



Legislation Text

File #: 21-1017, **Version:** 1

Resolution to Approve the Settlement and Mutual Release Agreement between the City of Ann Arbor and Michigan Department of Environment, Great Lakes and Energy (EGLE) to Resolve Challenges to the National Pollutant Discharge Elimination Program (NPDES) Permit for the City's Wastewater Treatment Plant

The proposed Settlement Agreement discussed in this memorandum, if approved, would resolve a long running series of disputes and pending administrative and legal actions arising from challenges to the phosphorus discharge limits in the NPDES permit for the City's Wastewater Treatment Plant (WWTP).

BACKGROUND

In 1999, the City's WWTP was one of four major point sources in the middle Huron River watershed to which EGLE issued a NPDES permit with revised phosphorus limits that were more restrictive. These phosphorus limits were based on a total maximum daily load (TMDL) study completed by EGLE in 1996 to address nuisance algal blooms in two man-made river impoundments, Ford and Belleville Lakes. All four point sources (Ann Arbor, Chelsea, Dexter, and Loch Alpine Sanitary Authority) retained Varnum, LLP and contested these and subsequent NPDES permits and phosphorus limits on the basis that the TMDL was based on unrealistic modeling data, ignored seasonal externalities, and reached flawed conclusions unsupported by the science which EGLE used to impose more restrictive phosphorus discharge limits. In short, the communities argued their WWTP discharges were not the cause of the nuisance algal blooms, and that the TMDL did not represent proper lake management for addressing the water quality problem in the impacted man-made lakes. The City also argued that if implemented, the TMDL would impose a significant financial burden on the City's residents served by its WWTP while not achieving the desired water quality objective for the man-made lakes.

Attempts to resolve the ongoing dispute were unsuccessful, and the contested case eventually went to a hearing before an Administrative Law Judge (ALJ) in 2015 who ruled in favor of EGLE and upheld the NPDES permits. The Middle Huron communities appealed the ALJ's decision to Washtenaw County Circuit Court, which remanded the matter and ordered EGLE to conduct a new TMDL study and update the NPDES permits based on the study results. In 2019, EGLE conducted a new TMDL study using the same flawed data and methodologies and set even more restrictive phosphorus limits, which the communities contested through further administrative and legal actions.

In mid-2020, the Circuit Court ordered the parties to mediation, which resulted in the proposed Settlement Agreement. Varnum attorneys, City staff and attorneys, and representatives from the other Middle Huron communities participated in the mediation.

SUMMARY OF THE PROPOSED SETTLEMENT AGREEMENT

Generally, the Settlement Agreement provides that all pending administrative and legal proceedings will be dismissed, and that EGLE will issue new NPDES permits with agreed upon phosphorus limits imposed in three tiers over approximately 25-30 years. There are also provisions for the Whole

Effluent Toxicity (WET) testing requirements for the City’s WWTP and artificial mixing of the man-made lakes as an alternative to the more restrictive phosphorus limits.

The Settlement Agreement does not contain any monetary payments by or to any party, and each party will bear its own litigation costs.

The three-tiered phosphorus limits are the primary substantive term in the Settlement Agreement. The phosphorus limits for the City’s WWTP and when each takes effect are summarized as follows:

Tier 1 - a maximum monthly average concentration for phosphorus of 0.8 mg/L on a year-round basis effective upon issuance of new NPDES permit in 2021 to October 1, 2023.

Tier 2 - a maximum monthly load for phosphorus with limits per the chart below effective October 2, 2023 to October 1, 2048:

Month	Monthly maximum load in pounds per day (lb/d), unless noted otherwise
April	150
May	60
June	60
July	50
August	50
September	60
Oct-March	0.8 mg/L

Tier 3 - a maximum monthly load for phosphorus of 25 lb/day on a year-round basis and a maximum monthly concentration of 0.2 mg/L on a year-round basis effective on or after October 2, 2048.

Because the Tier 3 phosphorus limit is not currently achievable without modifications to the City’s WWTP and because the effective date is so far in the future, to comply with the Tier 3 limit the Settlement Agreement requires the City to complete the following steps according to the schedule and dates listed:

- a. By October 1, 2040, the City would complete a feasibility study to assess potential treatment technologies needed to comply with the Tier 3 limits (unless it already has the ability or planned ability to satisfy the Tier 3 limits, in which case a feasibility study would not be necessary) and estimate the costs for the potential treatment technologies.
- b. By October 1, 2043, the City would commence basis of design reports for any necessary upgrades at the WWTP to ensure it has the capability of meeting the Tier 3 total phosphorus limits.

- c. By October 1, 2044, the City would submit a permit application including complete design documents for construction of any necessary upgrades at the WWTP identified in the basis of design.
- d. By March 1, 2045, the City would commence construction of any approved upgrades at the WWTP.
- e. By October 1, 2048, the City would complete construction of any approved upgrades at the WWTP and achieve the Tier 3 total phosphorus limits.

Also because of the uncertainties related to the Tier 3 phosphorus limit taking effect so far in the future, the Settlement Agreement expressly reserves the City's right to challenge the TMDL or phosphorus limit in any manner allowed by law, and it expressly states:

Nothing in this agreement prevents the Permittees from challenging the 2019 TMDL or the phosphorus limits based on the 2019 TMDL in accordance with law (including through a contested case process, a civil action, and/or related appeals) if and when the limits in Tier 3 become effective or after a Permittee completes a feasibility study under Paragraph 2.iv.a (including on the bases that any upgrades are economically or technologically infeasible). If any Permittee initiates such a challenge, the Permittee shall be allowed to raise any argument permitted by law.

The Settlement Agreement also provides that the City's NPDES permit expiring in 2025 will include an additional requirement for WET testing and its parameters, which are consistent with those required for any WWTP seeking NPDES permit renewal.

There is also a provision that allows the City and other affected WWTP jurisdictions to reduce algal blooms through legally enforceable engineered means (e.g., artificial mixing of Ford and Belleville Lakes, etc.). If the algal blooms can be reduced consistently by artificial mixing and Ford and Belleville Lakes are no longer designated as impaired waters due to nuisance algae blooms, then any legally enforceable engineered mean(s) used to eliminate the impairment will be written into the future NPDES permits. In addition, the Tier 2 limits would be incorporated into the future NPDES permits.

RECOMMENDATION

City staff recommend approval of the Settlement Agreement, and the other Middle Huron communities have approved it.

Prepared by: Timothy Wilhelm, Deputy City Attorney
Reviewed by: Craig Hupy, Public Services Area Administrator
Approved by: Tom Crawford, City Administrator

Whereas, Since the late 1990's the City and other Middle Huron communities have actively contested EGLE's TMDL and phosphorus limits in the NPDES permits that regulate their WWTP discharges to

the Huron River;

Whereas, The parties have engaged in court-ordered mediation, which resulted in a proposed Settlement Agreement that would resolve all pending administrative and legal actions involving the NPDES permit and phosphorus limits for the City's WWTP; and

Whereas, The proposed Settlement Agreement would implement agreed upon phosphorus limits in NPDES permits using a three-tiered approach under which limits would take effect on an agreed upon schedule over the next 25-30 years, providing the City certainty regarding its current and future NPDES permits and phosphorus limits, which would be in the City's best interest;

RESOLVED, That City Council approve the Settlement and Mutual Release Agreement between the City of Ann Arbor and Michigan Department of Environment, Great Lakes and Energy (EGLE) to resolve the pending administrative and legal actions challenging the NPDES permit phosphorus discharge limits for the City's WWTP;

RESOLVED, That the Mayor, Clerk, City Administrator and City Attorney be authorized to execute such Settlement Agreement and other settlement documents and take such other actions as are consistent with the purposes of this resolution;

RESOLVED, That the City's outside legal counsel, Matt Zimmerman and Kyle Konwinski of Varnum, LLP, be authorized to execute documents to dismiss the pending administrative and legal actions and other documents necessary to implement this resolution; and

RESOLVED, That the City Administrator and City Attorney be authorized to take any necessary administrative actions to implement this resolution.