassDEP has recently completed modeling which will serve as the basis for the Total Maximum Daily Load Study of the Nashua and North Nashua Rivers. The preliminary model results indicate the proposed seasonal total phosphorus limit of 0.2 mg/l to be appropriate (E. Hartmann, MassDEP, personal communication, December 2005). Furthermore, the State has also documented the eutrophication of the Pepperell Impoundment, located downstream of the Leominster WPCF. The impoundment is the downstream point of accumulation for any biomass produced upstream as the result of the Leominster phosphorus inputs. Id.

Based on the above quoted excerpt from the Fact Sheet it is clear that the EPA relied in part on the model and TMDL results that the City has not had an opportunity to review. EPA's response disavowing any reliance on the Model and TMDL, see Response #2, is disingenuous and this Board should grant review and remand the matter for further public hearing in order to give the City a meaningful opportunity to address the model and TMDL.

2. The more Stringent Permit Level for Phosphorus is Based on an Incomplete Post Hoc Rationalization of the New Permit limits, thus the New Permit limits are Arbitrary and Capricious

The EPA has knowingly mischaracterized and exaggerated with conditions of the receiving waters in order to justify the arbitrary phosphorus discharge limits in the New Permit. More specifically, on Page 7 of the Fact Sheet, the EPA states that the more stringent phosphorus discharge limit is necessary to control eutrophication of the Pepperell Impoundment located downstream of the Leominster WPCF. This contention, however, is contradicted by evidence that the EPA assisted in developing. More specifically, during the summer of 1998, the Massachusetts DEP conducted extensive Chlorophyll a, Phytoplankton and Periphyton sampling at various locations along the Nashua River. The results of this study were published as Appendix D to the DEP's

1998 Nashua River Water Quality Assessment (a true and accurate copy of Appendix D is attached hereto as Exhibit F). As a result of this extensive sampling, the DEP found that levels of chlorophyll a detected at the inlet to Pepperrell Pond, Pepperrell Pond and the outlet from Pepperrell Pond did not evidence cultural eutrophication. It is well established the Levels of chlorophyll a are commonly used as an indicator of the trophic status of waterbodies, and such levels have been used by EPA Region 1 to assess the degree of eutrophication of receiving waters. In addition, samples were examined to provide information on the algal community composition, to determine whether there was evidence of excessive nutrient enrichment. As a result of this sampling, the Department found as follows:

at the time of sampling in July and August there were no algal blooms evident, and little or no blue-green algae were present at any of the sampling sites. This suggests that nutrients, in combination with other environmental factors, were not causing excessive algal growth. The dominance of green algae in the outlet from Pepperrell Pond, along with elevated chlorophyll values, would contribute to the classification of this reach of the river as mesotrophic. (emphasis supplied).

Notwithstanding the strength of this evidence that the EPA assisted in developing, the permit drafters continue to insist that more stringent phosphorus limitations are necessary to control cultural eutrophication, referencing a Table in the main body of the Water Quality Assessment (Response to Comments, p. 9). Although the Table referenced by EPA identifies Pepperrell Pond as hypereutrophic, the specific basis for such classification if not given in the report, and is clearly erroneous when compared to the detailed findings set forth in Appendix D. Indeed, the EPA does not reference any support for this finding, but it goes on to discuss the so-called “Carlson Index” to support its position (Ex. A at Response to Comments, p. 9). The EPA’s

reliance on the Carlson Index, however, does not explain its disregard for the published site-specific data identified by the City and is clearly erroneous for the reasons discussed below. Therefore, in the absence of a TMDL and/or other more recent site specific information, the more stringent phosphorus limits are arbitrary and capricious.

Additionally, instead of working to make the data available for public review, or relying on the published data that already exists, EPA creates within the response to comments, four pages of text and calculations to affirm the prior action, which by their own admission is both incomplete and superficial. (See Ex. A) For example, in its response EPA states that “there may be some attenuation of phosphorus discharged from the treatment plants,” (Ex. B at Fact Sheet p. 5), and that their analysis “does not factor in other nonpoint sources of Phosphorus” Id. These shortcomings are exactly the issues that should be addressed in a proper TMDL.² Thus, EPA is implicitly admitting that the New Permit limits are not based on site specific analysis of the existing conditions at the River but rather unsupported hypothesis of the River conditions and the affect of the City’s discharge on those conditions. Accordingly, any imposition of more stringent permit limits is based on clearly erroneous findings of fact and conclusions of law.

EPA further compounds the original error by again referencing the unfinished and unavailable TMDL as substantiating the permit limits. In responding to Comment # 2, EPA acknowledges that “it would be desirable for the TMDL to be completed prior to the issuance of the permit” (Ex. B. at Fact Sheet p. 6). This creates an inference that this permit, issued at this time, is necessary to protect that River, and that EPA cannot afford

² A TMDL study is an evaluation of the Total Maximum Daily Load of a pollutant that a receiving water can tolerate and still meet water quality standards. Using a TMDL, regulators then set pollutant reduction targets (when necessary) for both point and nonpoint sources of pollution by a waste load allocation (WLA) process. A properly conducted TMDL and WLA would answer most of the City's complaints.

to await the issuance of the TMDL. Although the City has not had an opportunity to review the data on which the EPA relies, as discussed above, other data which published, clearly belies EPA's assertions.

Furthermore, the Agency has not yet issued draft permits to the three other dischargers in the upstream portions of the watershed that are collectively larger than the City's discharge, and control of their effluent phosphorus is presumably as important as that of Leominster's. Thus, the sense of urgency inferred by the Agency is inappropriate, and it should have awaited the issuance of the TMDL.

Accordingly, either EPA relied upon yet to be disclosed data that the City was not able to review prior to the issuance of the New Permit or the EPA admits that it did not rely upon current site specific conditions in arriving at the New Permit limits for phosphorus. As discussed above, if the EPA relied upon yet to be disclosed data then the City was deprived of any meaningful opportunity to comment on the data and this Board should grant review and remand the matter for further comment by the City. If EPA did not rely upon new site specific data without explaining what conditions in the River have changed to warrant more stringent limits, then the New Permit limits are arbitrary and capricious and thus clearly erroneous as a matter of law.

3. EPA's Logic Regarding the Application of its own Recommendations is Inconsistent and Arbitrary

EPA presents conflicting opinions as to the proper method to determine the affect of Leominster's discharge on cultural eutrophication in the receiving waters. In one instance, EPA chooses to use instream phosphorus concentrations alone to determine if the City's discharge causes or contributes to cultural eutrophication, (see Ex. B at Fact Sheet and Ex. A. Response to Comment #1) and in another, EPA acknowledges that

instream concentrations is one of a number of factors used to determine the affect of discharge on the trophic state of the River. (See Ex. B at Fact Sheet and Ex. A Response to Comment #3 p. 8)

As support for the significantly more stringent phosphorus limit in the New Permit, EPA cites the instream concentration of phosphorus in the receiving waters as the sole basis for concluding that the receiving waters are eutrophic. In the Fact Sheet (see Ex. B) and in the Response to Comment #1 (see Ex. A), calculations are presented by EPA to show that the City's discharge – both alone and in combination with those of other wastewater plants can result in instream concentrations in excess of various published reference standards. (See Ex. B Fact Sheet p. 7 and Ex. A Response to Comments, pages 1 through 5)

Notwithstanding EPA's reliance on instream phosphorus levels as indicative of the trophic state of the River in Comment #1, in Response to the City's Comment #3, the EPA acknowledges that elevated levels of phosphorus alone are not sufficient to cause water bodies to suffer cultural eutrophication. (See Ex. B). In Response #3, EPA identifies factors such as slope, tree cover, and bottom type as some of the factors which mitigate against gross eutrophication. (See Ex. B at Fact Sheet and Response to Comment #3 p. 8). Additionally, since the receiving water is a fast flowing river, residence time is an additional factor that will have a significant impact on cultural eutrophication. EPA should have waited until the TMDL for the receiving waters had been completed before issuing the permit since the TMDL would have integrated all the factors involved in accurately determining the state of the receiving water.

As demonstrated above, EPA has adopted conflicting positions on the importance of instream levels of phosphorus as an indicator of trophic state of the receiving waters, on the one hand instream phosphorus concentrations alone are sufficient to compel more stringent phosphorus limits to control cultural eutrophication; and then on the other hand, it acknowledges that there are other factors that could lead to different conclusions. At best this demonstrates that the EPA has based the more stringent phosphorus limits on arbitrary grounds and should have waited until the site specific TMDL was completed before issuing the New Permit. Obviously, since EPA has adopted mutually exclusive bases for imposing more stringent permit limits, one of the bases is incorrect and thus clearly erroneous factually.

Moreover, in an attempt to bolster its actions, EPA references the Carlson Index as the standard for determining the trophic status of various lakes, and, asserts that this index justifies its actions. The use of the Carlson index to determine the trophic status of the receiving waters is clearly erroneous and wholly inappropriate in this case. The Carlson index was developed for lakes, which have long residence times compared to impoundments behind dams in flowing river systems, such as Pepperell Pond. EPA's own fact sheet on the use of the Carlson index cautions against the wholesale application of the index, when it says "[t]he program manager must be aware, however, that the Carlson trophic state index was developed for use with lakes that have few rooted aquatic plants and little non-algal turbidity. Use of the index with lakes that do not have these characteristics is not appropriate". (See EPA's Fact Sheet on Carlson's Trophic State Index attached hereto as Exhibit E)(emphasis supplied).

The reliance on the Carlson index for determining the trophic status of Pepperell Pond is clearly erroneous because Pepperell Pond is not a lake and the residence time in Pepperell Pond is significantly shorter than in lakes. Moreover, as detailed above, the real analysis of the pond, and synthesis of the data is presented in the appendix to the DEP Document, (see Ex. F), which contains the appropriate data to determine the real condition of the water body. According to the appendix to the DEP Document Pepperell Pond is not eutrophic. Therefore, EPA's conclusion that a more stringent phosphorus limit is necessary based on the DEP Document is clearly erroneous.

D. The Board should grant review because this matter involves an important policy consideration

Finally the Board should grant review because this matter involves an important policy consideration. 40 C.F.R. §124.19(a). Specifically, as the City has outlined above, the New Permit is either based on outdated and unsupported conclusions on the conditions of the receiving water that do not take its actual effect of the City's discharge on the River. Indeed, there is currently a model and draft TMDL being finalized to determine the current condition of the River and the data that does exist clearly demonstrates that the conditions at the River do not justify more stringent phosphorus limits. If the New Permit conditions are allowed to take effect, then the City will be required to undertake an upgrade to the Facility which is estimated to cost approximately \$15,000,000. The City will be required to expend these funds without the benefit of an updated assessment of the current conditions of the River. Thus, the City would be required to begin engineering an upgrade only to have to reengineer or update the proposed upgrade once the new assessment of the River is completed or worse find that no upgrade was necessary. As it currently stands, no agency or individual knows, in fact,

whether the current conditions of the River warrant the more stringent permit conditions and the only information currently available demonstrates that the River is mesotrophic and thus not sensitive to phosphorus discharge.

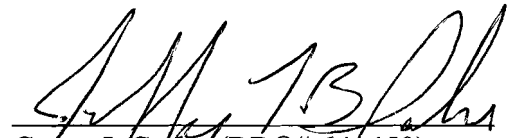
While it is acknowledge that costs are generally not given much weight in considering compliance with permit conditions, where, as here, the cost are wholly out of proportion to the benefits sought, if any, the conditions should be deemed arbitrary and capricious. See BAFS Wyandotte Corp. v. Costle, 598 F2d 637, 656 (1st Cir. 1979). Here, the factual predicate of said conditions are so dated and unreliable and an updated assessment is so near completion the Board should exercise its discretion and decide this important policy consideration in favor of the City and stay implementation of the New Permit conditions with respect to phosphorus.

IV. CONCLUSION

For the foregoing reasons, the Board should grant review and order the EPA to strike the new more stringent phosphorus limit contained in the New Permit and restore said limit to the level contained in the 2000 Permit.

City of Leominster

By its attorneys



Gregg J. Corbo (BBO# 641459)

Jeffrey T. Blake (BBO# 655773)

Kopelman and Paige, P.C.

Town Counsel

101 Arch Street

12th Floor

Boston, MA 02110-1109

(617) 556-0007