

## RESPONSE TO PUBLIC COMMENTS

From August 18, 2006 until September 16, 2006, the United States Environmental Protection Agency (“Region”) and the Massachusetts Department of Environmental Protection (“MassDEP”) solicited public comments on a draft modification of National Pollutant Discharge Elimination System (“NPDES”) permit number MA0100498, which authorizes effluent discharges from the Marlborough Easterly Wastewater Treatment Facility (“Marlborough WWTF”), located in Marlborough, Massachusetts. The draft modification was limited to (i) the compliance schedule to achieve the final summer seasonal phosphorus effluent limit of 0.1 mg/l (“Phosphorus Limit”) and (ii) the averaging period used to measure compliance with the interim seasonal phosphorus limit. The Environmental Appeals Board had remanded the Phosphorus Limit and the use of a seasonal averaging period with the interim seasonal phosphorus limit. In re City of Marlborough Easterly Wastewater Treatment Facility, NPDES Appeal No. 04-13, 12 E.A.D. \_\_\_ (August 11, 2005). After reviewing the comments received, EPA has decided to issue the final permit modification. The following describes and responds to comments.

A copy of the final permit may be obtained by writing David Pincumbe, United States Environmental Protection Agency, 1 Congress Street, Suite 1100 (CPE), Boston, Massachusetts, 02114-2023, or by calling (617) 918-1695. A copy may also be obtained from <http://www.epa.gov/region1/npdes/index.html>.

Comments submitted by Peter Shelley, Esq., John A. Pike, Esq. and John L. Davenport, Esq. of the Conservation Law Foundation:

Comment A1. The Environmental Appeals Board, in its August 11, 2005 decision on the Town of Sudbury’s appeal of the September 16, 2004 NPDES permit, remanded the permit because the record in the case was clear that its 0.1 mg/l summertime phosphorus effluent limitation, by itself and without any requirement for remediation of the phosphorus recycling into the water column from the bottom sediments, would not “ensure” compliance with the applicable water quality standards as required by 40 C.F.R. § 122.4(d) and § 301(b)(1)(C) of the Clean Water Act. This requirement for assurance is unqualified; cost and technological considerations may not be considered in establishing the water-quality based permit limitations required by § 301(b)(1)(C), In re Westborough and Westborough Treatment Plant Board, 10 E.A.D. 297 at 312 (2002).

The proposed permit modification is EPA Region I’s response to the EAB remand. The permit as proposed to be modified still fails to “ensure” compliance with the applicable water quality standards because it does not obligate the permittee, the Commonwealth of Massachusetts or anyone else to implement whatever bottom sediment remediation measures are necessary, in combination with the 0.1 mg/l effluent limitation, for attainment of those standards. In fact the proposed modification goes out of its way to avoid any such commitment by expressly providing that the Memorandum of Understanding referred to in paragraph 2 of Part E about implementation of the sediment reductions determined by the Army Corps of Engineering to be necessary “shall not. . .

create any legal rights or impose legal obligations on any party, or obligate the Permittee or any other party to take any actions concerning implementation of the Approved Option(s).” In addition, there is no due date by which the permittee, the Town of Sudbury and MADEP are required to enter into the Memorandum of Understanding, and no penalty or other consequence for their failure to do so.

Response A1: The proposed modification of the permit ensures compliance with water quality standards in accordance with Section 301(b)(1)(C) of the Clean Water Act without apportioning legal responsibility for sediment phosphorus load reductions. As modified, the permit initially imposes an effluent limitation and sets forth a framework for identifying and ensuring sediment remediation which, in combination with the effluent limit, will result in attainment of water quality standards. If the anticipated sediment remediation measures are not assured by October 1, 2009, then the reopener provision of the permit is automatically triggered and the Region will modify or revoke and reissue the permit to include whatever phosphorus effluent limitation is necessary to comply with standards prior to expiration of the permit after adjusting for any nonpoint source reductions that have been assured as of October 1, 2009. Whether the permit legally obligates a party to reduce sediment phosphorus loading is not the determinative question for purposes of assessing compliance with CWA § 301(b)(1)(C). Nor is the lack of a deadline by which to enter into an MOU to address such reductions. In the Region’s view, the dispositive question instead turns on whether the permit as written accounts with sufficient certainty for the possible failure of sediment load reductions to occur. This position accords with the remand, in which the EAB states:

[T]he Permit does not contain any provisions requiring that Marlborough study or otherwise address the potential for phosphorus releases from the sediment in the Hop Brook ponds during the term of this Permit; nor does the Permit contain any provisions requiring further action, evaluation, or modification in the event that water quality standards are not achieved despite compliance with the 0.1 mg/l phosphorus limitation. n20.

n20 The Permit itself does not clearly require modification if water quality standards are not met by the end of the Permit's four-year compliance schedule, but rather states that the Permit may be modified upon a demonstration that a presumably lower "alternative permit limit will achieve water quality standards." Permit Cond. I.A.1 and .2 n.6.

City of Marlborough, slip opinion at 22-23. The proposed reopener provision falls squarely within the terms of the remand by clearly requiring modification by a date certain depending on the occurrence and extent of sediment phosphorus remediation.

Comment A2. The permit reopener clause in the proposed permit modification does not provide the degree of certainty of attainment of water quality standards that 40 C.F.R. § 122.4(d), § 301(b)(1)(C) and the EAB decision require. The reopener clause only applies if the phosphorus sediment reductions “associated with” the Approved Options derived from the Army Corps of Engineers feasibility study have not been “assured” by the October 1, 2009 reopener date. Actual achievement of those sediment reductions by that

date, or any other date, is expressly not required. In addition, if the sediment reductions “associated with” the Approved Options, even when implemented, turn out to be insufficient, in combination with an effluent limitation no more stringent than the permit’s current 0.1 mg/l, for the attainment of water quality standards, the reopener clause will nevertheless not be triggered and the violation of the water quality standards for Hop Brook will continue unabated.

Response A2. The reopener clause in the proposed modified permit will result in compliance with water quality standards, either through a combination of the phosphorus effluent limit and assured nonpoint source reductions or through a more stringent phosphorus effluent limit. We believe the framework established in the permit provides sufficient incentives for impacted parties to vigorously and cooperatively pursue sediment phosphorus reduction efforts. The fact that the Feasibility Study has not yet been completed and that legal, technical and logistical complexities will accompany efforts to address phosphorus sediment loading complicates the task of establishing of a meaningful date certain for implementation of sediment phosphorus reductions at this time. An implementation schedule based on more complete information about these issues could be considered for inclusion in a future permit reissuance or modification. The commenter points to the possibility that full implementation of an Approved Option consistent with a phosphorus effluent limit of 0.1 mg/l would not result in attainment of standards. Any Approved Option would be based on the best available technical and scientific understanding of the nutrient impairment in the Hop Brook. In the event that full implementation of approved sediment remediation efforts and the phosphorus effluent of 0.1 mg/l in fact is not sufficient to attain water quality standards, the Region will have an opportunity to impose a more stringent limit based on its refined understanding of the impairment.

Comment A3. Furthermore (and most problematic), although the reopener clause in the modification states that, if the reopener is triggered, EPA will modify the permit to include “such limits and conditions” (not by such terms limited to effluent limits) that are necessary to ensure compliance with water quality standards, the Fact Sheet accompanying the permit modification limits EPA’s recourse to reduction of the phosphorus effluent limitation. However, the record (e.g. the ENSR Supplement Nutrient Loading Evaluation) is clear that even an effluent limitation more stringent than 0.1 mg/l will fail to ensure attainment of water quality standards without sufficient reduction of the sediments. By limiting the action that EPA can take in the event the reopener is triggered to tightening the effluent limitation, the permit modification effectively “ensures” that water quality standards will not be met.

40 C.F.R. § 122.4(d), § 301(b)(1)(C) of the Clean Water Act and the EAB decision require that the permit mandate implementation, by a date certain, of whatever sediment reductions and more stringent effluent limitations that the Army Corps of Engineers, EPA and MADEP determine to be necessary for the attainment of the applicable water quality standards. Although the Region is apparently concerned that the EPA may not have jurisdiction under the Clean Water Act to require sediment remediation because it is uncertain that the sediment is a “point source,” the EAB in its decision exhibited no such

concern (presumably relying on subsection (C) of § 301(b)(1)), remanding the permit specifically for its failure to require the permittee “to address the potential for phosphorus releases from the sediment.” In any event, we are aware of no such limitation on MADEP’s jurisdiction under the Massachusetts Clean Waters Act.

Response A3: The commenter correctly articulates the jurisdictional issue confronting the Region with respect to mandating nonpoint source reductions through an NPDES permit. The release of phosphorus from accumulated sediment lying on the river bed into the water column would not itself be from a “discernable, confined and discrete conveyance” and therefore not from a point source, the existence of which is a necessary element to EPA’s assertion of jurisdiction under the CWA. CWA § 502(14), 33 U.S.C. § 1362(14). In the Region’s view, the Board’s directive that the Region “address the potential for phosphorus releases from the sediment” does not represent a determination that EPA has the authority to regulate nonpoint sources, but rather instructs the Region to take account of the releases from the sediment when establishing the requisite effluent limitation on the point source, which in this case is the Marlborough Easterly POTW. This can be done through the imposition of more stringent phosphorus effluent limits on the point source. In this case, an extremely stringent phosphorus effluent limit – such as EPA’s guidance criterion or a numeric criterion adopted by Massachusetts applied end-of-pipe – would ensure that the POTW itself is not causing or contributing to a violation of water quality standards, and would allow for the attainment of the standards over a long period of time, likely decades, as the sediment phosphorus recycling gradually abated.

Although EPA and MADEP are not aware of any instance where the Massachusetts Clean Waters Act has been extended to regulate phosphorus releases from the sediments, in some situations, nonpoint source phosphorus loadings have been addressed through the development and implementation of a Total Maximum Daily Load.

Comments submitted by the Francis T. Lyons of the Hop Brook Protection Association:

Comment B1. While I have a major concern about parts of the permit that have not changed, specifically the fact that the permit does not put a requirement on the percentage of the phosphorous that must be dissolved phosphorous during the winter months when the Total Phosphorous limit is set to 0.75 mg/l, I realize no further comments can be made on that issue.

Regarding the most recent Draft Modification of the Permit which I received via email on 24 August 2006, my comments are related to the compliance schedule.

The Draft Modification calls for a compliance schedule of 78 months. I believe that is too long and should be modified as follows:

The compliance schedule calls for planning and design to be completed in 42 months from the effective date of the modification which seems excessive, but with the date for the reopener approximately 36 months from the effective date of the modification, I recognize that changes related to the reopener could take some time to implement in

planning and design phase.

If the planning and design are allowed to consume 42 months, construction should start immediately after the 42 month planning and design period, not 6 months later.

The amount of time allowed for construction is 30 months. I believe this is excessive. This construction period could and should be reduced to 18 months.

These two changes to the compliance schedule would reduce it from 78 months to 60 months which is more than adequate.

In support of these changes we need to recognize that this permit is already 13 years over due. During these 13 years a lot of damage has been done to the Hop Brook watershed. There is no justification in delaying a remedy for another 6 1/2 years if it can be implemented in 5 years — and it can be.

Also, from the perspective of the City of Marlborough, delaying the implementation of the upgrade makes it more expensive at a minimum through inflation and potentially with a higher interest rate for bonding. During the time that they spent appealing this permit, the Federal Reserve raised the discount rate 14 times. This delay has not served them well nor is it likely that a future delay will be to their benefit.

Response B1: Under implementing NPDES regulations, a schedule leading to compliance with CWA requirements may be used “when appropriate,” but must require compliance “as soon as possible.” 40 C.F.R. § 122.47; see also, 314 C.M.R. § 4.03(1) (authorizing discretionary use of compliance schedules in Massachusetts); see further, In re Star-Kist Caribe, Inc., 3 E.A.D. 172, 175 (Adm'r. 1990), modification denied, 4 E.A.D. 33 (EAB 1992). While the Region shares the commenter’s concern over the long delay in issuing the permit, it also believes the proposed compliance schedule in the modification is appropriate. Marlborough is currently conducting a major, multi-million dollar upgrade on its Westerly wastewater treatment plant. Introducing a delay of six months after the planning and design of the Easterly plant will not only allow Marlborough to fully adapt to any adjustments resulting from the Feasibility Study and MOU, but will also enable Marlborough to complete construction on the Westerly facility prior to initiating construction on the Easterly Plant. As noted in the Fact Sheet, “The agencies believe that sequencing the two schedules will allow Marlborough to more efficiently direct its resources to the successful and timely completion of each respective upgrade.” As to the length of time provided for construction, the Region typically allows approximately two years to complete a major facility upgrade. In this instance, the Region has provided slightly more time because the upgrade will be extensive, entailing not only new phosphorus controls but also other plant-wide improvements.

Nothing in the permit modification prevents Marlborough from completing the plant upgrade ahead of schedule to take advantage of the beneficial market conditions identified by the commenter.

Comments submitted by E. Michael Thomas, Esq., on behalf of the Town of Sudbury, Massachusetts were withdrawn by the Town on October 4, 2006.