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NEIL F. DIGNON

STEARNS & WHELEN

JAN 02 2003

December 23, 2002

26

Mayor Samuel Cooper  
City of Rehoboth Beach  
229 Rehoboth Avenue  
P.O. Box C  
Rehoboth Beach, Delaware 19971

Re: The City of Rehoboth Beach v. DNREC

Dear Mayor Cooper:

At long last, please find a copy of the Consent Order in the above captioned case, which has now been officially executed by Judge Graves. The litigation is now officially over! However as you know, there are many details that need to be worked out.

Finally, I would suggest that at some point after the new year we need to sit down with Bob Stenger and figure out what, if any, steps we need to meet the now court ordered interim phosphorous and nitrogen loads. If you have any further questions in the matter, please do not hesitate to contact me.

Merry Christmas!

Sincerely,



WALTER W. SPEAKMAN, JR.  
CITY SOLICITOR

Enclosure

WWS\th

cc: Greg Ferrese w/enclosure  
Robert Stenger w/enclosure  
Wastewater Treatment Plant

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

THE CITY OF REHOBOTH BEACH, )  
a municipal corporation of the )  
State of Delaware, )

Plaintiff, )

v. )

MARY MCKENZIE, Acting Secretary )  
of the DEPARTMENT OF NATURAL )  
RESOURCES AND ENVIRONMENTAL )  
CONTROL, and the DEPARTMENT OF )  
NATURAL RESOURCES AND )  
ENVIRONMENTAL CONTROL )  
OF THE STATE OF DELAWARE, )

Defendants. )

C.A. No. 98C-12-023-THG

NON-ARBITRATION

NOTICE OF MOTION TO ENTER CONSENT ORDER

TO: Walter W. Speakman, Jr., Esq.  
Brown, Sheils & Chasanov  
108 East Water Street  
P.O. Drawer F.  
Dover, Delaware 19903

Prothonotary  
Sussex County Superior Court  
10 The Circle, P.O. Box 746  
Georgetown, Delaware 19947

PLEASE TAKE NOTICE THAT the undersigned will present the attached Motion to the Superior Court, to enter the Consent Order between The City of Rehoboth Beach and The Department of Natural Resources and Environmental Control, to be heard at the earliest convenience of the Court.

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE

Dated: 12/6/02

  
Matthew P. Chesser I.D. No. 3935  
Deputy Attorney General  
102 W. Water Street  
Dover, Delaware 19901  
(302) 739-4636  
ATTORNEY FOR DEFENDANTS

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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Defendants. )

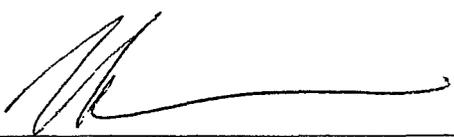
C.A. No. 98C-12-023-THG

NON-ARBITRATION

MOTION TO ENTER CONSENT ORDER

COMES NOW, Defendants John Hughes, Secretary of the Department of Natural Resources and Environmental Control, and the Department of Natural Resources and Environmental Control, by and through their counsel, Matthew P. Chesser, Deputy Attorney General, and move this Court for entry of the Consent Order attached hereto, resolving all of the issues between Plaintiff and Defendants, in accordance with the terms set forth in the Consent Order.

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE



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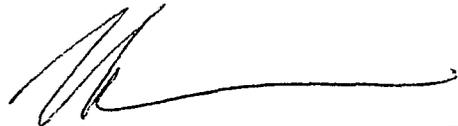
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Dover, Delaware 19901  
(302) 739-4636  
ATTORNEY FOR DEFENDANTS

Dated: 12/6/02



## **I. INTRODUCTION**

WHEREAS, the City of Rehoboth Beach (City) has filed this action alleging that the Secretary of DNREC improperly issued Order number 98-W-044 establishing a Total Maximum Daily Load (TMDL) for the Indian River, Indian River Bay, and Rehoboth Bay, Delaware which would eliminate systematically the wastewater discharge from the City's sewage treatment plant into the above referenced water bodies;

WHEREAS, the State of Delaware (State) asserts that the TMDL was properly promulgated, and would affect any future permit issued to the City;

WHEREAS, the parties desire to settle this issue without trial of any issues;

WHEREAS, the City and the State assert that this Consent Order has been negotiated by them in good faith, and that entry of such agreement will avoid prolonged and complicated litigation, and that this Consent Order is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby ORDERED AND DECREED as follows:

## **II. JURISDICTION AND VENUE**

The court has jurisdiction over this matter pursuant to 7 Del. C. § 6005(b)(1).

## **III BACKGROUND**

1. The Federal Clean Water Act (CWA) was designed to restore and maintain the chemical, physical and biological integrity of the Nation's waters (33 U.S.C. § 1251(a)), and it establishes several programs that are generally administered by the states, including the development of a water quality standard(s) (WQS) and, for many states, the issuance of permits to point source

discharges pursuant to § 402 of the CWA (33 U.S.C. § 1342(b)). WQSs represents the water quality goals of a water body or a portion of the water body, by designating the use or uses to be made of the water, as well as by establishing what are called “criteria” for protecting those uses (40 C.F.R. § 130.3).

2. Section 303(d) of the CWA (33 U.S.C. § 1313(d)(1)(A)) addresses water bodies failing to meet WQS even upon application of technology based controls, and it requires that states create a prioritized list of such water bodies and then, in accordance with that list, establish Total Maximum Daily Loads (TMDLs) for each water body for pollutants specified by the EPA. The TMDL represents the sum of (a) the individual waste load allocations for “point sources” and (b) load allocation for existing and future nonpoint sources of pollution or to natural background sources (33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2), and a margin of safety. The CWA further provides that states “shall submit” the prioritized lists of water bodies and accompanying TMDLs “from time to time, with the first such submission not later than one hundred and eighty (180) days after “[EPA identifies relevant pollutants].” 33 U.S.C. § 1313(d)(2). Upon receipt of lists and/or TMDLs, EPA must either approve or disapprove the lists and/or TMDLs not later than 30 days from the date of the submission. 33 U.S.C. § 1313(d)(2).

3. The Rehoboth Wastewater Treatment Plant (WWTP) is a point source discharger that treats the wastewater from the City, as well as from the Sussex County Sanitary Sewer Districts of Dewey Beach and Henlopen Acres. The Rehoboth WWTP is presently operating under a section 402 National Pollution Discharge Elimination System (NPDES) permit issued by the Department of Natural Resources and Environmental Control (DNREC), which permit expired in August 1999. The City is authorized to discharge 3.4 million gallons/day into the Lewes and Rehoboth Canal,

which canal flows into Rehoboth Bay with strict limits on discharges of total nitrogen and phosphorous. The City has spent over \$2.6 million during the past few years in upgrades to its WWTP to reduce its level of total nitrogen and phosphorous discharges, and since 1985 it has reduced the level of total nitrogen by approximately 70%, and since 1989 it has reduced the level of total phosphorus by approximately 82%.

4. In its 1996 CWA Section 303(d) list, the DNREC identified three segments of the Indian River (DE140-005, DE140-006, and DE140-E01) and 12 square miles of Rehoboth Bay (DE280-E01) as Water Quality Limited Segments.

5. On or about August 23, 1996, American Littoral Society and Sierra Club filed a complaint in the United States District Court for the Eastern District of Pennsylvania (Civ. No. 96-5920) against the EPA and officials within the EPA, alleging, *inter alia*, that EPA failed to perform a duty under the CWA to ensure compliance with the requirement to establish TMDLs for those water bodies identified as Water Quality Limited Segments. On or about December 1, 1996, the case was transferred to the United States District Court of the District of Delaware (C.A. No. 96-591).

6. Pursuant to Consent Order entered in Case No. 96-591, on July 31, 1997, the EPA is required to establish a TMDL for the Inland Bays, which includes Rehoboth Bay, if Delaware failed to do so by December 15, 1998.

7. On or about August 1, 1998, the DNREC proposed its TMDL. It was published in the Delaware Register of Regulations, Vol. 1, Issue 2. Article I of the TMDL provides that "all point sources which are currently discharging into the Indian River, Indian River Bay, and Rehoboth Bay and their tributaries shall be eliminated systematically." This prohibition applies to the City's discharges into Lewes-Rehoboth Canal.

8. The City timely objected to the TMDL, both orally at a public hearing and in written comments.

9. On December 1, 1998, a final TMDL for the Indian River, Indian River Bay, and Rehoboth Bay, Delaware, was published in the Delaware Register of Regulations, Secretary's Order No. 98-W-0044. Article I provides that "all point sources which are currently discharging in the Indian River, Indian River Bay, and Rehoboth Bay and their tributaries shall be eliminated systematically."

10. On or about December 21, 1998, the City of Rehoboth Beach filed an appeal of the Secretary's Order before the State Environmental Appeals Board (EAB).

11. During the course of preparing its appeal to the EAB, the City was advised that the State might raise the argument that the EAB lacks jurisdiction to hear its appeal. Thus, the City filed a complaint for Declaratory Relief on these issues on or about December 30, 1998 in the Superior Court in Sussex County.

12. On February 29, 2000 the Superior Court held that the EAB has jurisdiction over the City's appeal of the TMDL.

13. The State then sought to appeal the Superior Court's decision to the Delaware Supreme Court. On May 23, 2000, the Supreme Court dismissed the State's appeal.

14. Since then the State and the City have been in extensive discussions to resolve the City's concern with the TMDL.

#### **IV OBJECTIVE**

15. The objective of this Consent Order is to achieve a mutually satisfactory resolution of the matters raised in the City's appeal of the Secretary's Order before the State

Environmental Appeals Board and the Superior Court.

## V. AGREEMENT

16. By entering into this Consent Order, the City and the State hereby declare their intention to cooperatively and voluntarily resolve and settle all issues relating to the claims involved in this case.

17. Within two (2) years of the issuance of a National Pollutant Discharge Elimination System (NPDES) permit to discharge nitrogen and phosphorus, the City agrees to meet interim permit levels, which are a 25% reduction from current permitted levels by trading and/or technical refinements at the Rehoboth WWTP. Specifically, there will be a reduction to a maximum level of 24,300 lbs./yr. of nitrogen and 5308 lbs/yr. of phosphorus within two (2) years of the effective date of the NPDES Permit.

18. The City will consider the feasibility of two (2) different options for eliminating nitrogen and phosphorus discharges. These two options are elimination in fact and effective elimination of the discharges. For the purposes of this Order, "elimination in fact" refers to the removal of nutrients from the Rehoboth WWTP effluent through technical changes or upgrades or through some method of removing discharges from the Lewes-Rehoboth Canal, such as the construction of an ocean outfall or the use of spray irrigation. "Effective elimination" refers to some form of nutrient trading by the reduction of nutrients loads within the Inland Bays watershed that may be credited towards the Rehoboth WWTP's nutrient limits. These examples are only for illustrative purposes and do not constitute all possible technologies or techniques that may be used to eliminate nutrient loading of the Lewes-Rehoboth Canal.

19. The parties agree to allow two and one-half (2 ½) years from permit issuance for the

City to evaluate and determine the technical and economic feasibility of elimination in fact of the nitrogen and phosphorous discharges. The City will meet periodically with the State during this period to discuss the status of their evaluation.

20. If the City determines that elimination in fact is technically and economically feasible, it shall be allowed one (1) year from such determination to investigate and secure the source(s) of funding for the project.

21. Upon agreement of both Parties, extensions of time will be permitted for either the feasibility study or the funding investigation, or both, if necessary.

22. Beginning two (2) years after the permit is issued, the State intends to accelerate the effective elimination of discharges if it is determined by the State that the City is not acting in good faith. The State shall notify the City in writing of its intention to make such a determination. The City may appeal such determination to the Environmental Appeals Board in accordance with 7 Del. C. § 6008. The City will be allowed two (2) years to effectively eliminate the discharges from the time of such determination.

23. If the City determines that elimination in fact of the nitrogen and phosphorus discharges to be technically and economically feasible and that adequate funding is available, it shall select an option and submit an Implementation Plan to the State within six (6) months of such determination.

24. Final implementation of any such plan will occur within four (4) years after all the necessary permits are obtained.

25. If the City determines that elimination in fact of the nitrogen and phosphorus discharges is not economically feasible or that adequate funding is not available, it shall proceed to

effectively eliminate the nitrogen and phosphorus discharges through some combination of technical upgrades at the waste water treatment plant and/or trading with non-point sources.

26. Nutrient reductions through technical upgrades at the waste water treatment plant will be credited at a ratio of 1.0 (*i.e.*, 1 lb. credited for every 1 lb. removed).

27. Nutrient reduction through trading will be credited at a ratio of 0.5 (*i.e.*, 1 lb. credited for every 2 lb. removed).

28. Nutrient reductions achieved through trading must be completed within two (2) years from the determination made in paragraph 25, nutrient reductions achieved through technical upgrades at the waste water treatment plant must be completed within three (3) years from the determination made in paragraph 25.

## **VI FORCE MAJEURE**

29. A force majeure event is an event resulting from circumstances beyond the control of the City or any entity controlled by the City that causes or may cause a delay in compliance with any provision of the agreement. If a force majeure occurs, the City will be excused and the schedule tolled for the period of time the force majeure event delays compliance with the relevant provision(s).

## **VII DISPUTE RESOLUTION**

30. All disputes with regard to this Consent Order shall be first resolved by the parties where possible. Both parties reserve all rights available to them to seek redress in any court of competent jurisdiction within the State of Delaware.

## **VIII MODIFICATION**

31. The provisions of this Consent Order dealing with schedules or which otherwise do

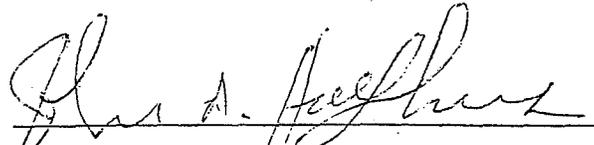
not materially affect the agreement shall be modified by mutual agreement of the parties. Otherwise the Consent Order shall not be modified without the written agreement of the parties and by order of the Court.

## **IX GENERAL PROVISIONS**

32. The State agrees that it will propose NPDES permit(s) consistent with the provisions of this Consent Order and issue permits consistent with the Consent Order unless compelled by law to act otherwise. The State agrees to waive statute of limitations defenses if it does not issue permit(s) consistent with this agreement, thus, allowing the City at its option to reinstate litigation in this Court or in the EAB, challenging the validity of the State's TMDL Regulation of December 11, 1998. Further, the Court retains jurisdiction of this matter in the event and or in regard to the enforcement of this Consent Order.

33. This Order shall become effective upon its execution by the Court.

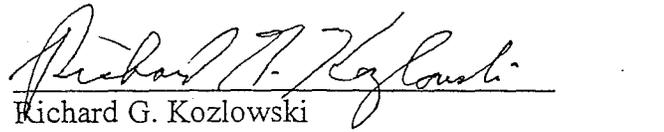
DATED: 11/25/02

  
John A. Hughes, Secretary  
Department of Natural Resources and  
Environmental Control  
89 Kings Highway  
Dover, Delaware 19901

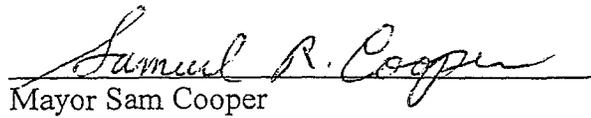
DATED: 11/25/02

  
Matthew P. Chesser, Deputy Attorney General  
Department of Justice – Environmental Unit  
102 West Water Street, 3<sup>rd</sup> Floor  
Dover, Delaware 19901  
ATTORNEY FOR DNREC

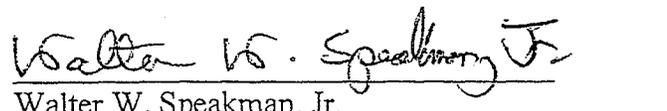
DATED: 10/31/02

  
Richard G. Kozlowski  
VanNess Feldman  
1050 Thomas Jefferson Street N.W.  
Washington, D.C. 20007-3877  
ATTORNEY FOR THE CITY OF REHOBOTH

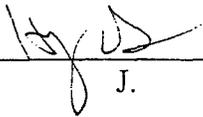
DATED: 10/17/02

  
Mayor Sam Cooper  
City of Rehoboth

DATED: 10/18/02

  
Walter W. Speakman, Jr.  
Brown, Shiels, Beauregard, & Chasnov  
108 East Water Street  
Dover, Delaware 19903  
ATTORNEY FOR THE CITY OF REHOBOTH

It is hereby ORDERED this 11 day  
of DEC, 2002.

  
\_\_\_\_\_  
J.

MPC:mcm/C/412-04.wpd

2002 DEC 11 AM 11:40

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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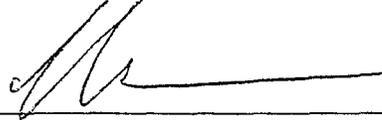
CERTIFICATE OF SERVICE

I, Matthew P. Chesser, Deputy Attorney General, do hereby certify that two true and correct copies of each of the foregoing Notice of Motion to Enter the Consent Order between The City of Rehoboth Beach and The Department of Natural Resources and Environmental Control, and Motion for Entry, were sent by U.S. Mail, First Class Mail, Postage Pre-Paid, on

December 6<sup>th</sup>, 2002 to the following:

Walter W. Speakman, Jr., Esq.  
Brown, Sheils & Chasanov  
108 East Water Street  
P.O. Drawer F.  
Dover, Delaware 19903

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE



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