



Roll Call Number

Agenda Item Number

39

Date ..... March 22, 2010 .....

**APPROVAL OF CONSENT ORDER, JUDGMENT AND DECREE BETWEEN THE STATE OF IOWA AND THE CITY OF DES MOINES AND DES MOINES METROPOLITAN WASTEWATER RECLAMATION AUTHORITY**

WHEREAS, on August 15, 2006 the Iowa Environmental Protection Commission and Iowa Department of Natural Resources (IDNR) referred the Des Moines Metropolitan Wastewater Reclamation Authority (WRA) and the City of Des Moines (CITY) to the Office of the Iowa Attorney General for an enforcement action pertaining to alleged violations relating to the violation of nine minimum controls required to reduce combined sewer overflows which result in discharges allegedly in violation of the Iowa Code; and

WHEREAS, the WRA and CITY retained Hall & Associates to assist and represent the two entities with regard to the alleged violations and in negotiations with IDNR and the Iowa Attorney General's Office; and

WHEREAS, following three years of discussions and negotiations with the Iowa Attorney General's Office and the IDNR, negotiations have concluded as to a proposed Consent Order, Judgment and Decree; and

WHEREAS, the WRA and CITY are being asked to approve the Consent Order, Judgment and Decree between the State of Iowa, ex rel., IDNR and the CITY and WRA; and

WHEREAS, the WRA approved the Consent Order, Judgment and Decree on March 16, 2010, subject to the City of Des Moines also approving it; and

NOW, THEREFORE, BE IT RESOLVED, by the City Council of the City of Des Moines, Iowa that the Consent Order, Judgment and Decree between the State of Iowa, ex rel., Iowa Department of Natural Resources and the City of Des Moines and Des Moines Metropolitan Wastewater Reclamation Authority is hereby approved and the Mayor and Deputy City Attorney are hereby authorized and directed to execute the Consent Order, Judgment and Decree on behalf of the City and that half of the costs of the action as determined by the Court are authorized to be paid.



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BE IT FURTHER RESOLVED that changes may be made to the settlement, including the Permit and the Consent Order, Judgment and Decree that are satisfactory to the Public Works Director and legal counsel.

(Council Communication No.10- 165 )

Moved by \_\_\_\_\_ to adopt.

Approved as to Form:

*Kathleen Vanderpool*

Kathleen Vanderpool  
Deputy City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
GRIESS				
HENSLEY				
MAHAFFEY				
MEYER				
MOORE				
TOTAL				

CERTIFICATE

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

MOTION CARRIED APPROVED

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

STATE OF IOWA, ex rel., IOWA )  
DEPARTMENT OF NATURAL RESOURCES, )  
(99AG23542), )

LAW NO. \_\_\_\_\_

Plaintiff, )

vs. )

**CONSENT ORDER, JUDGMENT  
AND DECREE**

CITY OF DES MOINES and DES MOINES )  
METROPOLITAN WASTEWATER )  
RECLAMATION AUTHORITY, )

Defendants. )

NOW on this \_\_\_\_ day of \_\_\_\_\_, 2010, the Court is presented with the Plaintiff's petition seeking injunctive relief pursuant to Iowa Code section 455B.191. The Court having read the petition and being otherwise advised by the parties FINDS:

1. The Court has jurisdiction of the parties and the subject matter of this action and the parties consent to entry of this Consent Order, Judgment and Decree.

2. The Defendant, City of Des Moines, Iowa (City), admits the allegations in the Petition at Law as to the allegations against the City of Des Moines, Iowa. The Defendant, Des Moines Metropolitan Wastewater Reclamation Authority (WRA), admits the allegations in the Petition at Law as to the allegations against the Des Moines Metropolitan Wastewater Reclamation Authority.

3. The parties have entered into this Consent Order, Judgment and Decree for the purpose of establishing an enforceable schedule for implementing the Long Term Control Plan (LTCP) submitted by the City as modified herein and approved by the Iowa Department of

Natural Resources (DNR), and for preventing, reducing and eliminating the effects of combined sewer overflows and sanitary sewer overflows into the Des Moines River.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

**Implementation of LTCP**

4. The City shall perform all tasks necessary to fully implement the Long Term Control Plan (LTCP) Phases I-IV (providing for activities until December 31, 2023), approved by the DNR on December 7, 2005, and as modified herein, except those work elements to be accomplished by the WRA below. The WRA shall perform all the work elements detailed below to implement the LTCP Phases I-IV (providing for activities until December 31, 2023), approved by the DNR on December 7, 2005, with said work elements being set forth in the WRA Facility Plan Update, as amended, and described as follows in accordance with the nomenclature of the WRA:

- a. Completion of the Combined Sewer Solids Separation Facility (“CSSS Facility”) - WRA Phase 17, Segment 2;
- b. Completion of the New Main Outfall - WRA Phase 17, Segments 1 and 3-7; and
- c. Completion of the Des Moines River Outfall - WRA Phase 17, Segments 8 and 9.

It is recognized that the work elements of the LTCP identified in paragraphs five (5) and six (6) below that are the responsibility of the City cannot be performed by the City until the WRA performs its work elements set forth in paragraph eleven (11) herein. It is recognized that the work elements of the LTCP identified in paragraph eight (8) that are the responsibility of the

WRA cannot be performed by the WRA until the City performs its work elements set forth in paragraph nine (9).

**Elimination of CSOs**

5. The City shall permanently eliminate combined sewer overflows (CSOs) at the following locations, identified in subparagraphs (a) through (c) below, by June 30, 2013, or within one hundred eighty (180) days after the WRA has completed and has in operation the facilities identified in paragraph eleven (11) below, whichever is later:

- a. CSO at Outfall 005 - grit chamber (confluence of the Des Moines and Raccoon River);
- b. CSO at Outfall 007 - Court Avenue; and
- c. CSO at Outfall 011 - East Grand Avenue.

6. Due to the fact that changes to be made to the sewer system impact and can have effects on the CSO at Outfall 016 (2<sup>nd</sup> Avenue and Franklin Street), it is not known at this time whether that outfall should appropriately be eliminated following construction by the WRA of the facilities referred to in paragraph eleven (11) below, to be completed by June 30, 2013. Following completion of such construction, the City is provided five (5) years in which to assess whether Outfall 016 should be eliminated or whether additional sewer work will be required, except that if a ten-year storm event occurs before the expiration of the five year period, the assessment period shall instead expire on the date of the ten-year storm event (unless the WRA, City and DNR agree that the collection of additional flow and storm information would be helpful before taking subsequent action). During this assessment period, the City shall only allow discharge(s) from this outfall if it reasonably determines that in the absence of such

overflow there is a likelihood of a back-up of the sewer flows into basements or overflowing of manholes. For purposes of this section, determination of whether a storm event constitutes a “ten-year storm event” shall be made based upon the rainfall in inches for the “10-year” recurrence interval for Region 5 in Table 3, page 129 of *Rainfall Frequency Atlas of the Midwest*, Midwestern Climate Center and Illinois State Water Survey, Bulletin 71 (MCC Research Report 92-03) (1992), provided the particular storm event lasts three hours, as measured by rainfall monitoring equipment at the WRA’s Beaver Avenue flow meter located approximately 600 feet east of the intersection of Martin Luther King Parkway and Urbandale Avenue, Des Moines, Iowa. As such, a “ten-year” storm will be determined by a rainfall meeting the following criteria:

<u>Duration</u>	<u>Rainfall</u>
3-hr	2.73 inches or greater

The WRA shall properly maintain and operate said rainfall monitoring equipment and maintain written records of rainfall data.

- a. In the event that there are no overflows from the CSO at Outfall 016 (2<sup>nd</sup> Avenue and Franklin Street) during the assessment period referred to in paragraph six (6) above, then the City shall permanently eliminate such outfall within one hundred eighty (180) days after such assessment period; and
- b. In the event that there is an overflow from the CSO at Outfall 016 (2<sup>nd</sup> Avenue and Franklin Street) during the assessment period referred to in paragraph six (6) above, then the City shall submit a plan to the DNR for the permanent elimination of such outfall in an expeditious manner but in no event later than December 31, 2019, unless (i) this Court approves a Force Majeure extension pursuant to paragraphs thirty-two (32) through thirty-six (36) or an extension of deadlines due to increased costs under paragraph thirty-eight (38); or (ii) the DNR agrees that the City has demonstrated that, after the assessment period, the City cannot reasonably eliminate the outfall by December 31, 2019, in which case

the City and DNR agree to negotiate in good faith a new date for the elimination of Outfall 016, unless agreement cannot be reached in which case the City may seek a Force Majeure extension pursuant to paragraphs thirty-two (32) through thirty-six (36).

7. The City shall permanently eliminate the CSO at Outfall 015 – Birdland Pump Station (this does not require modifications to the pump station) by December 31, 2018.

8. The WRA shall permanently eliminate combined sewer overflows (CSOs) at Outfall 028 (22<sup>nd</sup> Street and High Street) by December 31, 2023, or within ninety (90) days after the City has completed and has in operation the work elements referred to in paragraph nine (9) below, whichever is later.

9. Defendant City shall complete and have in operation by October 2, 2023, the following facilities identified in subparagraphs (a) through (g) as follows:

- a. Ingersoll Run Storm Sewer & Overflow Modification, Phase 2, Storm Sewer Extension;
- b. 33<sup>rd</sup> Street Storm and Sanitary Separation;
- c. Storm Sewer Extension (Dahl's Site Extension);
- d. Eastern Ingersoll Run Sewer Separation;
- e. Woodland Cemetery Neighborhood Storm and Sanitary Separation;
- f. Western Ingersoll Run Sewer Separation (North of I-235); and
- g. Western Ingersoll Run Sewer Separation (South of I-235).

Should the City fail to complete and have in operation all of the facilities identified in subparagraphs (a) through (g), then stipulated penalties under paragraph twenty-five (25) shall be calculated as follows: (i) if the WRA, nevertheless, permanently eliminates Outfall 028 by December 31, 2023, no stipulated penalty shall be owed; or (ii) if the WRA does not permanently

eliminate Outfall 028 by December 31, 2023, then the City's liability shall in no event exceed the number of days after December 31, 2023, that Outfall 028 is permanently eliminated (e.g., if the City was thirty (30) days late in completing the facilities, but the Outfall 028 was permanently eliminated on January 20, 2024, then the City would only be liable for twenty (20) days of stipulated penalties).

10. For purposes of paragraphs five (5) through nine (9), "permanently eliminate" shall mean all necessary structural changes to the applicable combined sewer system (CSS) and outfall to prevent any further discharge of wastewater from the identified CSS outfall prior to entering the Wastewater Reclamation Facility (WRF).

**Construction and Operation of the CSSS Facility,  
New Main Outfall, and the Des Moines River Outfall**

11. The WRA shall obtain applicable construction and operation permits from the DNR, construct, install, and, no later than June 30, 2013, begin operation of the CSSS Facility, the New Main Outfall, and the Des Moines River Outfall as identified in paragraphs 4(a) through (c).

12. The parties agree that there will be a CSO-related discharge associated with the CSSS Facility. The WRA and DNR agree that this facility will be built to have the capability to disinfect the wastewater in the CSSS Facility and to provide for dechlorination, if applicable, in the event such actions should appropriately be required in the future. Nothing herein shall be deemed to reflect a determination by DNR that disinfection or dechlorination is required at the CSSS Facility. The parties reserve their respective rights regarding the potential applicability of such provisions in the future.



13. The parties agree that the NPDES Permit attached as Exhibit A has been issued in accordance with applicable law and requirements and is deemed to fully meet the requirements of the CSO policy and applicable law. Unless otherwise agreed to by the parties, the DNR shall not impose additional or more stringent effluent limitations upon the permitted discharges from the WRF unless specifically required by a change in federal or state law or a substantial change in wastewater characteristics. Compliance with water quality standards is based upon the presumption approach as contained in the CSO policy. Upon elimination of the CSO outfalls as provided in paragraphs five (5) through (9), herein, the City/WRA is authorized, pursuant to the presumption approach set forth in the CSO Policy, to have an annual average of six (6) CSO events per year. In addition to such overflows, the City/WRA is authorized, pursuant to the CSO policy, to discharge wastewater from the CSSS Facility, provided the wastewater has received: 1) a minimum of primary clarification (or any combination of treatment technologies or methods that are shown to be equivalent to primary clarification); 2) solids and floatables disposal; and 3) disinfection of effluent, if disinfection is later determined through the NPDES permitting process to be necessary, to meet water quality standards, protect designated uses and protect human health, including removal of harmful disinfection chemical residuals, where necessary. In the event water quality standards are being exceeded due to discharges from the CSSS Facility or the six (6) CSOs as referenced above, the City/WRA shall be provided an opportunity to develop, submit to the DNR for approval, and implement a revised CSO control plan in lieu of imposing effluent limitations. In the event the definition of "bypass" in 567 Iowa Admin. Code 60.2 or the bypass rule at 567 Iowa Admin. Code 63.6 is amended, the DNR agrees to expeditiously amend the WRA's NPDES permit to substitute such new language upon request of the WRA.

**Solids and Floatables Elimination Program**

14. In order to reduce or minimize solids and floatables discharges from Outfall 015 - Birdland Pump, the City shall conduct street sweeping on streets tributary to that outfall (i.e., the sweeping area will consist of the streets that contribute surface storm water flow to the storm water inlets that are connected to the combined sewers that are tributary to the outfall 015) a minimum of twenty-four (24) times during the months of March through November each year. The City, subject to its discretion, shall concentrate the street sweeping to take place during those times when it is expected that the debris load would be greater or such other times as it deems appropriate subject to the City meeting the frequency provided herein.

**Monitoring of CSOs**

15. Until elimination of the specified outfall, starting in 2010 the City shall continue to monitor at the following frequency and locations, should there be the minimum number of overflows of at least 3-hour duration per overflow at each location:

Three (3) times per year

Outfall 007- Court Avenue

Outfall 011 - East Grand Avenue at Des Moines River

Outfall 015 - Birdland Pump Station

Outfall 016 - 2<sup>nd</sup> Avenue and Franklin Street

16. Until elimination of the specified outfall, starting in 2010 the WRA shall continue to monitor at the following frequency and location, should there be the minimum number of overflows of at least 3-hour duration per overflow at each location:

Three (3) times per year

Outfall 028- 22<sup>nd</sup> Street and High Street

The legal responsibility for compliance with this paragraph associated with Outfall 028 shall transfer from the WRA to the City upon the date identified in a jointly signed notification from the WRA and City to DNR agreeing to the transfer of such legal responsibility and identifying a date for such transfer of responsibility.

17. The monitoring required by paragraphs fifteen (15) and sixteen (16) shall be for the following pollutants using approved DNR methods and holding times, provided the sample is collected between 6:00 a.m. and 3:00 p.m. Monday through Thursday:

E.coli

Total Suspended Solids (TSS)

Five-day Carbonaceous Biochemical Oxygen Demand (CBOD5)

Ammonia-Nitrogen (NH3-N)

18. Monitoring results shall be included in the Annual Compliance Report required under paragraph twenty-four (24), and shall also be made available to the DNR at other times upon request.

#### **Monitoring of the Des Moines and Raccoon Rivers**

19. Starting in 2010, the City shall sample and analyze the Des Moines River and Raccoon River at the following locations for a period of five (5) years following the date of entry of this Consent Order, Judgment and Decree:

Three (3) times per year	Des Moines River Upstream (2 <sup>nd</sup> Avenue)
	Raccoon River Upstream (Des Moines Water Works Park)
	Des Moines River Downstream (E. 6 <sup>th</sup> Street)

Monitoring shall be for the same parameters referred to in paragraph seventeen (17) above.

- 20. a. The WRA shall by December 31, 2012, submit to the DNR for approval a plan for monitoring water quality impacts, if any, from the operation of the CSSS Facility. The plan shall outline the frequency, locations, and methods for monitoring for the parameters referred to in paragraph seventeen (17) above; and
- b. Subject to the WRA's discretion, the WRA may collect data or otherwise undertake a study on the (1) uses, if any, occurring when the CSSS Facility discharges; and on the (2) proper application of E.coli standards. In such event, the DNR agrees to utilize such data/study, as appropriate, in the development of future requirements, if any, to be imposed on the CSSSF discharge.

**Nine Minimum Controls**

21. The WRA and/or City, as applicable and as specifically delineated in the NPDES Permit, shall perform all tasks assigned to that entity which are necessary to fully implement the Nine Minimum Controls referenced in NPDES Permit No. 7727001, and as later amended.

**Sanitary Sewer Overflow Elimination Program**

22. In response to DNR concerns regarding sanitary sewer overflows, the City states that it has undertaken the following activities: increased storm water utility fees to allow for: (1) subcontracting of two additional catch basin cleaners for the cleaning of sewers; (2) purchase of additional televising equipment; and (3) hiring of additional crew members and/or subcontractors to undertake catch basin cleaning, televising and access structure rehabilitation. The City agrees to make the purchases and hire the approved additional crew members or subcontract the work in a reasonably expeditious manner if the City has not already done such. As to such new employees and/or subcontractors, nothing herein shall be deemed to require the City to maintain these positions beyond fiscal year 2010.

### **Street Sweeping**

23. Except as provided in paragraph fourteen (14) addressing outfall 015, the City shall conduct street sweeping on all streets served by the CSOs referred to in paragraphs five (5) through eight (8), an average of once every two (2) months for the months of April through November, for each calendar year, until the applicable action for the service area (i.e., elimination of a CSO or commencement of operation of the CSSS Facility) has been undertaken. The City, subject to its discretion, shall concentrate the street sweeping to take place during those times when it is expected that the debris load would be greater or such other times as it deems appropriate subject to the City meeting the once every two (2) months average provided herein.

### **Annual Compliance Report**

24. Starting on January 31, 2011, the City and WRA, shall submit to the DNR by January 31<sup>st</sup> of every year for the preceding calendar year a joint annual report documenting in detail their efforts to implement their LTCP and the requirements of this Consent Order, Judgment and Decree.

### **Stipulated Civil Penalties**

25. Except as otherwise provided herein, the City shall pay the following stipulated civil penalties:

- a. For each day that the City fails to comply with each of the deadlines contained in paragraphs five (5) through seven (7), and paragraph nine (9):

Period of Violation	Penalty per day per violation
1-30 days	\$ 750
31-60 days	\$1,000
Each day over 60 days	\$1,250

- b. If a particular violation, referred to in subparagraph (a) above, occurs for more than one hundred eighty (180) days, the stipulated civil penalty of \$1,250 per day per violation shall continue unless and until the State of Iowa files in this action an Application or other pleading requesting that the Court assess against the City up to a maximum civil penalty of \$5,000 per day per violation for such additional violations occurring after the date of the Application or other pleading. The City reserves the right to contest the amount of any such penalties; and
- c. One Hundred Dollars (\$100) per day that the City fails to comply with the deadline contained in paragraph twenty-four (24).

26. Except as otherwise provided herein, the WRA shall pay the following stipulated civil penalties:

- a. For each day that the WRA fails to comply with each of the deadlines contained in paragraphs eight (8) and eleven (11):

Period of Violation	Penalty per day per violation
1-30 days	\$ 750
31-60 days	\$1,000
Each day over 60 days	\$1,250

- b. If a particular violation, referred to in subparagraph (a) above, occurs for more than one hundred eighty (180) days, the stipulated civil penalty of \$1,250 per day per violation shall continue unless and until the State of Iowa files in this action an Application or other pleading requesting that the Court assess against the Des Moines Metropolitan Wastewater Reclamation Authority up to a maximum civil penalty of \$5,000 per day per violation occurring after the date of the Application or other pleading. The WRA reserves the right to contest the amount of assessment of any such penalties; and

- c. One Hundred Dollars (\$100) per day that the WRA fails to comply with each of the deadlines contained in paragraphs twenty (20)(a), and twenty-four (24).

27. Payment of the stipulated civil penalties referred to in paragraphs twenty-five (25) and twenty-six (26) shall be made no later than ten (10) days after receipt of a written demand from the Plaintiff for payment, or after a court order requiring such payment, whichever is later. Payments shall be made payable to the State of Iowa, and sent to attorney David R. Sheridan at the address below. Payment of these stipulated civil penalties shall not relieve the defendants from obligations established by the City's LTCP, this Consent Order, Judgment and Decree, NPDES Permit No. 7727001, and as subsequently amended, or other provision of law. Payment of these stipulated civil penalties shall constitute full and final settlement of any penalty claims that were made or could have been made by DNR in this action for the particular violations to which the stipulated civil penalties apply. In any event, the Plaintiff may at any time seek entry of contempt and appropriate sanctions and relief for any willful failure to comply with the requirements of this Consent Order, Judgment and Decree.

#### **Effect of Consent Decree**

28. This Consent Order, Judgment and Decree constitutes full and complete settlement of the claims made, or which could have been made, by the DNR in this action against the City and the WRA relating to the City and the WRA's wastewater on or before the date of entry of this decree.

#### **Effect of Earlier Compliance with Water Quality Standards**

29. The parties recognize that implementation of the LTCP in accordance with the schedule herein is expected to achieve compliance with water quality standards.

Notwithstanding any provision to the contrary, the City and/or the WRA may at any time pursuant to the demonstration approach set forth in section II.C.4.b of the CSO Policy (59 Fed.Reg. 18693) demonstrate that water quality standards are being achieved. In such case, the obligations of the City/WRA to undertake additional construction activities after such demonstration under this Consent Order, Judgment and Decree shall terminate.

30. Notwithstanding the initial use of the presumption approach as set forth in section II.C.4.a.i. of the CSO Policy, nothing in this Consent Order, Judgment and Decree shall preclude the City and WRA from instead using any of the presumption approaches set forth in section II.C.4.a.ii of the CSO Policy. Any such changes shall be submitted to DNR for approval and, upon written agreement, would constitute a modification of this Consent Order, Judgment and Decree pursuant to paragraph forty (40).

**Notice and Copy Recipients**

31. For purposes of implementation of this Consent Order, Judgment and Decree, all technical submittals, documents or correspondence shall be sent to the following:

James Stricker, Supervisor  
DNR Field Office No. 5  
Iowa Department of Natural Resources  
401 S.W. 7th, Suite 1  
Des Moines, IA 50309

All legal notices, documents or correspondence shall be sent to the following:

David R. Sheridan  
Assistant Attorney General  
Environmental Law Division  
Lucas Building, Ground Floor  
321 E. 12th Street, Room 018  
Des Moines, IA 50319

Gary B. Cohen  
HALL & ASSOCIATES  
1101 - 15th St., N.W., Suite 203  
Washington, DC 20005-5007



Jon Tack, Attorney  
Iowa Department of Natural Resources  
502 E. 9<sup>th</sup> Street  
Des Moines, IA 50319

Kathleen Vanderpool  
Deputy City Attorney  
City of Des Moines Legal Department  
400 Robert D. Ray Drive  
Des Moines, IA 50309

A party may change either the notice recipient or the address for providing notices to it by serving all other parties with a notice setting forth such new notice recipient or address.

**Force Majeure**

32. If either Defendant is unable to meet any of the deadlines set forth in this order, that Defendant shall provide notice to the Plaintiff and the other Defendant within thirty (30) days specifying the delayed event, the cause of the delay, its possible duration, the Defendant's efforts to remedy the situation, and the expected effect of the delay upon the schedule contained in this order. Defendant shall adopt all reasonable measures to avoid or minimize such delays. Failure by Defendant to provide notice to the Plaintiff of an event which causes or may cause a delay or impediment to performance shall render the Force Majeure provisions of paragraphs thirty-two (32) through thirty-six (36) voidable by Plaintiff as to the specific event for which Defendant has failed to comply with such notice requirement, and, if voided, are of no effect as to the particular event involved.

33. The Plaintiff shall notify Defendants in writing regarding the Plaintiff's position as to a particular Defendant's claim of a delay or impediment to performance as soon as practicable, but in any event within thirty (30) days after receipt. If the Plaintiff agrees that the delay or impediment to performance has been or will be caused by circumstances beyond the reasonable control of Defendant, and that Defendant could not have prevented the delay by the exercise of due diligence, the parties shall stipulate to an extension of the required deadline(s) for all

requirement(s) affected by the delay by a period equivalent to the delay actually caused by such circumstances. Defendant shall not be liable for any stipulated penalties for the period of any such delay.

34. If the Plaintiff does not accept a Defendant's claim that a delay or impediment to performance is caused by a Force Majeure event, to avoid payment of stipulated penalties, Defendant must submit the matter to this Court for resolution within twenty (20) business days after receiving notice of the Plaintiff's position by filing a petition for determination with this Court. Once Defendant has submitted this matter to this Court, the Plaintiff shall have twenty (20) business days to file its response to said petition.

35. If a Defendant submits the matter to this Court for resolution and the Court determines that the delay or impediment to performance has been or will be caused by circumstances beyond the reasonable control of Defendant, including any entity controlled by Defendant, and that Defendant could not have prevented the delay by the exercise of due diligence, Defendant shall be excused as to that event(s) and delay (including stipulated penalties), for a period of time equivalent to the delay caused by such circumstances. Defendant shall bear the burden of proving that any delay of any requirement(s) of this Consent Order, Judgment and Decree was caused by or will be caused by circumstances beyond its reasonable control, including any entity controlled by it, and that Defendant could not have prevented the delay by the exercise of due diligence. Defendant shall also bear the burden of proving the duration and extent of any delay(s) attributable to such circumstances. An extension of one compliance date based on a particular event may, but does not necessarily, result in an extension of a subsequent compliance date or dates.

36. In light of the fact that the parties cannot predict with certainty the underlying conditions that will be encountered as work proceeds in eliminating CSOs, the parties recognize that the identification of unforeseen conditions which were beyond the reasonable control of a Defendant and could not have been prevented with the exercise of due diligence (including significant adverse changes to the City's financial circumstances not otherwise addressed in paragraph 38) may require additional time as a Force Majeure, but the State reserves its rights to contest any request for an extension of time. In addition, failure of a permitting authority to issue a necessary permit or other required approval in a timely fashion is an event of Force Majeure provided that Defendant can meet its burden of demonstrating that it has:

- a. submitted a timely and complete application;
- b. responded to requests for additional information by the permitted authority in a timely fashion; and
- c. prosecuted appeals of any disputed terms and conditions imposed by the permitting authority in an expeditious fashion.

Where the City and/or WRA have successfully appealed a permit or condition thereof all dates affected by such appeal shall be appropriately extended. For the purposes of this paragraph, "successfully appealed a permit or condition thereof" includes the settlement of the appeal providing for modification of the permit condition.

37. Unanticipated or increased costs or expenses associated with performance of a Defendant's obligations under this Consent Order, Judgment and Decree shall not constitute circumstances beyond the reasonable control of the Defendant, or serve as a basis for an extension of time, except as provided in paragraph thirty-eight (38).

### **Extension of Deadlines Due to Increased Costs**

38. The City/WRA currently estimate that the costs of the measures necessary to comply with paragraphs four (4) through twelve (12) of this Consent Order, Judgment and Decree will be \$204,826,378 (in 2009 dollars). At least every five years, the City/WRA shall report on the actual costs compared to the estimated costs for the measures completed since the last report, and the City/WRA shall reevaluate the estimated costs of the remaining measures. If one of these reports shows that the costs to the City/WRA of implementing the measures required to comply with paragraphs four (4) through twelve (12) of this Consent Order, Judgment and Decree, will exceed \$255,008,841 (in 2009 dollars), then the City/WRA may seek an extension of the date for completion of one or more of the requirements set forth in paragraphs four (4) through twelve (12) of this Consent Order, Judgment and Decree as follows:

- a. In the event that the City/WRA seek an extension of any of the completion dates under paragraphs four (4) through twelve (12) of this Consent Order, Judgment and Decree, the City/WRA shall provide the DNR with a written submission that: demonstrates that costs will exceed \$255,008,841 (in 2009 dollars); explains why the City/WRA believes that, because of the increased costs, it is not practicable to complete activity within the schedules set forth in paragraphs four (4) through twelve (12), as applicable; demonstrate that the new dates are as expeditious as possible; include information that the City/WRA believe support the requested modification; and include all additional information that DNR reasonably requests to assist in evaluating the City/WRA's extension request.
- b. If the parties agree on a proposed modification to the Consent Order, Judgment and Decree, modification shall be by written agreement or Order of the Court pursuant to paragraph forty (40).
- c. If the DNR does not agree that a modification proposal under subparagraph (a) is warranted, the City/WRA reserves the right to submit the matter to this Court for resolution in accordance with the resolution procedures of paragraph thirty-four (34) which shall be deemed to apply to this situation. A request by the City/WRA for Court resolution shall

not relieve the City/WRA of its obligations pursuant to this Consent Order, Judgment and Decree, unless the Court orders otherwise, and the City/WRA shall continue with timely implementation of the activities herein until the Court rules on any request in a manner that modifies the City/WRA's obligations under this Consent Order, Judgment and Decree.

- d. Upon the City/WRA's receipt of the DNR's approval of the requested deadline extensions, or upon resolution of any disputes pursuant to subparagraph (c), the City/WRA shall implement the identified activities in accordance with the approved extension of deadline(s), as applicable, in lieu of the original deadline(s) as set forth in paragraphs four (4) through twelve (12) of this Consent Order, Judgment and Decree.

### **Termination**

39. This Consent Decree shall be subject to termination upon motion by any party after Defendants have satisfied all requirements of this Consent Decree. At such time, if Defendants believe that they are in compliance with the requirements of this Consent Decree, and have paid any stipulated penalties required by this Consent Decree, then Defendants shall so certify in writing to the Plaintiff, and unless the Plaintiff objects in writing with specific reasons within forty-five (45) days after receipt of the certification, the Court shall order that this Consent Order, Judgment and Decree be terminated on Defendants' motion. If the Plaintiff objects to Defendants' certification, then the matter shall be submitted to the Court for resolution. In such case, Defendants shall bear the burden of proving that this Consent Order, Judgment and Decree should be terminated. The State's assurances and commitments in paragraph thirteen (13) of this Consent Order, Judgment and Decree shall continue and be binding following the termination date of this Consent Order, Judgment and Decree.

**Modification**

40. This Consent Order, Judgment and Decree may be amended as necessary to accommodate changed circumstances. The consent order may be amended by the written agreement of the parties or by Order of the Court.

**Jurisdiction Retained**

41. The Court retains jurisdiction of this matter to insure compliance with the terms of this Consent Order, Judgment and Decree.

**Court Costs**

42. The costs of this action are taxed to the Defendants in the amount of \$ \_\_\_\_\_  
(Clerk to enter).

\_\_\_\_\_  
JUDGE, Fifth Judicial District of Iowa

Approved as to form:

IOWA DEPARTMENT OF  
NATURAL RESOURCES

CITY OF DES MOINES, IOWA

\_\_\_\_\_  
RICHARD A. LEOPOLD, Director

\_\_\_\_\_  
DES MOINES METROPOLITAN  
WASTEWATER RECLAMATION  
AUTHORITY

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