

COUNCIL ACTION FORM

SUBJECT: IOWA LEAGUE OF CITIES V. US EPA

BACKGROUND:

Municipal wastewater treatment systems throughout the country are subject to impacts from major rainfall events. While the adverse effects from routine rainfall conditions can be addressed by cost-effective sanitary sewer system maintenance and modifications to treatment plant processes, eliminating peak flows caused by extreme weather conditions is not practical or reasonable. For decades the US EPA recognized this reality and allowed municipalities like Ames to use flexible approaches and innovative technologies to process such peak flows. Federal rules routinely allowed discharges that could not be feasibly treated under extreme events.

Since 2005, however, EPA has initiated a series of more restrictive rule interpretations regarding acceptable treatment plant design that have placed otherwise compliant facilities in violation of their discharge permits. These new rule interpretations are forcing state regulatory agencies to dictate additional sewer system and treatment plant designs to address rare wet weather flows. EPA asserts that State rules and plant treatment processes previously approved as consistent with federal regulations are now unlawful under the very same rules. This is the case with the newly issued NPDES permit for the City of Ames, where IDNR and the US EPA are asserting that the operational practices in use at the Ames facility are not approved for use under peak wet weather flow conditions. The new permit could expose the City of Ames to fines and enforcement of penalties of \$37,500 per day. To avoid this potential enforcement, the City would likely need to construct additional flow equalization storage capacity and/or expand the hydraulic capacity of the treatment plant. The cost for such upgrades could range from \$30 million to more than \$50 million.

The Iowa League of Cities recognizes that EPA's new rule interpretations are having a dramatic and unanticipated financial impact on Iowa cities. In order to assist Iowa cities, the League initiated direct legal action by filing a Petition for Review in the United States Court of Appeals for the 8th Circuit. The Petition for Review challenges the legal authority for the EPA advice that is causing IDNR to hold cities to a higher standard than in the past. The League retained the law firm of Hall & Associates as counsel for the litigation. Hall & Associates is the same firm hired by the City of Ames to assist with the pending NPDES permitting process now before IDNR.

The Iowa League of Cities has requested that municipalities with a common interest in the outcome of the 8th Circuit litigation share in the legal fees and expenses. Each

interested municipality will become a participant by entering into a Joint Litigation Agreement. The Agreement entitles participants to exchange confidential information, receive status reports, and to serve on the steering committee that provides guidance to Hall & Associates regarding the conduct of the litigation. Under the terms of the Agreement, aggregate fees and expenses related to the litigation will be paid in equal per capita shares by each of the participants after the steering committee reviews and approves monthly billing statements. The Agreement terminates when final judgment is entered in the League litigation, but participating cities may withdraw at any time before then by giving notice to the other participants and paying any outstanding per capita fees and expenses due up to the point of withdrawal.

The League estimates that legal fees and expenses for the 8th Circuit litigation may total as much as \$250,000. The League requests that at least ten municipalities commit to sharing in the expenses in an amount not to exceed \$25,000 each. If more than ten municipalities participate, or if other state leagues from across the country also agree to participate, the total financial commitment could be far less than \$25,000 per participant. Each participating municipality will also sign an engagement letter, which is a commitment to pay to Hall & Associates a share of fees and expenses up to the amount authorized by the City Council. The City of Des Moines has already approved participation and financial support. More than ten other municipalities are also considering the issue in the next few weeks.

ALTERNATIVES:

1. The Council may support the Iowa League of Cities as an interested participant by:
 - A. Approving the Joint Litigation Agreement; and
 - B. Authorizing the engagement of Hall & Associates and expenditure of an amount not to exceed \$25,000 from the Sanitary Sewer Fund for payment of a share of the League's litigation expenses.
2. The Council may choose not to support the Iowa League of Cities' Petition for Review.

MANAGER'S RECOMMENDED ACTION:

The Iowa League of Cities has initiated litigation that could benefit the City of Ames by clarifying the legal authority of EPA to approve the operational practices in use at the Ames facility for use under peak wet weather flow conditions. If successful, the League litigation could reduce or eliminate any requirement for the City of Ames to construct costly additional flow equalization storage capacity and/or expand the hydraulic capacity of the treatment plant.

Therefore, it is the recommendation of the City Manager that the City Council adopt Alternative No. 1, thereby approving the Joint Litigation Agreement and authorizing expenditure of an amount not to exceed \$25,000 from the Sanitary Sewer Fund for litigation fees and expenses of Hall & Associates.