

RECEIVED  
U.S. E.P.A.

SEP 27 12 PM 2 00

ENVIRONMENTAL APPEALS BOARD

DEIRDRE C. MENOYO  
ATTORNEY AT LAW  
388 WILLIS ROAD  
SUDBURY, MA 01776  
PH: 978-440-9690  
FAX: 978-440-9692

**BY HAND**

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
Colorado Building  
1341 G Street, N.W., Suite 600  
Washing, DC 20005

RE: In re: Town of Wayland Wastewater Management District Commission  
National Pollutant discharge Elimination System  
Permit NPDES no. MA0039853

Dear Sir or Madam:

Enclosed please find one (1) original and five (5) copies of an Initial Petition for Review from Mr. Thomas B. Arnold with respect to the above-referenced permit.

Very truly yours,



Deirdre C. Menoyo

Enclosures

cc: USEPA Region 1  
Ann Williams, Esq.

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

In re: Town of Wayland  
Wastewater Management District Commission  
NPDES Permit No. MA0039853

NPDES Appeal No. \_\_\_\_\_

**INITIAL PETITION FOR REVIEW**

FROM

THOMAS B. ARNOLD

Deirdre C. Menoyo  
Attorney at Law  
388 Willis Road  
Sudbury, MA 01776  
Tel: 978-440-9690  
Fax: 978-440-9692  
Email: [dm@menoyolaw.com](mailto:dm@menoyolaw.com)

Attorney for the Petitioner:  
Thomas B. Arnold  
20 Kendall Road  
Sudbury, MA 01776  
E-Mail: [tba1959@comcast.net](mailto:tba1959@comcast.net)

Dated: November 17, 2008

### **INITIAL PETITION FOR REVIEW**

Pursuant to 40 C.F.R. § 124.19(a), Thomas B. Arnold submits this initial petition ("Initial Petition") for review of NPDES Permit No., MA0039853 ("Final Permit"), which was jointly issued to the Town of Wayland, Wastewater Management District Commission ("Permittee"), on September 30, 2008, by the United States Environmental Protection Agency ("EPA"), Region 1 ("Region"), and the Massachusetts Department of Environmental Protection ("DEP").

### **JURISDICTIONAL BASIS FOR MR. ARNOLD'S APPEAL**

Any person who filed comments on a draft NPDES permit may petition the Board for review of its terms and conditions. 40 C.F.R. §124.19(a). By a letter dated April 11, 2006, attached hereto as Exhibit A and incorporated in total by reference, Mr. Arnold filed comments on the draft permit raising, among others, the issues presented in this petition. In addition to Mr. Arnold, the following persons submitted comments: Linda Segal of Wayland; John Davenport and Carol Lee Rawn of the Conservation Law Foundation, Boston, MA; Jamie Fosburgh, Director, River Program, US Department of the Interior, National Park Service, Northeast Region; and Sarah R. Newbury of Wayland, among others. Mr. Arnold's comments, along with comments from the parties identified above, collectively raise and support the issues presented in this Initial Petition. Therefore, Mr. Arnold complies with the requirement that the issues raised in the petition for review were raised below, in accordance with 40 C.F.R. § 124.19(a).

\*\*\*

**REASON FOR INITIAL PETITION FOR REVIEW: DISPUTE REGARDING  
COMMENCEMENT OF THIRTY-DAY APPEALS PERIOD.**

Mr. Arnold and the Region disagree as to the actual deadline for his petition. Mr. Arnold contends that the time for counting his appeal period dates from his receipt of the certified mail packet containing the Permit on October 31, 2008. *See* attached Exhibit B showing the USPS record of delivery on October 31, 2008. The Region dates his appeal period from the first date that the USPS attempted to deliver the certified mail packet -- October 17, 2008. *See* photograph of envelope containing the packet attached as Exhibit C, showing three attempted deliveries starting on October 17. The markings also show that, on November 1, the USPS returned the certificate of receipt to the Region. Mr. Arnold was abroad from October 15, 2008 to November 3, 2008. A family member retrieved the packet from the local post office sometime after the last attempted delivery of October 28. Adding to the confusion, the Region informed Mr. Arnold that they have in hand a receipt signed October 29. This statement contradicts the USPS record showing that delivery occurred on October 31, 2008. *See* attached Exhibit B. The USPS record of delivery on October 31 is consistent with the return made on November 1. Computation of the start time for appeal is further confounded by the sixteen-day delay in notification to Mr. Arnold of the Final Permit's issuance. While the Permit was issued on September 30, the Region initiated notice to Mr. Arnold on October 16, as shown by the postmark date on the envelope. *See* Exhibit C. In fact, the Region apologized to Mr. Arnold for the delay in a letter dated October 15, 2008. The Region's Chief of the Municipal Permits Branch, Roger Janson, stated: "Please note that appeals of NPDES

permits must be filed with the Environmental Appeals Board within thirty days of receipt of notice. (40 CFR 24.19(a).” (Emphasis added.) See letter attached as Exhibit D. There was no way that Mr. Arnold could have anticipated issuance of the Final Permit at this specific juncture, two and one-half years after he submitted his comments, so as to provide a means to accept delivery.

If Mr. Arnold correctly understands the regulations and the information provided to him in the packet, his deadline is December 1, 2008. If the Region’s calculation is correct, his deadline would be November 17, at the earliest.

Without conceding anything as to the proper computation of his deadline, and to assure that his party status and his basic objections are preserved before the Board by the earliest arguable deadline, November 17, Mr. Arnold submits this Initial Petition.

\*\*\*

#### **PURPOSE OF INITIAL APPEAL FOR REVIEW**

The Initial Petition for Review is designed to identify for the Environmental Appeals Board (“EAB”) and the Region those contested terms and conditions of the Permit concerning which Mr. Arnold seeks review. The new Permit contains terms and provisions based on clearly erroneous conclusions of fact or law that Mr. Arnold and others specifically identified in public comments, but which the Region failed to rationally address. In addition, the analysis that the Region conducted which provide the foundation for the appealed permit provisions, fails to duly consider the data and public comments or to draw rational conclusions from that data or those comments. Finally, the

Initial Petition identifies issues that involve an exercise of discretion or an important policy consideration that the EAB should, in its discretion, address.

\*\*\*

### **BACKGROUND**

The Final Permit approves a discharge into a segment of the Sudbury River that is part of the federally designated Wild and Scenic Sudbury, Assabet and Concord Rivers watershed. The point at which the discharge will enter the river is characterized by low flow that descends only one foot over approximately 12 miles, according to USEPA. member of the Board of Directors of the Sudbury River Watershed Organization, Mr. Arnold took the photographs attached as Exhibits E, F, G, and H, all in the reach of the river affected by the discharge. They show wide swaths of eutrophic growth, including algae, duckweed and water chestnuts, all signs of excess nutrients in the river. Exhibits G and H show a duckweed harvester deployed by US Fish and Wildlife (for the stretch bounded by the Great Meadows National Wildlife Refuge), the adjoining towns of Sudbury, Wayland, Lincoln and Concord, as well as private citizens and groups. Mr. Arnold's photographs demonstrate the extensive impingement of this noxious growth on the recreational value of the river to canoeists such as himself, who started leading canoe tours on the Sudbury River in 1977.

\*\*\*

### **FACTUAL AND LEGAL ISSUES**

Mr. Arnold asserts that certain conditions included in the Permit, and other conditions that EPA and DEP omitted from the Permit, violate the applicable requirements of the Federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), the Massachusetts Clean Water Act, M.G.L.c.21, § 26 *et seq.*, ("Act") and the regulations thereunder. These conditions pertain primarily to the discharge of phosphorus under the Permit. In short, the Permit allows the Permittee to discharge phosphorus at levels that

will contribute to and exacerbate existing severe eutrophication of the Sudbury River and thereby violate state water quality standards.

Throughout the permit documents, the Region repeatedly acknowledges that the Sudbury River is eutrophic in the vicinity of the discharge. On page 5 of the Fact Sheet, the Region stated: "given the over-allocation of nutrients of this watershed, and the existing eutrophic conditions, a flow increase at the Wayland WWTF would not be permitted, unless approved after a rigorous antidegradation review." See Fact Sheet p. 5 attached as Exhibit I. See also Responses to Comments ("We do agree that the background concentrations indicate impairment due to nutrients...") ("Given the impairments in the Sudbury River, more stringent total phosphorus limits were calculated and applied.") See pp. 4-5 of the Response to Comments attached as Exhibit J.

Nevertheless, the Region has imposed less stringent average monthly phosphorus limits (0.2 mg/l in summer months and 0.5 in winter) than it has imposed elsewhere in this very watershed. The Region purportedly deferred to the Massachusetts Department of Environmental Protection's supposed determination that the "best available and practical treatment" in setting total phosphorus monthly average limits of 0.2mg/l in summer and 0.5 mg/l in winter.

The Region should have followed the mandate of the federal Clean Water Act (CWA) requiring that "there shall be achieved ... not later than July 1, 1977, any more stringent limitations, including those necessary to meet water quality standards ... or require to implement any applicable water quality standard established pursuant to this chapter." 33 U.S.C. § 1311(b)(1)(C). To implement this statutory mandate, CWA regulations state: "No permit may be issued: (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states.: 40 C.F.R. §122.4(d); see also 40 C.F.R. §122.4(a) (No NPDES permit may be issued if its conditions do not provide for compliance with the applicable requirements of the CWA and the regulations thereunder.) The CWA regulations further state that if a permit is to be issued for a discharge that causes or contributes to water quality violations, conditions must be included in the permit to achieve water quality standards

and/or eliminate contributions to violations of water quality standards. 40 C.F.R. §122.44 (d)(1).

Massachusetts Surface Water Quality Standards set forth a narrative water quality standard regarding nutrients: "Unless naturally occurring, all surface waters shall be free from nutrients in concentrations that would cause or contribute to impairment of existing or designated uses.... " 314 CMR 4.05(5)(c). The designated uses for Class B waters such as the Sudbury River includes swimming and bathing. The narrative for aesthetics requires that "All surface waters shall be free from pollutants in concentrations or combinations that settle to form objectionable deposits, float as debris, scum or other matter to form nuisances; produce objectionable odor, color, taste or turbidity,, or produce undesirable or nuisance species of aquatic life. 314 CMR 4.05(5)(a).

On its face, the Region's Response to Comments shows that it anticipates the discharge to contribute to the phosphorus concentration in the Sudbury River. (See Exhibit X, p. 4). By virtue of these defects in the Final Permit, the Sudbury River will suffer severe eutrophication due to the wastewater discharges by this Permittee. Consequently, the outcome of this appeal will have an enormous and direct impact on the health, smell and human enjoyment of the Sudbury River.

\*\*\*

#### **BASIS FOR APPEAL**

The facts and circumstance outlined in its Petition demonstrate that the contested Permit provisions are based on errors of law and fact and involve an exercise of discretion or an important consideration that the EAB should exercise its power to review.

\*\*\*

#### **RELIEF SOUGHT**



Mr. Arnold respectfully seeks full review by the EAB of the appealed terms, conditions and limits of the Final Permit, based on this initial Petition and on his supplemental Petition for review to be submitted.

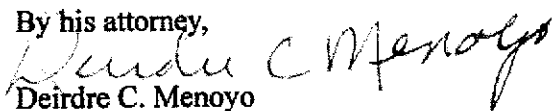
As part of such review, Mr. Arnold seeks the following relief:

- (1) that the EAB grant review of the Initial and Supplemental Petitions for Review.
  
- (2) remand to the Region for further permitting procedures, including, but not limited to, imposing more stringent total phosphorus limits that will eliminate any contribution by the permitted discharge to the eutrophication of the Sudbury River.

Respectfully submitted,

Thomas B. Arnold

By his attorney,

  
Deirdre C. Menoyo  
388 Willis Road  
Sudbury, MA 01776  
PH: 978-440-9690  
FAX: 978-440-9692

CERTIFICATE OF SERVICE

I, Deirdre C. Menoyo, hereby certify that I have served a copy of the foregoing Initial Petition for Review on the following by mailing same, postage paid, this 17<sup>th</sup> day of November 2008, to:

Ann Williams. Esq.  
US EPA – Region 1  
1 Congress Street  
Boston, MA 02114-2023

  
Deirdre C. Menoyo

Dated: November 17, 2008