

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION**

**UNITED STATES OF AMERICA, and )  
STATE OF INDIANA, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
CITY OF MISHAWAKA, INDIANA, )  
 )  
Defendant. )  
\_\_\_\_\_ )**

**Case No.**

**CONSENT DECREE**

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**APPENDIX A**

WHEREAS, Plaintiffs United States of America (United States) on behalf of the United States Environmental Protection Agency (EPA) and the State of Indiana (Indiana) on behalf of the Indiana Department of Environmental Management (IDEM) have filed, concurrently with the lodging of this Consent Decree, a Complaint alleging that defendant City of Mishawaka (Mishawaka) violated Sections 301 and 309 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1321 (Act), the applicable provisions of Title 13 of the Indiana Code and Title 327 of the Indiana Administrative Code, and Mishawaka's National Pollutant Discharge Elimination System permit (NPDES Permit) by discharges from Combined Sewer Overflows (CSO), into the waters of the United States and the waters of Indiana, that have violated and continue to violate Mishawaka's NPDES Permit. The United States and Indiana seek civil penalties and injunctive relief for these violations;

WHEREAS, Mishawaka has agreed to comply with the requirements of Appendix A to this Consent Decree;

WHEREAS, modeling data suggest that, after Mishawaka completes all of the requirements of Appendix A, during a Typical Year of rainfall Mishawaka will not have any CSO Discharges from any of Mishawaka's CSO Outfalls;

WHEREAS, Mishawaka's estimate of the cost of complying with the requirements of Appendix A constitutes a High Burden within the meaning of the Financial Capability Matrix on page 41 of EPA's Financial Capability Assessment Guidance;

The Parties agree, and the Court by entering this Consent Decree finds, that the parties negotiated this Consent Decree in good faith, that the Consent Decree will avoid complex and protracted litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW THEREFORE, before the taking of any testimony, without the adjudication or admission of any fact or law except as provided in Section I, below, and with the consent of the Parties, the Court ORDERS, JUDGES, and DECREES as follows:

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and Section 309(b) of the Act, 33 U.S.C. § 1319(b), and over the Parties. Venue lies in this District pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b), 1395(a), because Mishawaka is located in this judicial district and the violations alleged in the Complaint are alleged to have occurred in this judicial district. For purposes of this Decree, or any action to enforce this Decree, Mishawaka consents to the Court's jurisdiction over this Decree or such action and over Mishawaka, and consents to venue in this judicial district.
2. For purposes of this Consent Decree, Mishawaka agrees that the Complaint states claims on which relief may be granted pursuant to Section 309 of the Act, 33 U.S.C. § 1319, and Title 327 of the Indiana Administrative Code.

**II. APPLICABILITY**

3. The obligations established in this Consent Decree apply to and are binding on the United States and Indiana, and on Mishawaka and any successor or other entities or persons otherwise bound by law.
4. Any transfer of the ownership or operation of all or any part of the Facility to any other person or entity must be conditioned on the transferee's agreement to undertake the

obligations required by this Decree, as provided in a written agreement between Mishawaka and the proposed transferee, enforceable by the United States and Indiana as third party beneficiaries of such agreement. At least 30 Days prior to such transfer, Mishawaka shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement to EPA Region 5, the United States Attorney for the Northern District of Indiana, and the United States Department of Justice, in accordance with Section XV of this Decree (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Decree. No transfer of ownership or operation of the Facility, whether in compliance with this Paragraph or otherwise, shall relieve Mishawaka of its obligation to ensure that the terms of the Decree are implemented.

5. Mishawaka shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties reasonably might include compliance with any provision of this Decree, and any contractor retained to perform work required pursuant to this Consent Decree. Mishawaka shall condition any such contract on performance of the work in compliance with the terms of this Consent Decree.
6. In any action to enforce this Consent Decree, Mishawaka shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

### **III. OBJECTIVES**

7. The objectives of this Consent Decree include:
  - a. the objectives stated in Section 101(a) of the Act, 33 U.S.C. § 1251;
  - b. causing Mishawaka to come into and remain in compliance with the Clean Water Act;
  - c. causing Mishawaka to come into and remain in compliance with State Law; and
  - d. causing Mishawaka to come into and remain in compliance with Mishawaka's NPDES Permit.

### **IV. DEFINITIONS**

8. Terms used in this Consent Decree, including the attached Appendix, that are defined in the Act or in regulations promulgated pursuant to the Act or in Mishawaka's NPDES Permit shall have the meanings assigned to them in the Act or such regulations or Mishawaka's NPDES Permit, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, including the attached Appendix, the following definitions shall apply:
  - a. "Appendix" or "Appendix A" shall mean Appendix A, as referenced in Paragraph 10 of this Decree, which is attached to, and incorporated into this Decree;
  - b. "ACS" shall mean American Community Survey data collected and analyzed by the United States Census Bureau;
  - c. "Bypass," "Bypasses," or "Bypassed" shall mean the intentional diversion of waste streams from any portion of a treatment facility;

- d. “CAFR” shall mean the Comprehensive Annual Financial Report or similar document that Mishawaka prepares in the normal course of its financial reporting each year;
- e. “Clean Water Act” or “Act” shall mean the Clean Water Act, which is currently codified at 33 U.S.C. §§ 1251-1387, and all regulations promulgated thereunder, in effect at the time in question;
- f. “Collection System Model” shall mean the Storm Water Management Model produced by XP Software, Incorporated that Mishawaka used while developing its Long Term Control Plan to simulate flow in Mishawaka’s sewer collection and conveyance system, and any updated Collection System Model after Mishawaka (1) Submits to EPA and IDEM a Collection System Model Re-calibration Report as required by section 2.3.1 of Appendix A; and (2) receives written authorization from EPA and IDEM to proceed with Mishawaka’s collection system performance criteria analysis required by section 2.3.2 of Appendix A.
- g. “Complaint” shall mean the complaint filed by Plaintiffs in this case;
- h. “Consent Decree” or “Decree” shall mean this Consent Decree and Appendix A;
- i. “CSO” shall mean Combined Sewer Overflow;
- j. “CSO Control Measures” shall mean the structural measures designed to eliminate, reduce, or mitigate the volume, frequency, or pollutant levels in the CSOs described in Table 1 of Appendix A;



- k. “CSO Control Policy” shall mean EPA’s “Combined Sewer Overflow (CSO) Control Policy,” which was published in the Federal Register on April 19, 1994 (59 Fed. Reg. 18688);
- l. “CSO Discharge” shall mean any discharge from any CSO Outfall identified in Mishawaka’s NPDES Permit;
- m. “CSO Outfall” shall mean any point source that is specifically identified in Mishawaka’s NPDES Permit as a Combined Sewer Overflow or CSO Outfall;
- n. “Day” shall mean a calendar day unless expressly stated to be a Working Day. To compute any period of time pursuant to this Consent Decree in which the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next Working Day;
- o. “Design Criteria” shall mean the Design Criteria described in Table 1 of Appendix A;
- p. “DMR” shall mean any discharge monitoring report or monthly report of operations that Mishawaka is required to submit to IDEM on a monthly basis pursuant to Mishawaka’s NPDES Permit or State Law;
- q. “Effective Date” shall mean the date of entry of this Consent Decree by the Court after satisfaction of the public notice and comment procedures of 28 C.F.R. § 50.7;
- r. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

- s. “EPA’s Financial Capability Assessment Guidance” shall mean EPA’s February 1997 publication number EPA 832-B-97-004, entitled “Combined Sewer Overflows–Guidance for Financial Capability Assessment and Schedule Development;”
- t. “Facility” shall mean and include all or any part of the following:
  - 1. any wastewater collection, storage, or conveyance sewer, tunnel, LS, FM, RC, interceptor, or other structure or system, including without limitation all such structures identified in Appendix A, Section 1 and Appendix A, Table 1, owned or operated by Mishawaka that is designed to collect, convey, or store domestic, commercial, and industrial sewage to a wastewater treatment plant or to a combined sewer overflow structure;
  - 2. any wastewater treatment plant owned or operated by Mishawaka;
  - 3. any combined sewer overflow structure owned or operated by Mishawaka; and
  - 4. any combined sewer overflow structure to which Mishawaka directs or conveys the flow of domestic, commercial, and industrial sewage or at which such sewage from Mishawaka users comes to be found;
- u. “Federal Census” shall mean census data and analysis published by the United States Census Bureau every 10 years;
- v. “FM” shall mean forcemain;
- w. “IDEM” shall mean the State of Indiana Department of Environmental Management;

- x. “Indiana” shall mean the State of Indiana;
- y. “Interest” shall mean interest calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961;
- z. “LS” shall mean lift station;
- aa. “MGD” shall mean millions of gallons per day;
- bb. “MHI” shall mean median household income;
- cc. “Mishawaka” shall mean the City of Mishawaka, Indiana;
- dd. “NPDES Permit” shall mean Mishawaka’s National Pollutant Discharge Elimination System (NPDES) Permit No. IN0025640, and any such permits that succeed that permit in effect at a particular time in question;
- ee. “Nine Minimum Controls” shall mean the Nine Minimum Controls set forth in the CSO Control Policy and discussed in EPA’s May, 1995 publication entitled “Combined Sewer Overflows; Guide for Nine Minimum Controls;”
- ff. “Overflow Event” shall mean one or more overflows from the combined sewer system resulting from a single precipitation event. If multiple outfall pipes overflow during a single precipitation event, those overflows constitute one Overflow Event;
- gg. “Paragraph” shall mean a portion of this Decree identified by an arabic numeral;
- hh. “Party” or “Parties” shall mean the United States, Indiana, and Mishawaka, or any of them;
- ii. “Performance Criteria” shall mean the Performance Criteria described in Table 1 of Appendix A;

- jj. “Plaintiffs” shall mean the United States and Indiana;
- kk. “Residential Indicator” shall mean the Residential Indicator described in section III of EPA’s Financial Capability Assessment Guidance;
- ll. “RC” shall mean river crossing;
- mm. “Section” shall mean a portion of this Decree identified by a Roman numeral;
- nn. “State Law” shall mean the applicable provisions of Title 13 of the Indiana Code and Title 327 of the Indiana Administrative Code;
- oo. “Submit,” “Submits,” or “Submitted” shall mean any of the following: (1) place in the United States Postal System in a properly addressed envelope with sufficient postage for first class delivery; (2) tender to an overnight courier in a properly addressed envelope and prepay the delivery fees; or (3) hand-deliver and obtain the signature of the recipient;
- pp. “Subparagraph” shall mean a portion of this Consent Decree and appendices identified by a lower case letter;
- qq. “Ten State Standards” shall mean Recommended Standards for Wastewater Facilities; Policies for the Design, Review, and Approval of Plans and Specifications for Wastewater Collection and Treatment Facilities, A Report of the Wastewater Committee of the Great Lakes-Upper Mississippi River Board of State and Provincial Public Health and Environmental Managers (Wastewater Committee) published by Health Research Incorporated, Health Education Services Division, Post Office Box 7126, Albany, New York 12224. As of 2004, the Wastewater Committee was comprised of the following member states and

province: Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, New York, Ohio, Ontario, Pennsylvania, and Wisconsin;

rr. “Typical Year” shall mean the amount, intensity, and frequency of rainfall or other precipitation, and the St. Joseph River flow rates, that occurred during 1992;

ss. “Unlisted Discharge” shall mean any discharge to waters of Indiana or waters of the United States from the Facility, from or through any point source that is not specifically identified in Mishawaka’s NPDES Permit as a Combined Sewer Overflow or CSO outfall;

tt. “United States” shall mean the United States of America acting on behalf of EPA;

uu. “Working Day” shall mean a day other than a Saturday, Sunday, or federal holiday;

vv. “WQS” shall mean the applicable water quality standards in effect at a particular time in question including without limitation water quality based requirements in Mishawaka’s NPDES Permit and State Law; and

ww. “WWTP” shall mean Mishawaka’s Wastewater Treatment Plant located at 1020 Lincolnway West, Mishawaka, Indiana 46544.

## **V. COMPLIANCE REQUIREMENTS**

### **A. NINE MINIMUM CONTROLS**

9. Mishawaka shall comply with the provisions in Mishawaka’s NPDES Permit pertaining to the Nine Minimum Controls including without limitation provisions pertaining to implementation of Mishawaka’s CSO Operational Plan (Operational Plan), and any revisions to the Operational Plan.

**B. APPENDIX A**

10. Mishawaka shall comply with the requirements of Appendix A to this Consent Decree.
11. Requirements After Completing all Requirements of Section 1 of Appendix A. After completing all requirements of section 1 of Appendix A:
  - a. Mishawaka shall properly operate and maintain the Facility including all improvements and other remedial measures implemented pursuant to the requirements in Appendix A;
  - b. Mishawaka shall have no Unlisted Discharges;
  - c. Mishawaka's remaining CSO Discharges, if any, shall comply with the Clean Water Act, State Law, and Mishawaka's NPDES Permit; and
  - d. Mishawaka shall have eliminated Bypasses or, to the extent Mishawaka demonstrates that there are no feasible alternatives for eliminating Bypasses, any remaining Bypasses shall meet the conditions governing Bypass in Mishawaka's NPDES Permit, and any discharges of Bypassed flow shall meet all applicable narrative and numeric effluent limitations in Mishawaka's NPDES Permit.

**C. OTHER PROVISIONS**

**1. Permits**

12. If any compliance obligation under this Section requires Mishawaka to obtain a federal, state, or local permit or approval, Mishawaka shall submit timely and complete applications and make best efforts to obtain all such permits or approvals. Mishawaka may seek relief under the provisions of Section X (Force Majeure) of this Consent Decree for any delay in the performance of any such obligation resulting from a failure to obtain,

or a delay in obtaining, any permit or approval required to fulfill such obligation, if Mishawaka has Submitted timely and complete applications and has made best efforts to obtain all such permits or approvals.

13. Subject to Mishawaka's right to seek relief pursuant to the provisions of Paragraph 12 and Section X (Force Majeure) of this Decree, the pendency or outcome of any proceeding concerning issuance, reissuance, or modification of any NPDES permit shall not affect or postpone Mishawaka's responsibilities under this Decree.

## **2. Funding and Other Delays**

14. Mishawaka's compliance with the requirements of this Consent Decree is not conditioned on the receipt of federal or state grant funds. Additionally, a failure to comply with, or a delay in complying with, any requirement of this Consent Decree shall not be excused by the lack of federal or state grant funds including without limitation construction grants and State Revolving Loan Funds, or any other grants or loans, or by any delay in processing any applications for such funds, subject to Mishawaka's right to seek relief pursuant to the provisions of Section X (Force Majeure) of this Decree.
15. Delays caused by inadequate facility planning or plans and specifications on the part of Mishawaka shall not be cause for extension of any required compliance date in this Consent Decree.

## **VI. CIVIL PENALTIES**

16. Within 30 Days after the Effective Date of this Consent Decree, Mishawaka shall pay the United States the sum of \$14,000 as a civil penalty in the manner specified in Section IX (Payment and Related Matters).

17. Within 30 Days after the Effective Date of this Consent Decree, Mishawaka shall pay Indiana the sum of \$14,000 as a civil penalty in the manner specified in Section IX (Payment and Related Matters).

**VII. REPORTING REQUIREMENTS**

18. Mishawaka shall submit the following reports:
  - a. After lodging of this Decree, and until termination of this Decree pursuant to Section XXI, Mishawaka shall Submit to the United States and Indiana a Semi-Annual Report by April 30 of each year covering the preceding six months between October 1 and March 31; and by October 31 of each year covering the preceding six months between April 1 and September 30. The Semi-Annual Reports shall include:
    1. an identification of all deadlines that this Consent Decree required Mishawaka to meet during the six-month period, and a statement regarding whether or not and to what extent Mishawaka met those requirements, and the reasons for any noncompliance. Notification to the United States and Indiana of any anticipated delay in meeting a deadline shall not, by itself, excuse the delay;
    2. a general description of the work completed within the six-month period, and a projection of work to be performed pursuant to this Consent Decree during the next six-month period;
    3. information generated in accordance with the Post-Construction Monitoring Program requirements in Appendix A, section 2, to the extent



that any such information was generated during the six-month period covered by the Semi-Annual Report, including without limitation:

- (i) a detailed summary of Mishawaka's efforts to collect and analyze rainfall and sewer response data, and St. Joseph River water quality data pursuant to the requirements of section 2.2 of Appendix A;
- (ii) a detailed summary of Mishawaka's Collection System Model calibration and validation efforts, and collection system performance criteria analysis efforts, required by section 2.3 of Appendix A; and

- 4. copies of all DMRs and other reports pertaining to CSO discharges and bypassing that Mishawaka Submitted to IDEM in accordance with Mishawaka's NPDES Permit during the six-month period; and

- b. If Mishawaka violates any requirement of this Consent Decree, Mishawaka shall Submit written notice to the United States and Indiana of such violation and its likely duration within ten Working Days of the day Mishawaka first became aware of the violation or potential violation, with an explanation of the violation's likely cause and of the remedial steps taken, or planned, to prevent or minimize the violation. If the cause of the violation cannot be fully explained at the time the notice is due, Mishawaka shall include a statement to that effect in the notice. Mishawaka shall investigate to determine the cause of the violation and then shall submit an amendment to the notice, including a full explanation of the cause of the violation, within 30 Days of the day Mishawaka becomes aware of the cause

of the violation. Nothing in this Paragraph 18 or Paragraph 19 relieves Mishawaka of its obligation to provide the requisite notice for purposes of Section X (Force Majeure).

19. In the case of any violation or other event that may pose an immediate threat to the public health or welfare or the environment, Mishawaka shall notify EPA and Indiana orally or by electronic or facsimile transmission as soon as possible, but not later than 24 hours after Mishawaka first knew of, or should have known of, the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.
20. Mishawaka shall Submit all notices to the persons designated in Section XV of this Consent Decree (Notices).
21. Each notice that Mishawaka Submits pursuant to Paragraph 18 of this Decree shall be signed by an appropriate Mishawaka official and include the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing and willful submission of materially false statements.

22. The reporting requirements of this Consent Decree do not relieve Mishawaka of any reporting obligations required by the Clean Water Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

23. The United States and Indiana may use any information generated or provided pursuant to this Consent Decree in any proceeding to enforce the provisions of this Consent Decree, in any proceeding pursuant to Section XI (Dispute Resolution) of this Decree, and as otherwise permitted by law. In any of the proceedings described in the preceding sentence, Mishawaka shall not object to the admissibility into evidence of information submitted by Mishawaka or its agents.

### **VIII. STIPULATED PENALTIES**

24. If Mishawaka fails to pay the civil penalty required pursuant to Section VI of this Decree (Civil Penalties) when due, Mishawaka shall pay, in the manner specified in Section IX (Payment and Related Matters), a stipulated penalty of \$2,000 per day for each day that the payment is late.

25. Mishawaka shall be liable for Stipulated Penalties to be paid to the United States and Indiana as specified below, unless excused under Section X (Force Majeure) of this Decree. A violation includes failing to perform any obligation required by this Decree, including the requirements in Appendix A, and any schedules and deadlines in Appendix A, according to all applicable requirements of this Decree and Appendix A.

26. Reporting Requirements and Other Requirements.

The following Stipulated Penalties shall accrue per violation per day for each violation of

the requirements of this Consent Decree identified in Subparagraphs a and b of this Paragraph:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1 <sup>st</sup> through 30 <sup>th</sup> day
\$1,000	31 <sup>st</sup> through 60 <sup>th</sup> day
\$2,000	61 <sup>st</sup> day and beyond

- a. Violation of any provision in Section VII (Reporting Requirements) of this Consent Decree; and
- b. Violation of any provision of this Consent Decree not specified in the next Paragraph of this Decree.

27. Substantive Requirements.

The following Stipulated Penalties shall accrue per violation per day for each violation of the requirements of Section V (Compliance Requirements) of this Consent Decree, but stipulated penalties for violations of Paragraph 11 of this Decree shall not begin to accrue less than six months after Mishawaka completes construction of the CSO Control Measures required by section 1 of Appendix A:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1 <sup>st</sup> through 14 <sup>th</sup> day
\$2,000	15 <sup>th</sup> through 30 <sup>th</sup> day
\$4,000	31 <sup>st</sup> day and beyond

- 28. Stipulated Penalties pursuant to this Section shall begin to accrue on the day after performance is due or on the day a violation occurs, whichever is applicable, and shall

continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated Penalties shall accrue simultaneously for separate violations of this Consent Decree. Within 30 Days of receiving a written demand from either the United States or Indiana, Mishawaka shall either pay any stipulated penalties in the manner specified in Section IX (Payment and Related Matters) or Submit a written Notice of Dispute to the United States and Indiana pursuant to Paragraph 40 of this Decree. If Mishawaka fails to Submit a written Notice of Dispute within the time required by this Paragraph, Mishawaka shall thereafter be forever barred from disputing the stipulated penalties specified in the written demand from the United States or Indiana. The United States, or Indiana, or both may seek stipulated penalties pursuant to this Section. Either sovereign may waive Stipulated Penalties, or reduce the amount of Stipulated Penalties sought, in the exercise of their unreviewable discretion, and in accordance with this Paragraph. Where both sovereigns seek Stipulated Penalties for the same violation of this Consent Decree, Mishawaka shall pay 50 percent to the United States and 50 percent to Indiana. Where only one sovereign demands Stipulated Penalties for a violation, and the other sovereign does not join in the demand within ten Working Days of receiving the demand, or timely joins in the demand but subsequently elects to waive or reduce Stipulated Penalties for that violation, Mishawaka shall pay the Stipulated Penalties due for the violation to the sovereign making the initial demand, less any amount paid to the other sovereign. The determination of one sovereign not to seek Stipulated Penalties, or subsequently to waive or reduce the amount sought, shall not preclude the other sovereign from seeking Stipulated Penalties.

29. Stipulated penalties shall continue to accrue as provided in the preceding Paragraph during any Dispute Resolution but need not be paid until the following:
- a. if the dispute is resolved by a written agreement, Mishawaka shall pay accrued penalties determined to be owing within 30 Days of the date that Mishawaka signs the written agreement;
  - b. if the dispute is resolved because the position that Mishawaka advocated in a Notice of Dispute Submitted to Plaintiffs during informal dispute resolution is deemed to be rejected by Plaintiffs pursuant to Paragraph 40 of this Decree, and Mishawaka does not seek judicial review within the time provided in Paragraph 41 of this Decree, Mishawaka shall pay accrued penalties determined to be owing within 51 Days of the date that Mishawaka Submitted the Notice of Dispute to Plaintiffs;
  - c. if Mishawaka seeks judicial review pursuant to Paragraph 41 of this Decree and either the United States or Indiana prevails in whole or in part, Mishawaka shall pay all accrued penalties that the court determines to be owing within 60 Days of the date of the court's decision or order, except as provided in Subparagraph d of this Paragraph; or
  - d. if any Party appeals the district court's decision, Mishawaka shall pay, within 20 Days of the date of the final appellate court decision, all accrued penalties that the appellate court determines to be owing.
30. If Mishawaka receives a written demand for stipulated penalties from the United States or Indiana between the date of lodging and the Effective Date of this Consent Decree,

Mishawaka shall pay the Stipulated Penalties occurring within 30 Days of the Effective Date of this Decree in the manner specified in Section IX (Payment and Related Matters).

31. Subject to the provisions of Section XIII of this Consent Decree (Effect of Settlement/Reservation of Rights), the Stipulated Penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States and Indiana for Mishawaka's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of the Clean Water Act or State Law, Mishawaka shall be allowed a credit, for any Stipulated Penalties paid, against any statutory penalties imposed for such violation.

#### **IX. PAYMENT AND RELATED MATTERS**

32. Mishawaka shall make the payments to the United States required by Section VI (Civil Penalties) and Section VIII (Stipulated Penalties) by FedWire Electronic Funds Transfer to the United States Department of Justice (DOJ) in accordance with instructions to be provided to Mishawaka by the Financial Litigation Unit of the United States Attorney's Office for the Northern District of Indiana. At the time of payment, Mishawaka simultaneously shall Submit written notice of payment and a copy of any transmittal documentation (which should reference United States Attorney's Office File Number 2003V00803; United States Department of Justice Reference Number 90-5-1-1-08205; and the case number that the Court assigns to the case; and state that the payment is for either a Civil Penalty or Stipulated Penalties) to the United States in accordance with Section XV of this Decree (Notices).

33. Mishawaka shall make the payments to Indiana required by Section VI (Civil Penalties) and Section VIII (Stipulated Penalties) by certified check payable to the “Indiana Department of Environmental Management Special Fund” and Submitted to:

Cashier  
Indiana Department of Environmental Management  
100 North Senate Avenue  
MC 50-10C  
Indianapolis, Indiana 46204-2251

At the time of payment, Mishawaka simultaneously shall Submit a copy of the check and any transmittal documentation (which should reference United States Attorney’s Office File Number 2003V00803; the case number that the Court assigns to the case; and state that the payment is for either a Civil Penalty or Stipulated Penalties) to Indiana in accordance with Section XV of this Decree (Notices).

34. If Mishawaka fails to pay Stipulated Penalties according to the terms of this Consent Decree, Mishawaka shall be liable for Interest on such penalties accruing as of the date payment became due. If Mishawaka invokes Dispute Resolution regarding a written demand for stipulated penalties in the manner specified, and by the deadline specified in Paragraph 28 of this Consent Decree, however, Mishawaka shall not be liable for Interest from the date that Mishawaka invokes Dispute Resolution through the date that any payment becomes due pursuant to Section XI (Dispute Resolution) of this Decree.

**X. FORCE MAJEURE**

35. A “force majeure event” is any event beyond the control of Mishawaka, its contractors, or any entity controlled by Mishawaka that delays the performance of any obligation under this Consent Decree despite Mishawaka’s best efforts to fulfill the obligation. “Best



efforts” includes anticipating any potential force majeure event and addressing the effects of any such event (a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. “Force Majeure” does not include Mishawaka’s financial inability to perform any obligation under this Consent Decree.

36. Mishawaka shall provide notice orally or by electronic or facsimile transmission to EPA and Indiana as soon as possible but not later than 72 hours after the time Mishawaka first knew of, or by the exercise of due diligence, should have known of, a claimed force majeure event. Mishawaka also shall provide written notice to the United States and Indiana, as provided in Section XV of this Consent Decree (Notices), within seven Days after the time Mishawaka first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state the anticipated duration of any delay; its cause(s); Mishawaka’s past and proposed actions to prevent or minimize any delay; a proposed schedule for carrying out those actions; and Mishawaka’s rationale for attributing any delay to a force majeure event. Failure to provide oral and written notice as required by this Paragraph shall preclude Mishawaka from asserting any claim of force majeure.
37. If Plaintiffs agree that a force majeure event has occurred, the United States and Indiana may agree to extend the time for Mishawaka to perform the affected requirements for the time necessary to complete those obligations. An extension of time to perform obligations affected by a force majeure event shall not, by itself, extend the time to perform any other obligation. If Plaintiffs agree to an extension of time, the appropriate

modification shall be made pursuant to Section XVIII of this Consent Decree (Modification).

38. If Plaintiffs do not agree that a force majeure event has occurred, or do not agree to the extension of time sought by Mishawaka, the position of the United States shall control unless Mishawaka invokes Dispute Resolution under Section XI of this Consent Decree. In any such dispute, Mishawaka bears the burden of proving, by a preponderance of the evidence, that:
- a. each claimed force majeure event is a force majeure event;
  - b. Mishawaka gave the notice required by Paragraph 36;
  - c. the force majeure event caused any delay that Mishawaka claims was attributable to that event; and
  - d. Mishawaka exercised best efforts to prevent or minimize any delay caused by the event.

## **XI. DISPUTE RESOLUTION**

39. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Such procedures, however, shall not apply to actions by the United States and Indiana to enforce obligations of Mishawaka that have not been disputed in accordance with this Section.
40. Informal Dispute Resolution. Any dispute subject to dispute resolution under this Consent Decree first shall be the subject of informal negotiations. The dispute shall be considered to have arisen when Mishawaka Submits a written Notice of Dispute to the

United States and Indiana. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 21 Days from the date the dispute arises, unless the period is modified by written agreement. During the informal negotiation period, or any agreed extension of that period pursuant to this Paragraph, if the Parties do not resolve the issues raised in the Notice of Dispute with a written agreement, the position that Mishawaka advocated in the Notice of Dispute shall be deemed to be rejected by Plaintiffs. Such resolution of the dispute shall be binding unless Mishawaka seeks judicial review in the manner prescribed in the next Paragraph 41 of this Decree within 30 Days after the conclusion of the informal negotiation period. Any negotiation period that precedes the date on which Mishawaka Submits to the United States and Indiana a written Notice of Dispute shall not be considered to be part of the informal negotiation period.

41. Judicial Review. Mishawaka may seek judicial review of a dispute by filing with the Court and serving on Plaintiffs, in accordance with Section XV of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 Days of the conclusion of the informal negotiation period as defined in the preceding Paragraph. The motion shall contain a written statement of Mishawaka's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documents, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.
42. Plaintiffs shall respond to Mishawaka's motion within the time period allowed by the Local Rules of this Court, or any extension of time to which the parties agree or the Court

orders. Mishawaka may file a reply memorandum within the time period allowed by the Local Rules of this Court, or any extension of time to which the parties agree, or the Court orders.

43. In any motion for judicial review, Mishawaka shall bear the burden of demonstrating that its position clearly complies with and furthers the objectives of this Consent Decree and the Clean Water Act, and that Mishawaka is entitled to relief under applicable law.
44. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Mishawaka under this Consent Decree unless and until final resolution of the dispute so provides. Stipulated Penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 29 of this Consent Decree. If Mishawaka does not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

## **XII. INFORMATION COLLECTION AND RETENTION**

45. The United States, Indiana, and their representatives including attorneys, contractors, and consultants, shall have the right of entry to any Facility covered by this Consent Decree, at all reasonable times upon presentation of credentials, to:
  - a. monitor the progress of activities required under this Consent Decree;
  - b. verify any data or information submitted to the United States or Indiana in accordance with this Consent Decree, Mishawaka's NPDES Permit, the Clean Water Act, or State Law;

- c. obtain samples and, upon request, splits of any samples taken by Mishawaka or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Mishawaka's compliance with this Consent Decree, Mishawaka's NPDES Permit, the Clean Water Act, or State Law.

46. Splits of Samples.

- a. Upon prior request, Mishawaka shall provide EPA and Indiana or their authorized representatives splits of any samples taken by Mishawaka. Absent a prior request, upon timely request Mishawaka shall provide EPA and Indiana or their authorized representatives splits of any extant samples taken by Mishawaka. A request made after the holding time has expired shall not be considered timely.
- b. Upon prior request, EPA or Indiana shall provide Mishawaka or its authorized representatives splits of any samples taken by EPA or Indiana. Absent a prior request, upon timely request EPA or Indiana shall provide Mishawaka or its authorized representatives splits of any extant samples taken by EPA or Indiana. A request made after the holding time has expired shall not be considered timely.

47. Until five years after termination of this Consent Decree, Mishawaka shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all records and documents (including records or documents in electronic form) in Mishawaka's possession, custody, or control, or that come into the possession, custody, or control of Mishawaka or its contractors or agents, and that relate in any manner to Mishawaka's performance of its obligations pursuant to this Consent Decree. This record retention

requirement shall apply regardless of any corporate or institutional document-retention policy to the contrary. At any time during this record-retention period, the United States or Indiana may request copies of any documents or records required to be maintained under this Paragraph. Within 30 Days of the date of such a request, Mishawaka shall provide to the requesting Plaintiff all documents responsive to the request. If Mishawaka asserts that any of the requested documents are privileged, in lieu of producing the document(s) regarding which Mishawaka asserts a privilege, Mishawaka may, within 30 Days of the date of the request, provide to the requesting Plaintiff a privilege log containing the information required by the following Paragraph.

48. Mishawaka may assert that certain documents or records are privileged under the attorney-client privilege or any other privilege recognized by federal law. For each document regarding which Mishawaka asserts such a privilege, Mishawaka shall include the following information on a privilege log:
- a. the title of the document or record;
  - b. the date of the document or record;
  - c. the name and title of the author of the document or record;
  - d. the name and title of each addressee or recipient;
  - e. a description of the subject of the document or record; and
  - f. the privilege asserted by Mishawaka.

Nevertheless, Mishawaka shall not withhold on the grounds that they are privileged any documents or records created or generated pursuant to the requirements of this Consent Decree.

49. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information or documents, held by the United States or Indiana pursuant to applicable federal or state laws, regulations, or permits, nor does this Decree limit or affect any duty or obligation of Mishawaka to maintain documents, records, or information imposed by applicable federal or state laws, regulations, or permits.

### **XIII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

50. This Consent Decree resolves the civil claims of the United States and Indiana for the violations alleged in the Complaint filed in this case through the date of lodging.

51. This Consent Decree shall not be construed to prevent or limit the rights of the United States or Indiana to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in this Consent Decree.

52. Mishawaka is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Mishawaka's compliance with this Consent Decree shall be no defense to any action commenced pursuant to those laws, regulations, or permits. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. The United States and Indiana do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that Mishawaka's compliance with any aspect of this Consent Decree will result in compliance with any provisions of the Clean Water Act, State Law, or Mishawaka's NPDES Permit.

53. Nothing in this Consent Decree including the Appendix, or Plaintiffs' review or approval of any report or other document pursuant to this Decree, shall be construed as relieving Mishawaka of the obligation to comply with the Clean Water Act, State Law, or Mishawaka's NPDES Permit.
54. This Consent Decree does not limit or affect the rights of any Party against any third parties that are not Parties to this Consent Decree, nor does this Decree limit the rights of third parties that are not Parties to this Consent Decree, against Mishawaka, except as otherwise provided by law.
55. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party that is not a Party to this Consent Decree.
56. The United States and Indiana reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in this Decree.
57. In any subsequent administrative or judicial proceeding initiated by the United States or Indiana for injunctive relief, civil penalties, or other appropriate relief relating to the Facility, Mishawaka shall not assert, and may not maintain, any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based on any contention that the claims raised by the United States or Indiana in the subsequent proceeding were or should have been brought in this case, except with respect to claims that specifically were resolved pursuant to Paragraph 50 of this Decree.



#### **XIV. COSTS**

58. The parties shall bear their own costs and attorneys' fees in this case and all other matters related to this Consent Decree, except that the United States and Indiana shall be entitled to collect the costs and attorneys' fees incurred in any action necessary to collect any portion of the civil penalties or any portion of any Stipulated Penalties due, as specified in Paragraph 28, but not paid by Mishawaka.

#### **XV. NOTICES**

59. Unless otherwise specified in this Decree, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

If required to be sent to the United States:

If sent by United States Mail

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
Post Office Box 7611, Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-1-1-08205

and

United States Attorney  
Northern District of Indiana  
5400 Federal Plaza, Suite 1500  
Hammond, Indiana 46320  
Re: USAO File No. 2003V00805

and

Chief  
Water Enforcement and Compliance Assurance Branch  
Water Division  
United States Environmental Protection Agency, Region 5  
77 West Jackson Boulevard (WC-15J)  
Chicago, Illinois 60604

If sent by Courier

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
601 D Street, N.W.  
ENRD Mailroom, Room 2121  
Washington, D.C. 20004  
Re: DOJ No. 90-5-1-1-08205

and

United States Attorney  
Northern District of Indiana  
5400 Federal Plaza, Suite 1500  
Hammond, Indiana 46320  
Re: USAO File No. 2003V00805

and

Chief  
Water Enforcement and Compliance Assurance Branch  
Water Division  
United States Environmental Protection Agency, Region 5  
77 West Jackson Boulevard (WC-15J)  
Chicago, Illinois 60604

If required to be sent to EPA:

Chief  
Water Enforcement and Compliance Assurance Branch  
Water Division  
United States Environmental Protection Agency, Region 5  
77 West Jackson Boulevard (WC-15J)  
Chicago, Illinois 60604

If required to be sent to Indiana:

Chief, Compliance Branch  
Office of Water Quality  
Indiana Department of Environmental Management  
100 North Senate Avenue  
Post Office Box 6015  
Indianapolis, Indiana 46206

and

Chief, Enforcement Section  
Office of Legal Counsel  
Indiana Department of Environmental Management  
100 North Senate Avenue  
Post Office Box 6015  
Indianapolis, Indiana 46206

If required to be sent to Mishawaka

Mayor  
City of Mishawaka  
600 East Third Street  
Mishawaka, Indiana 46544

and

Superintendent  
Wastewater Division  
1020 Lincolnway West  
Mishawaka, Indiana 46544

and

Corporate Counsel  
City of Mishawaka  
600 East Third Street  
Mishawaka, Indiana 46544

and

Fredric P. Andes  
Barnes & Thornburg LLP  
One North Wacker Drive, Suite 4400  
Chicago, Illinois 60606

60. Any Party may, by written notice to the other Parties, change its designated notice recipients or notice addresses provided above.

**XVI. EFFECTIVE DATE**

61. The Effective Date of this Consent Decree shall be the date on which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

**XVII. RETENTION OF JURISDICTION**

62. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XI and XVIII of this Decree, or effectuating or enforcing compliance with the terms of this Decree.

**XVIII. MODIFICATION**

63. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties and filed with the Court. If the modification constitutes a major change to any term of this Decree, the modification only shall be effective after approval by the Court. Changes to the terms and schedules contained in the Appendix to this Decree shall be considered minor modifications and may be modified by a written agreement of the Parties without Court approval, unless the United

States determines that any such modification effects a major change to the terms of this Consent Decree.

**XIX. RECONSIDERATION OF LIFT STATION, FORCEMAIN, INTERCEPTOR, RIVER CROSSING, AND SEWER SIZES**

64. On a maximum of two occasions on or before December 31, 2021, Mishawaka may Submit to the United States and Indiana, a request for consideration of a smaller lift station, forcemain, parallel interceptor, river crossing, or sewer size for any or all CSO Control Measures that Mishawaka is required to construct and put into service pursuant to Table 1 of Appendix A. The size reconsideration request must include evidence demonstrating that Mishawaka will achieve the Performance Criteria of zero Overflow Events during a Typical Year even with the proposed smaller lift station, forcemain, parallel interceptor, river crossing, or sewer size(s).
65. If, pursuant to this Section, the United States and Indiana grant Mishawaka's request for a smaller lift station, forcemain, parallel interceptor, river crossing, or sewer size requirement for any or all of the CSO Control Measures in Appendix A, section 1, the Parties shall reduce the agreement to a written document signed by an authorized representative of each Party and filed with the Court. Such an agreement shall be considered a minor modification to this Consent Decree and shall not require approval of the Court unless the United States determines that the modification effects a major change to the terms of this Consent Decree.
66. If, pursuant to this Section, either the United States or Indiana denies in writing Mishawaka's size reconsideration request, in whole or in part, or if neither the United

States nor Indiana Submits any written response to Mishawaka regarding the size reconsideration request within 90 Days from the date that Mishawaka Submits its size reconsideration request to the United States and Indiana, Mishawaka may invoke informal dispute resolution pursuant to Paragraph 40 of this Consent Decree by Submitting a written Notice of Dispute to the United States and Indiana (1) no later than 30 Days after the date of the earliest written communication in which either the United States or Indiana denies Mishawaka's size reconsideration request in whole or in part; or (2) if no written response is Submitted to Mishawaka by either the United States or Indiana within 90 Days of the date that Mishawaka Submitted its size reconsideration request to the United States and Indiana, then Mishawaka may Submit a written Notice of Dispute to the United States and Indiana at any time after 90 Days from the date that Mishawaka Submitted its size reconsideration request to the United States and Indiana.

67. If the Parties do not resolve the issues raised in the Notice of Dispute during the informal dispute resolution time period defined in Paragraph 40 of this Consent Decree, Mishawaka may seek judicial review of the dispute within the time required by Paragraph 41 of the Consent Decree. If Mishawaka seeks judicial review, the Court may, in its discretion, grant Mishawaka's size reconsideration request, in whole or in part, but only if Mishawaka proves that:
  - a. Mishawaka has complied with the requirements and limitations for the size reconsideration request described in Paragraph 64 of this Section;
  - b. The United States or Indiana either (1) denied in writing Mishawaka's size reconsideration request; or (2) did not Submit any written response to Mishawaka

regarding the size reconsideration request within 90 Days from the date that Mishawaka Submitted its size reconsideration request to the United States and Indiana;

- c. Either (1) Mishawaka Submitted a Notice of Dispute to the United States and Indiana within 30 Days after the date of the earliest written communication in which either the United States or Indiana denied Mishawaka's size reconsideration request in whole or in part; or (2) if no written response was Submitted to Mishawaka by either the United States or Indiana within 90 Days of the date that Mishawaka Submitted its size reconsideration request to the United States and Indiana, Mishawaka (a) Submitted a Notice of Dispute to the United States and Indiana; and (b) Mishawaka did not submit the Notice of Dispute any sooner than 90 days after Mishawaka Submitted its size reconsideration request to the United States and Indiana; and
  - d. Mishawaka sought judicial review of the dispute within the time required by Paragraph 41 of the Consent Decree.
68. If Mishawaka invokes dispute resolution procedures pursuant to Paragraph 66 of this Section for a denial of a size reconsideration request, the invocation of dispute resolution procedures shall not extend, postpone, or affect any of Mishawaka's obligations pursuant to this Consent Decree unless and until final resolution of the dispute so provides.

**XX. SCHEDULE RECONSIDERATION BASED ON FINANCIAL CIRCUMSTANCES**

69. No earlier than 5 years after the Effective Date, and on a maximum of one occasion every five years during the pendency of this Consent Decree, Mishawaka may Submit to the United States and Indiana a request for approval of an extension of up to a maximum of five years, less the length of any prior extension request granted, of the deadlines for completing any of the remaining requirements of Appendix A. Under no circumstances shall the total combined time of all extensions pursuant to this Paragraph exceed five years. Mishawaka shall include in any such schedule extension request evidence demonstrating that:

- a. Mishawaka actually has spent at least \$19,482,500 complying with the requirements of Appendix A since the Effective Date;
- b. The Residential Indicator, when calculated in accordance with EPA's Financial Capability Assessment Guidance as modified by the requirements of Paragraph 70 of this Section and using the inputs described and defined in Paragraph 71 of this Section, and using a reasonable engineering estimate of the remaining costs of completing the requirements in Appendix A expressed in the value of dollars during the year that Mishawaka submits the schedule extension request, but excluding the cost of the Post-Construction Monitoring Program, exceeds 2.5%;
- c. During the period since the Consent Decree was entered, or since Mishawaka Submitted the last schedule extension request, whichever event is later, Mishawaka's Residential Indicator has increased by at least 0.2 percentage points;



- d. A description of each requirement and associated deadline in Appendix A for which Mishawaka seeks a schedule extension; and
  - e. Each requested schedule extension is as short as reasonably possible, but in no event would extend the schedule more than five years after the deadline for completing each specified requirement in Appendix A.
70. To determine Mishawaka's MHI to calculate the Residential Indicator, as required by the preceding Paragraph, Mishawaka shall use MHI data for the most recent year from either the Federal Census or ACS, whichever is the most current. If the most current ACS data includes both a one-year estimate and a three-year estimate of MHI, Mishawaka shall use the one-year estimate to determine Mishawaka's MHI.
71. To calculate and determine Mishawaka's Residential Indicator at the time a schedule extension request is Submitted, Mishawaka shall use the following inputs:
- a. Current wastewater and sewer annual operation and maintenance expenses calculated as total expenses less depreciation in Mishawaka's CAFR for the most recent year, but only if the CAFR accurately states Mishawaka's operation and maintenance expenses. If Mishawaka's CAFR for the most recent year either does not exist or does not accurately state Mishawaka's operation and maintenance expenses, Mishawaka shall calculate and determine this input with appropriate accounting records, including source documents, and submit to EPA and Indiana copies of the accounting records and source documents;
  - b. Current wastewater and sewer annual debt service calculated as the total principal and interest payments on bonds and notes from the financing activities section of

the cash flow statement in Mishawaka's CAFR for the most recent year but only if the CAFR accurately reflects the principal and interest payments. If Mishawaka's CAFR for the most recent year either does not exist or does not accurately state Mishawaka's principal and interest payments, Mishawaka shall calculate and determine this input with appropriate accounting records, including source documents and shall submit to EPA and Indiana copies of the accounting records and source documents;

- c. Reasonable documented engineering estimates projecting the increase in operation and maintenance expenses expected after completing the requirements in Appendix A expressed in the value of dollars for the year during which Mishawaka submits the schedule extension request;
- d. The increased annual capital costs based on the expected financing of a reasonable, documented engineering estimate of the remaining costs of completing the requirements in Appendix A expressed in the value of dollars during the year that Mishawaka submits the schedule extension request. To support Mishawaka's calculation of this input, Mishawaka shall submit to EPA and Indiana an explanation of the basis for, and calculation of, the annual cost estimate and the engineering estimates, accounting records, and source documents on which Mishawaka relied to calculate this input;
- e. When calculating Mishawaka's residential share of wastewater treatment costs in accordance with EPA's Financial Capability Assessment Guidance, Mishawaka shall use the most recent year of Federal Census or ACS data and billing data

regarding Mishawaka's customer base unless Mishawaka can demonstrate changes to its customer base not reflected in such data. Mishawaka also shall use the same ratio between total wastewater flow and residential infiltration and inflow that Mishawaka uses for rate setting purposes, if any, to calculate the residential share of wastewater treatment; and

- f. When calculating the total number of households in Mishawaka's service area, Mishawaka shall count each single family house, and each unit in multi-family housing structures such as apartment buildings and duplexes, but shall not count households that have onsite sewage disposal systems and are not paying fees to Mishawaka. To the extent that customer billing data does not accurately reflect the number of units in multi-family housing structures, Mishawaka shall use ACS data and Federal Census data to more accurately estimate the total number of households in Mishawaka's service area.

72. If, pursuant to this Section, the United States and Indiana grant Mishawaka's request for an extension for completing any of the deadlines in Appendix A, the Parties shall reduce the agreement to a writing signed by an authorized representative of each Party and filed with the Court. Such an agreement shall be considered a minor modification to this Consent Decree and shall not require further approval of the Court unless the United States determines that the modification effects a major change to the terms of this Consent Decree.

73. If, pursuant to this Section, either the United States or Indiana denies in writing Mishawaka's request for an extension for completing any of the deadlines in Appendix A,

in whole or in part, or if neither the United States nor Indiana Submits any written response to Mishawaka regarding the schedule extension request within 90 Days from the date that Mishawaka Submits to the United States and Indiana its request for an extension of deadlines pursuant to this Section, Mishawaka may invoke informal dispute resolution pursuant to Paragraph 40 of this Consent Decree by Submitting a written Notice of Dispute to the United States and Indiana (1) no later than 30 Days after the date of the earliest written communication in which either the United States or Indiana denies Mishawaka's schedule extension request in whole or in part; or (2) if no written response is Submitted to Mishawaka by either the United States or Indiana within 90 Days of the date that Mishawaka Submitted its schedule extension request to the United States and Indiana, then Mishawaka may Submit a written Notice of Dispute to the United States and Indiana at any time after 90 Days from the date that Mishawaka Submitted its schedule extension request to the United States and Indiana.

74. If the Parties do not resolve the issues raised in the Notice of Dispute during the informal dispute resolution time period defined in Paragraph 40 of this Consent Decree, Mishawaka may seek judicial review of the dispute within the time required by Paragraph 41 of the Consent Decree. If Mishawaka seeks judicial review, the Court may, in its discretion, grant Mishawaka's request for an extension of the schedule to complete any of the requirements in Appendix A, in whole or in part, but only if Mishawaka proves that:
- a. Mishawaka meets the minimum threshold requirements for seeking a schedule extension described in Paragraph 69 of this Section;

- b. The United States or Indiana either (1) denied in writing Mishawaka's request for approval of a schedule extension; or (2) did not Submit any written response to Mishawaka regarding the schedule extension request within 90 Days from the date that Mishawaka Submitted its schedule extension request to the United States and Indiana;
  - c. Either (1) Mishawaka Submitted a Notice of Dispute to the United States and Indiana within 30 Days after the date of the earliest written communication in which either the United States or Indiana denied Mishawaka's schedule extension request in whole or in part; or (2) if no written response was Submitted to Mishawaka by either the United States or Indiana within 90 Days of the date that Mishawaka Submitted its schedule extension request to the United States and Indiana, Mishawaka (a) Submitted a Notice of Dispute to the United States and Indiana; and (b) Mishawaka did not submit the Notice of Dispute any sooner than 90 days after Mishawaka Submitted its schedule extension request to the United States and Indiana; and
  - d. Mishawaka filed a motion seeking judicial review of the dispute within the time required by Paragraph 41 of the Consent Decree.
75. If Mishawaka invokes dispute resolution procedures pursuant to Paragraph 73 of this Section for a denial of a schedule extension request, the invocation of dispute resolution procedures shall not extend, postpone, or affect in any way any of Mishawaka's obligations pursuant to this Consent Decree unless and until final resolution of the dispute so provides.

## **XXI. TERMINATION**

76. Mishawaka may Submit to the United States and Indiana a Request for Termination, with all necessary supporting documentation, only after Mishawaka:
- a. complies with all provisions of Section V (Compliance Requirements) of this Consent Decree;
  - b. demonstrates that the CSO Control Measures in Appendix A as built or otherwise implemented, meet the Design Criteria for those CSO Control Measures required by Appendix A;
  - c. demonstrates that the CSO Control Measures in Appendix A, as operated, meet the Performance Criteria for those CSO Control Measures required by Appendix A;
  - d. demonstrates that, from the time Mishawaka achieves compliance with all applicable requirements of the Clean Water Act, State Law, Mishawaka's NPDES Permit, and this Decree, until the date that Mishawaka Submits the Request for Termination, Mishawaka continuously maintained such compliance for at least one year;
  - e. has paid the civil penalties required by Section VI (Civil Penalties) of this Decree; and
  - f. has paid any accrued Stipulated Penalties required by Section VIII (Stipulated Penalties) of this Decree.
77. After Plaintiffs receive Mishawaka's Request for Termination, the Parties shall confer informally concerning the Request for Termination and any disagreement that the Parties may have regarding whether Mishawaka has complied with the requirements for

termination of this Consent Decree. If the United States and Indiana agree that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

78. After the parties informally confer as required by the preceding Paragraph, if Plaintiffs do not agree that the Decree may be terminated, Mishawaka may seek judicial review of the dispute pursuant to, and in accordance with the requirements of, Paragraph 41 of this Decree. Mishawaka shall not seek judicial review, however, earlier than 60 days, or later than 90 days, after Mishawaka submits the Request for Termination to the United States and Indiana. This Consent Decree shall remain in effect pending resolution of the dispute unless and until the Court enters an Order terminating the Decree.

## **XXII. PUBLIC PARTICIPATION**

79. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, inadequate, or inconsistent with the purposes of the Clean Water Act. Mishawaka consents to entry of this Consent Decree without further notice.

## **XXIII. SIGNATORIES/SERVICE**

80. Each undersigned representative of Mishawaka, the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice on behalf of the United States, and the Chief Operating Officer of the Indiana Attorney General's Office on behalf of Indiana, certifies that he or she is fully authorized to enter

into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents.

81. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.
82. Mishawaka agrees not to oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Mishawaka in writing that the United States no longer supports entry of the Decree.
83. Mishawaka agrees to accept service of process by mail, to the agent authorized to accept service on behalf of the City of Mishawaka indicated underneath the signatures of Mishawaka's representatives on this Consent Decree, with respect to all matters arising under or related to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including without limitation service of a summons.

#### **XXIV. INTEGRATION/APPENDIX**

84. This Consent Decree and its Appendix, constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree, and supersede all prior agreements and understandings, whether oral or written, concerning the settlement embodied in this Decree. Other than the Appendix, which is attached to and incorporated into this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.



**XXV. FINAL JUDGMENT**

85. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, Indiana, and Mishawaka.

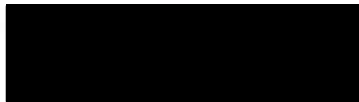
Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

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UNITED STATES DISTRICT JUDGE  
Northern District of Indiana

THE UNDERSIGNED PARTIES enter into this Consent Decree in *United States, et al. v. City of Mishawaka, IN* (N.D. Ind.):

FOR THE UNITED STATES OF AMERICA



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ROBERT G. DREHER  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

THE UNDERSIGNED PARTIES enter into this Consent Decree in *United States, et al. v. City of Mishawaka, IN* (N.D. Ind.):

FOR THE UNITED STATES OF AMERICA

DAVID CAPP  
United States Attorney



---

WAYNE T. AULT  
Assistant United States Attorney  
5400 Federal Plaza, Suite 1500  
Hammond, Indiana 46320  
Telephone: 219-937-5500  
Telecopy: 219-937-5547  
Internet Address: [Wayne.Ault@usdoj.gov](mailto:Wayne.Ault@usdoj.gov)

THE UNDERSIGNED PARTIES enter into this Consent Decree in *United States, et al. v. City of Mishawaka, IN* (N.D. Ind.):

FOR THE UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY



MARK POLLINS

Director

Water Enforcement Division

Office of Civil Enforcement

Office of Enforcement and Compliance Assurance

United States Environmental Protection Agency



LOURDES BUFILL

Attorney-Advisor

Water Enforcement Division

Office of Civil Enforcement

Office of Enforcement and Compliance Assurance

United States Environmental Protection Agency

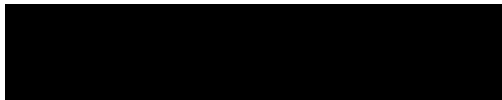
THE UNDERSIGNED PARTIES enter into this Consent Decree in *United States, et al. v. City of Mishawaka, IN* (N.D. Ind.):

FOR THE UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY



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SUSAN HEDMAN  
Regional Administrator  
United States Environmental Protection Agency  
Region 5



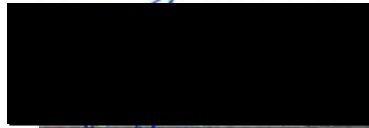
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THOMAS J. KENNEY <sup>0</sup>  
Senior Attorney  
Office of Regional Counsel  
Region 5  
United States Environmental Protection Agency  
77 West Jackson Boulevard (C-14J)  
Chicago, Illinois 60604-3590

THE UNDERSIGNED PARTIES enter into this Consent Decree in *United States, et al. v. City of Mishawaka, IN* (N.D. Ind.):

FOR THE STATE OF INDIANA

GREGORY F. ZOELLER  
Attorney General of Indiana



PATRICIA ORLOFF ERDMANN  
Chief Counsel for Litigation  
Office of the Attorney General  
Indiana Government Center South  
302 West Washington Street  
Indianapolis, Indiana 46204



THOMAS W. EASTERLY  
Commissioner  
Indiana Department of Environmental Management



ELIZABETH ADMIRE  
Attorney  
Indiana Department of Environmental Management

Agent authorized to accept service on behalf of the State of Indiana:

PATRICIA ORLOFF ERDMANN  
Chief Counsel for Litigation  
Office of the Attorney General  
Indiana Government Center South  
302 West Washington Street  
Indianapolis, Indiana 46204

THE UNDERSIGNED PARTIES enter into this Consent Decree in *United States, et al. v. City of Mishawaka, IN* (N.D. Ind.):

FOR THE CITY OF MISHAWAKA



DAVID A. WOOD  
Mayor

Agent authorized to accept service on behalf of the City of Mishawaka:

Corporate Counsel  
City of Mishawaka  
600 East Third Street  
Mishawaka, Indiana 46544

# **APPENDIX A**



## **Appendix A: Section 1**

### **Summary of CSO Control Measures**

#### **Introduction**

The following section summarizes the CSO Control Measures that Mishawaka has committed to construct, operate, and otherwise implement, and includes the deadlines by which Mishawaka must complete construction and implementation of, and begin operating each CSO Control Measure.

#### **Brief Description of CSO Control Measures**

##### **Milburn Area**

For the Milburn Area, Mishawaka shall perform sewer separation and rehabilitation as defined in the Milburn Boulevard Sewer Master Plan (Lawson-Fisher, 2005). Mishawaka shall increase the size of the Middleboro Lift Station to the size specified in Table 1 of this Appendix unless Mishawaka Submits a size reconsideration request to EPA and IDEM, EPA and IDEM concur with Mishawaka's proposal, and the parties reduce the agreement to a written document signed by an authorized representative of each party and filed with the Court, pursuant to Section XIX of the Consent Decree. As a result of completing the work in the Milburn Area, Mishawaka shall eliminate discharges from CSO outfalls 002 and 003.

##### **Wilson Boulevard Area**

For the Wilson Boulevard Area, Mishawaka shall transport all sewage and precipitation flows from the sewers feeding CSO outfalls 004 and 005 with an interceptor east toward RC-4, and shall transport all sewage and precipitation flows from the sewers feeding CSO outfalls 006, 007, and 008 with an interceptor west toward RC-4. Mishawaka shall close CSO outfalls 005, 007, and 008 and, in the near term, divert and consolidate the sewage and precipitation flows to CSO outfalls 004 and 006. After Mishawaka successfully diverts all of the sewage and precipitation flow to RC-4, Mishawaka shall discontinue use of RC-3 and eliminate discharges from CSO Outfalls 004 and 006.

##### **Central Park Area**

In the Central Park Area, Mishawaka shall eliminate discharges from CSO outfalls 011, 016, and 019. Currently, flows from the northeast portion of Mishawaka are directed towards the Central Park Area. Mishawaka shall re-direct sewage and precipitation flow from the Central Park Area to the East Area by constructing the Daisy Road Lift Station and force main, and RC-5, discontinuing use of RC-1, and constructing a conveyance sewer from RC-5 to Merrifield Park to the capacity (for the LS) and sizes (for the FM, RC, and sewer) specified in Table 1 of this Appendix unless Mishawaka Submits a size reconsideration request to EPA and IDEM, EPA and IDEM concur with Mishawaka's proposal, and the parties reduce the agreement to a written document signed by an authorized representative of each party and filed with the Court, pursuant to Section XIX of the Consent Decree. After completing that redirection, Mishawaka shall expand the capacity of the interceptor between CSO outfall 016 and the tail works of RC-1 to the size specified in Table 1 unless Mishawaka Submits a size reconsideration request to EPA and IDEM, EPA and IDEM concur with Mishawaka's proposal, and the parties reduce the agreement to a written document signed by an authorized representative of each party and filed with the Court, pursuant to Section XIX of the Consent Decree. Mishawaka also shall construct a storage and conveyance sewer between CSO outfalls 019 and 011 and shall expand the size of RC-2 to transport flow from the Central Park Area to the additional Front Street sewer on the south side of the St. Joseph River.

Mishawaka shall construct the sewer between CSO outfalls 019 and 011, RC-2, and the Front Street Sewer to the size specified in Table 1 of this Appendix unless Mishawaka Submits a size reconsideration request to EPA and IDEM, EPA and IDEM concur with Mishawaka's proposal, and the parties reduce the agreement to a written document signed by an authorized representative of each party and filed with the Court, pursuant to Section XIX of the Consent Decree.

### **East Area**

In the East Area, Mishawaka shall separate the sewers and rehabilitate the area south of the St. Joseph River roughly bounded by Merrifield Avenue, Eller Ditch, and East 4<sup>th</sup> Street. Mishawaka shall construct sewer improvements to transport flows from CSO outfalls 014, 015, 018, 020, 021, 022, 023, 023A, and 024 to the storage and conveyance tunnel to the WWTP (River Center/CSO 009 Area). Mishawaka shall eliminate discharges from CSO outfalls 015, 018, 020, 021, 022, 023, 023A, and 024 by: (1) constructing a storage and conveyance sewer from Capital Avenue to Merrifield Avenue; and (2) constructing the US 331 underpass (Mariellen) lift station and sewer improvements east of Capital Avenue. Mishawaka shall construct the US 331 underpass (Mariellen) lift station, the storage and conveyance sewer between Capital Avenue and Merrifield Avenue, and the storage and conveyance sewer east of Capital Avenue to the capacity and sizes specified in Table 1 of this Appendix unless Mishawaka Submits a size reconsideration request to EPA and IDEM, EPA and IDEM concur with Mishawaka's proposal, and the parties reduce the agreement to a written document signed by an authorized representative of each party and filed with the Court, pursuant to Section XIX of the Consent Decree. During wet weather events larger than the Typical Year, Mishawaka will discharge excess flow through an outfall located at or near CSO outfall 014 (downstream of Merrifield Park). Given the projected infrequency of such a discharge, Mishawaka will not be required to disinfect the discharge from CSO outfall 014.

### **River Center/CSO 009 Area**

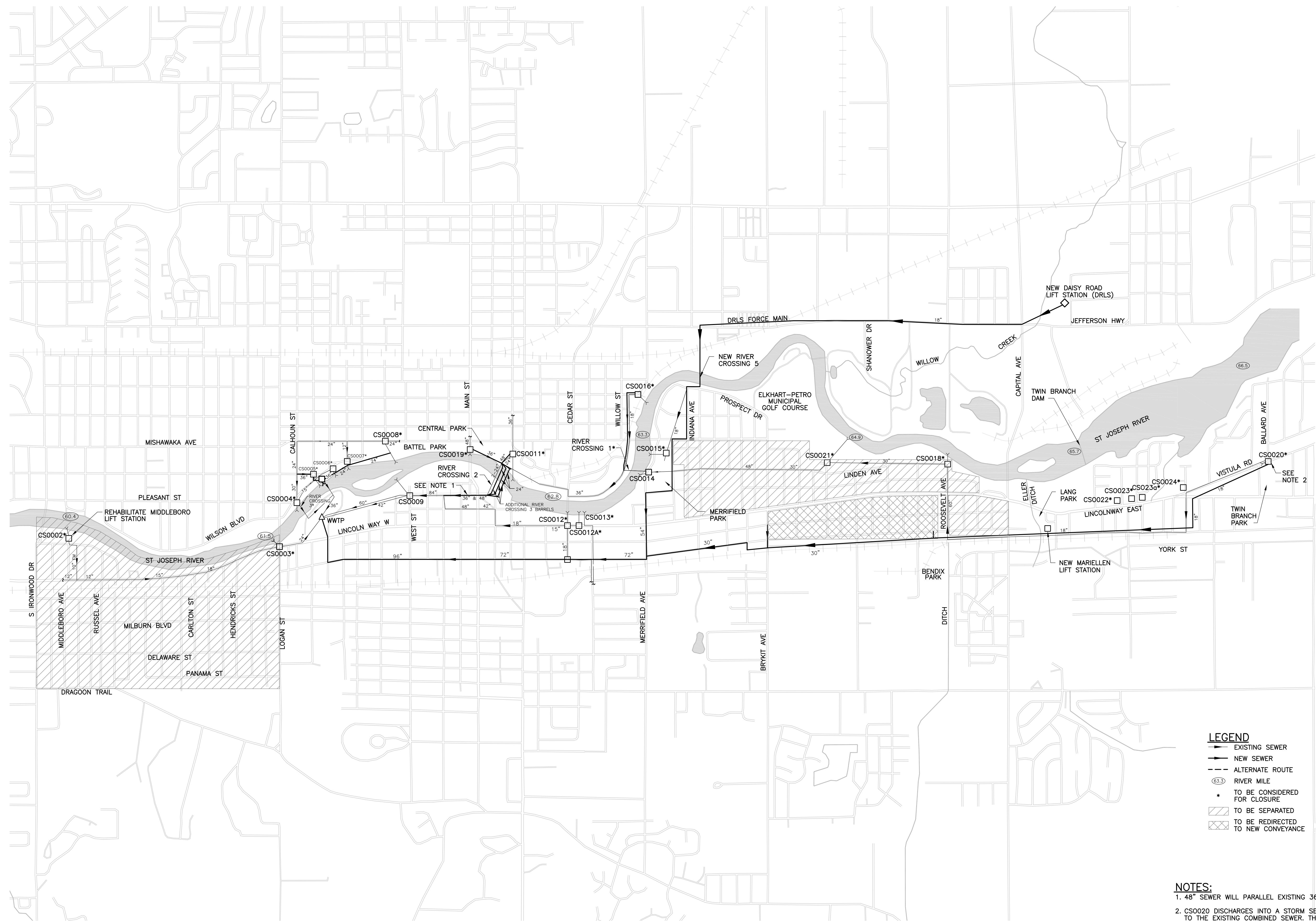
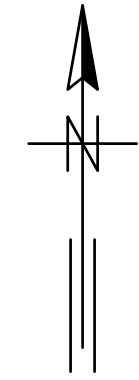
In the River Center/CSO 009 Area, Mishawaka shall construct a storage and conveyance sewer/tunnel from Main Street to the Wastewater Treatment Plant. Additionally, Mishawaka shall construct a storage and conveyance sewer/tunnel from Merrifield Avenue to Main Street. Finally, Mishawaka shall construct a storage and conveyance tunnel from Merrifield Park (Linden Avenue) to 4<sup>th</sup> Street. Mishawaka shall construct the storage and conveyance sewers/tunnels between Main Street and the Wastewater Treatment Plant, Merrifield Avenue and Main Street, and Merrifield Park (Linden Avenue) and 4<sup>th</sup> Street to the sizes specified in Table 1 of this Appendix unless Mishawaka Submits a size reconsideration request to EPA and IDEM, EPA and IDEM concur with Mishawaka's proposal, and the parties reduce the agreement to a written document signed by an authorized representative of each party and filed with the Court, pursuant to Section XIX of the Consent Decree. The three storage and conveyance sewers/tunnels in the River Center/CSO 009 area were designed to be of sufficient size to capture excess wet weather flows during a Typical Year, and allow these flows to be diverted to the WWTP for treatment once the wet weather event has ended. CSO outfall 009 will serve as an overflow during wet weather events that exceed those experienced during a Typical Year. Given the projected infrequency of this discharge, disinfection will not be required.

In conclusion, the CSO Control Measures consist of the following:

- Milburn Area: sewer separation and rehabilitation of the Middleboro Lift Station;
- Wilson Boulevard Area: parallel sewer to RC-4, and discontinue use of RC-3;
- Central Park Area: re-direct flow from Central Park Area to East Area;
- East Area: Sewer separation, and sewer and Mariellen lift station improvements; and
- River Center/CSO 009 Area: conveyance and storage sewers/tunnels.

The CSO Control Measures were designed to result in meeting the Performance Criteria of zero CSO Discharges during a Typical Year.

The CSO Control Measures are shown on Figure 1. A brief description of each CSO Control Measure that Mishawaka is required to construct or otherwise implement, the required size of each Facility that Mishawaka is required to construct for each CSO Control Measure, and the deadlines by which Mishawaka must complete construction of, and otherwise implement each CSO Control Measure are shown in Table 1. The total estimated capital cost of the CSO Control Measures is \$132,067,000 as shown in Table 1.



- LEGEND**
- EXISTING SEWER
  - - - NEW SEWER
  - - - ALTERNATE ROUTE
  - 63.5 RIVER MILE
  - \* TO BE CONSIDERED FOR CLOSURE
  - ▨ TO BE SEPARATED
  - ▩ TO BE REDIRECTED TO NEW CONVEYANCE

- NOTES:**
1. 48" SEWER WILL PARALLEL EXISTING 36" FRONT STREET SEWER.
  2. CS0020 DISCHARGES INTO A STORM SEWER PARALLEL TO THE EXISTING COMBINED SEWER. THE STORM SEWER DISCHARGES INTO ELLER DITCH.
  3. THE FINAL FACILITIES WILL BE SIZED TO ACHIEVE ZERO OVERFLOWS DURING THE TYPICAL YEAR (1992). THE MINIMUM PRELIMINARY SIZES SHOWN WERE DETERMINED BY SUBBASIN FLOW MONITORING FOR EACH PROJECT COMPONENT.

**CSO LTCP CONTROL MEASURES**  
SCALE: 1" = 1000'

**City of Mishawaka, Indiana**  
**Appendix A**  
**Table 1**  
**CSO Control Measures**

Project		Description	Design Criteria	Performance Criteria	Capital Cost Estimate <sup>1</sup>	Size	Start Date <sup>2</sup>	End Date <sup>3</sup>
Milburn Area	1	Sewer separation and rehabilitation improvements and rehabilitation of the Middleboro Lift Station in the area south of the St. Joseph River bounded by Logan Street, Panama Street, Dragoon Trail and Ironwood Drive.	Designed based upon accepted engineering practice taking into account the Ten State Standards	Facilities will achieve 0 Overflow Events during the Typical Year	\$19,460,000	1.3 MGD Middleboro Lift Station	Started 2007	December 2026
Wilson Boulevard Area	2	Parallel interceptor to redirect flows from CSO 004, 005, 006, 007, and 008 to River Crossing RC-4.	Designed based upon accepted engineering practice taking into account the Ten State Standards	Facilities will achieve 0 Overflow Events during the Typical Year	\$5,000,000	East Interceptor 24-inch diameter West Interceptor 36-inch diameter	December 2011	December 2020
Central Park Area	3	Main Street Underpass Sewer Improvements	Designed based upon accepted engineering practice taking into account the Ten State Standards	Facilities will achieve 0 Overflow Events during the Typical Year	\$5,000,000	N/A	Started 2008	December 2013
	4	Daisy Road Lift Station Forcemain RC-5 Conveyance from RC-5 to Merrifield Park			\$9,301,000	2.9 mgd Daisy Road LS 18-inch diameter FM 18 & 24-inch diameter dual RC-5 18 inch diameter sewer	December 2021	December 2029
	5	Front Street Sewer			\$2,250,000	48-inch diameter parallel sewer	Started 2008	December 2014
	6	CSO 016 sewer improvements CSO 019 sewer improvements CSO 011 sewer improvements RC-2 improvements			\$9,200,000	CSO 016 - 0-inch diameter <sup>4</sup> CSO 019 - 36-inch diameter CSO 011 - 48-inch diameter RC-2 three 24-inch diameter	Started 2008	December 2031
East Area	7	Sewer separation and rehabilitation improvements in the area south of the St. Joseph River roughly bounded by Merrifield Ave., Eller Ditch, and East 4th Street.	Designed based upon accepted engineering practice taking into account the Ten State Standards	Facilities will achieve 0 Overflow Events during the Typical Year	\$19,168,000	N/A	December 2016	December 2028
	8	Storage and conveyance from Capital Avenue to Merrifield Avenue.			\$5,765,000	30 inch diameter	December 2017	December 2028
	9	Sewer improvements east of Capital Avenue (upstream of Mariellen Lift Station) U.S. 331 underpass (Mariellen) lift station improvements.			\$9,900,000	18 inch diameter 4.8 mgd Mariellen Lift Station	Started 2011	December 2031
River Center/CSO 009 Area	10	Storage and conveyance tunnel from Merrifield Park (Linden Avenue) to 4th Street.	Designed based upon accepted engineering practice taking into account the Ten State Standards	Facilities will achieve 0 Overflow Events during the Typical Year	\$5,730,000	54 inch diameter	December 2015	December 2023
	11	Storage and conveyance tunnel from Merrifield Avenue to Main Street.			\$18,730,000	72 inch diameter	December 2014	December 2022
	12	Storage and conveyance tunnel from Main Street to WWTP.			\$22,563,000	96 inch diameter	December 2012	December 2020
<b>TOTAL ESTIMATED CAPITAL COST</b>					<b>\$132,067,000</b>			

<sup>1</sup> Capital costs are based on the Engineering News Record Construction Cost Index of 8000 (2007). Capital cost including 25% contingency and 20% engineering, administrative, and legal costs.

<sup>2</sup> Engineer under contract to design the initial facility within grouping.

<sup>3</sup> All facilities within grouping operational.

<sup>4</sup> Improvements to the interceptor from CSO 016 to the tail works of RC-1 may not be required to achieve zero overflows based on the results of redirection of the flow to RC-5 by means of the Daisy Road Lift Station.

## Appendix A: Section 2 Post-Construction Monitoring Program

### 2.1 Purpose of Post-Construction Monitoring Program and Deadline for Completion

The purpose of Mishawaka's Post-Construction Monitoring Program is to determine whether the CSO Control Measures implemented pursuant to section 1 of this Appendix have achieved the Design Criteria and Performance Criteria specified in Table 1 of this Appendix. Mishawaka shall complete all requirements of section 2 of this Appendix A, including the requirement in section 2.4 of this Appendix A to Submit to the United States and Indiana a Final Post-Construction Monitoring Report, as follows:

- Collection System Re-calibration Report: On or before August 31, 2033
- Final Post-construction Monitoring Report: Within 12 months after EPA and IDEM approval of Collection System Re-calibration Report

### 2.2 Data Collection

After fully constructing and implementing the CSO Control Measures described in Table 1 of this Appendix, Mishawaka shall monitor rainfall volume and intensity for a 12-month post-construction monitoring period as a component of Mishawaka's Post-Construction Monitoring Program. Mishawaka shall use this rainfall data to assess the simulated performance of each CSO Control Measure during the Typical Year after the CSO Control Measures are constructed and implemented.

After Mishawaka constructs and fully implements the CSO Control Measures, Mishawaka shall collect sewer response data for each CSO Control Measure location, and use such data, in conjunction with the rainfall data described above, to properly calibrate the Collection System Model.

During each precipitation event that occurs during the 12-month post-construction monitoring period, at a minimum, Mishawaka shall collect the following data: (1) 15-minute rainfall data for each event; (2) CSO Discharge volumes and frequency and duration at each CSO Outfall; and (3) water quality samples from the St. Joseph River as provided below.

During the 12-month post-construction monitoring period, Mishawaka shall collect weekly samples of the St. Joseph River at the following locations: Bittersweet Road Bridge (upstream of all of the Mishawaka's CSO outfalls) and the Logan Street Bridge (downstream of all of Mishawaka's CSO outfalls). Mishawaka shall analyze these weekly samples for *E. coli* to document the upstream and background *E. coli* concentration in the St. Joseph River before the impact of discharges from Mishawaka's CSO outfalls and the St. Joseph River's bacterial water quality downstream of Mishawaka's CSO outfalls.

After constructing and fully implementing the CSO Control Measures in Table 1 of this Appendix, during the 12-month post-construction monitoring period Mishawaka shall monitor

any remaining discharges from any remaining CSO Outfalls (including without limitation CSO Outfall 014 and CSO Outfall 009) for flow volume and duration to assist in the Collection System Model calibration and validation and ultimate assessment of system performance. As part of this Post-Construction Monitoring Plan, Mishawaka shall compare the Collection System Model output to the actual observed sewer system response to verify that the model is predicting the same overflows that actually are observed during the 12-month post-construction monitoring period, as more fully described in section 2.3.1 of this Appendix. Mishawaka shall modify the Collection System Model as necessary until the Collection System Model is calibrated and validated to predict the same sewer system response and CSO outfall activation frequency, duration, and volume as observed in the monitoring results.

After Mishawaka verifies that the Collection System Model incorporating all CSO Control Measures has been accurately calibrated and validated, writes all reports required by section 2.3.1 of this Appendix, and receives written approval to proceed from EPA and IDEM as described in section 2.3.1 of this Appendix, Mishawaka shall use the calibrated and validated Collection System Model to conduct a simulation based on the Typical Year to determine how many Overflow Events are predicted to occur. If the properly calibrated and validated model simulation predicts zero Overflow Events during the Typical Year, Mishawaka will be deemed to have met that performance objective.

## 2.3 Collection System Data Analysis

### 2.3.1 Collection System Model Calibration and Validation

Mishawaka shall update, calibrate, and validate the Collection System Model by performing the following steps:

1. Collect flow monitoring, rainfall, and CSO activation data, as described in greater detail in section 2.2 Data Collection of this Appendix, sufficient to re-calibrate the Collection System Model during a 12-month post-construction monitoring period that commences after Mishawaka finishes constructing and implementing all of the CSO Control Measures described in Section 1 of this Appendix.
2. Perform quality assurance and quality control of the data collected in Step 1, as described in Mishawaka's Quality Assurance Project Plan.
3. Update the Collection System Model to incorporate all completed CSO Control Measures and any other system improvements completed since the latest previous Collection System Model calibration or validation effort. Mishawaka also shall update the Collection System Model if the characteristics of the CSO Control Measures described in Section 1 of this Appendix have in any way changed since the last previous Collection System Model update. Mishawaka then shall use the updated Collection System Model and the rainfall data collected during the post-construction monitoring period to run a continuous simulation of CSO discharges for the 12-month post-construction monitoring period.
4. Compare CSO Discharge frequency in the continuous simulation outputs to the CSO monitoring data for the 12-month post-construction monitoring period to determine whether re-calibration of the Collection System Model is needed. For each CSO Outfall, the model-predicted CSO Discharges shall

be no fewer than the number of monitored CSO Discharges during the 12-month post-construction monitoring period. If these criteria are not met, Mishawaka shall recalibrate the Collection System Model in accordance with Steps 5-6 below. At the conclusion of Step 4, Mishawaka shall Submit an Initial Collection System Model Validation Report to EPA and IDEM for written authorization to proceed to the next step.

5. If re-calibration is needed, Mishawaka shall select two or more appropriate rainfall events from the 12-month post-construction monitoring period for Collection System Model re-calibration.

6. After Mishawaka re-calibrates the Collection System Model using sound engineering judgment in accordance with standard industry practices, Mishawaka shall run another continuous simulation for the entire monitoring period to verify that the re-calibrated Collection System Model has achieved the criteria described in Step 4, above. Thereafter, Mishawaka shall compare the continuous simulation outputs to the CSO monitoring data, as described in Step 4, to determine whether additional re-calibration is needed. If additional re-calibration is needed, Mishawaka shall re-calibrate in accordance with Steps 5-6 until the Collection System Model has achieved the criteria described in Step 4, above.

After completing Steps 1-6 in this section 2.3.1, Mishawaka shall Submit to EPA and IDEM a Collection System Model Re-calibration Report documenting the re-calibration and validation efforts. After receiving written authorization to proceed from EPA and IDEM, Mishawaka shall conduct the Performance Criteria analysis described in section 2.3.2 of this Appendix.

### 2.3.2 Collection System Performance Criteria Analysis

Mishawaka expects that Mishawaka's CSO Control Measures, when fully constructed and implemented, will result in eliminating all Overflow Events during the Typical Year. Overflow Events may occur when the volume or intensity of the rainfall event exceeds the volume or intensity of a rainfall event during the Typical Year. Nevertheless, the CSO Control Measures will capture for treatment the first part of each storm, known as the first flush.

After Submitting to EPA and IDEM the Collection System Model Re-calibration Report required by section 2.3.1 of this Appendix, and receiving written authorization to proceed from EPA and IDEM, Mishawaka shall use the validated Collection System Model to run a continuous simulation for the Typical Year to determine whether Mishawaka has achieved the Performance Criteria of zero Overflow Events during a Typical Year. Thereafter, Mishawaka shall include in the Final Post-Construction Monitoring Report required by section 2.4 of this Appendix any discussions, descriptions, analyses, plan, and schedule required by section 2.4(g) of this Appendix.



## 2.4 Final Post Construction Monitoring Report

On or before August 31, 2033, Mishawaka shall Submit to the United States and Indiana a Collection System Model Re-calibration Report. Within 12 months of EPA and IDEM approval of the Collection System Model Re-calibration Report Mishawaka shall Submit a final Post-Construction Monitoring Report. In the Final Post-Construction Monitoring Report, Mishawaka shall:

- (a) demonstrate that Mishawaka completed all of the requirements of the Post-Construction Monitoring Plan in section 2 of this Appendix A;
- (b) evaluate whether each CSO Control Measure implemented pursuant to section 1 of this Appendix was constructed as designed and in compliance with the Design Criteria described in, and required by, Table 1 of this Appendix, and is performing as designed and expected;
- (c) evaluate how well Mishawaka's entire Facility is performing as a whole, following completion of all CSO Control Measures, and shall include without limitation an assessment of whether the CSO Control Measures implemented pursuant to section 1 of this Appendix, as constructed, operated, or otherwise implemented, have achieved the Performance Criteria of zero Overflow Events during the Typical Year;
- (d) summarize the data collected during the entirety of the 12-month post-construction monitoring period and include any new data relevant to the evaluation that Mishawaka did not previously Submit to EPA or IDEM;
- (e) evaluate whether Mishawaka has any Unlisted Discharges;
- (f) evaluate whether Mishawaka's remaining CSO Discharges, if any, comply with all applicable requirements in this Appendix A, the Clean Water Act, State Law, and Mishawaka's NPDES Permit;
- (g) if model or monitoring results show that Mishawaka's CSO Control Measures did not meet the Performance Criteria of zero Overflow Events during the Typical Year,
  - (1) identify and describe in detail deficiencies or performance-limiting factors in system design, process, operations, and maintenance that may have limited the ability of the CSO Control Measures to achieve their intended performance; and
  - (2) for review and approval by the United States and Indiana, Submit a plan and schedule for the construction or implementation of additional CSO Control Measures, alternative operating strategies, structural modifications, and additional processes necessary to meet the Performance Criteria of zero Overflow Events during the Typical Year.