



Richard S. Davis
1900 N Street NW Suite 100
Washington, DC 20036
+1.202.789.6025
rdavis@bdlaw.com

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Via email to: Mikaela.mcdermott@newbedford-ma.gov

Ms. Mikaela McDermott
City Solicitor
City of New Bedford
133 William Street, Room 203
New Bedford, MA 02740

Dear Ms. McDermott:

You have asked that I provide an assessment of the potential legal consequences of a continued failure on the part of the City Council to adopt the Loan Order in the amount of \$57 million dollars for wastewater projects as submitted by Mayor Mitchell on July 21, 2021 ("Loan Order"). It is your expressed expectation that this letter will be provided to the City Council and may subsequently be provided to other 3rd parties. For that purpose, I offer the following assessment of the City's potential exposure.

As described in greater detail below, continued failure to approve the Loan Order and appropriate funds already being collected from City residents pursuant to the sewer rate increase adopted by the City Council on June 24, 2021 will have serious consequences. Most immediately, it will expose the City to substantial civil penalties for violation of an order issued pursuant to the federal Clean Water Act. It also is likely to result in replacement of a flexible existing administrative order with a rigid judicial decree that is directly enforceable by the federal court and that imposes far more onerous conditions, including automatic assessment of stipulated penalties for imperfect compliance. More broadly, such a failure will extinguish the hard-won and irreplaceable good will that the City has earned through decades of responsible partnership with the federal and state agencies.

These and other considerations argue powerfully for the City Council to act favorably and promptly on the Loan Order currently before it.

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BACKGROUND

On December 15, 2019, the City entered into an Administrative Order on Consent (Docket No. CWA-AO-R01-FY20-15) (the “Order”) with the United States Environmental Protection Agency (“EPA”) related to alleged violations of the Clean Water Act. The Order obligates the City to make certain capital improvements to its combined sewer system, and also to perform other activities related to the operation of its wastewater and stormwater systems. The Order includes enforceable deadlines for those capital improvement projects, as well as for the performance of other mandated activities. Recognizing the City’s proactive approach and long history of responsible environmental stewardship, EPA sought no administrative or civil penalties at the time of entry of the Order.

Increases in the City’s sewer rates are necessary to comply with the terms of the Order. The first such increase was proposed in 2020 but its adoption was interrupted by the COVID-19 pandemic. As a result, projects subject to the enforceable schedule contained in the Order were delayed.

In a September 28, 2020 letter to EPA, the City explained that a FY21 rate increase sufficient to support work required by the Order could neither be calculated nor, in conscience, imposed until the pandemic and its economic impacts stabilized. In that letter, the City proposed a Recovery Plan under which it would adopt the needed rate increases beginning in FY22 (that is, by June 30, 2021), and asked that, in lieu of immediate enforcement, EPA consider modification of the Order following adoption of that increase to shift project and other deadlines forward by one year to account for the uncontrollable impact of the pandemic.

Consistent with the Recovery Plan, the Office of the Mayor forwarded a FY22 rate ordinance to the City Council on June 1, 2021 which was acted on at the June 10, 2021 meeting. The City Council adopted that ordinance on June 24, 2021, and those increased rates are reflected in billings beginning on July 1, 2021. The Loan Order currently before the City Council is the necessary final step to appropriate the proceeds of that rate increase for the purpose of restarting work under the Order following the forced hiatus of the pandemic year.

EPA has not formally responded to the City’s lack of progress under the Order during the pandemic year. It has been the City’s reasonable hope and understanding, however, that the Agency will entertain a modification of the Order to revise deadlines to accommodate that forced hiatus if the City made good on its promise to fund that work with sufficient sewer rate increases and the necessary Loan Order for FY22. In order to make good on that promise, positive action on the Loan Order for FY22 was required by August 31, 2021.

Because that date has now passed without favorable action on the Loan Order, it is now impossible for the City to fully deliver on the Recovery Plan provided to EPA. Continued delay in the taking of such action signals to the Agency that the Council is unwilling to take actions

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necessary to secure even delayed compliance with the Order. On the other hand, prompt adoption of the Loan Order at the next possible opportunity will enable the City to provide EPA with a revised project schedule that, while still imperfect, represents at least partial fulfillment of the proposed Response Plan and demonstrates that the City remains EPA's reliable partner.

CONSEQUENCES OF DELAY OR INACTION

Failure to or continued delay in adopting the Loan Order can be expected to have severe consequences for the City.

Assessment of Penalties

The violation of an administrative order issued under the Clean Water Act is punishable by the imposition of civil penalties established by the Act.¹ Civil penalties are imposed by the federal court and can be in any amount up to \$56,460 per day/per violation.² Penalty amount is case-specific and is assessed based on factors including evidence of or the absence of a good faith effort to comply. Civil penalty assessments in the millions of dollars are by no means unprecedented. Penalties are paid to the U.S. Treasury and provide no local benefit. It is these penalties to which inaction or delayed action on the Loan Order may subject the City.³

Judicial Consent Decree

If the existing administrative order proves insufficient to secure the City's performance it is not unreasonable to expect that EPA will conclude that a judicial decree is necessary to secure compliance. In such cases, EPA refers the case to the U.S. Department of Justice and largely cedes control of enforcement to the DOJ. Judicial consent decrees negotiated with DOJ and entered and enforced by federal district courts are far more rigid in their terms than is the City's existing administrative order. For example, projects may be subject to many more enforceable interim milestones than in the existing order; disputes about the adequacy of project design or the timeliness of completion are dealt with through a formal dispute resolution process that heavily favors the government; and automatic stipulated penalties, to which the City is not currently subject, are regularly included in judicial decrees.

Transaction Costs

Inviting a new round of enforcement also brings with it the cost of defense. This cost consists of both substantial disruption of City operations as City personnel are called upon to

¹ 33 U.S.C. 1319(d).

² 85 Fed. Reg. 83818 (December 23, 2020).

³ Administrative penalties are also provided by the Clean Water Act at 33 U.S.C. 1319(g). While not available for the violation of a federal administrative order, they may be assessed for underlying substantive violations in appropriate cases. Unlike civil penalties, administrative penalties are capped at \$282,293 per enforcement action.

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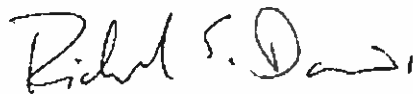
support defense or negotiation efforts, and the out-of-pocket cost of defense counsel. While no two cases are the same, a new round of negotiation triggered by a failure to timely adopt the Loan Order could be expected to last between 12 and 24 months, and generate direct and indirect defense costs running well into six figures.

Reputational Damage

The City has a long history of working successfully with EPA and MassDEP to protect water quality and the City has benefited substantially from being the trusted partner of its regulatory agencies. The trust and respect built over the past 25+ years allow reasonable City proposals a hearing that likely is not afforded to communities that have enjoyed less productive interactions with the agencies. The cost of losing even a portion of that willingness to listen if the current commitments are not met cannot be quantified. That impact will, however, be real and will be felt by the City for years to come.

As outside counsel to the City of New Bedford, I strongly urge the City Council to adopt the Loan Order as soon as is legislatively possible in order to avoid these likely and very significant adverse outcomes.

Sincerely,



Richard S. Davis
Counsel to the City of New Bedford