

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF:

City of Philadelphia
Philadelphia County

Clean Streams Law
Sewage

CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement ("COA") is entered into this 1st day of June, 2011, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department") and the City of Philadelphia Water Department ("City").

The Department has found and determined the following:

A. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); the rules and regulations ("rules and regulations") promulgated thereunder; and with the delegated authority to administer the permit program created under the National Pollutant Discharge Elimination System ("NPDES"), under Section 402 of the Federal Clean Water Act, 33 U.S.C. § 1342.

B. The City is a municipality as defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1, with a mailing address 1101 Market Street, 5th Floor, Philadelphia, PA 19107.

C. A combined sewer system ("CSS") is a sewer system or parts thereof which was designed, permitted, built, and operated to carry sanitary sewage, storm water, and industrial waste. For purposes of the COA, the term CSS shall not include private laterals and privately-owned common sewers.

D. A combined sewer overflow ("CSO") is an intermittent overflow or other untreated discharge from a municipal CSS to the waters of the United States or Commonwealth occurring before the headworks of the Sewage Treatment Plant ("STP") and as a result of flow in excess of the CSS's dry weather carrying capacity, pursuant to 25 Pa. Code § 92a.2.

E. The City owns or operates CSOs in the City of Philadelphia, Philadelphia County. The CSOs discharge to the following outfalls: in the Delaware River Estuary Zone 3 (NPDES PA0026689 CSO Outfalls 002-008, 010-022, 058 and NPDES PA0026662 CSO Outfalls 002-017, 020-034, 036-037); in Pennypack Creek (NPDES PA0026689 CSO Outfalls 023-027); in Tacony/Frankford Creek (NPDES PA0026689 CSO Outfalls 028-052, 054-057, 059, and 060); in the Schuylkill River (NPDES PA0026671 CSO Outfalls 002-040, 075); in Eagle Creek (NPDES PA0026671 CSO Outfall 001B); and in Cobbs Creek (NPDES PA0026671 CSO Outfalls 041-047, 049-052, 054-072, 078, 082-084). The CSOs constitute sewage under Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

F. The CSOs from the CSS of the City are authorized by individual NPDES Permits numbers PA0026662, PA0026671, and PA0026689 ("Permits"), issued by the Department to the City of Philadelphia on August 15, 2007, pursuant to Sections 201 and 202 of the Clean Streams Law, 35 P.S. §§ 691.201 and 691.202. True and correct copies of the presently current permits are attached hereto at Appendix A. The Permits authorize the

CSOs only when the flows in the CSS exceed conveyance or treatment capacities of the sewage treatment systems during wet weather periods.

G. The City is not upstream of and does not contribute to CSOs from sewer systems owned or operated by other municipalities or municipal authorities. The City's CSOs are not located upstream of any drinking water intakes owned or operated by the City or other municipalities or municipal authorities.

H. Under Section 402(q) of the Clean Water Act, 33 U.S.C. § 1342(q) (amended by the Wet Weather Water Quality Act of 2000," Act of December 21, 2000, P.L. 106-554, § 1(a)(4)), the City must comply with the Combined Sewer Overflow Control Policy signed by the United States Environmental Protection Agency ("USEPA") Administrator on April 11, 1994 (the "National CSO Control Policy").

I. The National CSO Control Policy (59 Fed. Reg. At 18,696) specifies that compliance schedules for permittees under a Phase II of a NPDES Permit be placed in an enforceable mechanism. A true and correct copy of the National CSO Control Policy is attached hereto at Appendix B.

J. The National CSO Control Policy represents a comprehensive national strategy to ensure that municipalities and the public engage in a comprehensive and coordinated planning effort to achieve CSO controls that ultimately meet appropriate health and environmental objectives.

K. In addition to its regulatory requirements to implement certain requirements of the National CSO Policy, set forth at 25 Pa. Code § 92a.27, the Department has its own CSO policy, called the Pennsylvania Combined Sewer Overflow Policy ("Pennsylvania CSO Policy"), DEP Doc. No. 385-2000-011 (final effective on September 6, 2008 with minor revisions effective on February 6, 2010), which replaces the Department's 2002 CSO

Policy. A true and correct copy of the Pennsylvania CSO Policy is attached hereto as Appendix C. The Pennsylvania CSO Policy strives to control and eliminate all CSO discharges to the extent practical, and require the remaining CSOs to discharge to Waters of the Commonwealth in a manner that assures compliance with state water-quality based standards.

L. The National CSO Control Policy, the Pennsylvania CSO Control Policy, and Part C of the Permits require the City to evaluate its CSSs and CSOs to meet appropriate health and environmental objectives.

M. The National CSO Control Policy requires the City to adopt either a "presumption" approach or a "demonstration" approach to meet the water-quality based standards of the Clean Water Act.

N. The City's Permits are Phase II NPDES permits that contain compliance schedules, as referenced in the National CSO Control Policy.

O. Pursuant to Part C of the City's past Permits, the City was required to complete, *inter alia*, the following reports and tasks in accordance with the following schedule:

- a. A System Inventory and Characterization ("SIC") by March 27, 1995;
- b. A System Hydraulic Characterization ("SHC") by June 27, 1995;
- c. A Documentation of Implementation of the Nine Minimum Controls ("NMCs") by September 27, 1995; and
- d. Submission to the Department of a Long Term CSO Control Plan ("LTCP") by September 27, 1996.

P. The City completed all of the reports and tasks set forth in Paragraph O in accordance with the schedule incorporated into Part C of its past Permits.

Q. To ensure that the City undertakes all measures necessary to comply with the Clean Water Act, including, but not limited to 33 U.S.C. § 1342(q), the regulations promulgated thereunder, the National CSO Control Policy, the Department's applicable Chapter 92 regulations, and the Pennsylvania CSO Control Policy, and to achieve a water-quality-based long-term control plan, and pursuant to a prior Consent Order and Agreement (dated August 4, 2008), the City was required to prepare and submit to the Department a revised and updated Long Term Control Plan by September 1, 2009.

R. The City completed the task set forth in Paragraph Q and submitted a Long Term Control Plan Update ("LTCPU") in September 2009. Between September 2009 and through the date of this COA, the Department reviewed and commented on the City's proposed 2009 LTCPU. As a result of that review and comment period, the City revised its LTCPU. Revisions to the LTCPU are documented in a letter from the City to DEP dated October 28, 2010 attached hereto as Appendix D, and in a collection of "Supplemental Documentation" dated April 2011, attached hereto as Appendix E.

S. In its LTCPU, the City has adopted a presumption approach to eliminate or control its CSOs in accordance with the National CSO Control Policy.

T. In accordance with the National CSO Control Policy and the Pennsylvania CSO Control Policy, the Department has the discretion to enter into an enforceable instrument with a permittee when the time frame for implementation of a LTCP will exceed its Phase II permit term. The main goal of such an enforceable instrument is to establish an enforceable schedule, milestones, and end date for implementation and completion of the LTCP.

U. Implementation of the City's LTCPU will go beyond the terms of its current set of NPDES permits. It is foreseeable that implementation of the City's LTCPU will also

go beyond the terms of the renewed permits that are scheduled to be issued following the expiration of the current set of permits.

V. The National CSO Policy encourages a permittee to consider its financial capability for implementing the selected CSO controls when developing its construction and financing schedules for the LTCP. These considerations include an evaluation of median household income ("MHI"), the total annual wastewater and CSO control costs per household as a percent of MHI, overall net debt as a percent of full market property value, property tax revenues as a percent of full market property value, property tax collection rate, unemployment, and the permittee's bond rating. The suggested methodology to evaluate a permittee's financial ability to implement CSO controls is set forth in the United States Environmental Protection Agency's (USEPA) Guidance for Financial Capability Assessment and Schedule Development (EPA 832-B-97-004, Feb. 1997) ("Financial Capability Guidance").

W. The City has conducted a financial capability assessment for implementing its LTCPU (*see* Section 11 of the LTCPU). It has determined that its financial burden is high, according to the methods in the Financial Capability Guidance. In arriving at this conclusion, the City has used the Financial Capability Matrix described in the Financial Capability Guidance. In part, its determination of financial capability is based on an assumption that, throughout implementation of the LTCPU, the City's projected average growth of MHI will be 2.29% and that the burden on residents from implementation of the LTCPU will be approximately 2.51% of the MHI by the end of implementation in COA Approval plus 25 years.

X. The Department issued the Permits to the City, which requires the City, inter alia, to properly operate and maintain its CSS and CSO structures.

Y. Also, pursuant to the NPDES Permits, the City is required to properly operate and maintain its CSS and CSO structures.

Z. Section 202 of the Clean Streams Law, 35 P.S. § 691.202, prohibits and makes it a nuisance for any person to discharge sewage in a manner that is contrary to the terms and conditions of a permit issued by the Department or the rules and regulations of the Department.

AA. Section 203 of the Clean Streams Law, 35 P.S. § 691.203, requires, *inter alia*, municipalities to file reports with the Department to enable the Department to determine whether existing sewer systems are adequate to meet present and future needs.

BB. In addition, Section 203 of the Clean Streams Law, 35 P.S. § 691.203, requires municipalities to construct, complete, extend and operate treatment facilities necessary to properly provide for the prevention of pollution or prevention of a public health nuisance and to negotiate with other municipalities for combined or joint sewer systems and treatment facilities.

CC. Section 210 of the Clean Streams Law, 35 P.S. § 691.210, requires a municipality to diligently comply with any Order issued pursuant to Section 203 of the Clean Streams Law.

DD. Section 402 of the Streams Law, 35 P.S. § 691.402, makes it unlawful and a nuisance for any person to conduct any activity contrary to terms of a permit issued by the Department or contrary to the rules and regulations of the Department.

EE. Title 25, Chapter 96, Section 3, 25 Pa. Code § 96.3, requires that all water quality criteria described in Chapter 93 (relating to water quality standards) shall be achieved in all surface waters, unless otherwise specified by Chapter 96.

FF. Although the City has submitted and implemented a LTCP for its CSOs, the receiving waters have not achieved water quality-based standards required under the Federal Clean Water Act and Chapter 93, and the City has not demonstrated that its discharges are complying with water quality-based standards in accordance with the National CSO Control Policy and the Pennsylvania CSO Control Policy.

GG. The City has had dry weather overflows from its CSS, but they have been unrelated to its hydraulic capacity. The City has documented these discharges to the Department in CSO Status Reports and has worked diligently to improve the operation and maintenance of its CSS to eliminate these discharges. A true and correct copy of an example of dry weather discharge documentation from a Combined Sewer Overflow (CSO) Status Report is attached hereto at Appendix F.

HH. The conditions described in Paragraph FF and GG are violations of Sections 202 and 402 of the Clean Streams Law, 35 P.S. §§ 691.202 and 691.402 and Pa. Code Title 25, Chapter 96, Section 3, 25 Pa. Code § 96.3.

II. The violation described in Paragraph FF and GG, hereof, constitutes unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611; a statutory nuisance under Sections 402 and 601 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.601.

ORDER

After full and complete negotiation of all matters set forth in this COA and upon mutual exchange of covenants contained herein, intending to be legally bound, it is hereby ORDERED by the Department and AGREED to by the City as follows:

1) Authority.

This COA is an Order of the Department authorized and issued pursuant to Sections 5, 202, 203, 316, 402, and 610 of the Clean Streams Law, 35 P.S. §§ 691.5, 691.202, 691.203, 691.316, 691.402, and 691.610 and Section 1917-A of the Administrative Code, *supra*.

2) Findings.

- a) The City agrees that the findings in Paragraphs A through II are true and correct and, in any matter or proceeding involving the City and the Department, the City shall not challenge the accuracy or validity of these findings.
- b) The parties do not authorize any other persons to use the findings in this COA in any matter or proceeding.

3) Compliance Requirements.

Within the time frames established as part of the LTCPU process described below in the Permits, attached hereto as Appendix A, or unless otherwise specifically provided in this COA, the City shall:

a) **Deliverables:** Submit to the Department the following Deliverables¹ by the dates given:

- i) Implementation and Adaptive Management Plan (6 months);
- ii) Green Infrastructure Maintenance Manual development process plan (12 months);
- iii) Comprehensive Monitoring Plan (18 months);
- iv) Facility Concept Plans for each of the three Water Pollution Control Plants (24 months);
- v) Updated Nine Minimum Controls Report (24 months);
- vi) Tributary Water Quality Model - Bacteria (24 months);
- vii) Tributary Water Quality Model - Dissolved Oxygen (36 months);
- viii) Green Infrastructure Maintenance Manual - First Edition (36 months);
- ix) Tidal Waters Water Quality Model - Bacteria (48 months); and
- x) Tidal Waters Water Quality Model - Dissolved Oxygen (48 months).

Each period of time in this paragraph is the duration from the final date of execution of this COA. Upon receipt of a written approval by the Department of a deliverable, the City shall implement that Department-approved Deliverable in accordance with such document's terms and conditions. Each Department-approved Deliverable will supplement the LTCPU. Should the Department provide written comments to the City instead of an approval for any Deliverable, the City shall provide responses to the Department's comments, in accordance with the time frame specified by the Department in its comment letter. Such time frame to respond shall be at least forty-five days, unless a shorter term is agreed to by the City.

¹ Descriptions of each of these Deliverables are set forth in the attached Appendix G.

- b) **Approved LTCPU:** Implement the Department-approved LTCPU (the "Approved LTCPU"), as set forth in the documents described in Paragraph R of the Findings, and including, but not limited to, any Department-approved Deliverable, and in accordance with the Department's approval letter of June 1, 2011. A true and correct copy of the Approval Letter is attached hereto as Appendix H.
- c) **Water Quality Requirements:** Discharge from the CSS only to the extent that such discharges are in compliance with the City's NPDES Permits, the water quality-based requirements of the Clean Water Act, 25 PA Code Chapter 93, the Federal CSO Control Policy, and the Pennsylvania CSO Policy. The City shall accept as a condition in future NPDES Permits a section that addresses the Water Quality Requirements that apply to the CSO discharges. The Water Quality Requirements section will include a Water Quality Based Effluent Limit (WQBEL). True and correct copies of the Water Quality Requirements proposed for acceptance in the City's next NPDES Permits are attached hereto at Appendix I (*2012 NPDES Permits - Part C Addendum*). The Water Quality Requirements shall apply to City Permits numbers PA0026662, PA0026671, and PA0026689, until the Department removes or modifies the Water Quality Requirements in a subsequent NPDES permit issuance. The City waives its rights to appeal the issuance of the next NPDES Permits on the basis of the contents of the Water Quality Requirements, provided that the terms and conditions are substantially the same as in Appendix I.
- d) **Annual Reports:** Submit to the Department written progress reports providing details on the City's implementation of CSO controls. The City shall submit to the Department Annual Reports, starting September 30, 2011, and by September 30 of each subsequent year, until the Department terminates this condition. The Annual

Reports shall include information concerning the City's implementation of the Nine Minimum Controls from the National CSO Policy, the Capital Projects from the 1997 Long Term Control Plan, and the CSO program elements discussed in the Approved LTCPU. If the City fails to achieve one or more of the Performance Standards from Table 1 in the Water Quality Requirements section in its NPDES Permits, as documented in an Evaluation and Adaptation Plan (EAP)², the subsequent Annual Reports shall include an update reporting on the City's progress towards meeting those standards. Such updates must be provided in every subsequent Annual Report until all the applicable standards have been achieved. When the standards have been achieved, the City shall provide a declaration of the date the City achieved the standard, and documentation to support this declaration in the form of a demonstration of compliance, as set forth in Paragraph 8.f. below.

- e) **Evaluation and Adaptation Plans:** Submit to the Department an EAP at least every five years, starting October 30, 2016, and by October 30 of each fifth year thereafter. Each EAP will be a comprehensive assessment of the City's progress with implementing the Approved LTCPU up until that time, and will include a description of program elements anticipated to be implemented in the next five-year period.

Each EAP must also include the following components:

- i) Performance tracking of the CSO Program in the form of hydrologic/hydraulic modeling with verification using metered data, as described in Section 10 of the LTCPU;

² The City's requirements regarding EAPs are described in detail in Paragraph 3.e.

- ii) Up-to-date values for each of the metrics that appears in Table 1 of the Water Quality Requirements section of the permits, with details to describe how the reported values were calculated;
- iii) An assessment of how each reported metric value compares to the Performance Standards provided in Table 1 in the Water Quality section of the NPDES permits;
- iv) If any reported metric value does not equal or exceed the corresponding Performance Standard in Table 1 in the Water Quality section of the NPDES Permits, the City shall include in that EAP an adaptive strategy for program implementation, describing the means that the City proposes to use to ensure that the metric will meet the appropriate Performance Standard by the date of the next EAP; and
- v) Up-to-date values for the following additional metrics:
 - (1) Total number of Green Infrastructure projects used to calculate Greened Acres;
 - (2) Volume (in million gallons per year) managed by new infrastructure other than Green Infrastructure; and
 - (3) Volume Percent Capture for the CSS as a whole.

Should the Department provide comments to the City concerning the EAP, the City shall provide responses to the Department's comments, in accordance with the time frame specified by the Department in its comment letter. Such time frame to respond shall be at least forty-five days, unless a shorter term is agreed to by the City. Any adaptive strategy proposed by the City shall not be considered final until approved in writing by the Department. Beginning with Year 10 (EAP due on October 30, 2021),

the EAPs must also include an updated assessment of receiving water conditions, using the results of water quality modeling for the receiving waters. After the first 5-year cycle, the City may submit an interim EAP before the fifth year in any cycle to propose modifications to its adaptive strategy for program implementation.

Notwithstanding the submission, or approval, of any interim EAPs, the City shall still submit an EAP by each fifth year.

- f) **Post-Construction Monitoring Plan:** Submit to the Department, accompanying the fourth EAP (due in the twentieth year after LTCPU approval), a written Post-Construction Monitoring Plan ("PCMP"). The PCMP shall describe actions that the City proposes to take to demonstrate that CSO discharges are not causing a violation of water quality standards.

In no event shall any compliance date in this Paragraph require action and/or compliance later than June 1, 2036.

4) Planning, Design, and Construction Requirements.

Within the time frames established as part of the LTCPU process, or unless otherwise specifically provided in this COA, the City shall design and construct facilities sufficient to capture and treat, for at least twenty years after the completion of the construction and full implementation of all the remedial controls required under the LTCPU, flows from the CSS as detailed in the Approved LTCPU.

5) Operational Requirements.

Within the time frames established as part of the LTCPU process, or unless otherwise specifically provided in this COA, the City shall operate the CSS such that it captures and treats, for at least twenty years after the completion of the construction and full

implementation of all the remedial controls required under the LTCPU, flows from the CSS as detailed in the Approved LTCPU.

6) Record Keeping.

The City shall maintain copies of any records, reports, plans, data, permits and documents related to or developed pursuant to this COA, including any underlying research and data, for a period of five (5) years from the date of creation of such documents. The City shall require any independent contractor, employee, agent, or officer implementing any portion of this COA to also retain such materials for a period of five (5) years from the date of creation of such documents. The City shall submit such supporting documents to the Department upon its request.

7) Water Quality Standards.

The Approved LTCPU is based upon a "Presumption" approach, consistent with the National CSO Policy. Under the Approved LTCPU, and consistent with the National CSO Policy, the City will eliminate or remove no less than the mass of pollutants (fecal coliform bacteria, by cell count; 5-day Carbonaceous Biochemical Oxygen Demand, by mass; and Total Suspended Solids, by mass) that otherwise would be removed by the capture of 85% by volume of the combined sewage collected in the CSS during precipitation events on a system-wide annual average basis. The Post-Construction Monitoring program, herein referenced in Paragraph 3.f., is intended to verify compliance with water quality standards and the protection of designated uses, as well as to ascertain the effectiveness of the CSO controls.

8) Stipulated Civil Penalties.

- a) In the event the City fails to comply in a timely manner with any of the provisions of Paragraphs 3, 4, 5, 6, or 7 the City shall be in violation of this COA. In addition to

other applicable remedies, the City shall pay civil penalties as provided in Paragraphs b., c., and d. below.

- b) For violations associated with submitting plans, reports, and other documents required according to Paragraph 3.a., Paragraph 3.d., Paragraph 3.e., or Paragraph 3.f. of this Consent Order, the City shall pay civil penalties as follows:
- i) Days 1 through 30 of each violation: \$1,000 per day per violation;
 - ii) Days 31 through 60 of each violation: \$1,500 per day per violation; and
 - iii) Days 61 and beyond of each violation: \$2,000 per day per violation.

For failure to submit timely and adequate responses to the Department's comments regarding proposed deliverables, as required by Paragraph 3.a. and Paragraph 3.e., the City shall pay stipulated penalties as set forth herein.

- c) Each penalty set forth in Paragraph 8.b. shall increase by \$500 every five years (e.g. for days 1-30 in years 0-5 the penalty will be \$1,000 per day per violation, and for days 1-30 in years 6-10 the penalty will be \$1,500 per day per violation).
- d) For failure to achieve any numerical Performance Standard specified in Table 1 of the Water Quality Requirements section of the NPDES permits, the City shall pay civil penalties as follows:
- i) Months 1 through 6 of each violation: \$25,000 per month per violation;
 - ii) Months 7 through 12 of each violation: \$50,000 per month per violation;
 - iii) Months 13 and beyond of each violation: \$100,000 per month per violation.

Non-compliance with any numerical Performance Standard specified in Table 1 of the Water Quality Requirements section of the NPDES permits shall constitute a separate and distinct violation. Penalties shall begin to accrue on the date that the City is required to submit an EAP, if that EAP shows a failure to achieve one or

more Performance Standard(s). The monthly penalty shall be assessed for each full month and for each part of a month that passes until the City achieves compliance with the standard(s).

- e) Stipulated civil penalty payments given in Paragraphs 8.b. and 8.c. shall be assessed monthly, and be payable by the City to the Department on the twenty-eighth day of the month, beginning with the month following the date of the violation. The payment shall be made by certified check or the like, made payable to the "Commonwealth of Pennsylvania, Clean Water Fund" and shall be sent to the address in Paragraph 13.
- f) Stipulated penalty payments given in Paragraph 8.d. shall be assessed monthly. Payments shall be made by no later than the twenty-eighth day of the month following the month in which the violation occurred. The payment shall be made by certified check or the like, made payable to the "Commonwealth of Pennsylvania, Clean Water Fund" and shall be sent to the address in Paragraph 13. Monthly payments may cease when the City believes it can demonstrate that compliance has been achieved. The City shall submit to DEP a demonstration of compliance with the standards. This demonstration shall be provided within 90 days of the last payment, and in no case later than the due date of the next Annual Report. The City may be liable for additional stipulated penalties if DEP should find, after reviewing the demonstration of compliance, that compliance was not actually achieved at the time originally declared by the City.
- g) Any payment under this Paragraph shall neither waive the City's duty to meet its obligations under this COA nor preclude the Department from commencing an action to compel the City's compliance with terms and conditions of this COA. The

payment resolves only the City's liability for civil penalties arising from the violation of this COA for which the payment is made.

h) Stipulated civil penalties shall be due automatically and without notice.

9) Additional Remedies.

a) In the event the City fails to comply with any provision of this COA, the Department may, in addition to the remedies prescribed herein, pursue any remedy available for a violation of an order of the Department, including an action to enforce this COA.

b) The remedies provided by this Paragraph and Paragraph 8 (Stipulated Civil Penalties) are cumulative and the exercise of one does not preclude the exercise of any other. The failure of the Department to pursue any remedy shall not be deemed to be a waiver of that remedy. The payment of a stipulated civil penalty, however, shall preclude any further assessment of civil penalties for the violation for which the stipulated civil penalty is paid.

10) Reservation of Rights.

The Department reserves the right to require additional measures to achieve compliance with applicable law. The City reserves the right to challenge any action which the Department may take to require those measures.

11) Liability of the City.

The City shall be liable for any violations of the COA, including those caused by, contributed to, or allowed by its officers, agents, employees, or contractors. Except as provided in Paragraph 12.c. below, the City also shall be liable for any violation of this COA caused by, contributed to, or allowed by its successors and assigns.

12) Transfer of Site.

- a) The duties and obligations under this COA shall not be modified, diminished, terminated or otherwise altered by the transfer of any legal or equitable interest in its CSS or any part thereof, unless agreed to by the Department as set forth in sub-Paragraph 12.c. below.
- b) If the City intends to transfer any legal or equitable interest in its CSS which is affected by this COA, the City shall serve a copy of this COA upon the prospective transferee of the legal and equitable interest at least thirty (30) days prior to the contemplated transfer and shall simultaneously inform the Regional Office of the Department of such intent.
- c) The Department in its sole discretion may agree to modify or terminate the City's duties and obligations under this COA upon transfer of the CSS. The City and transferee waive any right that they may have to challenge the Department's decision in this regard.

13) Correspondence with the Department.

All correspondence with the Department concerning this COA shall be addressed to:

Regional Water Quality Manager
Department of Environmental Protection
Southeast Regional Office
2 East Main Street
Norristown, PA 19401
Phone: 484-250-5970
Fax: 484-250-5971

14) Correspondence with the City.

All correspondence with the City concerning this COA shall be addressed to:

David A. Katz

Deputy Water Commissioner, Environmental Policy and Planning

1101 Market Street, 5th Floor

Philadelphia, PA 19107-2994

Phone: 215-685-6118

Fax: 215-685-4915

15) Force Majeure.

- a) In the event that the City is prevented from complying in a timely manner with any time limit imposed in this COA solely because of a strike, fire, flood, act of God, or other circumstance beyond the City's control and which the City, by the exercise of all reasonable diligence, is unable to prevent, the City may petition the Department for an extension of time. The City may also petition the Department for an extension of time from any time limit imposed in this COA, should the City determine that the cost to implement the LTCPU has exceeded or will exceed 2.27% of the MHI for the City's residents and, as a result, that the burden on the City to implement the LTCPU has or will exceed the level established as of the date of this COA, as measured using the Financial Capability Matrix set forth in the Financial Capability Guidance. An increase in the cost of performing the obligations set forth in this COA shall not constitute circumstances beyond the City's control, with the following exception. With the exception of the circumstances of the percentage of costs to implement the LTCPU exceeding 2.27% of the MHI and a resulting increase in the financial burden

on the City, as described herein, the City's economic inability to comply with any of the obligations of this COA shall not be grounds for any extension of time.

- b) The City shall only be entitled to the benefits of this paragraph if it notifies the Department within five (5) working days by telephone and within ten (10) working days in writing of the date it becomes aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation, as well as a notarized affidavit from an authorized individual specifying the reasons for the delay, the expected duration of the delay, and the efforts which have been made and are being made by the City to mitigate the effects of the event and the length of the delay. The initial written submission may be supplemented within ten working days of its submission. The City's failure to comply with the requirements of this paragraph specifically and in a timely fashion shall render this paragraph null and of no effect as to the particular incident involved.
- c) The Department will decide whether to grant all or part of the extension requested on the basis of all documentation submitted by the City and other information available to the Department. In any subsequent litigation, the City shall have the burden of proving that the Department's refusal to grant the requested extension was an abuse of discretion based upon the information available to it.

16) Severability.

The paragraphs of this COA shall be severable and should any part hereof be declared invalid or unenforceable, the remainder shall continue in full force and effect between the parties.

17) Entire Agreement.

This COA shall constitute the entire integrated agreement of the parties. No prior or contemporaneous communications or prior drafts shall be relevant or admissible for purposes of determining the meaning or intent of any provisions herein in any litigation or any other proceeding.

18) Attorney Fees.

The parties shall bear their respective attorney fees, expenses and other costs in the prosecution or defense of this matter or any related matters, arising prior to execution of this COA.

19) Modifications.

No changes, additions, modifications, or amendments of this COA shall be effective unless they are set out in writing and signed by the parties hereto.

20) Titles.

A title used at the beginning of any paragraph of this COA may be used to aid in the construction of that paragraph, but shall not be treated as controlling.

21) Decisions under this Consent Order and Agreement.

Any decision which the Department makes under the provisions of this COA, including a notice that stipulated civil penalties are due, is intended to be neither a final action under 25 Pa. Code §1021.2, nor an Adjudication under 2 Pa. C.S. §101. Any objection which the City may have to the decision will be preserved until the Department enforces this COA.

22) Jurisdiction.

The parties agree that the terms and conditions of this COA shall be enforceable and venue shall lie only in the Commonwealth Court of Pennsylvania.

23) Dispute Resolution.

- a) The City may initiate dispute resolution under this paragraph, in response to any decision required of the Department under Paragraph 24.c.
- b) To initiate dispute resolution, the City shall provide written notice to the Department within ten (10) days of the decision in dispute. The City shall have an additional ten (10) days to provide the Department with a written list of objections to the decision in dispute, the relevant facts, analysis and opinions and other supporting data ("Statement of Position"). The Department shall have twenty (20) days after the date it receives the City's Statement of Position to provide its Statement of Position.
- c) Within the twenty (20) day period following receipt of the Department's Statement of Position, the Department's Water Quality Management Program Manager and the City's Water Commissioner, or his or her designee, shall confer in an attempt to resolve the dispute. In the event the parties are unable to resolve the dispute within this period, the Statements of Position shall be provided to the Department's Regional Director to issue a final decision resolving the dispute.
- d) During the pendency of the dispute resolution procedures set forth in Subparagraphs (b) and (c), any obligation to be performed under this COA, which is the subject of such dispute and any associated activities whose performance is directly dependent upon the resolution of the dispute, shall be postponed for a period of time not to exceed the actual time taken to resolve the dispute pursuant to Subparagraphs (b) and (c) or as otherwise agreed by the parties. All other obligations and activities shall be completed in accordance with the terms of this COA.
- e) Any time period for dispute resolution set forth herein may be extended by written agreement of the parties.

24) Termination.

The obligations in Paragraphs 3 through 8 of this COA shall terminate upon the first occurrence of one of these conditions:

- a) On June 1, 2036,
- b) When the Department determines that the City has complied with the terms and conditions of this COA, or
- c) When the Department notifies the City in writing that it is terminating the COA because the City has failed to meet both of the conditions specified below:
 - i) The City has failed to meet one or more of its 5, 10, 15, or 20-year Performance Standards as specified in the Water Quality Requirements section of the NPDES permits, and
 - ii) Either of the following:
 - (1) The Department determines that it will not approve the City's adaptive strategy for program implementation, if such is required in the City's EAP (see Paragraph 3.e. of this COA); or
 - (2) The Department determines, based on any information including but not limited to any Annual Report (see Paragraph 3.d.), and notwithstanding the Department's prior approval of any adaptive strategy for program implementation, that the City is failing to maintain sufficient progress towards the Water Quality goals in the NPDES permits.

Upon termination of this COA, the Department shall incorporate the requirements set forth within Paragraph 5 (Operational Requirements) in a subsequent issuance of the City's NPDES Permits. The City waives its rights to appeal the issuance of its NPDES Permits

after termination of this COA on the basis of the inclusion of the requirements set forth within Paragraph 5, herein.

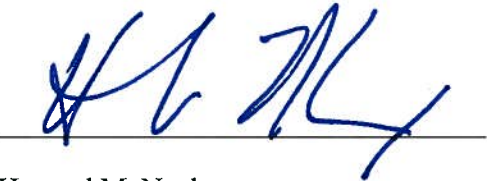
25) Revision.

In the event of the promulgation of new, or revisions to existing, Federal or state statutes or regulations, that the United States Congress, United States Environmental Protection Agency, Pennsylvania General Assembly, or the Department passes, promulgates, or issues, or any policy that revises, changes, or supersedes the National CSO Control Policy or the Pennsylvania CSO Policy, or either agency rescinds their respective policies, either party may request to the other party revisions to this COA, which may be accomplished if agreed upon in writing by both the Department and the City.

IN WITNESS WHEREOF, the parties hereto have caused this Consent Order and Agreement to be executed by their duly authorized representatives. The undersigned representatives of the City certify under penalty of law, as provided by 18 Pa. C.S. §4904, that they are authorized to execute this Consent Order and Agreement on behalf of the City, that the City consents to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that the City hereby knowingly waives its rights to appeal this Consent Order and Agreement and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L.530, No. 1988-94, 35 P.S. §7514; the Administrative Agency Law, 2 Pa. C.S. § 103(a) and Chapters 5A and 7A; or any other provision of law. Signature by the City's attorney certifies only that the agreement has been signed after consulting with counsel.

FOR THE CITY OF PHILADELPHIA:

FOR THE COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION:



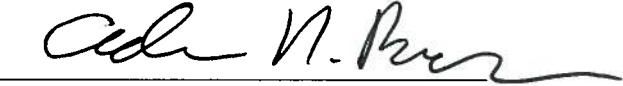
Howard M. Neukrug
Water Commissioner



Jenifer Fields
Regional Program Manager
Water Quality Protection



David A. Katz
Deputy Water Commissioner



Adam Bram
Office of Chief Counsel
Assistant Counsel



J. Barry Davis
Solicitor