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March 25, 2010

Mr. Francis X. Meaney
Chatham Concerned Taxpayers
45 Bittersweet Lane
North Chatham, MA 02650

Dr. Robert A. Duncanson, Ph.D
Town of Chatham
261 George Ryder Road
Chatham, MA 02633

Re: Request for a Notice of Project Change (NPC) - Chatham Comprehensive Wastewater Management Plan, Chatham, MA (EEA #11510)

Dear Mr. Meaney and Dr. Duncanson:

On behalf of Secretary Ian Bowles, I write concerning the Comprehensive Wastewater Management Plan (CWMP) for the Town of Chatham. As you know, this project, which involved the development of a comprehensive wastewater management plan/facilities plan for the Town of Chatham, has been previously subject to review by this Office in accordance with the Massachusetts Environmental Policy Act (MEPA), M.G.L. c. 30, ss. 61-62I. This letter addresses the recent request of the Chatham Concerned Taxpayers and others to re-open the MEPA process to allow for additional review of project alternatives.

As explained in further detail herein, the project at issue was subject to thorough review under MEPA over an eleven year time period. The Town of Chatham's selection of its preferred alternative was arrived at following an alternatives analysis and review of environmental impacts that were certified by the Secretary of Energy and Environmental Affairs as adequate under MEPA. Following the completion of MEPA review last year, DEP has now issued all required permits and approvals for the proposed project to proceed. It is therefore extremely late in the process to revisit issues that were already subject to an open and thorough public review.

Although MEPA provides a valuable forum for direct public input on important projects such as this, there is a high bar for re-examining the finality of MEPA approvals where the process has already been completed in accordance with the regulations. Moreover, the request for a third party submittal of a Notice of Project Change without the consent of the proponent is an unusual one under any circumstances, and the MEPA Office has always applied a high threshold for invoking third party review.

Despite these procedural considerations, I have nonetheless carefully reviewed the substantive arguments supplied by the Chatham Concerned Taxpayers (CCT) and others. However, as discussed in detail below, I am not persuaded that the information presented has surpassed the high bar that is set for re-opening MEPA after its completion. I have determined that there has not been any material change to the project as it was previously reviewed under MEPA within the meaning of 301 CMR 11.10. I have further determined that the Proponent has not knowingly or inadvertently concealed a material fact or submitted false information during MEPA review.¹ Finally, I do not believe that improper segmentation of the project has occurred. Accordingly, no further MEPA review for this project is required at this time.

Although I am declining to require further MEPA review at this juncture, I am aware of the significant public concern that has been expressed with respect to Chatham's current and future wastewater management plans. I ask that the Town of Chatham seek to address these ongoing public concerns in an open and transparent manner to answer outstanding questions. I am also aware that there are ongoing concerns about future plans to expand the project beyond what was reviewed by MEPA to include a potential future connection of Chatham's wastewater treatment plant to sewers in other towns. As noted in the discussion below, it is premature to make conclusions about these future plans at this time. However, I wish to be clear that any future expansion of the project beyond what was previously reviewed in MEPA will require a Notice of Project Change before it will be allowed to proceed.

MEPA History

The environmental review of the project under MEPA was defined in a Special Review Procedure established by agreement between the Town of Chatham and the MEPA Office in April 1998 and called for the filing of four documents:

- Phase I - Needs Analysis;
- Phase II - Screening of Alternatives;
- Phase III - Draft EIR/Facilities Plan; and
- Phase IV - Final EIR/Facilities Plan.

The Phase I – Needs Analysis was submitted to the MEPA Office in September 1999 and was

¹ As discussed further below, this determination applies to the Secretary's review of the claims included in the NPC petition submittals pertaining to the information provided by the Proponent in the ENF, DEIR and FEIR documents that were submitted to the MEPA Office as part of the MEPA Review process for the Chatham CWMP project. Allegations made by the NPC Petitioners about statements or claims made by the Proponent outside of the MEPA process have not (and cannot) be addressed by this Office.

found adequate in October of 1999. A Notice of Project Change (NPC) was filed with the MEPA Office on March 10, 2004 pursuant to Section 11.10(2) of the MEPA Regulations because more than three years had elapsed between the publication of the Secretary's Certificate on the Town's Phase I submittal and the Town's filing of the Phase II - Screening of Alternatives document with the MEPA Office. The NPC included the Town's request to modify the previously established April 1998 Special Review Procedure to include the filing of three documents: Needs Analysis; Draft Environmental Impact Report/Draft CWMP; and Final Environmental Impact Report /Final CWMP. The Secretary's Certificate on the NPC submittal (April 9, 2004) found that the proposed changes to the Special Review Procedure were appropriate and acceptable. The Town filed a Draft Environmental Impact Report (DEIR)/Draft CWMP with the MEPA Office on May 7, 2008. On June 13, 2008, I issued a Certificate on the DEIR/Draft CWMP submittal and determined that it adequately and properly complied with the Massachusetts Environmental Policy Act. The Certificate on the DEIR/Draft CWMP required the Phase III - FEIR/Final CWMP submittal provide additional information and a response to comments pertaining to the Town's proposed Adaptive Management Plan, Restoration of Muddy Creek, Growth Management policies, regulations and bylaws and Mitigation. The Town filed a Final Environmental Impact Report (FEIR)/Final CWMP with the MEPA Office on June 10, 2009. On July 17, 2009, I issued a Certificate on the DEIR/Draft CWMP submittal and determined that it adequately and properly complied with the Massachusetts Environmental Policy Act.

On January 25, 2010 the MEPA Office received a petition from Francis X. Meaney and the Chatham Concerned Taxpayers (CCT or "NPC Petitioners") requesting a review of the Chatham CWMP under the Notice of Project Change (NPC) provisions of the MEPA regulations (301 CMR 11.10). On January 28, 2010 the MEPA Office requested the Town of Chatham (the Proponent) to provide any information concerning the subject matter of this NPC petition request, including any project updates that are relevant to the circumstances described in the NPC petition. On February 16, 2010 the Town of Chatham provided the MEPA Office with a written response to the CCT's NPC petition. On February 10, 2010 and again on February 22, 2010, the MEPA Office received Supplemental NPC filings from the NPC Petitioners. On March 10, 2010, in response to a further request from this Office, the Town of Chatham provided a response to the 2nd and 3rd NPC filings. On March 15, 2010, the NPC Petitioners filed a further "rejoinder" to the Town's submissions.

I have carefully reviewed each of the submissions of the NPC Petitioners and the responses provided by the Proponent. In addition, I have received and reviewed correspondence from several other interested commenters and have consulted with the Massachusetts Department of Environmental Protection (MassDEP).

Petitions for a Notice of Project Change

The various NPC petitions submitted to this office contain four distinct claims under the MEPA regulations. Specifically, the NPC Petitioners assert that: (1) there has been a material change to the Project prior to the taking of all Agency Actions for the Project (under 301 CMR 11.10(1)); (2) that the Town has either knowing or inadvertently concealed a material fact or submitted false information during MEPA review (under 301 CMR 11.10(5)); (3) that the

Proponent has segmented the Project in violation of 301 CMR 11.01; and (4) that the Proponent has failed to obtain a required Permit for the project in violation of the Secretary's July 17, 2009 Certificate. Each of these claims is addressed in turn below.

1. 301 CMR 11.10(1): There has not been a material change to the Project prior to the taking of all Agency Actions for the Project.

As described in the NPC petition document, CCT asserts that the Town failed to adequately consider decentralized alternatives to a centralized sewer system in the CWMP planning process. According to the NPC petitioners, at least one decentralized system monitored by the Massachusetts Septic System Test Facility and utilizing Nitrex technology was performing as required (3-5 mg nitrogen/liter) but was not included in the Town's alternative analysis section (Chapter 6) of the DEIR/CWMP. Essentially, the Petitioners argue that there was a viable alternative treatment technology available at the time of the CWMP MEPA review that the Proponent failed to consider in violation of MEPA.

Chapter 6 of the FEIR/CWMP identified the technologies that MassDEP has approved for use in nitrogen sensitive areas. Technologies that were shown to obtain nitrogen removal performance down to 3 to 5 mg/L TN, including the Nitrex technology, were evaluated and discussed in the Draft CWMP/DEIR and Final CWMP/FEIR. Decentralized systems were further evaluated, along with their associated costs, in Chapter 9 of the Final CWMP/FEIR. The Final CWMP/FEIR evaluated a decentralized approach (Alternative #2) in watersheds that have assimilative capacity as defined by the Total Maximum Daily Loads (TMDLs). Costs for Alternative #2 were presented in the FEIR/CWMP.

As described in the Final CWMP/FEIR, the feasibility of decentralized wastewater treatment alternatives was determined by consideration of system costs, operability, construction feasibility, environmental impacts on surrounding neighborhoods and conditions within each Area of Concern (AOC) to be sewerred. The Town determined that the use of a decentralized system design involving multiple small wastewater treatment facilities to address the Town's wastewater treatment and disposal needs (Alternative #2) was not considered a viable option based on the limited number of parcels of property available to locate and manage multiple small wastewater treatment facilities and the additional costs associated with their necessary operation and management to verify that they consistently achieve permit limits so TMDLs can be achieved. For these reasons, the Town determined that a decentralized wastewater treatment alternative (Alternative #2) was a less attractive alternative to the use of a centralized system. I therefore find that the Proponent did in fact examine decentralized treatment options adequately in its prior MEPA filings, as the Secretary previously certified.

Under Section 11.10(1) of the MEPA regulations, a NPC is required if "there is any material change in a Project prior to the taking of all Agency Actions for the Project." The NPC Petitioners have alleged that the presence of the Nitrex alternative technology as a potential alternative to centralized treatment is a material change to the project as it was reviewed under MEPA. I do not agree. It is not uncommon for external circumstances (e.g. the presence of Nitrex as a potentially feasible alternative) to evolve subsequent to the completion of MEPA

review. However, unless the project plans themselves are altered, the presence of further environmental impacts beyond what was previously reviewed are discovered, or the information originally submitted was later determined to be faulty at the time it was submitted, no material change to the project within the meaning of 301 CMR 11.10 has occurred. The Town of Chatham has not changed its plans from what was presented during MEPA, and no additional environmental impacts are expected beyond what was previously reviewed. Likewise, none of the information provided in the CWMP/FEIR has been shown to have been incorrect at the time the project was undergoing review. Moreover, the Nitrex technology, as of this date, remains only provisionally approved for use.

In addition, it appears that all Agency Actions for the proposed project (i.e. Permits and grants of State Financial Assistance) had been completed at the time the NPC Petition was submitted in January 2010.² The essential purpose of MEPA review is inform future Agency Action on proposed projects, and where, as here, all Agency Actions have been completed, the Notice of Project Change provisions are unavailable. This is a significant procedural barrier to the Petitioner's request and one that has not been overcome.

I acknowledge the views expressed by the NPC Petitioners and others that there might be alternative measures that could potentially allow Chatham to comply with applicable water quality requirements at a lesser cost. However, the plans for Chatham's CWMP underwent extensive public review through the MEPA process and all feasible alternatives were examined at that time, as required by the Secretary under MEPA. Chatham therefore complied with the public notice and alternatives analysis requirements that are central to MEPA's purposes. Chatham's environmental impact reports concluded that a centralized treatment facility was the preferred alternative, and it does not appear that Chatham has altered its initial conclusion, despite the information presented by the NPC Petitioners. While I understand that the NPC Petitioners disagree with the preferred alternative that Chatham has chosen, I have not been able to identify any significant flaw in the prior MEPA process that would warrant re-opening this project for further review.

2. 301 CMR 11.10(5): The Proponent has not knowingly or inadvertently concealed a material fact or submitted false information during MEPA review.

In their NPC petition document, the NPC Petitioners assert that the information concerning costs provided in the CWMP was out-of-date, insufficient and misleading. As described in the CWMP/FEIR, the project's estimated capital costs of \$340 million dollars will be paid through property taxes. The Final CWMP/FEIR provided a fiscal analysis that described the fiscal impacts associated with the implementation of the Town's CWMP at the individual property (taxpayer) level based on cost estimates at the time. This information included a summary of the costs for both Phase 1 and Phase 2, and it identified an expected range of one-time sewer connection costs of \$3,000 to \$10,000 per connection as well as an expected annual user charge of \$400/year based on costs incurred by current users.

² See further discussion below concerning the applicability of the Section 401 Water Quality Certificate requirements to the project.

The cost information provided in the Draft CWMP/DEIR and Final CWMP/FEIR was sufficiently detailed for MEPA review and to make planning projections and facilitate the needed decision-making processes. This information was made available to the public during the time MEPA review occurred through MEPA's standard public notification requirements, and costs have not increased since that time. In fact, according to the Town and MassDEP, the actual costs to the Chatham taxpayers should be less than originally projected due to the time-limited availability of federal stimulus funds. In the supplemental information provided by the Town in response to the Petitioners' NPCs, the cost projections compared the amount by which the property tax is expected to increase for the average taxpayer whose house is valued at \$600,000 with the funding from the Federal Stimulus Program and without funding from the Federal Stimulus Program. Based on an estimated average Chatham property value of \$600,000, the estimated property tax increase for Fiscal Year (FY) 2012 is \$102.00 and will gradually increase to \$210.00 in FY 2017. The Town anticipates smaller tax increases through FY 2033 and a decline in taxes associated with the sewer project from FY 2033 - 2054.

I find that the cost information provided in the Draft CWMP/DEIR and Final CWMP/FEIR was not insufficient or misleading and that it provided sufficient detail for the MEPA review and public comment process.³ I further find that the Town has not knowingly concealed information or failed to disclose information in the CWMP planning process related to the wastewater technology alternatives. As discussed above, the Town did disclose material facts accurately and completely regarding decentralized alternatives to a centralized sewer system.

I am aware that the NPC Petitioners have alleged that the Town presented misleading information on project costs at the Town's May 11, 2009 Annual Town Meeting in support of Warrant Article 14 requesting Town Meeting appropriation for the Initial Implementation of the Town's CWMP and also at a more recent public meeting on October 17, 2009. The Town disputes that it has presented any misleading information. While I am aware of the allegations and the Town's position, I have not made any findings concerning these claims. My review of the Petitioners' NPCs is limited to the information provided by the Proponent in the ENF, DEIR and FEIR documents and submitted to the MEPA Office as part of the MEPA Review process. Allegations made by the NPC Petitioners about statements or claims made outside of the MEPA process are beyond the jurisdiction of this office.

3. 301 CMR 11.01: The Proponent has not improperly segmented the project in an effort to avoid MEPA review.

According to the NPC Petitioners, the Town withheld information describing the Town's future plans to design and construct its WWTF with additional capacity to serve the Town of Chatham's anticipated future wastewater flows, as well as additional wastewater flows to be received from the neighboring towns of Orleans, Brewster and Harwich. Although a potential future connection to Harwich was referenced in the CWMP/FEIR, in general these potential

³ It is important to note that the estimated costs of a project are not considered to constitute "Damage to the Environment" as defined in the MEPA regulations and they are therefore reviewed by MEPA for purposes of providing the public with all available information on a proposed project and to inform selection of a preferred alternative, but a project's costs themselves do not fall squarely within MEPA's jurisdiction.

future connections were not reviewed as part of the proposed project. The NPC Petitioners allege that the failure to include these potential future plans represents improper segmentation of the project in violation of the MEPA regulations.

As described in the Final CWMP/FEIR, the WWTF's design capacity for each of Phase 1 and Phase 2 was developed based on existing water consumption, build-out projections, engineering allowances for Inflow and Infiltration (I/I), and engineering peaking factors for the Town to adjust average annual flows to peak flow conditions. The Town, in cooperation with Massachusetts Estuaries Project (MEP), MassDEP and the Cape Cod Commission, collaborated to develop reliable flow estimates prior to sizing the proposed WWTF. According to the information presented, the Phase 1 WWTF facilities were not planned or sized to treat wastewater from Orleans, Brewster, and Harwich; rather, the WWTF was sized to accommodate the maximum potential flows that might ultimately be needed by the Town of Chatham itself.

As noted above, the Town of Chatham has had discussions with the Town of Harwich regarding a possible sewer extension into Harwich and the development of a regional watershed solution. Such an approach is consistent with MassDEP's efforts to encourage regional solutions to wastewater treatment. However, the current Phase 1 design is not sized for flows from Harwich (or Orleans or Brewster) and there are no current plans to accept flows from outside Chatham. The Town has acknowledged that, in the event that sewerage in Chatham lags behind construction of the WWTF, excess capacity at the WWTF may exist for an interim period. In that circumstance, it is possible that this excess capacity could be used to serve neighboring communities on an interim basis. However, the information provided to this office by the Town unequivocally states that the Phase 1 WWTF facilities were not designed or sized to treat wastewater from other towns and that there are no current plans to accept flows from outside Chatham. I accept the Town's representations about its current plans. However, should any plans to share capacity with other communities be ultimately pursued, such plans would need to be reviewed in the form of a Notice of Project Change at that time.

I find that the Town has not knowingly concealed information or failed to disclose information in the CWMP planning process related to the design capacity of its WWTF.⁴ As discussed above, the Town did disclose material facts accurately and completely regarding design capacity and regional approaches to wastewater treatment planning.

4. A 401 Water Quality Certificate is not required for the project.

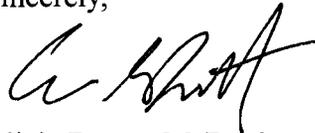
Lastly, the NPC Petitioners and others have contended that the Project is in violation of the Secretary's Certificate on the Final EIR because that Certificate listed a 401 Water Quality

⁴ Also according to the NPC Petitioners, the Town's concealment of material facts pertaining to the design capacity of the WWTF and the Town's future acceptance of wastewater flows from nearby towns will result in the overloading of Cackle Creek Cove with treated wastewater recharge from the WWTF. However, MassDEP reviewed impacts to groundwater and other water resources in issuing its December 17, 2009, Groundwater Discharge Permit. I find that these issues were properly considered during the permitting process (which is now complete) and that the information provided by the Town in the Draft CWMP/DEIR and Final CWMP/FEIR pertaining to the project's potential impacts on the groundwater system was not insufficient and misleading and provided sufficient detail for the MEPA review and public comment process.

Certificate (401 WQC) as being among the permits required for this project. As recently affirmed by both the Proponent and MassDEP, the project as currently designed does not in fact require a 401 WQC under the regulations pertaining to issuance of those permits. The listing in the Secretary's Certificate on the FEIR was apparently an error. In any event, the Secretary's Certificate does not create permitting requirements for a proposed project, it merely recites the permits that will be required pursuant to other regulations. The Secretary's Certificate did not therefore create a requirement to obtain a 401 WQC, and no 401 WQC permit appears to be required under the regulations themselves. The Town may therefore proceed with the project without obtaining a 401 WQC.

For all of the foregoing reasons, I hereby find that no further MEPA review is required at this time.

Sincerely,



Alicia Barton McDevitt
Assistant Secretary