

COUNCIL ACTION FORM

SUBJECT: APPEAL OF NPDES PERMIT FOR WATER POLLUTION CONTROL FACILITY

BACKGROUND:

On June 29, 2010, the Iowa Department of Natural Resources (IDNR) issued a formal "draft" National Pollutant Discharge Elimination System (NPDES) permit for the Ames Water Pollution Control Facility (WPCF). Release of the draft permit triggered a public comment period. Staff presented to Council on August 10, 2010 a summary of six issues of significant concern with the draft permit. After receiving Council's concurrence, those six issues were raised to the IDNR in the form of public comments.

After the public comment period closed, the IDNR reviewed all comments received and then prepared a "responsiveness summary." In that responsiveness summary, the IDNR accepted the revisions requested by the City for only one of the six issues. The other five issues were not changed. The IDNR has now issued the Ames NPDES permit as "final," making it a legally enforceable permit.

The implications of these five issues could be significant for the rate-payers of the Ames sanitary sewer utility, with costs measured in the tens of millions of dollars with only marginal environmental benefits at best. **Staff is recommending that the City Council authorize staff to file an appeal of those five permit elements that were rejected by the IDNR during the public comment process.** The five permit elements of concern are described below.

1. The new permit alters the minimum dissolved oxygen limitations from the current seven-day average limitation to a single-day limitation. IDNR asserts that a single-day limit is appropriate. Based on the way Iowa's water quality standards were adopted, staff believes a seven-day average to be appropriate.
2. The new permit establishes a single-day carbonaceous biochemical oxygen demand (CBOD₅) limit, as opposed to the previous permit's seven-day average limit. Much like the dissolved oxygen standard, staff believes that a seven-day average is both practical and appropriate for CBOD₅ limitations.
3. The new permit includes language that reads "wastes in such quantities as to exceed the design capacity of the treatment works...are considered to be a waste which interferes with the operation or performance of the treatment works [and] are prohibited...." Staff's concern is not with the wording in the permit per se, as it is with

an IDNR staff member's assertion that they intend to treat "flow" as a "waste." Staff believes there are no enabling federal or state statutes granting IDNR the authority to establish numeric limits for wastes entering a treatment plant, only the effluent leaving the plant. Also, there is no underlying water quality standard that would treat "flow" as a pollutant. As such, imposing such a limitation has neither a water quality nor legal basis for inclusion in a permit.

4. The new permit contains a compliance schedule for the installation of disinfection at the facility, calling for the system to be operational within 37 months of the effective date of the permit. However, there are steps in the process where the City is entirely at the mercy of IDNR staff to process applications and grant approvals in a timely manner. Staff is not comfortable accepting a compliance schedule with a fixed end date when critical portions are outside the city's control. City staff provided a compliance schedule to IDNR that would alleviate this concern, but that solution was not incorporated into the final permit.
5. The new permit would not allow the continued use of the plant's existing peak wet-weather treatment scheme of "blending" and, instead, would treat it as an illegal bypass. In order to comply with this requirement, the City would need to spend an estimated \$30 to \$40 million to construct additional hydraulic capacity that would be needed on average only a few hours each year.

The appeal must be filed no later than September 30, 2010. The appeal begins first with an administrative appeal to the director of the IDNR. **Staff is also recommending that the agreement with the outside consultant be continued to provide ongoing technical, regulatory, and legal advice and assistance.** A total of \$5,183.61 has been spent to date on outside assistance during the public comment phase. An additional \$10,000 is estimated for assistance through the first round of administrative appeals.

ALTERNATIVES:

1. Authorize staff to file an administrative appeal with the Director of the Iowa Department of Natural Resources. Authorize the continuation of outside consulting services in an additional amount not to exceed \$10,000 without prior authorization.
2. Authorize staff to file an administrative appeal with the Director of the Iowa Department of Natural Resources but do not authorize the continuation of the outside consulting services.
3. Do not authorize staff to file an administrative appeal. This would preclude the City from making any future administrative or legal appeal of the permit and would require the City to comply with the terms and conditions contained in the final permit.

MANAGER'S RECOMMENDED ACTION:

City staff has performed an evaluation of the NPDES permit with the assistance of outside experts. The following are key points from that evaluation leading to the City Manager's recommendation.

- A number of requirements contained in the permit are not authorized by either state or federal legislation or regulation.
- The imposition of inappropriate numerical limits would expose the City to enforcement action, including citizen suits, even in the absence of any water quality impairment or any violation of the Clean Water Act.
- Conditions contained in the permit would place the City in the position of being liable for a disinfection compliance schedule when portions of the process are outside the City's control.
- Terms in the permit would compel the City to construct additional hydraulic capacity with a cost of tens of millions of dollars that would sit idle for all but a few hours each year.

Therefore, it is the recommendation of the City Manager that the City Council adopt Alternative No. 1, thereby authorizing staff to file the above-described appeal to the Director of the Iowa Department of Natural Resources in response to the National Pollutant Discharge Elimination System permit for the Ames Water Pollution Control Facility. It is also the recommendation that City Council authorize the continuation of outside consulting services in an additional amount not to exceed \$10,000 without prior authorization.

It should be noted that the appeal of the new NPDES permit for the Water Pollution Control Facility is separate from the *Iowa League of Cities v. U.S. EPA* litigation also on the agenda for this Council meeting. The *League* action is a broad coalition-based response to the positions being taken by the U.S. EPA on the issue of peak wet-weather flows. Supporting the broader *League* effort does not eliminate the need to protect the City's interests in regard to its individual NPDES permit.