



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

**BY FEDERAL EXPRESS**

November 18, 2008

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

Re: City of Pittsfield Wastewater Treatment Plant  
NPDES Appeal No. 08-19

Dear Ms. Durr:

Enclosed please find one original and five copies of (i) the Response to Petition for Review; (ii) the Certified Index to the Administrative Record, and (iii) exhibits containing relevant portions of the Administrative Record (original and three copies provided) submitted by the U.S. Environmental Protection Agency, Region I, with respect to the above referenced NPDES permit appeal.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Ann H. Williams".

Ann H. Williams  
Senior Assistant Regional Counsel

Enclosures

cc: Bruce Collingwood, P.E., City of Pittsfield

ENVIR. APPEALS BOARD

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

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In the Matter of: )  
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City of Pittsfield, ) NPDES Appeal No. 08-19  
Massachusetts ) )  
 ) )  
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NPDES Permit MA0101681 )

ENVIR. APPEALS BOARD

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**RESPONSE TO THE PETITION FOR REVIEW**

Pursuant to 40 C.F.R. § 124.19, Region 1 of the U.S. Environmental Protection Agency (“Region”) respectfully submits this Response to the Petition for Review (“Petition”) to the Environmental Appeals Board (“Board”) in the above-captioned matter filed by the City of Pittsfield, Massachusetts (“Petitioner” or “City”).

On August 22, 2008 the Region issued a final National Pollutant Discharge Elimination System (“NPDES”) permit (“Final Permit”) to the City, authorizing the discharge of treated wastewater to the designated receiving water, the Housatonic River. Petitioner seeks review of the Final Permit.

Petitioner argues that the Final Permit should have been significantly modified from its draft version based upon the concerns raised by the Petitioner during the comment period, and that without significant modification to address the Petitioner’s concerns, the Final Permit requirements are not achievable by the City. In making this argument the Petitioner has merely reiterated its previous comments made on the Draft

Permit without demonstrating with any specificity why the Region's response to those comments is clearly erroneous or otherwise without merit.

The record establishes that this Final Permit does not merit review because Petitioner fails to demonstrate that the Region committed any clear error of fact or law, or otherwise abused its discretion in issuing the permit in question. Therefore, the Board should deny the Petition on all issues, with the exception of the copper limit, which the Region is withdrawing from the Final Permit for reasons described below.

### **STATEMENT OF THE CASE**

#### **A. STATUTORY AND REGULATORY BACKGROUND**

Congress enacted the Clean Water Act ("CWA" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* CWA § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, 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 sections of the Act. *See* CWA §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a). Section 402 establishes one of the CWA's principal permitting programs, the National Pollutant Discharge Elimination System. Under this section of the Act, EPA may "issue a permit for the discharge of any pollutant, or combination of pollutants" so long as the requirements of the CWA and its implementing regulations are met. *Id.* NPDES permits generally contain discharge limitations and establish related monitoring and reporting requirements. *See* CWA § 402(a)(1), (2), 33 U.S.C. § 1342(a)(1), (2). The regulations governing EPA's NPDES permit program are generally found in 40 C.F.R. Parts 122, 124, 125 and 136.

NPDES permits are issued by EPA or by a state agency subject to EPA review in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program. *See* CWA § 402(a)-(d), 33 U.S.C. § 1342(a)-(d). The Commonwealth of Massachusetts has not obtained such authorization, and as a result, the Region issued the Permit to the City of Pittsfield. Although the Region administers the NPDES program in Massachusetts, the Commonwealth maintains separate, independent permitting authority over surface water discharges pursuant to the Massachusetts Clean Waters Act. *See* Mass. Gen. Laws Ann. Ch. 21 § 43. While the federal and state permits have separate legal foundations, the Region and the Massachusetts Department of Environmental Protection (“MassDEP”) typically coordinate their respective permitting efforts and simultaneously issue the two permits using a single document. These permits are often identical, but there is no legal requirement for them to be the same.

Section 301 of the CWA provides for two types of effluent limitations to be included in NPDES permits: “technology-based” limitations and “water quality-based” limitations. *See* CWA §§ 301, 303, 304(b), 33 U.S.C. § 1311, 1313, 1314(b); 40 C.F.R. Parts 122, 125, 131. Technology-based limitations, generally developed on an industry-by-industry basis, reflect a specified level of pollutant-reducing technology available and economically achievable for the type of facility being permitted. *See* CWA § 301(b), 33 U.S.C. § 1311(b). As a class, Publicly Owned Treatment Works (“POTWs”) must meet performance-based requirements based on available wastewater treatment technology. *See* CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B). The performance level for POTWs is referred to as “secondary treatment.”

Water quality-based effluent limits, on the other hand, are designed to ensure that state water quality standards are met regardless of the technological and economic factors that inform the derivation of technology-based limitations. In particular, section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), requires achievement of “any more stringent limitation [than the technology-based requirements set forth in Section 301(b)(1)(A) and (B)], including those necessary to meet water quality standards...established pursuant to any State law or regulation....”

Water quality standards under the Act consist of three elements, two of which are relevant here:<sup>1</sup> (1) a designated “use” of the water, such as for public water supply, aesthetics, recreation, propagation of fish, or agriculture; and (2) “criteria,” which specify the amounts of various pollutants that may be present in those waters without impairing the designated uses, expressed either in numeric form for specific pollutants or in narrative form (*e.g.*, waters shall contain no phosphorus or nitrogen in such concentrations that would impair any existing or designated uses, unless naturally occurring). *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); *see also* 40 C.F.R. §§ 130.3, 130.10(d)(4), 131.6, 131.10 and 131.11.

Massachusetts Surface Water Quality Standards (“Massachusetts Standards”) designate the segment of the Housatonic River where the Petitioner’s discharge outfall is located (segment MA21-04) as a Class B Warm Water Fishery. *See* 314 C.M.R. § 4.06 (Table 2). A Class B Warm Water Fishery is designated as a habitat for fish, other aquatic life and wildlife, and for primary (*e.g.*, swimming) and secondary (*e.g.*, fishing and boating) contact recreation. *See* 314 C.M.R. §§ 4.05(3)(b) and 4.06 (Table 2). The

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<sup>1</sup> The third component of the overall water quality standards program is the antidegradation policy, which is not at issue here.

Massachusetts Standards establish a number of criteria specific to Class B waters, such as criteria for dissolved oxygen and bacteria. *See* 314 C.M.R. § 4.05(3)(b)(1-8).

In addition to criteria specific to Class B waters, Massachusetts imposes minimum narrative criteria applicable to all surface waters, including aesthetics (“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”); bottom pollutants and alterations (“free from pollutants in concentrations or combinations or from alterations that adversely affect the physical or chemical nature of the bottom, interfere with the propagation of fish or shellfish, or adversely affect populations of non-mobile or sessile benthic organisms.”); toxics (“free from pollutants in concentrations that are toxic to humans, aquatic life or wildlife”); and 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...”). *See* 314 C.M.R. § 4.05(5)(a),(b), (e) and (c). Section 4.05(e) also establishes numeric criteria on toxic pollutants for which EPA has adopted CWA section 304(a) National Recommended Water Quality Criteria. Massachusetts Standards do not establish a numeric criterion for total phosphorus.

Massachusetts Standards require water quality standards to be met even during severe hydrological conditions, *i.e.*, periods of critical low flow when the volume of the receiving water is able to provide relatively little dilution. In Massachusetts, NPDES permit limits for discharges to rivers and streams must be calculated based on the

“7Q10,” or “the lowest mean flow for seven consecutive days to be expected once in ten years.” *See* 314 C.M.R. § 4.03(3).

Under the federal regulations implementing the NPDES program, permit issuers are required to determine whether a given point source discharge “causes, has the reasonable potential to cause, or contributes to” pollutant levels in excess of the narrative or numeric criteria set forth in state water quality standards. *See* 40 C.F.R. § 122.44(d)(1)(ii). If a discharge is found to cause, have the reasonable potential to cause, or contribute to pollutant levels in excess of a numeric or narrative state water quality criterion, NPDES regulations implementing section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), provide that a permit *must* contain effluent limits as necessary to achieve state water quality standards. *See* 40 C.F.R. §§ 122.44(d)(1), 122.44(d)(5) (providing in part that a permit must incorporate any more stringent limits required by CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C)). The regulatory mechanism used by permit writers to interpret narrative water quality criteria and establish numeric water quality-based effluent limits is set forth at 40 C.F.R. § 122.44(d)(1)(vi). Where a state has not established a numeric water quality criterion for a specific chemical pollutant that is present in the effluent at a concentration that causes or has a reasonable potential to cause or contribute to a violation of narrative water quality standards, the permitting authority must establish effluent limits in one of three ways: (i) based on a “calculated numeric criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and fully protect the designated use”; (ii) on a “case-by-case basis” using CWA § 304(a), 33 U.S.C. § 1314(a), recommended water quality criteria, supplemented as necessary by other relevant information; or (iii) in

certain circumstances, based on an “indicator parameter.” 40 C.F.R. §

122.44(d)(1)(vi)(A)-(C).

Under CWA § 401, EPA may not issue an NPDES permit to a proposed discharger until the state in which the discharger is located “certifies” that the permit contains conditions necessary to assure compliance with, among other things, the state’s water quality standards. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 124.53(a), 124.55(a)(2).

## **B. FACTUAL AND PROCEDURAL BACKGROUND**

Petitioner owns and operates a POTW (“Facility”), which is an advanced wastewater treatment facility with a design flow of 17 million gallons per day located in Pittsfield, Massachusetts. *Ex. 1 (Fact Sheet)* at 3 (*Administrative Record (“AR”) 9*). The Towns of Dalton, Lenox (North), Hinsdale, and Lanesborough contribute flow to the Facility and are named as co-permittees. *Id.* On October 2, 2000 the Region issued an NPDES permit (“2000 Permit”) to the City authorizing discharge from the Facility to the Housatonic River. *Id.* The 2000 Permit expired on December 5, 2005. *Id.* The City filed a timely application for re-issuance and was granted an administrative continuance pending re-issuance. *Id.*

On December 28, 2007, the Region and MassDEP issued a draft permit for public comment. *Ex. 2 (Draft Permit)* (*AR 8*). The agencies solicited public comments until February 10, 2008. *Ex. 1 (Fact Sheet)* at 1 (*AR 9*). The City filed comments on a number of permit conditions. *See Ex. 3 (City of Pittsfield Public Comments (“Comments”))* (*AR 18*). The City questioned the phosphorus, aluminum, *E. coli* and copper limits; the inclusion of additional permittees and their responsibilities; the necessity of certain



testing and reporting requirements; and sought clarification of a number of other issues. *Id.* The Region reviewed all comments submitted on the Draft Permit and prepared a Response to Comments that addressed the issues raised by City in its timely comments. *See Ex. 4 (Response to Comments ("RTC")) (AR 16).* The Region provided a clear and reasoned response to each of the City's comments and, in response to several of the City's concerns, made changes or provided clarification in the Final Permit. After the Region obtained a CWA section 401(a) certification of the permit from Massachusetts, *Ex. 5 (Massachusetts Water Quality Certification) (AR 7)*, the director of the Region's Office of Ecosystem Protection signed a final NPDES permit for the City on August 22, 2008. *Ex. 6 (Final Permit) (AR 1).* The Region mailed the Final Permit to the City on August 28, 2008. *Ex. 7 (Notification of Final Permit) (AR 2).* On September 29, 2008 the Board received the City's Petition for Review of the Final Permit.

### **STANDARD OF REVIEW**

This Petition for Review was brought pursuant to 40 C.F.R. § 124.19(a), which creates a direct appeal to the Board of federally-issued NPDES permit decisions.

Although the Board has broad authority to review decisions made in NPDES permit cases, EPA intended the Board's power of review to be exercised "only sparingly." *See* 44 Fed. Reg. 32853, 32887 (June 7, 1979). With respect to appeals under Part 124 regarding NPDES permits, EPA policy calls for most such permits to be finally adjudicated at the regional level. *Id.*

In proceedings brought under 40 C.F.R. § 124.19(a), the Board generally will not grant review unless the petitioner establishes that a permit condition 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)(1)-(2); *In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004). The burden of demonstrating that review is warranted rests with the petitioner. 40 C.F.R. § 124.19(a); *see Rohm & Haas*, 9 E.A.D. 499, 504 (EAB 2000). A petitioner must argue with specificity why the Board should grant review. *See In re Puerto Rico Electric Power Authority*, 6 E.A.D. 253, 255 (EAB 1995). To meet the threshold of specificity required under 40 C.F.R. § 124.19(a), a petitioner must take two necessary steps: (1) state the objections to the permit that are being raised for review, and (2) explain why the Region's previous response to those objections is clearly erroneous or otherwise warrants review. *See Michigan Dep't of Env'tl. Quality v. EPA*, 318 F.3d 705, 708-09 (6th Cir. 2003) (citing *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. at 255). Thus, the mere repetition of objections made during the comment period or the "mere allegation of error" without specific supporting information are insufficient to warrant review. *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496, 520 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000).

### ARGUMENT

**I. The City's Petition Merely Restates Prior Objections Raised During the Comment Period Without Addressing Issues Raised in the Region's Response to Those Comments and Therefore Fails to Demonstrate with Specificity why the Region's Response is Clearly Erroneous or Otherwise Merits Review.**

The City's Petition for Review consists of a general letter to the Board along with a copy of the City's original comments on the Draft Permit. This submission falls far short of what is required to attain review by the Board. As described below, the Region provided a clear and reasoned response to each of the City's comments and, in some

cases, made changes to the permit in response to issues raised by the City. However, the Petition does not attempt to explain why the Region's response to the City's comments was inadequate, erroneous or otherwise warrants review. In fact, the Petition does not even acknowledge the Region's Response to Comments. The City's Petition for Review should be denied because the Petitioner has merely reiterated its previous comments made on the Draft Permit without demonstrating with specificity why the Region's response is clearly erroneous or otherwise merits review. *See In Re: Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001). "[A] petitioner may not simply reiterate its previous objections to a draft permit." *In re Austin Powder Co.*, 6 E.A.D. 713, 721 (EAB 1997). Moreover, the Petition provides no evidence that the Region's permit decision is based on clear error of law or fact or raises important policy considerations meriting review. The City has failed to "... provide compelling arguments as to why the Region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review." *In re: Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997). Because the City's petition merely restates objections from its earlier comments without ever addressing why the Region's Response to Comments was clearly erroneous or otherwise merits review, the Board should conclude that the City has failed to establish any clear error or abuse of discretion by the Region and deny the City's Petition for Review. *See In Re: Town of Ashland*, 9 E.A.D. 661, 670.

*i. The Phosphorus Limit*

In its comments on the Draft Permit, the City expressed concern over the new phosphorus limit because there had not been a Total Maximum Daily Load ("TMDL")

for phosphorus established in this section of the Housatonic. *See Ex. 3 (Comments)* at 2 (*AR 18*). The Region explained that a TMDL is not required for the establishment of water quality-based effluent limitations in NPDES discharge permits. *See Ex. 4 (RTC)* at 12 (*AR 16*). The Region further explained that Section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), requires achievement of any more stringent limitation than technology-based effluent limitations necessary to achieve state water quality standards in the receiving water. *Id.* Under federal regulations implementing the NPDES program, EPA is required to determine whether a given point source discharge “causes, has the reasonable potential to cause, or contributes to” pollutant levels in excess of the narrative or numeric criteria set forth in state water quality standards. *See* 40 C.F.R. § 122.44(d)(1)(ii). If a discharge is found to cause, have the reasonable potential to cause, or contribute to pollutant levels in excess of a numeric or narrative state water quality criterion, then a permit *must* contain effluent limits as necessary to achieve state water quality standards. *See* 40 C.F.R. §§ 122.44(d)(1), 122.44(d)(5).

The relevant Massachusetts Standards provide a narrative criterion pertaining to nutrients. *See* 314 C.M.R. § 4.00 *et seq.* Because the Massachusetts Standards do not include numeric criteria for phosphorus, the Region relied on the provisions of 40 C.F.R. § 122.44(d)(1)(vi)(A), nationally-recommended criteria, technical guidance, site-specific surveys and data and peer-reviewed scientific literature to interpret and apply the narrative criterion to achieve Massachusetts Standards in the receiving water. *See Ex. 4 (RTC)* at 13 (*AR 16*). The Region concluded, after extensive review and analysis conducted in accordance with the aforementioned narrative criterion assessment guidance materials, that the 1.0 mg/l phosphorus limit contained in the 2000 Permit was inadequate

and that a phosphorus limitation of 0.1 mg/l is “necessary to ensure that the discharge does not cause or contribute to a violation of water quality standards in the receiving water” and therefore *must* be included in the Final Permit. *Id.* at 12, 17.

Additionally, the City commented that the sources of the background phosphorus concentrations relied upon by the Region did not “seem appropriate,” and noted that other facilities discharging to the Housatonic “are not being required to remove phosphorus to the proposed limit.” *Ex. 3 (Comments) at 2 (AR 18)*. The Region responded, explaining that the “information and procedures used to determine the need for, and to derive the 0.1 mg/l phosphorus limit, are consistent with the requirements of 40 C.F.R § 122.44(d)(1)(ii), 40 CFR § 122.44(d)(1)(v) and 40 CFR § 122.44(d)(1)(vi)(A) and (B) and also conform with the procedures followed by [the Region] in making decisions regarding the imposition of water quality-based effluent limits in NPDES permits.” *Ex. 4 (RTC) at 17-18 (AR 16)*. The Region identified sources considered when determining the appropriate effluent limitations and explained how a close examination of all relevant factors resulted in the conclusion that a total phosphorus limit of 0.1 mg/l is necessary to ensure that Massachusetts Standards in the receiving water will be met. *See Id.*

The City further commented that the Facility is “not capable of meeting the [phosphorus] limit” without costly new infrastructure and in light of the need for capital improvements to existing infrastructure, “spending of the City’s limited funds to remove a small fraction of phosphorus seems inappropriate....” *Ex. 3 (Comments) at 2-3 (AR 18)*. In response, the Region explained that cost is not pertinent to establishing water quality based effluent limitations and indicated a willingness to issue an Administrative Order with a reasonable compliance schedule. *See Ex. 4 (RTC) at 18-19 (AR 16)*.

Under Section 301(b)(1)(C) of the CWA, 33 U.S.C. § 1311(b)(1)(C), effluent limits must be set at the levels determined to be necessary to meet water quality standards, even where such limits are more stringent than the technology-based limits established under §§ 301(b)(1)(A) and (B) of the CWA, 33 U.S.C. §§ 1311 (b)(1)(A) and (B). *See In re: Town of Hopedale*, NPDES Appeal No. 00-04, slip op. at 22-23 (EAB, Feb. 13, 2001). Here, the Region determined that there is a reasonable potential for an excursion above the narrative water quality criterion for phosphorus in the Housatonic and a 0.1 mg/l phosphorus limit is necessary to meet the State water quality standards. *Ex. 1 (Fact Sheet)* at 13-16 (*AR 9*); *Ex. 4 (RTC)* at 17 (*AR 16*). Therefore, the phosphorus limit cannot be eliminated simply because the City asserts that compliance may be costly. Indeed, it is well established that technological feasibility and cost are not to be taken into consideration when setting water quality-based permit limitations. *See U.S. Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) (finding “states are free to force technology” and “if the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations”); *In re City of Moscow*, 10 E.A.D. 135, 168 (EAB 2001) (quoting *In re City of Fayetteville, Ark.*, 2 E.A.D. 594, 600-601 (CJO 1988) (stating that CWA section 301(b)(1)(C) “requires unequivocal compliance with applicable [water quality standards], and does not make any exceptions for cost or technological feasibility”); *See also In Re: Hopedale*, NPDES Appeal No. 00-04, slip op. at 24; *Massachusetts Correctional Institution - Bridgewater*, NPDES Appeal No. 00-9, slip op. at 10-11 (EAB, October 16, 2000) (citing numerous cases). Accordingly, the City’s assertion that meeting the phosphorus limits may be costly does not provide a basis for reviewing the water quality based effluent limits.

*ii. The Aluminum Limit*

Commenting on the Draft Permit, the City claimed that the Facility “will be unable to meet [the aluminum limit] on a consistent basis” and, considering the role of aluminum-based chemistry in the wastewater treatment process, “elimination of aluminum from the water and wastewater processes will not be easily attained and may require the investment of millions of dollars and increased operation and maintenance costs.” *Ex. 3 (Comments)* at 3 (*AR 18*). In Response, the Region thoroughly explained the necessity of aluminum limits to meet water quality standards and explained that cost is not pertinent to establishing water quality based effluent limitations. *See Ex. 4 (RTC)* at 19-21 (*AR 16*).

According to the Massachusetts Standards, effluent limitations for metals are based upon the criteria published in the National Recommended Water Quality Criteria: 2002 (USEPA 2002 [EPA-822-R-02-047]) (“NRWQ Criteria”), unless site-specific criteria are established or MassDEP determines that natural background concentrations are higher than the criteria. *See* 314 CMR § 4.05(5)(e). MassDEP has not established site-specific criteria for aluminum for the Housatonic River, nor has it determined that the natural concentrations of aluminum in the river are greater than the criteria published by EPA. Therefore, the NRWQ Criteria for aluminum were used to develop the effluent limits for aluminum in the Permit in order to ensure attainment of water quality standards in the receiving water. The Region determined that a reasonable potential exists for the discharge to cause or contribute to an excursion above the chronic water quality criterion for aluminum, in violation of state water quality standards. *Ex. 1 (Fact Sheet)* at 19 (*AR*

9), *Ex. 4 (RTC)* at 21 (*AR 16*). Thus the inclusion of the chronic effluent limit in the permit was necessary. *See* CWA § 301(b)(1)(C) and 40 C.F.R. § 122.44(d)(1)(iii).

The Region also explained that the aluminum limit cannot be eliminated simply because the City asserts that compliance may be costly. As discussed *supra* at 13, it is well established that technological feasibility and cost are not to be taken into consideration when setting water quality-based permit limitations. Accordingly, the City's assertion that attaining the aluminum limits may be costly does not provide a basis for reviewing the water quality-based effluent limits.

*iii. The E. Coli Limit*

Commenting on the Draft Permit, the City noted that EPA changed the indicator organism for pathogens from fecal coliform bacteria to *E. coli* bacteria without first conducting a study to determine whether the Facility is capable of meeting the new limit. *See Ex. 3 (Comments)* at 3 (*AR 18*). The Region explained that the permit change was the result of changes made to the Massachusetts Standards and noted that the Final Permit contains a compliance schedule allowing for an additional year before the new limits must be met. *See Ex. 4 (RTC)* at 22 (*AR 16*). As the Region pointed out in its response, changes to the Massachusetts Standards, promulgated in December 2006 and approved by EPA on September 19, 2007, replaced criteria for fecal coliform bacteria with criteria for *E. coli*. *Id.*

*iv. The Copper Limits*

Commenting on the Draft Permit, the City argued that the copper limits are "overly stringent" and that the hardness value, in so far as it is different from zinc, is "inappropriate." *Ex. 3 (Comments)* at 5 (*AR 18*). In response, the Region provided



extensive explanation of its method for calculating the copper limit. *See Ex. 4 (RTC)* at 30-34 (*AR 16*). Although the City has not challenged the Region's calculations, technical judgments or the explanation of those judgments provided in the Response to Comments, the Region has further evaluated the basis for the copper limits and concluded it erred in basing the limits on past performance. Therefore, the Region has decided to withdraw the copper limits from the Final Permit.

The Region intends to withdraw the copper limits at the same time that it notifies the Petitioner and the Board of the contested and uncontested conditions of the permit. That notification will cause the uncontested provisions of the permit to take effect thirty days after the notice. The Region will then propose a permit modification with copper limits equal to those included in the 2000 Permit. The City and the public will have full rights to comment on and ultimately appeal any final permit modification.

*v. Additional Permittees*

The City expressed concern over the inclusion of the Towns of Dalton, Lenox (North), Hinsdale, and Lanesborough as co-permittees because the City does not have jurisdiction over infrastructure located in these communities. *See Ex. 3 (Comments)* at 1 (*AR 18*). The Region explained that a POTW is comprised of all infrastructures conveying wastewater to the Facility. *Ex. 4 (RTC)* at 10 (*AR 16*). Some of this infrastructure may fall outside the City's jurisdiction. *Id.* at 11. To address this jurisdictional issue, the Towns of Dalton, Lenox (North), Hinsdale, and Lanesborough, all contributing flow to the Facility, were included as co-permittees. *Id.* The Region explained that "each of the co-permittees is responsible for the activities required by Part I.D. and Part I.E. of the permit regarding the operation and maintenance of the collection

system owned and operated by each town” and further clarified the obligations of each co-permittee in explanatory language located on the cover page of the Final Permit. *See Id.*; *see also Ex. 6 (Final Permit) (AR 1)*.

The City also commented that requirements to implement an operation and maintenance program, an infiltration and inflow control plan, and to provide an annual report, are not justified and are burdensome in light of programs already in place. *See Ex. 3 (Comments) at 5 (AR 18)*. The City argued that it has no means by which to attain information required in the report from the co-permittees or to force them to meet the permit requirements. *Id.*

The Region explained that these conditions are included in the NPDES permit in order to ensure that the permittee, and all co-permittees, are developing and adequately funding infiltration and inflow control programs. *Ex. 4 (RTC) at 27 (AR 16)*. The Region further explained that these requirements apply “to each of the towns that have been named as co-permittees,” and each community is responsible for meeting the obligations “for the portions of the wastewater collection system they own and operate.” *Id.* The Region assured the City it is not responsible for “any of the activities required by Part I.D. and Part E. of the permit with respect to any portion of the wastewater collection system that lie outside the City’s jurisdiction.” *Id.*

*vi. Additional Monitoring*

Commenting on the Draft Permit, the City noted that new monitoring requirements and increased frequency of certain tests would impact the Facility’s annual operating costs. *See Ex. 3 (Comments) at 3 (AR 18)*. The City argued that the new requirements do not provide any additional protection for the environment and are only

meant to “develop information for regulators to issue more unfounded stringent limits.”

*Id.* The Region responded by reducing some monitoring frequencies for CBOD5, TSS and Whole Effluent Toxicity in the Final Permit after considering the compliance and enforcement history of the Facility, the monitoring frequencies in the current permit, the percentage below current limits of certain discharge levels, and site-specific conditions, consistent with EPA guidance.<sup>2</sup> *See Ex. 4 (RTC) at 22-23 (AR 16).*

*vii. Routine Sampling Program*

The City commented that it uses several standard operating procedures to perform all sampling and testing in addition to which any additional requirements for routine sampling are “unnecessary and redundant.” *Ex. 3 (Comments) at 3 (AR 18).* In Response, the Region explained that the new sampling requirements, which require samples to be taken at the same location, at the same time and on the same day each month, are being included in all NPDES permits issued to POTWs in Massachusetts in order to promote consistency and reduce variability in results. *See Ex. 4 (RTC) at 24 (AR 16).*

*viii. Reporting Requirements for Industrial Dischargers*

The City commented that the language of the POTW reporting requirements for industrial dischargers requiring adequate notice of any new or substantial change in pollutants was “extremely broad...and onerous.” *Ex. 3 (Comments) at 4 (AR 18).* The Region noted that the challenged language “is contained within all NPDES discharge

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<sup>2</sup> See Interim Guidance for Performance-Based Reductions of NPDES Permit Monitoring Frequencies, EPA- 833-B-96-001 (EPA 1996).

permits issued to POTWs” and clarified the meaning of “substantial change” as interpreted in EPA guidance.<sup>3</sup> *Ex. 4 (RTC) at 25 (AR 16).*

*ix. Special Conditions*

Commenting on the Draft permit, the City took issue with the nitrogen load discharge and optimization reporting requirement and argued that it is “...likely leading to an unattainable limit that will result in other costly upgrades to the [Facility].” *Ex. 3 (Comments) at 4 (AR 18).* In response, the Region reassured the City that the evaluation process is only meant to identify how the treatment process at the *existing* facility may be enhanced. *Ex. 4 (RTC) at 26 (AR 16).* The Region further explained the intent of the requirements to “...ensure that loadings of total nitrogen from out-of-basin point sources discharging to the Connecticut, Thames, and Housatonic River watersheds remain at or below the required aggregate 25% reduction from the baseline total nitrogen loading required by the Waste Load Allocation included in the TMDL for Long Island Sound.” *Id.*

*x. Development of Limitations for Industrial Users*

The City commented that due to the limited industrial capacity in the Pittsfield area most existing industries are permitted due to categorical status or for non-priority pollutants, thus local limits review is unnecessary. *See Ex. 3 (Comments) at 4 (AR 18).* The Region explained that the City is only required to submit a technical report analyzing local limits to assist in determining whether existing local limits need to be revised. *See Ex. 4 (RTC) at 27 (AR 16).*

*xi. Non-Conventional Pollutants*

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<sup>3</sup> See Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastewater Formula, pp 2-6, EPA 833-B-85-201 (USEPA 1985).

The City commented that the “reporting and study requirements” for nitrogen seem “arbitrary and unnecessary.” *Ex. 3 (Comments) at 5 (AR 18)*. The Region explained that the increase in monitoring frequencies for nitrogen and additional nitrogen reporting requirements are needed to accurately characterize the effluent. *See Ex. 4 (RTC) at 29 (AR 16)*.

*xii. Total Residual Chlorine*

Commenting on the Draft Permit, the City took issue with the extended disinfection season and the requirement of an alarm system for the chlorination and de-chlorination systems. *See Ex. 3 (Comments) at 3-4 (AR 18)*. The City, noting it consistently met the permit limits and recently upgraded its disinfection system, argued that the new requirements are not necessary and will result in significant cost to the facility. *Id.* The Region explained that extending the season from April 1<sup>st</sup> through October 15<sup>th</sup> to April 1<sup>st</sup> through October 31<sup>st</sup> was necessary to protect the primary and secondary contact recreation designated uses of the river during the likely duration of the recreational season. *See Ex. 4 (RTC) at 25 (AR 16)*. The Region further explained the purpose of the alarm system to ensure that Facility personnel are alerted to any “malfunction and/or interruption of the chemical dosing systems...potentially affecting the amount of chlorination and/or de-chlorination chemicals added to the effluent.” *Id.* Additionally, the Region clarified the alarm system requirement, explaining that a “continuous residual chlorine analyzer for the monitoring and recording chlorine concentrations in the effluent” is not required, and adding clarifying language to the Final Permit to that effect. *Id.*; *see also Ex. 6 (Final Permit) at 6, FN 8 (AR 1)*.

*xiii. Industrial Pretreatment Program*

The City commented that because it maintains an Industrial Pretreatment Program in conformance with the 2000 permit, and is working to meet the Streamlining Rule, the deadline for compliance with the Streamlining Rule is unnecessary. *See Ex. 3 (Comments)* at 5 (*AR 18*). The Region explained its policy to include the Streamlining Rule compliance deadline in all NPDES permits for POTWs. *See Ex. 4 (RTC)* at 28 (*AR 16*).

*xiv. Available Dilution*

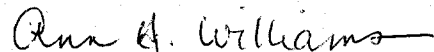
Commenting on the Draft Permit, the City questioned the use of the average daily design flow of the facility to calculate the dilution ratios for the proposed limits. *See Ex. 3 (Comments)* at 5 (*AR 18*). The Region explained that NPDES permit limitations for POTWs must be based on the design flow of the facility according to 40 C.F.R. §122.45(b). *See Ex. 4 (RTC)* at 29 (*AR 16*).

**CONCLUSION**

As described above, the Region provided a clear and reasoned response to each of the City's comments and, in some cases, made changes to the permit in response to issues raised by the City. The Petitioner has made no attempt to explain why the Region's response to the City's comments was inadequate, or why any permit condition is clearly erroneous or otherwise warrants review. The Petition does not even acknowledge the Region's Response to Comments. The Petitioner has merely restated objections from earlier comments on the Draft Permit. As such, Petitioner has not carried its burden to demonstrate that the Region's permit decision is based on clear error of law or fact or

raises important policy considerations meriting review. Therefore, Petitioner's request for review should be denied.

Respectfully submitted,



Ann H. Williams  
Senior Assistant Regional Counsel  
US EPA Region 1 (RAA)  
One Congress St. - Suite 1100  
Boston, MA 02114-2023  
Phone: (617) 918-1097  
Fax: (617) 918-0097  
williams.ann@epa.gov

Of Counsel:  
Peter Ford  
Water Law Office  
Office of General Counsel

Dated: November 18, 2008

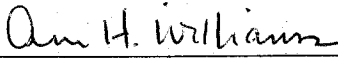
In the Matter of:           City of Pittsfield Wastewater Treatment Plant  
                                  Appeal No. NPDES 08-19

CERTIFICATE OF SERVICE

I, Ann H. Williams, hereby certify that one original and five copies of (i) the Respondent's Response to Petition for Review; (ii) the Certified Index to the Administrative Record; (iii) and exhibits containing relevant portions of the Administrative Record (original and three copies provided) were mailed by Federal Express on this 18th day of November, 2008 to the Environmental Appeals Board, U.S. Environmental Protection Agency, Colorado Building, 1341 G Street, N.W., Suite 600, Washington, D.C., 20005; and that a true copy of the foregoing was sent by First Class Mail, postage prepaid, to the following person:

Bruce I. Collingwood, P.E.  
Commissioner, Department of Public Works and Utilities  
City Hall  
70 Allen Street  
Pittsfield, MA 01201

Dated: November 18, 2008

  
\_\_\_\_\_  
Ann H. Williams  
Senior Assistant Regional Counsel  
US EPA Region 1 (RAA)  
One Congress St. - Suite 1100  
Boston, MA 02114-2023  
Phone: (617) 918-1097  
Fax: (617) 918-0097  
williams.ann@epa.gov



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

ENVIR. APPEALS BOARD

2008 NOV 19 AM 11:00

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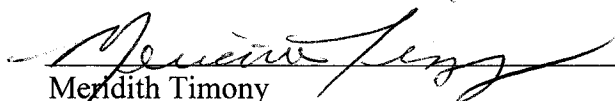
\_\_\_\_\_)  
In the Matter of: )  
) NPDES Appeal No. 08-19  
)  
City of Pittsfield, )  
Massachusetts )

**CERTIFICATION OF THE INDEX OF THE ADMINISTRATIVE RECORD FOR  
NPDES PERMIT MA0004928 ISSUED BY EPA REGION 1**

I, Meridith Timony, am an environmental scientist and permit writer in the Office of Ecosystem Protection in the Region 1 office of the United States Environmental Protection Agency ("Region 1"). My duties include maintenance of records pertaining to National Pollutant Discharge Elimination System permit number MA0101681 ("Permit"), issued by Region 1 on August 22, 2008, to the City of Pittsfield, Massachusetts, for the Pittsfield Wastewater Treatment Plant.

I hereby certify that to the best of my knowledge and belief the materials identified in the attached Index of the Administrative Record constitute the complete administrative record before Region 1 for the Permit under 40 C.F.R. § 124.18.

Dated this 17<sup>th</sup> day of November, 2008.

  
Meridith Timony  
EPA-Region 1

ADMINISTRATIVE RECORD INDEX  
PITTSFIELD WASTEWATER TREATMENT PLANT  
NPDES PERMIT No. MA0101681

**A. PERMIT DOCUMENTS**

1. Final National Pollutant Discharge Elimination System (NPDES) Permit No. MA0101681 issued to the City of Pittsfield, Massachusetts authorizing the discharge from the Pittsfield Wastewater Treatment Plant, dated August 22, 2008, with attachments.
2. Written correspondence from Roger Janson, U.S. Environmental Protection Agency (U.S. EPA-Region I), to Bruce I. Collingwood, P.E., Commissioner, Department of Public Works and Utilities, City of Pittsfield, Massachusetts, transmitting the final permit, dated August 28, 2008.
3. Written correspondence from Roger Janson, U.S. EPA-Region I, to Bernie St. Martin and Peter Galant, Sewer/Water Administration, Town of Hinsdale, Massachusetts, transmitting the final permit, dated August 28, 2008.
4. Written correspondence from Roger Janson, U.S. EPA Region I, to Jeffrey T. Vincent, Superintendent, Department of Public Works, Town of Lenox, Massachusetts, transmitting the final permit, dated August 28, 2008.
5. Written correspondence from Roger Janson, U.S. EPA-Region I, to David Laviolette, Superintendent, Sewer Department, Town of Dalton, Massachusetts, transmitting the final permit, dated August 28, 2008.
6. Written correspondence from Roger Janson, U.S. EPA-Region I, to the Lanesborough Sewer Commission, Town of Lanesborough, Massachusetts, transmitting the final permit, dated August 28, 2008.
7. State 401 Water Quality Certification, dated August 8, 2008.
8. 2007 draft permit and attachments.
9. 2007 fact sheet.
10. Written correspondence from Roger Janson (U.S. EPA-Region I), to Glenn Haas, Director, Division of Watershed Management, Massachusetts Department of Environmental Protection (MassDEP), transmitting the 2007 draft permit for certification, dated December 26, 2007.
11. Written correspondence from Brian Pitt (U.S. EPA-Region I), to Bruce I. Collingwood, P.E., Commissioner, Department of Public Works and Utilities, City of Pittsfield, Massachusetts, transmitting the 2007 draft permit, dated

December 26, 2007.

12. Joint Public Notice for draft NPDES Permit No. MA0101681, dated December 28, 2007.
13. Written correspondence from Olga Vergara (U.S. EPA-Region I) to Bruce Collingwood, Commissioner, Department of Public Works and Utilities, City of Pittsfield, Massachusetts, letter confirming that the NPDES permit renewal application is complete, dated June 30, 2005.
14. Written correspondence from Bruce Collingwood, Commissioner, Department of Public Works and Utilities, City of Pittsfield, Massachusetts to Olga Vergara (U.S. EPA-Region I) transmitting the City of Pittsfield's NPDES permit renewal application, dated June 2, 2005.
15. Final NPDES Permit No. MA0101681 issued to the City of Pittsfield authorizing the discharge from the Pittsfield Wastewater Treatment Plant, dated October 3, 2000, with accompanying response to comments, fact sheet, and attachments.

**B. RESPONSE TO COMMENTS**

16. Response to comments and attachment.

**C. PUBLIC COMMENTS**

17. Written correspondence by Jane Winn, Berkshire Environmental Action Team, dated February 4, 2008.
18. Written correspondence by Bruce I. Collingwood, P.E., Commissioner, Department of Public Works and Utilities, City of Pittsfield, Massachusetts, dated February 5, 2008.

**D. TECHNICAL DOCUMENTS, GUIDANCE, RECOMMENDED CRITERIA, EPA RULEMAKING AND WEBSITES**

19. MassDEP. 2008. *Proposed Massachusetts Year 2008 Integrated List of Waters.*
20. MassDEP. 2007. *Housatonic River Watershed 2002 Water Quality Assessment Report.* Division of Watershed Management. Worcester, MA.
21. MassDEP. 2007. *Protocol for and Determination of Site-Specific Copper Criteria in Ambient Waters in Massachusetts.*

22. Connecticut Department of Environmental Protection. 2006. *2006 Integrated Water Quality Report to Congress*. Planning and Standards Division, Bureau of Water Management. Hartford, CT.
23. MassDEP. 2006. *Massachusetts Year 2006 Integrated List of Waters*.
24. MassDEP. 2004. *Massachusetts Year 2004 Integrated List of Waters*.
25. USEPA. 2002. *National Recommended Water Quality Criteria: 2002*. Document No. EPA-822-R-02-047. Office of Water, Office of Science and Technology. Washington, D.C.
26. USEPA. 2000. *Ambient Water Quality Criteria Recommendations. Information Supporting the Development of State and Tribal Nutrient Criteria, Rivers and Streams in Ecoregion XIV*. Document No. Office of Water, Office of Science and Technology, Health and Ecological Criteria Division. Washington, D.C.
27. USEPA. 2000. *Nutrient Criteria Technical Guidance Manual-Rivers and Streams*. Document No. EPA-822-B-00-002. Office of Water, Office of Science and Technology. Washington, D.C.
28. MassDEP. 2000. *Housatonic River Basin 1997/1998 Water Quality Assessment Report*. Division of Watershed Management. Worcester, MA.
29. Connecticut Department of Environmental Protection and New York State Department of Environmental Conservation. 2000. *A Total Maximum Daily Load Analysis to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound*.
30. USEPA. 1999. 1999 Update of Ambient Water Quality Criteria for Ammonia. USEPA, Office of Water, Office of Science and Technology; Washington, D.C., and Office of Research and Development, Mid-Continent Ecology Division, Duluth, Minnesota. EPA-882-R-99-014.
31. USEPA. 1996. *The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit from a Dissolved Criterion*. Document No. EPA 823-B-96-007. Office of Water. Washington, D.C.
32. USEPA. 1996. *Interim Guidance for Performance-Based Reductions of NPDES Permit Monitoring Frequencies*. Document No. EPA-833-B-96-001. Office of Water and Office of Enforcement and Compliance Assurance. Washington, D.C.
33. USEPA. 1991. *Technical Support Document for Water Quality-Based Toxics Control*. Document No. EPA/505/2-90-001. Office of Water. Washington, D.C.

34. MassDEP. 1990. *Massachusetts Water Quality Standards Implementation Policy for the Control of Toxic Pollutants in Surface Waters*.
35. USEPA. 1986. *Quality Criteria for Water* ("Gold Book"). Document No. EPA 440/5-86-001. Office of Water. Washington, D.C.
36. USEPA. 1985. *Guidance Manual for the Use of Production-Based Pretreatment Standards and the Combined Wastestream Formula*. Document No. EPA 833-B-85-201.
37. USEPA. 1984. *Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants*. 49 Fed. Reg. 9016.
38. 7th Circuit Court. 1977. *U.S. Steel Corp vs. Train*. 556 F.2d 822, 838.
39. United States Geological Survey (USGS) flow statistics for USGS gage No. 0119700 (period of record 1936-2006). <http://waterdata.usgs.gov/nwis>.

**E. EFFLUENT DATA**

40. 2000-2007 Whole Effluent Toxicity Test Results
41. 2000-2007 Discharge Monitoring Reports.
42. 1995-2005. Sludge PCB data.
43. 2005. Final effluent PCB data.
44. 2004. Nitrogen data from municipal (POTW) dischargers to the Housatonic, Connecticut, and Thames Rivers.

**F. CORRESPONDENCE WITH PERMITTEE, MASSDEP, AND OTHERS**

45. Personal communication. 2008. Telephone conversations regarding the analytic method used in the analysis of lead samples from 2005-2007 between Meridith Timony (U.S. EPA-Region I), Tom Landry (Superintendent, Pittsfield WWTP) and Dean O'Grady (Bio Analytical), dated July 7 and July 8, 2008.
46. Personal communication. July 30, 2008. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA- Region I) Re: Paul's edits/comments on response to comments document.
47. Personal communication. June 5, 2008. E-mail message from David Pincumbe (U.S. EPA-Region I) to Meridith Timony (U.S. EPA-Region I) Re: CT DEP's request to include influent nitrogen monitoring.

48. Personal communication. June 2, 2008. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA-Region I) Re: Paul's review of the response to comments document (edits/comments attached to e-mail).
49. Personal communication. October 25, 2007. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA-Region I) Re: Inclusion of statement in Part XI (Endangered Species Act) of the fact sheet regarding the permittee notifying the MA National Heritage and Endangered Species Program (MA NHESP).
50. Personal communication. October 25, 2007. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA-Region I) Re: Communication regarding MassDEP's comments on the pre-public comment version of the draft permit.
51. Personal communication. October 5, 2007. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA-Region I) Re: Comments on draft permit and fact sheet (attached to e-mail).
52. Personal communication. August 24, 2007. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA-Region I) Re: Transmittal of the draft *Housatonic River Watershed 2002 Water Quality Assessment Report* for Housatonic River Segment MA21-04 (segment where the Pittsfield WWTP discharge outfall is located; document attached to e-mail).
53. Personal communication. August 16, 2007. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA-Region I) Re: Paul's response to correspondence between Janet Labonte (U.S. EPA-Region I) and Dave Pincumbe on draft version of the permit and fact sheet drafted by Janet Labonte (U.S. EPA-Region I in 2006, dated August 15, 2007).
54. Personal communication. August 15, 2007. E-mail message from Janet Labonte (U.S. EPA-Region I) to Dave Pincumbe (U.S. EPA-Region I), Meridith Timony (U.S. EPA-Region I), Brian Pitt (U.S. EPA-Region I) and Paul Hogan (MassDEP) Re: Janet Labonte's response to Dave Pincumbe's comments on the version of the draft permit and fact sheet initially drafted on by Janet Labonte in 2006 (memo dated April 2, 2008 attached to e-mail).
55. Personal communication. August 13, 2006. E-mail message from Paul Hogan (MassDEP) to Meridith Timony (U.S. EPA-Region I) Re: July 2007 Discharge Monitoring Report nitrogen data.

56. Pincumbe, D. 2006. Memo from David Pincumbe (U.S. EPA-Region I) to Janet Labonte (U.S. EPA-Region I), Brian Pitt (U.S. EPA-Region I) and Paul Hogan (MassDEP) Re: David Pincumbe's comments on the version of the draft permit initially drafted by Janet Labonte in 2006, dated June 6, 2006.