1

KEEGAN, WERLIN & PABIAN, LLP

ATTORNEYS AT LAW
265 FRANKLIN STREET
BOSTON, MASSACHUSETTS 02110-3113

(617) 951-1400

TELECOPIERS
(617) 951-0586

June 3, 2004

BY OVERNIGHT DELIVERY

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

RE: *In re: City of Newburyport Wastewater Treatment Facility*
NPDES Permit No. MA-0101427

Dear Sir or Madam:

Enclosed for filing in the above-referenced matter, please find the *Petition for Review* of the City of Newburyport, that includes a supporting brief for the *Petition*. In accordance with EAB procedures, we are providing one original and five copies.

Thank you for your attention to this matter.

Very truly yours,

Barry P. Fogel

BPF/pf
Enclosures

cc: City of Newburyport Sewer Commission
Roger Janson, EPA
Madelyn Morris, DEP-NERO
Paul Hogan, DEP

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

In the Matter of:	
City of Newburyport, MA Wastewater Treatment Facility	NPDES Permit Appeal Case No. _____
NPDES Permit No. MA0101427	

PETITION FOR REVIEW

The City of Newburyport, by its Sewer Commission, with offices at 157 Water Street, Newburyport, MA 01950 (hereafter "Petitioner"), seeks review of the Final National Pollutant Discharge Elimination System ("NPDES") permit ("Final Permit") issued to it by Region I of the U.S. Environmental Protection Agency ("EPA"). A copy of the Final Permit is attached hereto as Exhibit A. The facts and grounds for the review, the relief sought, and additional information required by applicable statutes and regulations are provided in the supporting brief set forth below. This *Petition for Review* has been timely filed in accordance with the requirements of 40 CFR 124.19(a), as it is being delivered to the Environmental Appeals Board ("EAB") within thirty (30) days of the City's receipt of the Final Permit.[1]

[1] The Final Permit is dated May 3, 2004, but the cover letter from EPA to the Petitioner (sent by Certified Mail, Return Receipt Requested) is dated May 7, 2004, and the Petitioner received the Final Permit on May 10, 2004. According to 40 CFR 124.19(a), the 30-day period begins on the day after EPA serves notice of its permit decision, *unless a later date is specified in that notice*. Here, the cover letter states that a petition "should be submitted to the EAB as outlined in the enclosure . . . " The enclosure, entitled "Appealing/Contesting Permits,' states that in accordance with 40 CFR §§ 124.19 and 124.21, as amended, a petition to the EAB must be made "within thirty days of receipt of this letter."

I. Parties

1. The Petitioner owns and operates the Newburyport Wastewater Treatment Facility ("WWTF"), a publicly owned treatment works ("POTW"), under the authorization of NPDES permit MA0101427, which was issued on or about September 17, 1998 (the "Existing Permit"). The Petitioner filed an application for renewal of the Existing Permit in accordance with the Federal Clean Water Act, 33 U.S.C.A. §1341 ("Section 401").

2. The Respondent is an agency of the United States with the responsibility to implement, *inter alia*, the requirements of the NPDES permitting program under the Federal Clean Water Act, 33 U.S.C.A. § 1342.

II. Statement of Procedural Facts

1. The WWTF is authorized by the Existing Permit to discharge treated wastewater effluent into the Merrimack River. The Existing Permit would have expired on October 17, 2003. However, based upon the Petitioner's timely filing of an application for renewal of the NPDES permit, and in accordance with applicable regulations, the Existing Permit is continued administratively until a new permit is reissued and becomes effective.

2. EPA and the Massachusetts Department of Environmental Protection ("DEP") administer the NPDES program under federal and state law, respectively. On or about June 12, 2003, EPA and DEP issued Joint Public Notice of: (a) the Draft NPDES Permit renewal, and (b) EPA's request for State Water Quality Certification under Section 401 of the Federal Clean Water Act.

3. On June 12, 2003, EPA and DEP jointly issued a draft NPDES permit for public comment (the "Draft Permit"), and the agencies conducted a joint public hearing on

the Draft Permit and the Request for State Certification on July 15, 2003. A copy of the Draft Permit is attached hereto as Exhibit B.

4. The Petitioner participated in the joint public hearing on July 15, 2003, and filed detailed written comments dated August 27, 2003, on the Draft Permit (the "City's Written Comments"). A copy of the City's Written Comments is attached hereto as Exhibit C.

5. As stated above, the Final Permit was issued jointly by EPA and DEP by letter dated May 7, 2004. By its terms, the Final Permit would become effective 60 days after the Final Permit is signed by EPA and DEP. The Final Permit was signed on May 3, 2004, and, accordingly, subject to rights of appeal, the Final Permit would become effective and supersede the Existing Permit on July 2, 2004.

6. The Petitioner hereby requests review and modification of several conditions and requirements contained in the Final Permit that impose effluent limitations, monitoring requirements, and other requirements that EPA has imposed upon the operation of the WWTF. In each instance, the Petitioner alleges that these conditions are based upon errors of fact or conclusions of law by EPA, and/or constitute an exercise of discretion by EPA that warrants EAB review; and/or present issues of important policy consideration that warrant EAB review.

7. In accordance with 40 CFR § 124.19(a), the Petitioner has standing to seek review of each of the contested conditions as Petitioner participated in the public hearing and the City's Written Comments presented specific concerns for each of the contested conditions that was included in the Draft Permit. Moreover, as discussed in more detail below, each contested condition (or issue relating to a contested condition) either: (1) was

raised with the requisite specificity and clarity during the public comment period, or was not "reasonably ascertainable" at that time; or (2) was not included in the Draft Permit and was stated for the first time in the Final Permit.[2]

8. The Petitioner also has standing to seek review of each of the contested conditions because, as set forth below, this *Petition for Review* addresses with specificity and provides rebuttal to each of EPA's responses to the City's Written Comments. See EPA's *Response to Public Comments* included in Exhibit A.

9. Contemporaneously with the filing of this *Petition for Review*, the Petitioner has filed a *Notice of Claim for Adjudicatory Hearing* in accordance with 310 CMR 1.00 and 314 CMR 2.08, to challenge the conditions contained in the portion of the Final Permit issued by DEP.[3]

III. Statement of Final Permit Conditions for Which Review is Sought

The Petitioner is seeking review of ten (10) separate conditional items contained in the Final Permit. The following discussion sets forth the detailed basis why the EAB should grant the Petitioner's request for review for each of these items.

1. *Total Residual Chlorine - Mass Loading Limitations*

Part I.A.1. of the Final Permit includes effluent limits and monitoring requirements for various parameters for the Petitioner's authorized discharge. Among the effluent limits are Average Monthly and Average Weekly "mass loading" limits for Total Residual

---

[2] In 40 CFR § 124.19(a), EPA's regulations provide that even if a person failed to file comments or failed to participate in the public hearing on the Draft Permit, that person may petition for review of conditions added after issuance of the Draft Permit. The Petitioner understands this to mean that a party has standing to contest a condition included for the first time in the Final Permit

[3] On May 28, 2004, the Petitioner filed a *Notice of Claim for Adjudicatory Hearing* under 310 CMR 1.00 and 314 CMR 9.10, to challenge DEP's state Water Quality Certification.

Chlorine ("TRC"). These limits were not included in the Draft Permit and were not discussed with the Petitioner. As the Petitioner has not had a previous opportunity to challenge or comment on these limits, the Petitioner has standing now to seek review of this condition.

Mass loading limits for TRC are an unusual limit, not required under federal regulations and historically not included in NPDES permits. It is unclear why EPA added these limits to the Final Permit. The only apparent explanation is that EPA was responding to a public comment submitted by the Island Futures Group, Inc. ("IFG"). IFG suggests that "failure to impose such limitations constitute a clear violation of each agency's applicable 'anti-backsliding' and 'antidegradation' regulations." On page 13 of 29 of the *Response to Public Comments* in the Final Permit, EPA responded to IFG's comment with the following:

> The Total Residual Chlorine (TRC) limitations shall remain as concentration limitations. The National Recommended Water Quality Criteria for TRC are expressed as concentrations, and therefore, it is consistent for the permit limitations to be expressed in the same units. This is consistent with CFR 122.45(0)ii.

EPA was correct to note that the National Recommended Water Quality Criteria for TRC do not support the use of mass loading limitations. Thus, it remains unclear why EPA included the mass loading limits in the Final Permit.

Relief Sought: The inclusion of these conditions is based upon an error of fact and/or law, and/or constitutes an exercise of agency discretion that warrants EAB review. The Petitioner requests that the Final Permit be modified to remove these mass loading limitations for TRC.

2. *Total Residual Chlorine – Effluent Concentration Limits*

In both the Draft Permit and the Final Permit, Part I.A.1. includes effluent limits for TRC that: (a) revising the Maximum Daily concentration limit from 0.30 mg/l to 0.39 mg/l; and (b) add an Average Monthly concentration limit of 0.23 mg/l (the Existing Permit does not include an average monthly concentration limit). The City's Written Comments challenged EPA's proposed Average Monthly concentration limit on the grounds that the basis for changing the limit was flawed, principally based upon: (a) insufficient information to change the accepted immediate dilution factor from 39:1 to a lower factor of 30:1 selected by EPA, and (b) concerns about adverse impacts on disinfection efficiency. See Exhibit C, Comments #2 and #3. At the time, the Petitioner's comments focused on the flaws associated with using a draft dilution study by the U.S. Department of Health and Human Services as the basis for lowering the estimated dilution.

EPA's response to Comment #2, on page 3 of 29 of the *Response to Public Comments*, states that EPA performed further evaluation of the dilution factors for the treatment facility outfall, using additional information and new guidance materials, *after* the close of the public comment period on the Draft Permit. EPA states that the additional evaluation included selecting the critical design condition, as provided in EPA's *Technical Support Document for Water Quality Based Toxics Control*, and re-running the CORMIX models to reflect these conditions.

Based on EPA's response to the Petitioner's comments, it appears that EPA obtained varied results from the CORMIX model and therefore used its judgment in interpreting the dilution results. However, it appears that in calculating the new Average Monthly limit for TRC, EPA misused the "critical" (or "worst case") condition (i.e., low

water, slack/spring tide) to estimate the dilution to be used with the "chronic" toxicity requirements.

EPA's written response to Petitioner's comment does not provide sufficient details or back-up documentation regarding EPA's modified conclusions. The Petitioner believes that EPA's selection of the critical design conditions may be appropriate in establishing the Maximum Daily TRC limit, as it is related to acute toxicity. However, the Petitioner believes that EPA erred and failed to exercise appropriate discretion by using "worst case" methodology to determine a "chronic" limit, when the chronic limit should reflect "average" design conditions.

In EPA's response to Comment #3 on page 5 of 29 of the Response to Public Comments in the Final Permit, EPA states:

> The TRC limits are based on the National Recommended Water Quality Criteria, 2002 (EPA-822-R-02-047). In the Existing Permit, the chronic criteria (monthly average) was used to calculate the acute limit (maximum daily). This error resulted in a maximum daily limitation which was more stringent than required. EPA has corrected this error in this permit and has included a monthly average limit based on the chronic criteria.

The Petitioner does not object specifically to correction of the Existing Permit's limit by revising the Maximum Daily discharge limit to 0.39 mg/l. However, the Petitioner has not been provided with the opportunity to review EPA's new CORMIX model results. Accordingly, the Petitioner believes that a basis for the lower 30:1 dilution still has not been substantiated sufficiently to support a new TRC Average Monthly limit of 0.23 mg/l.

EPA also stated in its response that "the diffuser has not been inspected to verify that the installation and current conditions are in accordance with the design condition." In fact, the Final Permit requires inspection of the diffuser, and that inspection, when

completed, will provide more detailed information for use in refining dilution estimates Therefore, the dilution factor should be maintained until the inspection is completed.[4]

Relief Sought: The imposition of these TRC effluent limitations is based upon a clearly erroneous finding of fact or conclusion of law, and/or constitutes exercise of EPA discretion that warrants EAB review. The Petitioner requests that the Final Permit be modified to provide an Average Monthly limit for TRC of 0.30 mg/l.

3. *Total Residual Chlorine – Monitoring Requirements*

The Draft Permit proposed a new requirement for the Petitioner to install a continuous monitor for TRC at a location in the WWTF prior to the point of dechlorination and to use this monitor for compliance purposes. In the City's Written Comments, the Petitioner objected to this requirement and proposed, as an alternative, to increase the collection of grab samples for TRC from once per day in one location to twice per day at two locations (one prior to and one after dechlorination). See Exhibit C, pp. 7 and 8 of 9.

In Part I.A.1. of the Final Permit, EPA removed the condition stated in the Draft Permit and established the monitoring requirement for compliance of four (4) grab samples per day (two each day at each of two locations). This reflects incorporation of the *alternative* offered by the Petitioner to the continuous monitoring requirement. However, in Footnote 8 on page 3 of 13 in the Final Permit, EPA states a requirement for continuous monitoring both before and after the point of dechlorination. This requires the addition of a new continuous analyzer, and reporting of data from both analyzers with chart recorders,

[4] Another reason that the dilution factor should have been maintained is that EPA and DEP were aware that the Petitioner has proposed a dilution study that would provide specific dilution data.

one pre-dechlorination and one post-dechlorination, along with the discharge monitoring reports ("DMRs").

EPA has exercised its discretion inappropriately, failing to recognize that the Petitioner currently has one TRC analyzer that does not have a chart recorder for this equipment, and that the new requirements would impose substantial cost without adequate justification. As set forth in EPA's response to Comment A.4 on page 6 of 29 of the *Response to Comments* in the Final Permit, EPA acknowledges that one analyzer is required for compliance purposes:

> EPA recognizes that the continuous monitoring of total residual chlorine levels prior to dechlorination is only an indirect measure of disinfection effectiveness, but it is crucial to protect downstream shellfishing resources.

EPA's position that continuous monitoring for TRC is an "essential element of the immediate warning system" for shellfish resources was not raised in the Draft Permit and was not discussed with the Petitioner with respect to the requirement for the warning system (*see* discussion in Item No. 8 below.)[5]

Moreover, EPA's response suggests simply that the requirement for continuous monitoring of TRC is "an essential element of the immediate warning system which is a requirement of this permit." However, EPA has not justified adequately why the warning system requires installation of a second monitor. By merely providing the general declaration that the warning system is "required" by the permit, EPA has not provided

[5] Furthermore, prior to the issuance of the Final Permit, the Petitioner relocated the existing TRC analyzer at the WWTF treatment facility at a location prior to dechlorination, rather than following dechlorination. The Petitioner finds that at this location, the analyzer equipment can be used to pace the dechlorination system, making the overall chlorination/ dechlorination process more efficient. The Petitioner believes that use of the existing analyzer at a pre-dechlorination location, and the warning plan to be developed, adequately address the "crucial" need identified in EPA's response.

adequate justification for the specific requirement at issue here, and certainly has not provided a sufficient response to the comments submitted by the Petitioner.

The installation of a second TRC analyzer to monitor conditions downstream of dechlorination should not be required. This system's reliability can be monitored effectively using the increased number of grab samples (two prior to dechlorination and two post-dechlorination, taken at different times) as offered by the Petitioner in the City's Written Comments and adopted by EPA in the Final Permit. Also, with the relocation of the current monitor, the WWTF has a system that is significantly more reliable than required under the Existing Permit.

Also, the installation of chart recorders for the TRC monitoring equipment is not a critical component of the monitoring system. The chart recorders will be costly to install and maintain, will create additional paper requiring storage, will take additional operator and administrative attention to collect and review, and will not result in any increase in treatment efficiency or effluent quality. The increased frequency and dual location of TRC grab samples offers a significant (and reliable) increase in compliance measurement over the Existing Permit's requirements.

Relief Sought: The imposition of a condition requiring continuous monitoring for TRC is based upon a clearly erroneous finding of fact or conclusion of law, and/or is an exercise of EPA discretion and/or an important policy consideration that warrants EAB review. The Petitioner requests that the Final Permit be modified by deleting the first two sentences of the second paragraph in Footnote 8 under Part 1.A.1.

4. *Fecal Coliform Bacteria – Effective Date of New Effluent Limits*

Part I.A.1. of the Final Permit includes Average Monthly and Maximum Daily effluent limitations for fecal coliform bacteria of 88 MPN/100 ml and 260 MPN/100 ml, respectively. These limits were not included in the Draft Permit. As the Petitioner has not had a previous opportunity to challenge or comment on these limits, the Petitioner has standing to seek review of this condition. However, the Fact Sheet to the Draft Permit (page 8 of 14) stated: "If the waters in the vicinity of the discharge are approved for conditionally restricted shellfishing, . . . EPA will modify the permit when this occurs."

The Petitioner (and EPA and DEP) had expected that the Final Permit would be reissued before shellfish bed reclassification occurred. Thus, the Petitioner also had expected that the limits for fecal coliform in the Final Permit would be the same as in the Draft Permit and that, at most, the Final Permit would contain the language cited in the Draft Permit regarding modification of the permit if the shellfish beds were reclassified.

After the close of the public comment period on the Draft Permit, the Massachusetts Division of Marine Fisheries ("DMF") announced in a press release dated November 24, 2003, that shellfish beds in the Merrimack River estuary were reclassified for conditional re-opening, but that actual harvesting of the beds could not occur until DMF and the applicable communities had implemented a management plan. The Petitioner believes that the referenced language in the Draft Permit meant that a formal permit modification process would be followed by EPA and DEP before the Final Permit could be modified to impose new limitations for fecal coliform bacteria.

Nevertheless, in an effort to reach agreement on this issue with EPA and DEP before issuance of the Final Permit, the Petitioner communicated with DEP regarding a

compliance schedule for the new limits.[6] *See* Petitioner's letter to DEP dated February 23, 2004, attached hereto as Exhibit D. Nevertheless, EPA and DEP added the new limits to the Final Permit with an effective date that does not take into account all of the concerns raised by the Petitioner.

Relief Sought: The inclusion of a condition imposing new fecal coliform limits four months after the effective date of the Final Permit is based upon a clearly erroneous finding of fact or conclusion of law, and/or is an exercise of agency discretion or an important policy consideration that warrants EAB review. The Petitioner continues to believe that under applicable regulations, a formal modification process is required with respect to the change in these limitations. Specifically, the Petitioner believes that it is entitled to formal review of its comments on the timing of the implementation of the new limits, e.g., that the Petitioner needs a longer compliance schedule for the new limits in order to allow completion of planned improvements to the aeration system at the WWTF.

5. *Fecal Coliform Bacteria – Effluent Limits*

The Fact Sheet provided with the Draft Permit (page 8 of 14) recognized that the water quality criteria for Class SB waters with conditionally restricted shellfishing (as provided in DEP's regulations at 314 CMR 4.05) require that "fecal coliform bacteria shall not exceed a median or geometric mean MPN of 88 per 100 ml nor shall more than 10% of the samples exceed a MPN of 260 per 100 ml." However, Part I.A.1. of the Final Permit includes a Maximum Daily effluent limitation for fecal coliform bacteria of 260 MPN/100

[6] The issue of a compliance schedule was not raised during the public comment period because (1) the fecal coliform limits were not changed in the Draft Permit; and (2) the Fact Sheet to the Draft Permit implied that a modification would ensue if and when the shellfish beds were reclassified.

ml, but it does *not* include the provision set forth in the regulation requiring that not more than 10% of the samples exceed an MPN of 260 per 100 ml.

Relief Sought: The inclusion of a condition in the Final Permit specifying testing methods for fecal coliform is based upon a clearly erroneous finding of fact or conclusion of law, and/or is an exercise of agency discretion or an important policy consideration that warrants EAB review. In order to be consistent with the Class SB Restricted water quality criteria, the Petitioner requests that the Final Permit be modified to add a footnote under the Maximum Daily limit for Fecal Coliform Bacteria of 260 MPN/100 ml stating that the facility will be considered to be in compliance with the Maximum Daily limit so long as not more than 10% of samples exceed the 260 MPN/100 ml limit.

6. *Fecal Coliform Bacteria – Test Method for Effluent Limits*

The Final Permit includes lower limits for fecal coliform bacteria expressed in units "MPN/100 ml." These MPN ("Most Probable Number") units represent data typically obtained by using the "multiple tube fermentation" technique for determining the presence of fecal coliform bacteria. The Draft Permit and the initial limits in the Final Permit refer to "colony forming units" (i.e., cfu/100 ml) that represent data typically obtained by using the "membrane filter technique" that also is approved for determining the presence of fecal coliform bacteria.

The membrane filter technique is the standard method used by the vast majority of POTWs in monitoring fecal coliform bacteria, and this method is recognized in the NPDES permits issued for the majority of POTWs, including many that are required to meet regulatory limits stated in MPN units. The membrane filtration method has the advantages of providing a quicker and more direct method of counting coliform bacteria, and does not

present the potential complications related to the multiple dilutions required for the multiple tube fermentation method. Both methods are approved under 40 CFR § 136.3. Accordingly, the Petitioner believes that the membrane filtration method, yielding results in "cfu/100 ml" (rather than MPN/100 ml), should be acceptable to EPA for the WWTF.

Relief Sought: The condition requiring the use of the multiple tube fermentation method is an exercise of agency discretion and/or an important policy consideration that warrants EAB review. The Petitioner requests that the Final Permit be modified to indicate that the membrane filtration method is an acceptable test method and that "cfu/100 ml" is an appropriate unit for reporting fecal coliform bacteria.

7. *Flow – Monthly Calibration*

Footnote 3 under Part I.A.1. of the Final Permit includes a requirement for developing and implementing a plan for "conducting a monthly calibration to assure representative flows are reported." No such requirement was included in the Draft Permit or discussed with the Petitioner. As the Petitioner has not had a previous opportunity to challenge or comment on these requirements, the Petitioner has standing now to seek review of this condition.

The Petitioner, through its Sewer Department, has been working actively to ensure that flow metering at the WWTF is representative of actual flows. Past inconsistencies between the influent and effluent flow meter readings were studied by the Sewer Department, and that information has been shared with EPA and DEP. The results of those studies indicated that past readings of the effluent flow meter had been significantly higher than actual treated flows. The same analysis concluded that the influent flow meter was

significantly more representative of flows treated by the WWTF. Use of the influent flow meter for reporting treatment facility flows was approved by DEP in June 2001.

To provide a more definite confirmation of flow meter accuracy, the Sewer Department and its consultant, Weston & Sampson Engineers, Inc., developed a volumetric calibration method that could provide highly accurate confirmation of the influent flow meter accuracy. This repeatable method of volumetric calibration has shown that the influent flow meter is depicting flow through the WWTF with significant accuracy. Both DEP and EPA have accepted this conclusion, as recognized in the Draft Permit Fact Sheet. As addressed in the Draft Permit, the Petitioner has agreed to repeat this calibration annually to confirm the flow meter accuracy. This volumetric calibration process is atypical, as it goes well beyond industry standards for the level of flow confirmation and calibration imposed on secondary and tertiary POTWs.

The addition of a monthly calibration requirement to the Final Permit is an unprecedented step – imposing significant costs for which no justification has been provided. It appears that this requirement was added in response to a comment from IPG identified by EPA as Comment B.3. On page 10 of 29 in the Response to Comments, EPA stated that the calibration requirement was added "given the questions about the accuracy of flow measurements." This is not an adequate basis for imposing the requirement, as the "questions" raised by others were adequately rebutted and shown to be invalid. For example, the Petitioner has shown that after multiple calibrations, neither of the WWTF's flow meters has been found to be under-estimating flows through the plant. Because the meters have reported slightly *higher* flows than actually pass through the WWTF, the foundation of the argument for adding the monthly calibration to the permit is flawed. In

fact, other permit requirements that apply if and when flows reach 80% of permitted capacity create incentives for the Petitioner to monitor closely the flow meters' accuracy.

Relief Sought: While the condition requiring annual volumetric calibration adds a significant level of assurance regarding flow measurement, the additional requirement is unwarranted and will impose significant cost without proper basis. The inclusion of an additional requirement for monthly calibration was based on a clearly erroneous finding of fact, and/or is an exercise of agency discretion and/or an important policy consideration that warrants EAB review. The Petitioner requests that the Final Permit be modified to remove the requirement for planning and implementing monthly calibration.

8. *Immediate Warning System*

Part I.C.6 (on page 8 of 13) of the Final Permit includes the addition of a requirement to submit to EPA and DEP the details of an "immediate warning system developed with input from the Massachusetts Division of Marine Fisheries (DMF)." The condition includes a new requirement, not stated in the Draft Permit, that the notification be made "automatically." This requirement is a significant change from the Draft Permit required the Petitioner to "work with the Massachusetts DMF to develop an immediate warning system notifying DMF of a disinfection failure or if TRC concentrations exceed the permit limit." As the Petitioner has not had a previous opportunity to challenge or comment on this condition, the Petitioner has standing now to seek review of this condition.[7]

[7] Although the Petitioner was not given the opportunity to provide input or discuss the timing of the submittal to EPA, the Petitioner accepts the language requiring the submittal of system details within 12 months of the effective date of the Final Permit.

The Petitioner did not object to the requirement of the Draft Permit for working with the DMF to develop a warning system, and agreed that it would do so. However, the new requirement for an "automatic" warning system is vague and burdensome. This language is potentially limiting and circumvents the process of the Petitioner and DMF working together to develop a reasonable and reliable immediate warning system.

Relief Sought: The condition requiring automatic notification is based on a clearly erroneous finding of fact or conclusion of law, and/or is an exercise of agency discretion and/or an important policy consideration that warrants EAB review. The Petitioner requests that the Final Permit must be modified to remove the specific requirements included in the second paragraph of Part I.C.6. that require implementation of a "system" that provides notification "automatically." The Petitioner believes that the second paragraph should read as follows to provide for implementation of a practical solution with input from the Petitioner and DMF:

> The system shall enable the WWTF operators to provide immediate notification to the Division of Marine Fisheries in the event of a disinfection failure. Details of the system should be acceptable to the resource managers at the Division of Marine Fisheries.

9. *Total Kjeldahl Nitrogen – Monitoring Requirements*

Part I.A.1. of the Final Permit includes the addition of a new requirement for monthly sampling (24 hour composite) and reporting for total kjeldahl nitrogen ("TKN"). No such requirement was included in the Draft Permit or discussed with the Petitioner. As the Petitioner has not had a previous opportunity to challenge or comment on this condition, the Petitioner has standing now to seek review of this condition.

TKN monitoring is not a requirement for the receiving water and EPA has not stated why this is a necessary requirement of the permit. This requirement will impose significant costs and burdens on the Petitioner without adequate justification.

Relief Sought: The inclusion of a condition requiring TKN monitoring is an exercise of agency discretion and/or an important policy consideration that warrants EAB review. The Petitioner requests that the Final Permit be modified to remove the monitoring requirement for TKN.

10. *Nitrite and Nitrate Nitrogen Monitoring Requirements*

Part I.A.1 of the Final Permit includes the addition of a new requirement for monthly sampling (24 hour composite) and reporting for nitrite and nitrate nitrogen. No such requirement was included in the Draft Permit or discussed with the Petitioner. As the Petitioner has not had a previous opportunity to challenge or comment on this condition, the Petitioner has standing now to seek review of this condition.

Nitrite and nitrate nitrogen monitoring is not a requirement for the receiving water and EPA has not stated why this is a necessary requirement of the permit. This requirement will impose significant costs and burdens on the Petitioner without adequate justification

Relief Sought: The inclusion of a condition requiring nitrite and nitrate nitrogen monitoring is an exercise of agency discretion and/or an important policy consideration that warrants EAB review. The Petitioner requests that the Final Permit be modified to remove the monitoring requirement for nitrite and nitrate nitrogen.

IV. Prayer for Relief

The Petitioner requests the following relief:

(1) That the Final Permit be remanded for modification of the ten (10) conditional items contained in the Final Permit as listed and described above;

(2) That, pursuant to 40 CFR 124.16(a), the effect of each contested condition be stayed during the pendency of this appeal and until the Final Permit is modified;

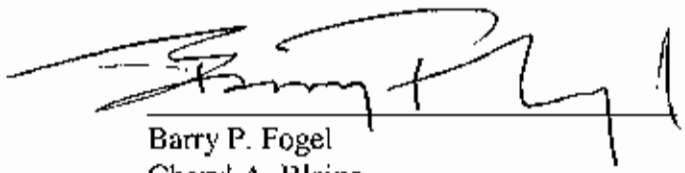
(3) That, if a petition for review of the Final Permit is filed by any party other than the Petitioner, the EAB will provide the Petitioner with notice that such petition has been filed and allow the Petitioner to file a response with the EAB addressing the allegations raised in that petition;

(4) That the EAB grant such other relief to Petitioner as it shall deem appropriate.

Respectfully submitted,

CITY OF NEWBURYPORT

By its attorneys,



Barry P. Fogel
Cheryl A. Blaine
Nancy A. Kaplan
Keegan, Werlin & Pabian, LLP
265 Franklin Street
Boston, MA 02110
(617)-951-1400
(617)-951-1354 (facsimile)

Dated: June 3, 2004