



# United States Department of the Interior

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**VIA FEDEX**

November 15, 2008

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

Re: Department of Interior Petition for Review  
Town of Wayland, Wastewater Management District Commission  
Wayland, Massachusetts  
National Pollution Discharge Elimination System  
NPDES Permit No. MA 0039853

Dear Sir/ Madam:

Enclosed please find the original and five copies of The Department of The Interior's Petition for Review of conditions included in the final permit for The Town of Wayland, Wastewater Management District Commission located in Wayland, Massachusetts.

Sincerely,

Robin Lepore,  
Senior Attorney

cc: EPA Region 1  
Town of Wayland, Wastewater Management District Commission  
US Fish and Wildlife, Great Meadows NWR  
Minute Man National Historical Park  
NPS, Sudbury, Assabet and Concord Wild and Scenic River

**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. \_\_\_\_\_

**PETITION FOR REVIEW**

FROM

THE DEPARTMENT OF THE INTERIOR

Attorney for the Petitioner:

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By:

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Dated: November 14, 2008

## PETITION FOR REVIEW

Pursuant to 40 CFR Section 124.19, the Department of Interior (the Department) hereby petitions the Environmental Appeals Board for review of NPDES permit # MA0039853 which was jointly issued to the Town of Wayland, Massachusetts (the Town) by the US Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection (DEP).

The Department of the Interior 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 (CWA), 33 U.S.C. §1251, and its implementing regulations. In addition, there are other requirements and considerations of federal law which are relevant to this permit action and have not been complied with. The concerns of the DOI focus both on the level and the increase in total volumes of phosphorus that will be allowed to be discharged from the Wayland Municipal Wastewater Treatment Plant (the Wastewater Plant). The Sudbury River already has severe eutrophication problems and has been recognized by EPA/DEP as impaired since they commenced administering the CWA. As shown in detail below, the Permit, as proposed, will allow the Town to discharge increased volumes of phosphorus into the river. Second, the Permit anticipates that the Town could relocate its discharge pipe from its current wetland discharge location into the main channel of the Sudbury River, which by altering the dilution calculations, would address some of the current regulatory concerns with the state water quality standards.

However, since a relocation of the outfall is likely to result in even greater quantities of pollutants reaching federal lands and resources, we object to any provision in the Permit which would authorize relocation of the outfall. Importantly, the interests of the three federally owned or managed areas immediately adjacent to or downstream of this discharge have not been appropriately addressed to date by the permit process. Two of these, a National Wildlife Refuge and a designated National Wild and Scenic River, lie a mere 300 feet from the current discharge pipe, and none of the procedural or substantive laws protecting federal property or designated Wild and Scenic Rivers have been complied with, despite objections which have been raised in this and even the preceding permit process. A number of on-going, already requested or reasonably anticipated water quality improvement initiatives reinforce the concern that additional investment—whether by the Town or private sector—in reliance upon the terms of this proposed permit, could well be rendered ill-advised should these initiatives result in more stringent discharge limitations or require alternative approaches in the near-term. Thus a more comprehensive basin-wide alternatives review, conducted with the full participation of the affected federal agencies, is needed.

## INTRODUCTION/BACKGROUND

### **The Setting and History:**

The Sudbury River rises in the town of Westborough and travels easterly through the towns of Southborough, Hopkinton and Ashland before flowing through a series of reservoirs in Framingham. The Sudbury River segment of the Sudbury Assabet and Concord Wild and Scenic River (the Scenic River) begins below the last reservoir at the

Danforth Street Bridge. The Scenic River flows to the north through the Towns of Wayland, Sudbury, Lincoln and Concord, joining the Assabet River to form the Concord River, which then flows under the Old North Bridge within the Minute Man National Historical Park (the National Park). The Scenic River also includes the lands and waters managed by the U.S. Fish and Wildlife Service as a part of the Great Meadows National Wildlife Refuge (the Wildlife Refuge). (Exhibit 1) The town of Billerica, even farther downstream, relies on the waters of the Concord River for its public water supply.

The Sudbury River is a popular recreational resource to the local communities and visitors who seek refuge from the urban areas around Boston for a day. Recreation is one of the 'outstandingly remarkable resource values' supporting the designation of the Wild and Scenic River, but public enjoyment is diminished during parts of the summer season due to excessive plant growth. (Exhibit 2 photos of the Sudbury River)

Both duck weed and water chestnut are prevalent in the Sudbury River, their growth encouraged by high levels of nutrients in the water. (Exhibit 3) Local communities on the Sudbury River including Lincoln, Concord, Sudbury and Wayland, the Refuge, the National Park and private partners are all working together to try to manage the water chestnut infestation. Because the river is slow moving and almost lake like, it is an easy place for water chestnut to grow. Each town has invested significant time and money into water chestnut harvesting efforts, working closely with the U.S. Fish and Wildlife Service (USFWS).

Just north of Route 20 on the eastern side of the Sudbury River is a former research facility once owned by the Raytheon Company, which abuts lands of the Refuge. In 1989, after having conducted some contaminant sampling on its own, the USFWS hired a consulting firm to conduct a site investigation of their lands and the waters of the Sudbury River. 5 samples were taken from the marsh and five from the water. The results indicated that there were "significant levels of metals, PCBs and PAHs in the sediments<sup>1</sup> proximate to the outfall from the Raytheon plant. The concentrations of contaminants in the sediments diminished in samples collected closer to the Sudbury River. These data were submitted to the DEP by the USFWS in a letter dated February 20, 1991." (Exhibit 4) The study indicated that the source of the contaminants could be the Raytheon site, a Superfund site just upriver of Framingham, or a series of impoundments known as the Framingham Reservoirs.

Over the following years, Raytheon abandoned the facility, its NPDES discharge permit for the facility lapsed, the land was purchased by the Town of Wayland (the Town), the contaminated wetlands were remediated, and the Town decided to operate a waste water treatment facility on the site. The Town decided to operate a waste water facility on this site in order to address the sewage needs of some commercial facilities and several nearby homes whose septic systems were routinely inundated by water. During the joint DEP/EPA permit process in 1998 to license the newly-operating Town facility, the National Park Service (NPS) raised concerns that the facility did not meet the standards that a new source would be required to meet; that the permit terms would result in increased

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<sup>1</sup> The sediment samples contained arsenic, cadmium, chromium, copper, lead, mercury, PCBs, and PAHs.

amounts of both phosphorous and nitrogen at the discharge point; that both point source and non-point source controls would be needed to keep nutrient levels from rising above baseline amounts; that seasonal limits, nitrogen limits, non-point source restrictions, and other technologies would be necessary; that a limit of .2 ppm for phosphorous rather than .5 ppm was required; and that various proposals for a nutrient trading requirement to eliminate land-based sources of phosphorous as well as other innovative technologies such as membrane separation and nitrogen limits raised a number of uncertainties about the exact permit conditions which would be imposed. (Exhibit 5) Underlying all of the comments was the over-riding concern, for both the Wildlife Refuge and the proposed (it was then under study) National Wild and Scenic River, that the permit must reduce nutrient loads to the Sudbury River. The letter concluded that its determination, as authorized by §7 of the Wild and Scenic Rivers Act, that this "federally licensed water resources project" would not have "direct and adverse impacts on the river's values" was contingent upon meeting at least five conditions. These conditions included the requirement that there be "no net cumulative increase in phosphorous loads at the end of the first five-year period." Due to the uncertainties identified in the proposal, and the lack of any documentation submitted to the Department showing that the initial permit has complied with the no net increase conditions among others, the Department cannot conclude that the conditions in the direct and adverse impacts determination were satisfied. The 1998 permit expired in 2003. The proposed permit under review in this Appeal is the first renewal of the 1998 permit.

The applicant requested renewal of the initial permit in 2003. The NPS and others provided comments to EPA in April 2006 (Exhibit 6) and May 2008 (Exhibit 13). The Region denied requests for a public hearing and issued its proposed permit on September 30, 2008.

The facility currently discharges slightly over 10,000 gpd. There are 27 users connected to the facility at present, which includes 5 households, some businesses and one municipal use. The expired permit authorizes a discharge of up to 52,000 gpd. The record below includes information that there are three large development projects which have either been approved for Wayland or are serious current proposals. These include a 48 unit condominium housing project, a 372,500 square foot mixed-use development including another 200 bedrooms and over 200,000 square feet of retail and restaurant space, and a third with 480 bedrooms. These projects will consume the full 52,000 gpd allocation and may require a future increase to the permit or may add other effluent sources to the receiving waters. The fact that each of these projects is either already approved or has received positive interim responses from the local government indicates that the Department's concerns with the actual increases in discharge volumes is not speculative, but is most likely to occur in the near-term.

In the discussion to follow, the Department will demonstrate why the permit, within the scope of the 'traditional NPDES approach' using numerical calculations, is inadequate to protect the waters of the Sudbury River, particularly for phosphorus. It does not comply with the requirements of the CWA and Massachusetts laws. Since that the initial permit did not meet all of the conditions imposed by the NPS in its initial direct and adverse effects determination, that permit action was invalid, so it is improper for the Region to treat the current discharge as

lawfully authorized. It cannot be considered an existing discharge and the standards pertinent to new and increased discharges apply to this proposal. Without question, the EPA has not properly complied with the direct and adverse effects process for this permit renewal, including the failure to incorporate the conditions proposed by the NPS in 2006 and 2008. In the explanation below, the Department will show how the currently proposed permit, and the 1998 one; are improper due to the failure to comply with EPA's regulations and other federal laws. As will also be explained in more detail below, important federal interests are affected by adverse impacts to federal property, which is located both directly adjacent to the discharge as well as farther downstream. This proposed permit should be remanded to the Region to reinitiate its process so that proper consideration to and compliance with other relevant laws and federal agency concerns can occur.

#### **THE INTERESTS OF THE DEPARTMENT OF THE INTERIOR IN THIS PERMIT:**

Two agencies of the Department, the USFWS and the NPS, have responsibilities under federal law to protect the natural resources of the Sudbury River. This permit will directly affect three areas which have been established by Congress for the values which include the water quality of the Sudbury River. These areas are (1) the Great Meadows National Wildlife Refuge (the Wildlife Refuge) managed by the USFWS, (2) the Sudbury Assabet and Concord Wild and Scenic River (the Scenic River) and, (3) Minuteman National Historical Park (the National Park), both managed by the NPS. (Exhibit 1)

##### **1. Great Meadows National Wildlife Refuge:**

The United States Fish and Wildlife Service is responsible for managing the Great Meadows National Wildlife Refuge (the Refuge). The Refuge includes 3,863 acres principally located along 12 miles of the Sudbury and Concord Rivers. Importantly, the discharge pipe for the Wastewater Plant is located a mere 300 feet from the boundary of the Refuge. (Exhibit 7) The Refuge includes property on both sides of the rivers and the United States owns to the center of the river in those areas where it does not own to the opposite shore.

The Wildlife Refuge was created on May 3, 1944 under the Migratory Bird Conservation Act (16 U.S.C. §715d) and the Refuge Recreation Act (16 U.S.C. §460k-1) and is managed pursuant to the National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C. §668dd-ee). Its primary purpose is to protect habitat for migratory birds. Other refuge purposes include incidental fish and wildlife-oriented recreation, protection of natural resources including water quality, and the conservation of threatened and endangered species.

The Wildlife Refuge primarily consists of freshwater and riverine wetlands and is also interspersed with forested upland and old field habitats. The refuge supports a diverse mix of migratory birds including waterfowl, wading birds, raptors, shorebirds, and passerines. It is an important site for Blandings turtle, a state-listed species, as well as other reptiles, amphibians, fish and invertebrates. Some of these species spend their entire life-cycle within the Wildlife Refuge; others while migratory, may breed or feed upon species which depend upon the extensive water

and marsh systems of the Wildlife Refuge. The extensive and regionally significant wetlands occurring on and adjacent to the refuge, including the Sudbury and Concord Rivers and their associated tributary drainages and headwaters, have been listed as a priority for protection under both the North American Waterfowl Management Plan and the Emergency Wetlands Resources Act of 1986.

Annual human visitation to the Wildlife Refuge is almost 400,000. Large numbers of visitors use the Sudbury River including anglers, paddlers, wildlife photographers, and waterfowl hunters. Water chestnut is a significant invasive plant which severely limits recreational access on the river. The eutrophic conditions of the river contribute to the growth of this aquatic invasive plant.

The Wildlife Refuge has had an active and resource-intensive program to combat water chestnut since 1995. At that point, with contributions from six conservation partners, it purchased an aquatic weed harvester for over \$100,000. For 13 years, the harvester has been in intensive use amongst the seven partners along the Sudbury, Assabet and Concord watershed. Each partner is allowed two weeks during the summer, uses a three-person crew to operate the harvester and the dump truck to transport the load to the dump site. Even with some volunteer labor, the personnel costs for the WG-8 and WG-10 maintenance staff and the Wildlife Refuge biologist are about \$9000. An additional \$1000 is spent per partner for the crane which is needed to remove the harvester from each location and to put it into the next location two weeks later. Similar costs are likely incurred by each organization using the harvester, as these jobs require appropriate licenses to operate the equipment, so it cannot all be performed by volunteers. Due to the number of hours that this machine has been in use each summer, easily being operated over 50 hours a week for 14 weeks, the Wildlife Refuge's maintenance costs for the harvester have increased in recent years, from \$375 in 2004, to \$1345 in 2005, to \$14,350 in 2006, to \$16,850 in 2007. Anticipating the need to replace the harvester, the Wildlife Refuge has learned that it will cost over \$208,000 to purchase a new harvester. In addition, volunteers and staff, riding in canoes and small motorboats devote untold hours each year to hand removal of water chestnuts. These are significant costs, each borne by the seven partners in this effort, which if the eutrophic contributors were eliminated could be devoted to other resource protection needs.

Chemicals in impaired waters can impact the health and productivity of aquatic species directly and can concentrate in predator species through a process known as "bio-accumulation." Impaired water quality can also alter the distribution or density of aquatic plants which fish or wildlife species rely upon for food, shelter or breeding sites.

In addition to concerns about phosphorous, metals, the Wildlife Refuge is concerned about the impacts of pharmaceuticals and personal care products (PPCP), which can enter the waste stream and affect fish, wildlife, and humans. Increasing research is showing developmental disruption in fish and other aquatic species from PPCPs. This September sampling was conducted at the Wildlife Refuge as a part of a study of the Sudbury River to address whether discharges of human wastes have introduced measurable amounts of such chemicals into Wildlife Refuge waters and whether there are observed impacts on fish. (Exhibit 8) While there is insufficient information at

present to link waste water discharges to impacts on fish and other aquatic species, the Wildlife Refuge and the Department will continue to monitor emerging scientific information regarding the connections between human waste streams and the health of aquatic and avian species, so as to fulfill its mission to “ensure that the biological integrity, diversity, and environmental health of the [National Wildlife Refuge] System [is] maintained for the benefit of present and future generations of Americans...[and to] maintain adequate water quantity and water quality to fulfill the mission of the System and the purposes of each Refuge.” 16 U.S.C. §668dd(a)(4)(B) and (F).

Given the fact that the United States owns extensive property immediately adjacent to this discharge pipe, we are strongly concerned that the permit, as proposed, will cause an increase in the quantities of phosphorous, other chemicals and metals, and potentially other substances damaging aquatic life, over the amounts currently discharged into the waters of the Wildlife Refuge. This proposed permit will adversely affect the interests of the National Wildlife Refuge System and thus, on behalf of the U.S. Fish and Wildlife Service, the Department objects to its issuance as proposed.

## **2. The Sudbury Assabet and Concord Wild and Scenic River:**

NPS is responsible under Public Law 106-20 to administer the Sudbury Assabet and Concord Wild and Scenic River (the Scenic River). Two rivers, the Sudbury and the Assabet, join in the Town of Concord at Egg Rock; after their confluence, the river is then known as the Concord River. In 1999, Congress recognized some 29 miles of water, wetland and upland areas on these three rivers as a part of the Wild and Scenic River System, see Wild and Scenic Rivers Act of 1968 (Public Law 90-542; 16 USC §1271-1287) (the Act), 1999 amendments at 16 U.S.C. §1274(a)(160). The designation includes the lands and waters of the Wildlife Refuge, so the Wild and Scenic River is also located a mere 300 feet from the discharge pipe.

Wild and Scenic Rivers are so recognized because of their ‘outstandingly remarkable resource values’, of which the Sudbury, Assabet and Concord have five: scenery, ecology, recreation; history; and literature. One of only 6 rivers designated in New England, the Scenic River provides scarce and valuable opportunities for appreciation of its resources by millions of people and protects increasingly rare wildlife habitats. While only 20 miles from Boston and surrounded by towns and areas of considerable development, the gentle, bucolic meanders, the wide floodplains and wooded shores of the rivers provide acres of natural habitats and pastoral scenes. They constitute a part of the Atlantic Migratory Flyway as well as the fish and wildlife habitats described above. Recreational uses include boating (canoe, kayakers and small motorized boats), fishing, hiking, picnicking and historical visitation. Reflective of the increasing use of the Sudbury River for public recreation, in late 2008, a Sudbury River Boater’s Trail was created for 15 miles of the River, both to guide boaters and to narrate some of the natural and historical features. (Exhibit 9) The National Park, also within the Scenic River, honors the story of the American Revolution and particularly highlights the Old North Bridge which crosses over the Concord River. Great writers, including Thoreau and Emerson, spent time on, and wrote books read by people throughout the world, about these rivers. The Old Manse is also on the banks of the Concord River. It was home to Emerson and Hawthorne. It also is visited by



substantial numbers of tourists, school groups and those interested in history, architecture or American literature. These Rivers are rich in natural and cultural resources, and a treasure for local communities as well as national and international visitors.

The Congressional designation classified the 15 mile segment of the Sudbury River, which includes this outfall pipe, as a "scenic river". Over 14 miles are classified as "recreational", including the Assabet River, downstream portions of the Sudbury River about two miles above its confluence with the Assabet River, and the 8 miles of the Concord River. A "scenic" river is one which is "free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads," see §2(b)(2) of the Act, 16 U.S.C. §1273(b)(2). A "recreational" river is one which is "readily accessible by road or railroad, that may have some development along the shoreline, and that may have undergone some impoundment or diversion in the past," §2(b)(3) of the Act, 16 U.S.C. §1273(b)(3).

Administration of each component of the system is to "protect and enhance the values which caused it to be included...giv[ing] primary emphasis to protecting its esthetic, scenic, historic, archaeological, and scientific features...management plans [are authorized to establish specifics] for its protection and development," see §10(a) of the Act, 16 U.S.C. §1281(a). Two other sections of the Act, discussed in detail below, as well as EPA's regulations at 40 CFR §122.49(a), provide that EPA "must follow" the requirements of the Act, which call for affirmative notice to the DOI of permit actions having a "direct and adverse effect" on a designated scenic river. It is for the Department to determine whether the impacts will adversely affect "the values for which the national wild and scenic river was established." Inter-agency cooperation in administering water quality permits affecting designated scenic rivers is encouraged "for the purpose of eliminating or diminishing the pollution of waters in the rivers," not increasing it.

The purpose of the designation of the Scenic River is to protect its outstandingly remarkable resources, as defined in the initial study of the rivers (Exhibit 10) and to implement the River Conservation Plan. (Exhibit 11)

The vast majority of our Nation's designated Wild and Scenic Rivers are afforded strong resource protection resources because they flow through publicly owned land. The Columbia, Rio Grande, Missouri Rivers and other, primarily western rivers, benefit from extensive areas of public land. In the eastern United States where there are not large swaths of public land, a new model for managing Wild and Scenic Rivers has developed; this requires all partners to work collaboratively to protect these valuable resources. These 'partnership rivers', including the Sudbury, Assabet and Concord Rivers, flow through a patchwork of public and private ownerships. The towns, state and federal governments and nonprofits which have responsibility for protecting river resources must work together to protect these nationally valued river resources. As we explain in more detail below, other federal laws and EPA's own regulations, recognize that in making permit decisions for Wild and Scenic Rivers, the EPA must incorporate a

broader scope of impacts into its permit process than simply conducting single-chemical dilution calculations. This is particularly true for rivers where discharge pipes are a mere 300 feet from the Scenic River.

This proposed permit will adversely affect the interests of the designated National Wild and Scenic River and thus, on behalf of the National Park Service, the Department objects to its issuance as proposed.

### **3. Minute Man National Historical Park:**

Minute Man National Historical Park (the National Park) was created by an act of Congress in 1959 to preserve and interpret the events, ideas, significant historic sites, structures, properties and landscapes associated with the opening of the American Revolution at Concord's North Bridge and along the Battle Road of April 19, 1775. The National Park contains 967 acres distributed among three, distinct units and is located approximately 15 miles northwest of Boston, Massachusetts. The North Bridge Unit contains approximately 112 acres; the Wayside Unit contains approximately six acres; and the Battle Road Unit contains approximately 849 acres. The Concord River flows through the North Bridge Unit, while Route 2A traverses the Wayside and Battle Road Units.

On April 19, 1775, the American Revolution began at Lexington and Concord with a clash of arms known to history as "the shot heard round the world." At the National Park the opening battle of the Revolution is brought to life as visitors explore the battlefields and witness the American revolutionary spirit through the writings of the Concord authors. Approximately 1.2 M visitors from all parts of the country and from around the world visit the park every year to see where the American Revolution began. The North Bridge - where the "shot heard 'round the world" was fired on the morning of April 19, 1775 - spans the Concord River. The North Bridge is their primary destination point. This is a place for the contemplation of the meaning of liberty and of the sacrifices that must sometimes be made to maintain liberty. It is an important national battleground and commemorative site.

This part of the Concord River is important not only as a commemorative site but as an intensely popular recreational resource...throughout the spring, summer and fall months it is not unusual to see up to 24 canoes on the banks of the river by the famous North Bridge. Every year up to 10,000 people gather on the banks of the river for Patriot's Day celebrations. The National Park's formal garden overlooking the Concord River is often the site of the annual Riverfest opening event...an event which involves the eight towns along the Scenic River.

The National Park supports a variety of habitats. Forests are dominant, covering approximately 500 acres of the National Park, including about 200 acres of forested wetland. Non-forested wetlands, including several ponds, cover approximately 180 acres. Meadows and fields cover an additional 250 acres, including approximately 100 acres farmed under an agricultural leasing program. The goal of the National Park's land management program is to preserve and protect natural resource areas and habitats and to maintain cultural or historical views and land use, so the park maintains historic agricultural fields and farming techniques, such as using sheep to sustain open pasturage.

Recent NPS expenditures to improve the quality of the river environment included a \$1.2 M project to restore the landscape in the immediate area of the North Bridge. This project primarily involved the removal of overgrown invasive plants from the banks and vicinity of the river and replanting the banks with native vegetation to control erosion and re-growth of invasives. Resurfacing and grading the path to the Old North Bridge and repairing associated drainage structures was done to help protect the river from siltation. The NPS also invested in a program to combat stands of invasive purple loosestrife along the banks of the river via the release of *Galerucella* beetles which attack these plants. Efforts to maintain historic river vistas and to control growth of invasive and exotic plants are always ongoing.

While the lands and waters of the National Park are about 11 miles downstream (north) of the discharge pipe for the Treatment Plant, the entire river suffers from excessive eutrophication and invasive aquatic plants. Since the Concord River is the backdrop for all of the interpretive programs at the North Bridge and cannot be separated from the historical events which occurred here, the visual appearance and natural conditions of the river are of great concern to the NPS. Allowing increases in effluents which will increase phosphorous volumes in the Concord River will exacerbate the National Park's problems with aquatic invasives and the federal funds needed to control them. Directly controlling these chemicals at the source of the discharge is a far more appropriate and effective approach.

This proposed permit will adversely affect the interests of the Minute Man National Historical Park and thus, on behalf of the National Park Service, the Department objects to its issuance as proposed.

#### **JURISDICTIONAL BASIS FOR THIS PETITION:**

EPA regulations require that appellants raise their issues in the administrative proceedings below in order to contest a proposed NPDES permit on appeal, 40 CFR §124.18(a). On April 12, 2006, NPS submitted comments on the draft permit. The following parties also submitted comments during the public comment period on the draft permit: Lanna Carlson-Irwin, Town of Wayland Wastewater Management District Commission; Thomas B. Arnold, Sudbury; Linda L. Segal, Wayland; Prescott and Margery Baston, Wayland; John Davenport and Carol Lee Rawn, Conservation Law Foundation; Blair Davies, Wayland Wastewater Management District; and Mrs. Sarah R. Newbury, Wayland. The NPS comments, along with comments from the parties identified above, collectively raise and support the issues presented in this petition. Therefore, Department complies with the requirement that the issues raised in the petition for review were raised below, in accordance with 40 CFR §124.18(a).

In addition, the initial permit for the Treatment Plant was issued September 4, 1998. The NPS worked informally with the EPA in January of 1998 and filed formal comments on June 5, 1998 (Exhibit 5) objecting to the permit as proposed and requesting certain conditions be included. Many of the issues raised in this appeal were raised by the NPS during the initial permit process, such as the concern with eutrophication of the River, and remain outstanding today. Other concerns and conditions were provided to the Region by correspondence during the current

administrative process. Both as matters of EPA regulations, see 40 CFR §122.49(a), and federal law, 16 USC §1278(a), the Department of the Interior is to “determine” whether the “water resources project” would “have a direct and adverse effect on the values for which the river was established” prior to issuing its permit. Since the proposed permit is invalid as a matter of law, and the 1998 permit did not comply with the conditions of the direct and adverse effects determination, there are two additional jurisdictional bases for this appeal. Given the questions about whether the discharge was ever properly permitted, even at the current level of 10,000 gpd, there are relevant questions as to whether the Region can properly assert that this is not a “new or increased discharge.”

Third, despite the absence of formal notice of this permit process to the Wildlife Refuge, lands owned by the United States directly abut and surround the Town’s land, both to the north, within some 300 feet of the discharge pipe, and commencing at the mid-line of the Sudbury River. Aside from whatever amount of effluent is trapped or broken down by the marsh located on the Town’s land, Wildlife Refuge lands receive all of the discharge, as the direction of the river flow is to the north. (Exhibit 7) Thus the lands of the United States are immediately affected by the discharge from this pipe and will be even more heavily impacted when currently planned developments increase the volumes of discharge without sufficiently reducing the levels of phosphorous in the effluent. Similarly, lands of the United States located within the National Park are already adversely impacted by severe eutrophication and issuance of this permit will exacerbate the adverse impacts on the National Park. The federal property interests which will be adversely affected by private development actions should the proposed permit be issued are directly relevant to this proceeding.

Finally, another consultation requirement applies to federal undertakings which may affect historic resources under the National Historic Preservation Act. Under §106 of that law, the EPA is required to consult with historic specialist in the State, known as the State Historic Preservation Officer (SHPO). As we indicate in this Appeal, the failure to control the growth of aquatic nuisance species has a direct and adverse effect on historic resources. There is no information in the administrative record that these coordination procedures were every complied with, despite the requirements of federal law and EPA’s own regulations, §122.49(b).

**ARGUMENT:**

The Appellants will demonstrate below that the permit contains findings of fact or conclusions of law that are erroneous. This permit also reflects an inappropriate consideration of factors, thus failing to properly exercise its discretion and raises important policy implementation that the Board should review, see 40 CFR §124.19(a).

Specifically, the Department will show:

A. Issues specifically related to phosphorus:

1. The 0.2 mg/l phosphorus summer limit and 0.5 winter limit in the permit will actually increase the phosphorus load to the Sudbury River and will not help to bring the River into compliance with water quality standards.

2. This increase of phosphorus is significant because it has the potential to further impair the uses for which the river is designated.
3. New data from the Corps of Engineers indicates that phosphorus discharged in the winter remains in the system and contributes to phosphorus available in the summer growing season. The winter phosphorous limit in this permit of 0.5 mg/l is less than the previous permit, but is not low enough.
4. Precedent has been set within this watershed for a 0.1 mg/l phosphorus limit for discharges into a nutrient enriched river.
5. Since this discharge has never been properly permitted, it must be considered a new discharge and the evaluations, standards and processes pertinent to a new discharge must be followed.
6. This permit should be looked at in a regional context, considering the overall assimilative capacity of the river and impacts downstream of individual permit decisions. This is the purpose of a TMDL, which should be done on the Sudbury and Concord Rivers (as has been completed on the Assabet), and requested repeatedly by the Department, so a full understanding of the river system can be accomplished.

**B. Issues related to protection of federal lands and other federal laws pertinent to this permit process:**

7. The requirements of the Wild and Scenic Rivers Act were not appropriately considered when developing the initial permit and this proposed renewal action.
8. Federal lands and federal trust resources, already impaired from existing sources of eutrophication, will be further harmed by increases in volumes of material to be discharged under this permit.
9. Facilitating the relocation of the discharge pipe will exacerbate the injury to federal lands and resources.
10. The proposed federal action did not comply with the processes set forth in the National Historic Preservation Act.
11. An inappropriately narrow reading of the laws relevant to issuance of an NPDES permit has led to a narrowed scope of alternative approaches to effective improvement in water quality for the Sudbury River. More comprehensive factors must be taken into account in this case. This permit, as well as other requested processes, conditions or evolving scientific information, must be incorporated into any final permit action.

**A. The Permit does Not Comply with the Clean Water Act.**

The final permit's 0.2mg/l summer limit and 0.5 winter limit for total phosphorus are not stringent enough to meet water quality standards.

Section 301(b)(1)(C) of the Clean Water Act ("CWA") requires that the Final Permit contain "any [more stringent] limitation necessary to meet" the Commonwealth's water quality standards, including its numeric and narrative criteria for water quality 33 U.S.C. §1311(b)(1)(C). "Thus, we hold that [§301(b)(1)(C)] requires the Administrator to include in . . . permits whatever effluent limitations it determines are necessary to achieve the state water quality standards". Trustees for Alaska v. Environmental Protection Agency, 749 F.2d 549 at 557 (9<sup>th</sup> Cir. 1984). See also

40 C.F.R. §122.44(d)(1). Where necessary to achieve and maintain such standards, §301(b)(1)(C) requires limits more stringent than technology-based limits, and cost and technological considerations may not be considered in setting such water quality-based effluent limitations. In re Westborough and Westborough Treatment Plant Board, 10 E.A.D. 297 at 312 (2002), and cases cited therein. Section 401(a) of the CWA in turn requires that the Commonwealth certify that the discharge, as so limited, “will comply” with §301(b)(1)(C), and the EPA may not issue a permit without such certificate.

The relevant state water quality standards are as follows. 314 CMR 4.05(5)(a) states that “All surface waters shall be free from pollutants in concentrations 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.” Similarly, 314 CMR 4.05(5)(c) provides that “nutrients shall not exceed site-specific limits necessary to control accelerated or cultural eutrophication.”

The fact sheet present monitoring results from 2003-2004 which show average total phosphorus levels upstream and downstream of the discharge are 0.083mg/l and 0.11 mg/l respectively. Maximum reported values have been reported at 0.53 mg/l and 0.68 mg/l, upstream and downstream respectively. These results exceed criteria set by EPA for eutrophic conditions in a river setting. The Ecoregional Nutrient Criteria is 0.24 mg/l and the New England –wide criteria is 0.020-0.22 mg/l of total phosphorus. Even the more traditional Gold Book values for eutrophic conditions in free-flowing rivers (0.1 mg/l) are exceeded some of the time. Data from each of these sources indicates that the Sudbury River suffers from eutrophic conditions, thus violating 314 CMR4.05(5)(c).

In order to meet water quality standards, effluent limits for total phosphorus in this permit must be set at a level that controls accelerated or cultural eutrophication. The permit cannot allow effluent releases which form scum, nuisances or undesirable species of aquatic life. And yet, the new permit limits actually increase the load of phosphorus into the Sudbury River. Utilizing the data presented in the fact sheet, current flow at the plant is 0.0105 MGD and the phosphorus limit is 0.5mg/l year round resulting is an annual load of 15.98 lbs. The new permit with a design flow of 0.052 MGD and a phosphorus limit of 0.2 mg/l (April 1- October 31) and 0.5mg/l (November1 – March 31) results in an annual load of 51.32 lbs. Instead of reducing phosphorus, these permit limits add an additional 35.32 lbs each year. At 7Q10 low flow conditions, mass load of phosphorus in the river at the discharge is increased 3.5%. Use of the 7Q10 low flow parameters is appropriate because it is most likely that the low flow conditions will occur during the summer months when the growth of the aquatic nuisance species is most rampant, when fish and other species may be most stressed by low oxygen levels and high water temperatures, and when the degradation of the river is most apparent to the recreational users and visitors to the historic sites. Use of winter/early spring high water flows is invalid.

EPA’s record suggests that this increase in phosphorus is not significant to water quality issues on the Sudbury River. EPA states that “At a concentration of 0.2mg/l the discharge of phosphorus from the facility will not cause

an appreciable increase in the instream total phosphorus concentration and will therefore not cause or contribute to exceedances of water quality standards.”(Response B2 in response to comments – Exhibit 12). It suggests that since the permit limits are more stringent than the 1998 permit, that it is in compliance with the CWA, however, a permit cannot be renewed or reissued if it would result in a violation of the State’s water quality standards, see Section 402(o) and 303(d)(4) of the CWA.

EPA’s basis for considering that it is not a significant increase is based on assumptions and future activities, not yet fully implemented. EPA is depending on the improvements at the Marlborough Easterly treatment plant which discharges into Hop Brook, a tributary of the Sudbury River. Marlborough’s upgraded treatment plant should only just be becoming operational this year, if construction is on schedule. And how phosphorus moves through Hop Brook and into the Sudbury River is not clearly understood – there are a series of small dams and millponds which retain much of the phosphorus as exhibited in extreme levels of plant growth. How much of that phosphorus is bound in the sediments behind the dams is not known, nor conversely how much is being discharged into the Sudbury River. Even when the upgraded Marlborough Treatment Plant is on line and a lower effluent limit is in place, it is not known how or whether the phosphorus that has built up in the sediments will re-suspend into the water. These sediments could be a continued source of phosphorus downstream. Additionally EPA mentions implementation of storm water programs in upstream communities as a means to improve nutrient levels in the River. Reliance on these potential activities at some time in the future is not sufficient to justify an increase of 35 pounds of phosphorus to the river now.

40 CFR § 122.44(d)(1) requires that the permit itself “achieve water quality standards ... including state narrative criteria for water quality.” The Permit on its face does not. Instead, at best, other actions in the future and outside the Permit are being relied upon to achieve water quality compliance.

This Permit’s over-reliance on a technically unsupported action is strikingly similar to the permit reversed and remanded by this Board in *Government of the District of Columbia, Municipal Separate Stormwater System*, NPDES Permit No. DC 0000221, (EAB February 20, 2002), 2002 WL 257698. In that case, an EPA Region issued an NPDES permit that required the use of “best management practices” which the permit writer believed would be “reasonably capable of achieving water quality standards.” The Board rejected this approach for two reasons, both of which apply here:

“We have two concerns regarding the manner in which the Region has addressed the question of the Permit’s meeting water quality standards. First, it is not clear that the Region’s determination that the BMPs required under the Permit are “reasonably capable” of achieving water quality standards fully comports with the regulatory prohibition on issuing a permit “when imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states.” 40 C.F.R. § 122.44(d) (2001) (emphasis added). Simply stated, the “reasonably capable” formulation, accepting as it is of the potential that the Permit will not, in fact, attain water quality standards, does not appear to be entirely comparable to the concept of ensuring compliance. [FN20]

Second, and more importantly, even accepting the Region’s suggestion that ensuring compliance was what the permit writer had in mind, we find nothing in the record, apart from District’s section 401 certification, [FN21] that supports the conclusion that the Permit would, in fact, achieve water quality standards.”

2002 WL 257698, p. 14.

This permit has the same defects. As in the District of Columbia case, the drafters of the Wayland permit state that ‘Once it (the Marlborough Easterly plant has attained this limit (0.1 mg/l) there should be a reduction in background concentrations’ (Exhibit 12). This is not an assurance that water quality standards will be met.

Further, 40 CFR § 122.4 (d) states that ‘No NPDES permit may be issued ... when the imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states (emphasis added). This permit does not provide such an assurance. In re City of Marlborough, Massachusetts, Easterly Wastewater Treatment Facility, NPDES Appeal No 04-13, August 11, 2005 remanded the permit under appeal in that case, notwithstanding MADEP’s certification under 401(a) of the Clean Water Act because the record in the case did not establish with the degree of certainty required by 40 CFR § 122.4(d) that the permits 0.1 mg/l phosphorus limit, by itself would meet water quality standards. Although the limit is different in this case, the argument is the same – there is no degree of certainty that the permit as written will meet water quality standards.

Conventional thinking has been that during the winter months, phosphorus moves through the system and is not available for plant growth in the spring. A recent study by the Army Corps of Engineers (Exhibit 13) suggests that winter phosphorus discharges do in fact contribute to future plant growth. The relaxed winter phosphorus limit of 0.5 mg/l at this plant then exacerbates the problem.

While the location of the outfall pipe in the marsh will still affect waters of the United States, the marsh does serve to accumulate and breakdown some contaminants. Relocating the discharge pipe to the center of the river may enable the Region and the Applicant to achieve dilution calculations more easily without reducing phosphorus volumes. While the response to comments repeatedly states that the relocation option would require additional environmental reviews, the permit, as written, facilitates this outfall relocation alternative. The Department opposes this; the permit should explicitly forbid relocation of the outfall pipe. The property of the United States begins at the centerline of the Sudbury River. Whatever filtration processes are occurring on the Applicant’s land can only reduce releases to the stream and to federal lands. The goal here is to reduce the total volume of phosphorous being released from the discharge pipe, not to foster its dilution. If a direct discharge will have ‘minimal effect on instream concentrations’, then the appropriate course of action to take is to reduce instream concentrations from other sources, not to justify existing degradation to increase discharges above the current levels. (Exhibit 12, page 15)

40 CFR § 122.44 (d)(vi) requires the permitting authority (EPA) to establish an effluent limit where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard. This section gives EPA the discretion to effluent limits on a “case-by-case



basis”, 40 CFR § 122.44 (d)(vi)(B) so limits of .1 mg/l are encompassed by EPA’s scope of discretion. Furthermore, “re-openers” can be included in the permit conditions to allow modification or revocation of permit conditions which are not found to attain the standards, see § 122.44 (d)(vi)(C)(4). Given the need to prepare permit conditions which control accelerated or cultural eutrophication and do not allow effluent releases to form scum, nuisances or undesirable species of aquatic life, given the severely eutrophic conditions of the rivers at present, any increased phosphorous volume will violate the state’s narrative water quality standards.

The State of Massachusetts has defined ‘highest and best practical treatment’ for phosphorus to be 0.2mg/l. Clearly this technology based limit is not sufficient to meet water quality standards in the Sudbury River and a limit based on the narrative water quality standards should be applied. The State and EPA have set the precedent in the Sudbury-Assabet-Concord watershed by issuing limits of 0.1mg/l to four municipal wastewater treatment plants on the Assabet River, a river which also suffers from eutrophication.

Water quality data for the Sudbury River indicates that the river should be listed on the CWA 303(d) list and a TMDL should be done. Despite the data, the Sudbury River has not been listed on the 303(d) list for nutrients and a TMDL is not planned at this time. A TMDL and consistent watershed limits on phosphorus have been requested by the NPS in 1988, by SUASCO Watershed Team in 2003, by the NPS April 2006, and again in May 2008. Lack of a TMDL hinders the ability of EPA and others, including permit applicants, to evaluate in a more systematic way the cumulative contributions to water quality impairment and to propose permit limits and other actions that are truly protective of water quality. While a TMDL would benefit this watershed, the present lack of the TMDL cannot justify a reduced level of protection afforded by EPA in its NPDES permit.

The record shows that the river system, including the Sudbury, Assabet and Concord Rivers is dominated by wastewater. At 7Q10 low flow conditions, flow near the mouth of the Concord River is 22.4 MGD, while the permitted wastewater discharges are 27.4 MGD. Clearly this system is dominated by effluent. While there are at least 6 wastewater treatment plants discharging upstream, the Town of Billerica withdraws water from the Concord River for drinking water. In order to truly protect water quality, habitat, wildlife and human health a ‘watershed approach’ must be considered. While each permit must be written stringently to limit contributions of phosphorus from point sources, additional standards must be considered as well such as percent impervious surface in the watershed, implementation of a safe yield figure for water withdrawals etc.

Unquestionably, a TMDL plan will facilitate a water-shed wide reduction in phosphorous levels. Other alternatives exist as well. Reuse of wastewater and use of land-based treatments are encouraged by the Clean Water Act, 33 USC § 1294, and there are several areas near the Wastewater Plant which should be further evaluated for upland irrigation or other re-use options. The Region’s response to comments addresses the need for the Applicant to evaluate alternatives, so the scope of this alternatives review must necessarily include alternatives which would not entail the discharge of any waters to the Sudbury River, but would move the discharge waters inland and upland, so

that the nutrients they contain are removed from the riparian system. Given the need to affirmatively prevent increased impairment of the waters of the Sudbury River, land based reuse of the waste water should be a condition of the permit.

**B. The 2008 and the 1998 Permits do Not Comply with Section 7 of the Wild and Scenic Rivers Act.**

Two sections of the Act are particularly pertinent. Section 7(a), 16 U.S.C. §1278(a)<sup>2</sup>, states that “...no department of agency of the United States shall recommend authorization of any water resources project that would have a *direct and adverse effect* on the values for which such river was established, as determined by the Secretary charged with its administration...without advising the Secretary of the Interior...in writing of its intention to do so at least 60 days in advance, and without specifically reporting to Congress in writing [how]...it would affect the component [of the designated Scenic River] and the values to be protected by it.” (emphasis added) EPA’s own implementing regulations repeat this requirement, see §122.49(a). These regulations direct that the EPA “must follow” other federal laws which can require “adoption of permit conditions or...denial of a permit” and explicitly include the Act and the prohibition from licensing “any water resources project that would have a direct, adverse effect on the values for which a national wild and scenic river was established.” 40 CFR §122.49(a).

In preparing the 2008 permit, EPA did not comply with this section. EPA did not provide this 60 day notice to the Department. The NPS only learned of the pendency of this permit, which will have “a direct and adverse effect on the values of the river”, through citizen activists. The Wildlife Refuge, the adjacent landowner to the discharge site, has not received a notice of the proposed permit action.

A water resources project is not narrowly limited to the construction of dams. It includes the pilings, coffer dams and dredging actions requisite to constructing a bridge, Sierra Club North Star Chapter v. Pena, 1 F. Supp. 2d 971 (D. Minn. 1998). Recognizing that it was the first court to review what the term “water resources project” meant in the context of the Act, the court closely examined the legislative history and pertinent materials examining the meaning of this term. In determining that the term included bridges, and in upholding the determination of the NPS that a proposed bridge would have a direct and adverse effect on the values to be protected by the Wild and Scenic River, the court examined a 1969 Solicitor’s Opinion on the issue. That Opinion cited legislative history materials stating that Congress intended the term to encompass Corps of Engineers’ dredge and fill permits and sewage treatment plants. 1 F. Supp. 2d at 978.

The 1998 Fact Sheet recognized that the direct and adverse effects determination applied to their permit process, and stated that “EPA is obligated to consult with the [NPS] regarding this permit.” (Exhibit 14) The Region failed to initiate this process for the renewal action.

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<sup>2</sup> The 1998 correspondence from the NPS references section 7(b) of the Act, because that section applies to proposed Wild and Scenic Rivers.

In 1998, the NPS told the EPA that it was providing them a determination on the lack of a direct and adverse effect *provided the permit was issued with certain conditions*. Among the conditions specified was a “nutrient trading standard and implementation schedule [which] must ensure that there is no net cumulative increase in phosphorous loading at the end of the first five year period.” The NPS determination calculated the volumes of phosphorus which would be released with a five-year compliance period and stated that the nutrient trading scheme “should be implemented earlier, resulting in no net increase at the end of the initial five-year permit period.” (Exhibit 5) However, the 1998 permit, as issued, did not require a specific nutrient trading program; instead it required a plan to achieve such a program. (Exhibit 14, Fact Sheet page 6) There is no documentation showing that a final plan was ever prepared or submitted to EPA. Annual progress reports were also required by the 1998 permit and no such reports appear to have been prepared or provided to EPA or to the Department describing the enforceable measures were taken to connect non-point source users to the Wastewater Plant. No final 5-year report was ever submitted documenting that “the required reduction of non-point phosphorus loadings [were] achieved.” (Exhibit 14, Fact Sheet page 6)

Apparently, a voluntary program, with no set schedule for tie-ins was initiated, but as of December, 2004, it included a substantial number of “potential” users who were not yet connected. There never has been a report calculating the volumes of effluent which were moved from failing septic systems into treatment. Since there is no basis in EPA’s record of administering the 1998 permit to show that it required, or achieved, a 3:1 reduction in non-point source discharges by 2003, and certainly failed to achieve the “no net increase” condition by 2003, the conditions stated by the NPS in their 1998 direct and adverse effects determination were not met.

According to information submitted by the Town’s consultants in January, 2001, 21 homes and businesses were connected at that point. Some 33 others were not yet connected or signed up. (Exhibit 14, Fax of Chris Woodcock) A letter from the Wayland Wastewater Management District Commission (the Commission) to the EPA dated December 23, 2004 listed four “potential future” users, all of which cover discharges which did not exist in 2008. It also listed some 37 “users”, 10 of which were not yet connected. There are no calculations provided of the volumes of their contributions to the system and of how much effluent was removed from being non-point source. (Exhibit 14)

The approved or nearly-approved increase of some 1000 bedrooms and commercial facilities (some of which are listed on the Commission’s 2004 “potential future” list) is also contrary to the representations and conditions that were made in 1998. The 1998 Response to Public Comments (Exhibit 14, RPC page 2) states that the design flow capacity for the Wastewater Plant was chosen for “the potential to tie in more than the 4740 gpd” as they “did not want to limit the number of tie-ins by imposing a maximum flow limit below that for which the plant is designed.” Thus, the 1998 permit was based upon the assumption that the full capacity of the Wastewater Plant was to sewer

existing houses and businesses, to be fully used to reduce failing systems, not to provide for an increase in effluent for new development.

These compliance failures are egregious.

In addition, this means, as was pointed out by the NPS in their January, 1998 correspondence, since that the lapsed Raytheon permit did not authorize any existing level of discharge in 1998, it could not be considered an existing facility. The Raytheon facility had been vacant for over two years, so the baseline discharge was "0". At that point, the state's standard for new facilities was 0.2ppm. The Region should have processed the initial application as a new facility. When the concept of reducing non-point source discharges through a nutrient trading program was proposed, the Department obviously supported local initiatives to reduce non-point source discharges as long as it would result in an actual reduction in effluent loads. Therefore, the indirect and adverse effects determination included conditions for such an approach, but by failing to meet the conditions set out in 1998, no valid operating permit has existed over the last 10 years. Since the discharge over the past 10 years has in fact been only 10,000 gpd, to assert that an actual increase to 52,000 gpd is not an increase, is mere sophistry. Thus, this action cannot be considered an existing permitted facility nor can it be considered as anything other than an increased discharge.

Thus, the Department vigorously disagrees with the blithe rejection of the comments submitted by Mr. Thomas Arnold, (Exhibit 12, RPC B3). Mr. Arnold disputed the Region's justification for the permit on the grounds that it is more stringent than the existing permit. Mr. Arnold stated that the anti-degradation standards have not been met. The Region responded that "this is not a new or increased discharge, and therefore does not require a detailed anti-degradation review." A full detailed anti-degradation review is the only appropriate approach to processing this facility.

**C. Section 12 of the Wild and Scenic Rivers Act Provides for Interagency Cooperation to Eliminate or Diminish Water Pollution, not Increase it.**

In addition, §12 (c) of the Act, 16 U.S.C. §1283(c), provides that any "agency administering a component of the national wild and scenic rivers system shall cooperate with the Administrator, Environmental Protection Agency and with appropriate State water pollution control agencies for the purpose of eliminating or diminishing the pollution of waters in the rivers". In the spirit of this section of the Act, the NPS has commented on this discharge since 1998 (Exhibit 5) expressing its concerns with earlier permits and how they met water quality standards. More recently, NPS sent a letter to Robert Varney, Regional Administrator EPA Region 1 in May 2008 (Exhibit 15) requesting a meeting to discuss water quality issues facing the Sudbury, Assabet and Concord Wild and Scenic River, as well as other Wild and Scenic Rivers in New England. The response received (Exhibit 16) did not mention the possibility of arranging a meeting or otherwise cooperating on resolving these issues. Regardless of how poor the level of

interagency cooperation has been, this section of law affirmatively provides that *the purpose is to eliminate or diminish pollution, not to increase it.*

**D. The EPA has sufficient Authority to Include the Permit Conditions provided by the NPS.**

Section 40 CFR 124.59 requires "If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other State or Federal agency with jurisdiction over fish, wildlife, or public health advises the Director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the Director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of § 122.49 and of the CWA."

The NPS did submit comments in both permit proceedings requesting EPA to set sufficient effluent limits to reduce water degradation, so the EPA is not precluded from inserting these conditions.

40 CFR 124.59(c) states ' In appropriate cases the Director may consult with one or more of the agencies referred to in this section before issuing a draft permit and may reflect their views in the statement of basis, the fact sheet, or the draft permit'. The NPS sent a letter in 2006 (Exhibit 6) and another, unsolicited letter in May 2008 (Exhibit 15) requesting a meeting to discuss how to best coordinate in order to implement the intentions of both the CWA and the Act. The response (Exhibit 16) did not request input from NPS and the proposed permit does not reflect the conditions set forth by the Department..

**E. Federal Property is Being Harmed by the Discharges from the Wastewater Plant.**

The adverse effects of this proposed permit to the interests and mission of agencies of the Department have been demonstrated and documented above. As discussed, there are two major federal areas which manage the lands of the United States adjacent to or downstream of this discharge pipe. Actions which occur off of federal land, but which harm or adversely affect such lands are prohibited. It is well established that under the Property Clause of the Constitution that federal property can be protected, which includes regulating conduct on non-federal lands affecting federal land. See Minnesota v. Block, 660 F. 2d 1240, 1249 (8<sup>th</sup> Cir. 1981), cert. den'd, 455 U.S. 1007, 102 S. Ct. 1645 (1982) involving hunting on non-federal lands and waters within Voyageur's National Park where hunting was prohibited. "The power over the public land thus entrusted to Congress is without limitations," Kleppe v. New Mexico, 426 U.S. 529, 539, 96 S. Ct. 2285 (1976) which affirmed that federally protected wild burros migrating across public and private lands were protected. See also, Camfield v. United States, 167 U.S. 518 (1897) (prohibited erection of fences on private lands which effectively restricted access to other federal lands); United States v. Moore, 640 F. Supp. 164 (S.D. W. Va. 1986) (prohibited spraying of pesticides on state-owned bottom lands of a navigable river impacting NPS's lands and management policies to preserve natural ecological conditions) and United States v. Lindsey, 595 F. 2d 5 (9<sup>th</sup> Cir. 1979) (preventing harm to federal property does not rest upon

ownership of the land where the harmful activity occurs, prohibiting campfires on non-federal land near National Forest property.)

The Clean Water Act contains sufficient scope of discretion to compel the EPA to protect federal lands, even when its action does not directly involve actions on federal property.

As stated above, all of the lands in question bordering and under the water surface which are part of the Wildlife Refuge or the National Park are federal property. In Massachusetts, navigable waters are those with tidal influence, non-navigable waters are those without tidal influence, such as the Sudbury River. Commonwealth v. Charlestown, 18 Mass. 179, 182 (1822), Attorney General v. Woods, 108 Mass. 436 (1871). The sovereign owns the bed of navigable waters, Charlestown, supra. and Arundel v. McCulloch, 10 Mass. 70 (1813). Under federal law, prior to 1871, navigable waters were limited to those within the rise and fall of the tide. The Daniel Bell v. the United States, 77 U.S. (1871), changed the federal test to be whether or not the river was navigable in fact. Since Massachusetts retains the common law in regard to riparian ownership, the title of the United States in its lands along the Sudbury River continues includes the full bed of the river if it owns land on both sides of the river; where it owns only on one side, it owns to the centerline of the river, as is illustrated in Exhibit 7 showing the Wildlife Refuge's lands.

The jurisdiction of the EPA under the CWA rests upon the navigable servitude and other provisions of the Constitution, which view the Sudbury River as federally navigable waters. However, regardless of the ownership of the river bottoms, harms to lands owned by the United States emanating from non-federal lands can be prevented. EPA should utilize its direct regulatory authority to impose adequate protections to prevent harm to the interests of the United States.

#### **F. The National Historic Preservation Act Requires Consultation Prior to Issuance of this Permit.**

The National Historic Preservation Act (NHPA), 16 USC § 470 et.seq , was passed in 1966, so the procedural requirement for federal agencies to evaluate and consider the impacts of their actions on our historic national legacy was a part of EPA's duties in administering their programs for nearly a decade preceding the initial program delegation decision. (This is commonly known as the §106 consultation process.) EPA has incorporated these duties into its own regulations, acknowledging both at 40 CFR § 122.49(b) and § 6.301 that it has duties to "identify properties affected" and to consult about the impacts of its actions in accordance with the procedures set forth at 36 CFR Part 800. Since the particular national interests in the historic resources along the Sudbury River contain some of the most valuable and poignant parts of our national history, and since the National Park is being harmed by the excess of invasive plants and weeds from eutrophication of the river, this consultation process is applicable to this permit proceeding. The Fact Sheet does not indicate that the §106 consultation process was completed by the Region.

**RELIEF REQUESTED:**

The appropriate process here is to Remand this proposed permit to the Region to address the multiple failures in the processes conducted below. For all of the abovementioned reasons, the Department requests that the Board direct EPA Region 1 to amend the Final Permit to:

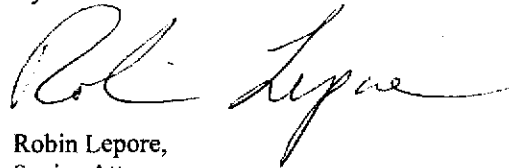
1. Require that the discharge contain a total phosphorus limit to 0.1mg/l year round so that there is no additional phosphorus entering the river and there are no direct and adverse impacts to the outstandingly remarkable resource values for which the river was designated as wild and scenic.
2. Enforce the assumptions of the 1998 permit to require that all of the properties identified by letter of January 30, 2001 are required to connect to the Wastewater Plant within 90 days or the Town will revoke the occupancy permits.
3. No connections to the facility from new users are permitted to occur until all existing users within the flood plain of the Sudbury River within the Town of Wayland have been connected.
4. The Region should conduct a full anti-degradation review, including examination for alternative upland discharge sites and approaches and other phosphorus reduction measures.
5. Due to the invalidity of the 1998 action, EPA should evaluate this permit as if it had imposed a 0.2 mg/l limit in 1998, to determine what volumes of phosphorous have been released in excess of the standards then applicable to new sources. Mitigation for this overage must be addressed, in addition to conditions looking to the future.
6. The Board shall direct the Region to gather the additional data needed on the Sudbury River in order to evaluate both point and nonpoint source pollution contributions to the phosphorus in the River needed to develop a TMDL for phosphorous.
7. The DEP shall list the Sudbury, Assabet and Concord Rivers within the designated Wild and Scenic River as state Special Resource Waters, deserving of the highest level of protection to be afforded to waters in the Commonwealth.
8. Any new permit shall contain a re-opener clause to provide for appropriate conditions should new information about PPCPs indicate harm to aquatic biota.

ON BEHALF OF THE DEPARTMENT OF THE INTERIOR

Attorney for the Petitioner:

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By:

A handwritten signature in cursive script, appearing to read "Robin Lepore".

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Dated: November 14, 2008



#### EXHIBIT LIST:

- Exhibit 1: Sudbury-Assabet-Concord Watershed Maps
- Exhibit 2: Photographs of Sudbury and Concord River Impairments
- Exhibit 3: Article on Water Chestnut Infestations in New England
- Exhibit 4: US Fish and Wildlife Final Site Assessment of Great Meadows NWR
- Exhibit 5: Correspondence from NPS to EPA, 1998
- Exhibit 6: Correspondence from NPS to EPA, 2006
- Exhibit 7: Aerial view of Great Meadows NWR in Vicinity of Discharge
- Exhibit 8: US Fish and Wildlife Assessment of Endocrine Disrupters
- Exhibit 9: Sudbury River Boater's Trail
- Exhibit 10: Sudbury-Assabet-Concord Wild and Scenic River Study
- Exhibit 11: Sudbury-Assabet-Concord Wild and scenic River Conservation Plan
- Exhibit 12: Response to Comment on 2008 Draft NPDES Permit
- Exhibit 13: Army Corp of Engineers Assabet River Sediment and Dam Removal Study
- Exhibit 14: Documents pertaining to the 1998 NPDES permit
- Exhibit 15: Correspondence from NPS to EPA, 2008
- Exhibit 16: Correspondence from EPA to NPS. 2008