STATE OF KANSAS
DEPARTMENT OF HEALTH AND ENVIRONMENT

In the Matter of:	)	
JOHNSON COUNTY WASTEWATER 11811 S. SUNSET DR. SUITE 2500 OLATHE, KANSAS 66061	)	Case No. 19-E-5 BOW
JOHNSON COUNTY - MILL CREEK KANSAS WATER POLLUTION CONTROL PERMIT NO. M-KS68-OO04 FEDERAL PERMIT NO. KS0088269	)	
JOHNSON COUNTY - NELSON KANSAS WATER POLLUTION CONTROL PERMIT NO. M-KS45-OO01 FEDERAL PERMIT NO. KS0055492	)	

CONSENT ORDER

Now on this 23rd day of October, 2019, the Kansas Department of Health and Environment ("KDHE") and Johnson County Wastewater ("Respondent" or "JCW") (collectively, the "Parties"), having agreed that settlement of this matter is in the best interests of the Parties and conducive to protection of public health and the environment, hereby represent and state as follows:

The Parties acknowledge that this Consent Order ("CO"), upon execution by the Secretary of KDHE ("Secretary"), shall be a final agency order. Respondent shall not contest the authority of the Secretary to issue this CO or any action by KDHE to enforce this CO. Respondent voluntarily and knowingly waives the right to an appeal or review of this CO and matters leading up to the execution of this CO under the Kansas Administrative Procedure Act ("KAPA"), K.S.A. 77-501, *et seq.* or the Kansas Judicial Review Act. K.S.A. 77-601, *et seq.* KAPA authorizes KDHE to enter into an informal settlement of this matter without the necessity of proceeding to a formal hearing, K.S.A. 77-505.

JCW has taken several steps to improve the collection system and individual treatment and pumping facilities, including: (a) community-wide planning, (b) upgrades of multiple treatment facilities to provide state-of-the-art treatment to improve dry weather treatment

performance and wet weather system performance, (c) sewer collection system optimization and renewal, and (d) prioritizing and coordinating system-wide improvements to deliver greatest environmental and community benefits at the earliest opportunity. Commitments by JCW in this CO reflect significant ongoing improvements to several of its wastewater plants and JCW's sewer collection system. Over the next 25 years, JCW's IP contemplates system upgrades and related investments approaching two billion dollars in cost.

The Secretary and Respondent deem that the Findings of Fact and Conclusions of Law in this CO are true and correct as related to the Johnson County Wastewater.

Findings of Fact

1. JCW owns and operates the following six wastewater treatment facilities and the collection systems that convey wastewater flows to these facilities:
    a. Blue River Main Sewer District No.1; Federal Permit Number: KS0092738
    b. Douglas L. Smith Middle Basin; Federal Permit Number: KS0119601
    c. Mill Creek Facility; Federal Permit Number: KS0088269
    d. Nelson Facility; Federal Permit Number: KS0055492
    e. New Century (Little Bull Creek Sewer Sub-District #2); Federal Permit Number: KS0119296
    f. Tomahawk Creek; Federal Permit Number: KS0100854

2. This Order is intended to address, as appropriate, JCW's entire sewer system.

3. The KDHE issued a National Pollutant Discharge Elimination System (NPDES), Kansas Water Pollution Control Permit Number M-KS68-OO04 for the Mill Creek Facility ("Mill Creek Permit") to the Respondent, with an effective date of January 1, 2014 and an expiration date of December 31, 2018.
    a. The Mill Creek Permit has been administratively extended and remains in effect until superseded by an approved permit.
    b. The Mill Creek Facility is adjacent to the Kansas River and the Mill Creek Permit authorizes discharges to the Kansas River subject to effluent limitations.

4. The KDHE issued a NPDES, Kansas Water Pollution Control Permit Number M-KS45-OO01 for the Nelson Facility ("Nelson Permit") to the Respondent, with an effective date of January 1, 2004 and an expiration date of September 30, 2006.

    a. KDHE drafted a renewed Nelson Permit and public noticed the permit on May 4, 2006, but to date, has not finalized that draft permit due to objections from the EPA.
    b. The Nelson Facility's collection system contains four peak excess flow treatment facilities (PEFTF) that had been referred to as Outfalls 002, 003, 004 and 005 in the Nelson Permit.

c. KDHE has administratively extended the Nelson Permit as issued in 2004, and it remains in effect until superseded by an approved permit.
d. The Nelson Facility is adjacent to Turkey Creek and the Nelson Permit, as it currently exists, authorizes discharges to Turkey Creek subject to effluent limitations.

5. On December 15, 2017, EPA approved KDHE's Lower Kansas River (area from Lecompton to Kansas City) Total Phosphorus Total Maximum Daily Load (TMDL). The TMDL states that phosphorus levels on the Kansas River are consistently high and sources of excessive nutrients are not being controlled within the basin to fully attain beneficial uses, including aquatic life, domestic water supply, and contact recreation. The TMDL includes wasteload allocations for the Mill Creek Facility and Nelson Facility.

6. On April 11, 2018, KDHE adopted revised criteria for ammonia aquatic life criteria that have or will result in more stringent ammonia effluent limitations in Kansas Water Pollution Control Permits, including JCW's listed above. The new criteria are adopted in the *"Kansas surface water quality standards: tables of numeric criteria,"* as adopted by reference in K.A.R. 28-16-28e for numeric criteria in Table 1c, *"pH and Temperature Dependent Values Aquatic Life Criteria for Total Ammonia Acute Criterion"*.

7. In addition to the ongoing improvements to the Tomahawk and Nelson Facilities, these and other regulatory requirements will require upgrades to the rest of JCW's treatment facilities. These upgrades are in addition to improvements to the sewer collection systems associated with JCW's treatment plants.

8. On April 26, 2016, KDHE and the Respondent entered into Consent Order 15-E-39 BOW that addresses the Tomahawk Creek WWTF Project Definition Phase Antidegradation Review results dated October 15, 2015 from the Respondent. The Consent Order requires the Respondent to construct a 19 Million Gallons per Day (MGD) Enhanced Nutrient Removal (ENR) facility in accordance with a schedule included therein. The Tomahawk Creek upgrade and schedule are included in JCW's IP attached hereto as Appendix A.

9. On June 5, 2012, USEPA published its Integrated Municipal Stormwater and Wastewater Planning Approach Framework ("Framework"). The stated purpose of the Framework is to "assist municipalities on their critical paths to achieving the human health and water quality objectives of the Clean Water Act by identifying efficiencies in implementing requirements that arise from distinct wastewater and stormwater programs, including how to best prioritize capital investments."

10. In January 2019, HR 7279, the Water Infrastructure Improvement Act of 2018 was enacted into law (Public Law No. 115-436). It codifies EPA's Integrated Planning (IP) framework, allowing communities and EPA to better prioritize their most pressing public health and environmental concerns efficiently and cost-effectively. The IP changes make clear that local governments may pursue integrated planning approaches via a permit or within the context of an administrative order. The language also expands the ability of a utility to prioritize wastewater and stormwater compliance obligations, as well as water reuse, water recycling, green infrastructure, and other innovative projects, over multiple permit terms.

11. KDHE staff and JCW's staff have met several times to discuss the optimal scheduling of the various system improvements required of JCW. As a result of these meetings it was agreed that an Integrated Plan (IP) would be developed to assist KDHE in determining the optimal scheduling of the various improvements and programs. Such IP would be incorporated into an enforcement document. The scheduling is designed to allow JCW to prioritize its achievement of regulatory requirements to deliver the greatest public benefits with each investment, also taking into consideration construction sequencing and other considerations

12. The Parties agreed that such an IP would be consistent with Public Law No. 115-436, which added Section 402(s) ("Integrated Plans") to the Federal Clean Water Act.

13. To that end, JCW has developed a phased Integrated Plan (attached as Appendix A), to identify, assess, and prioritize community environmental initiatives and investments, including the following wastewater improvements and programs:
    a. Regulatory or Capacity-Driven Wastewater Treatment Facilities Upgrades;
    b. Biosolids Management and Resource Recovery;
    c. Facility and Collection System Renewal and Asset Management;
    d. Facility and Collection System Operation and Maintenance;
    e. Infiltration and Inflow Reduction;
    f. Collection System Capacity Enhancement;
    g. System Expansion Providing Regional Service;
    h. Peak Excess Flow Treatment Facilities Interim Upgrades and Long-Term Elimination.

14. To facilitate the Department's establishment of optimal implementation schedules, this CO requires JCW to implement the phased IP, which is attached as Appendix A.

Conclusions of Law

15. On January 14, 2019, the Water Infrastructure Improvement Act of 2018 (H.R 7279) was signed into law. The bill amends the Clean Water Act (CWA) to allow municipalities to develop a plan that prioritizes and integrates wastewater, asset management, total maximum daily load implementation, stormwater, and other environmental program management and implementation (such as wastewater reuse and green infrastructure). In addition, the bill clarifies EPA's Integrated Planning process and provides legislative certainty to local communities seeking to develop an Integrated Plan to better manage costs and prioritize their clean water investments.

16. The Integrated Planning law encourages KDHE to work with communities to develop integrated plans and expressly allows those plans to be implemented through either NPDES permits or an enforcement mechanism such as this CO.

17. The KDHE is a duly authorized agency of the State of Kansas created by an act of the legislature. The Secretary has general jurisdiction over matters involving the environment and the public health of the people of Kansas, K.S.A. 65-101 *et seq.*, including general jurisdiction of matters involving the discharge of sewage, K.S.A. 65-161 *et seq.*

18. Pursuant to K.S.A. 65-164 *et seq.*, any person discharging wastewater or planning to discharge wastewater to waters of the State is required to obtain a KDHE-issued permit for such discharges. Such permits provide information about the permitted facility, operating and record keeping requirements and other conditions required pursuant to Kansas Statutes and Regulations. Requirements of the permit are enforceable under the authority of the Secretary of the KDHE (K.S.A. 65-101 and 65-164 *et seq.*) and the KDHE Director of the Division of Environment (K.S.A. 65-170 *et seq.*).

19. K.S.A. 65-161 states in pertinent part:

    (a) "Waters of the state" means all streams and springs, and all bodies of surface and subsurface waters within the boundaries of the state;

20. K.A.R. 28-16-28c(d) states in pertinent part:

    All effluent shall receive appropriate minimum levels of treatment in accordance with 40 C.F.R. 122.44, dated July 1, 2012.

21. K.A.R. 28-16-28e(d)(2) states in pertinent part:

    (A) Nutrients. The introduction of plant nutrients into streams, lakes, or wetlands from artificial sources shall be controlled to prevent the accelerated succession or replacement of aquatic biota or the production of undesirable quantities or kinds of aquatic life.

22. K.A.R. 28-16-28e(e) states:

> Tables. The numeric criteria for the designated uses of classified surface waters shall be the numeric criteria specified in the department's "Kansas surface water quality standards: tables of numeric criteria," dated December 15, 2017, which is hereby adopted by reference.

23. Based upon the above Findings of Fact, the Secretary concludes that the continued discharges from the Mill Creek Facility and Nelson Facility are not consistent with K.A.R. 28-16-28c (d), K.A.R. 28-16-28e (d)(2) and K.A.R. 28-16-28e (e).

ORDER

24. Based upon the above-referenced Findings of Fact and Conclusions of Law and pursuant to the authority vested in the Secretary of the Kansas Department of Health and Environment under the above referenced statutes, the Secretary hereby orders the Respondent, and the Respondent hereby agrees to comply with the following:

    (A) Implement the requirements of the Integrated Plan attached hereto as Appendix A in accordance with the schedules therein. The IP includes, among other items, the following:

    1. An evaluation of the Respondent's system-wide wastewater management needs and an identification, assessment, and prioritization of collection system and treatment plant improvements;

    2. The development of a long-range capital improvement plan prioritized based upon environmental and community benefits and costs, based on current understanding of system needs; and,

    3. Identification and prioritization of other environmental and/or public health improvements.

    4. Specific requirements related to the Mill Creek Facility are:

        a. An implementation schedule for nitrogen removal at this facility to achieve compliance with the final ammonia limits, and with the intent of meeting the annual average effluent total nitrogen goal of 10 mg/l.

        b. An implementation schedule for adding total phosphorus removal at this facility in order to achieve compliance with the final limits for total phosphorus of an annual rolling average load limit, as required by the EPA

approved Total Maximum Daily Load and Waste Load Allocation, of 156.63 lbs./day, and with the intent of meeting the effluent total phosphorus goal of 1.0 mg/l. Once effective, the limit will be a rolling 12-month average calculation.

5. Specific requirements related to the Nelson Facility are:

   a. An implementation schedule for nitrogen removal at this facility to achieve compliance with the final ammonia limits, and with the intent of meeting the annual average effluent total nitrogen goal of 10 mg/l.

   b. An implementation schedule for total phosphorus removal at this facility to achieve compliance with the final limits for total phosphorus of an annual rolling average load limit, as required by the EPA approved Total Maximum Daily Load and Waste Load Allocation, of 125.31 lbs./day, and with the intent of meeting the effluent total phosphorus goal of 1.0 mg/l. Once effective, the limit will be a rolling 12-month average calculation.

   c. An implementation schedule for peak excess flow treatment facilities (PEFTFs) located in the collection system of the Nelson Facility, previously referred to as outfalls 002, 003, 004 and 005 in the Nelson Permit. The IP includes an implementation schedule to address the PEFTF discharges. The IP also includes a schedule to improve PEFTF disinfection and dechlorination systems at each PEFTF during the interim period prior to elimination, to the extent practicable. JCW shall sample any PEFTF effluent for E. coli and total residual chlorine during each day that a PEFTF is discharging with a summary of sampling to be submitted to KDHE in the annual report.

25. The IP shall be the basis for subsequent agreed upon improvements and schedules between JCW and KDHE, with annual reports on progress provided to KDHE. Such reports shall be in addition to any other reports required by JCW's permits.

26. JCW shall submit the annual reports by January 31st of each year documenting the previous calendar year's progress of the scope of work in the Integrated Plan. The annual report shall include the following

    (A) Major work activities performed during the prior year;

    (B) A summary of any sampling results per discharge event from each PEFTF for E. coli and total residual chlorine;

(C) Any proposed updates to the approved Integrated Plan; and

(D) Major work activities planned for the next three years.

27. The Respondent will submit Integrated Plan updates for KDHE's review and approval at least every five years. Such updates shall be based upon greater system understanding, results of program and project implementation, and any updated program/project benefit evaluation. The first 5-year Integrated Plan update will be required no later than December 31, 2024.

28. KDHE-approved updates to JCW's IP shall become an enforceable part of this Consent Order.

29. Exhibits Incorporated. The following documents, as required, and any KDHE documents approving the following documents, are or shall be incorporated herein by reference:

    Appendix A: JCW's Integrated Plan dated September 2019, inclusive of all attachments and exhibits, including Table 7-1 and Figures 7-4 and 8-1.

30. KDHE Approval of Work and Documents. All activity contemplated or performed pursuant to this CO shall be conducted subject to the approval of KDHE in accordance with the terms of this CO and consistent with the standards, specifications, and schedules approved by KDHE.

    (A) All documents submitted to KDHE pursuant to this CO shall be considered draft documents until approved by KDHE.

    (B) Any documents, reports, plants, specifications, schedules and/or attachments required by this CO, upon approval by KDHE, and any KDHE documents granting such approval, shall be deemed incorporated into this CO by reference.

    (C) Upon KDHE approval, Respondent shall implement the tasks detailed in the documents in accordance with the corresponding implementation schedule.

31. The final approved Integrated Plan as it relates to the Respondent's regulatory obligations shall become an enforceable part of this CO.

32. The activities conducted pursuant to this CO are subject to approval by KDHE. The Respondent shall provide to KDHE all information requested by KDHE consistent with this CO.

33. The Respondent shall continue to operate the Mill Creek Facility and Nelson Facility in accordance with the applicable permits issued by KDHE.

Terms of the Settlement

34. The JCW agrees to comply with the terms of this CO. Failure to comply with the terms of this CO may subject the Respondent to further enforcement action as provided for under Kansas law.

35. **Additional Tasks May Be Required.** KDHE may determine that tasks may be required that are in addition to those specified in this CO. In the event KDHE makes such a determination, it shall notify Respondent in writing that additional tasks are necessary to meet the goals and objectives of this CO, to conform to applicable laws, and/or to protect public health, safety, and the environment. If such tasks are required, they shall be completed as specified by KDHE and within the timeframes established by KDHE. KDHE's issuance of written notice of additional tasks shall constitute a final decision subject to Paragraph XX dispute resolution of this CO.

36. This CO shall apply to and be binding upon the Parties, their respective agents, successors, and assigns. The Parties agree to undertake all actions required of them by the terms and conditions of this CO.

37. Notwithstanding the terms of any contract, the Respondent is responsible for compliance with this CO and for insuring that its contractors and agents comply with this CO.

38. This CO is meant to be a full resolution of the matters set forth herein.

39. **Liability.** Nothing herein shall be legally binding or have any effect on the position of the Parties on any matter that may be included in any other agreements negotiated between them. Neither the State of Kansas, nor any agency thereof shall be held out as a party of any contract entered into by the Respondent in carrying out activities pursuant to this CO.

40. **Force Majeure.** The following shall constitute the governing terms for force majeure, excusable delay, and modification of the CO.

    (A) Respondent shall perform the requirements under this CO within the time limits set forth herein unless the performance is prevented or delayed solely by events which constitute force majeure. For purposes of this CO, force majeure is defined as any event beyond the control of the Respondent which could not be overcome by due diligence and which delays or prevents performance by a date required by this CO. Such events do not include increased costs of performance or changed economic circumstances. Any delay caused in whole or in part by action or inaction by state or federal authorities shall be considered a force majeure event but shall not extend

the period of performance of the obligation required by the CO by more than the period of delay.

(B) Respondent shall have the burden of proving all claims of force majeure. Failure to comply by reason of force majeure shall not be construed as a violation of this CO.

(C) Respondent shall notify KDHE in writing within fourteen (14) days after becoming aware of an event, which the Respondent knew, or should have known, constituted force majeure. Such notice shall estimate the anticipated length of delay, its cause, measures to be taken to minimize the delay, and an estimated timetable for implementation of these measures. Failure to comply with the notice provision of this section shall constitute a waiver of Respondent's right to assert a force majeure claim for the period the notice was late and may be grounds for KDHE to deny the Respondent an extension of time for performance.

(D) Within seven (7) days of the receipt of written notice from the Respondent of a force majeure event, KDHE shall notify the Respondent of the extent to which modifications to this CO are necessary. In the event that KDHE and the Respondent cannot agree that a force majeure event has occurred, or if there is no agreement on the length of the extension, the dispute shall be resolved as set forth in Paragraph 35 of this CO.

(E) Any alterations to any schedule for performance or completion of a task required by this CO pursuant to this paragraph shall not alter the schedule for performance or completion of any other task required by this CO unless specifically agreed to by the parties in writing and incorporated into this CO.

41. **Modification**. This CO may be amended exclusively by written agreement of KDHE and the Respondent.

42. **Dispute Resolution.** The Parties recognize that a dispute may arise between them regarding implementation of the action to be taken as herein set forth or other terms or provisions of this CO.

(A) If Respondent disagrees, in whole or in part, with any final action or decision made by KDHE under this CO, Respondent may invoke dispute resolution, as follows: Respondent shall send written notice to the KDHE project coordinator stating the specific terms of the disputed KDHE action or decision, and shall provide copies of relevant information; KDHE must receive such notice within fifteen (15) days of the date of KDHE's final action or decision.

(B) Within thirty (30) days of receipt of any such notice of dispute from Respondent, KDHE and Respondent shall meet by telephone or in person to negotiate an

agreement on the matter in dispute. If the Parties cannot reach agreement by consent during this period, KDHE shall issue a brief written decision on the dispute. The final written decision or resolution shall be incorporated as a part of this CO. As authorized by applicable law, issuance of the final written decision under this subparagraph shall be deemed an "Order" as defined by K.S.A. 77-502(d) and shall trigger applicable time limits for requesting a hearing.

(C) In the event that Respondent seeks dispute resolution concerning a date for performance of an act set out in the CO or an incorporated document or submittal, the date for performance of such act shall be extended for a period equal to the delay resulting from the invocation of the dispute resolution provision. However, such extension does not alter the schedule for performance of completion of any other tasks required by this CO.

43. **Other Claims and Parties.** Nothing in this CO shall constitute or be construed as a release for any claim, cause of action, or demand in law or equity against any person, firm, partnership, or corporation not a signatory to this CO for any liability it may have arising out of or relating in any way to the subject violations alleged in this CO.

44. **Effective Date.** This CO shall become effective on the date that it is signed by the Secretary of the Kansas Department of Health and Environment.

45. **Termination.** This CO will be terminated upon written notice by KDHE to the Respondent that the requirements of this CO have been satisfied. Such notice shall not be unreasonably withheld by KDHE. KDHE reserves the right to unilaterally withdraw this CO for substantial non-compliance.

IT IS SO ORDERED AND AGREED.

KANSAS DEPARTMENT OF
HEALTH AND ENVIRONMENT
By:

Lee A. Norman MD

Lee A. Norman, MD
Secretary

10-23-19
Date

JOHNSON COUNTY WASTEWATER
By:

Signature

Susan D. Pekarek

Susan Pekarek, P.E.
General Manager

Oct. 21, 2019
Date

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 23rd day of October, 2019, a true and correct copy of the above and foregoing Order was placed in the U.S. Mail, postage prepaid, first class, return receipt and addressed to:

Susan Pekarek, P.E.
General Manager
Johnson County Wastewater
11811 S. Sunset Drive
Olathe, KS 66061

Brenda Sloop
Staff Member