

**BOARD OF DIRECTORS FOR CWA AUTHORITY, INC.**

**RESOLUTION NO. 3-2011**

**A RESOLUTION AUTHORIZING ENFORCEMENT OF VIOLATIONS AND ESTABLISHING AN ADMINISTRATIVE ADJUDICATION PROCESS FOR VIOLATIONS**

**WHEREAS**, the Department of Public Utilities of the City of Indianapolis ("City"), acting by and through the Board of Directors for Utilities (and on behalf of the utility special taxing district by the Board of Directors for Utilities) is vested by Indiana Code 8-1-11.1 with the power to own and operate utility properties of any kind within the City or outside the City within the limits authorized by law, and to own all utility property related or belonging thereto;

**WHEREAS**, pursuant to Special Ordinance No. 4-2010 and Special Ordinance No. 7-2010 (collectively, the "Ordinances"), the City and Citizens Energy Group ("Citizens") have entered into an Asset Purchase Agreement pursuant to which the transfer and delegation to, and vesting in and exercising by Citizens, of all of the powers, duties, functions and obligations of the District, the Department of Public Works and the Board of Public Works with respect to the wastewater system will be transferred to Citizens;

**WHEREAS**, CWA Authority, Inc. (the "Authority"), is an Indiana nonprofit corporation established pursuant to an "Interlocal Cooperation Agreement for the Provision of Utility Services (Wastewater)" (the "Interlocal Agreement") entered into among the Department of Public Utilities of the City of Indianapolis d/b/a Citizens Energy Group (Citizens"), acting by and through the Board of Directors for Utilities the City of Indianapolis (the "City") and the Sanitary District of the City of Indianapolis, acting by and through the Board of Public Works (the "District");

**WHEREAS**, pursuant to the Interlocal Agreement Authority possesses all the powers that are necessary, useful or appropriate to acquiring, owning and operating the wastewater system and/or having jurisdiction over disposal of sewage, including industrial wastes or other wastes; and

**WHEREAS**, such powers include the power to enact resolutions that have the force and effect of law and to enforce such and resolutions;

NOW THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS FOR CWA AUTHORITY, INC. AS FOLLOWS:

**Sec. 1. Definitions.**

As used in this resolution, the following terms shall have the meanings ascribed to them in this section.

- (a) "Board" means the board of directors of CWA Authority, Inc.
- (b) "Department" means CWA Authority, Inc.

(c) "Violation" means and includes a violation of one (1) or more of the resolutions of the board concerning:

- (1) unauthorized discharges;
- (2) industrial discharge permits; and
- (3) wastewater hauling.

(d) "Party" and "parties" means and includes the department and respondents.

(e) "Respondent" means a person to whom a notice of hearing is issued pursuant to section 4 of this resolution.

## **Sec. 2. General penalties for violations of resolutions.**

(a) Whenever in any resolution of this Board:

- (1) the doing of any act, or the omission to do any act or to perform any duty, is declared to be a violation of a resolution or resolutions adopted by the Board, or of any provision thereof, or is declared to be unlawful;
- (2) if there shall be no fine or penalty otherwise specifically prescribed or declared for any such violation, or for doing or for omitting to do any such act or to perform any such duty;

any person found to have committed any such violation shall be fined, by way of a penalty therefore, an amount not exceeding:

- (A) two thousand five hundred dollars (\$2,500) for the first violation, act or omission; and
- (B) seven thousand five hundred dollars ((\$7,500) for a second or subsequent violation;

in accordance with IC 36-1-3-8(a)(10)(B).

(b) In addition to the foregoing penalty, the Board may enjoin or abate any violation of a resolution by appropriate action.

## **Sec. 3. Prosecution; election by counsel for the department.**

In all cases where the same offense is made punishable or is created by different clauses or sections of a resolution, or of any additions thereto, counsel for the department may elect under which to proceed; but not more than one (1) prosecution and recovery shall be had against the same person for the same violation of any provision of a resolution actually constituting the same offense.

## **Sec. 4. Administrative adjudication provided.**

It is hereby declared to be the policy of the Board that violations may be subject to enforcement in administrative proceedings as provided in this resolution.

## **Sec. 5. Hearing officers; appointment and term; compensation; qualifications; conduct.**

(a) The administrative adjudication of a violation under this resolution shall be presided over by a hearing officer appointed by the Board. The Board may appoint more than one (1) hearing officer as necessary to address in an expeditious manner all violations pursuant to this a resolution. Nothing in this section shall automatically prohibit an individual who is an employee

of the department or the Board or an independent contractor associated with the department or the Board from being appointed or serving as a hearing officer.

(b) A person must have a minimum of two (2) years of legal and/or environmental experience to be appointed as a hearing officer.

(c) A hearing officer shall not preside over a hearing or approve a compliance agreement if the hearing officer believes he or she is subject to disqualification, or if by motion of any party it appears that the hearing officer is subject to disqualification, for:

- (1) Bias, prejudice, or personal interest in the outcome of a hearing;
- (2) Knowledge of a disputed evidentiary fact which might influence the decision;
- (3) Failure to dispose of any motion or hearing in an orderly and reasonably prompt manner after written request by a party; or
- (4) Any cause for which a judge of a court may be disqualified.

(d) Except as to the subjects of hearing schedules and procedures, a hearing officer who:

- (1) Comments publicly on a hearing over which the hearing officer presides; or
- (2) Communicates directly or indirectly with a party or other individual who has an interest in the outcome of a hearing, without notice and opportunity for all parties to participate in the communication;

is subject to disqualification under this section.

#### **Sec. 6 Notice of administrative hearing.**

(a) Whenever the department issues a notice of violation for an environmental violation under the rules of the board, the department shall issue a notice of administrative hearing as provided in this resolution.

(b) Service of notice of administrative hearing shall be by United States mail to the respondent's last known address, or by personal service. Service on an artificial person or a person incompetent to receive service shall be made on a person allowed to receive service under the rules governing civil actions in the courts. The department shall keep a record of the time, date and manner of service.

(c) The department shall cause a copy of each notice issued pursuant to this section to be delivered to the hearing officer who will preside over the hearing.

(d) Each notice of administrative hearing shall include the following information:

- (1) A caption for the hearing, which shall include the name of each party expected to participate in the hearing, and an official file or other reference number;
- (2) A statement of the date, time and place of the hearing;
- (3) A statement of the nature of the hearing, including the legal authority under which the hearing is to be held, and a summary of the parties' procedural rights at the hearing;
- (4) A statement of the date, time, place, and nature of each alleged violation, and the maximum penalty that can be imposed thereupon;
- (5) The official title and mailing address of the hearing officer and a telephone number through which information concerning the hearing may be obtained;

(6) The official title, mailing address and telephone number of the person who has been designated to appear on behalf of the department; and

(7) A statement that a party who fails to respond to the notice of the hearing, or to participate in the hearing, may be held in default.

(e) Notice of administrative hearing shall be issued at least twenty (20) days prior to the date of the hearing.

### **Sec. 7. Prehearing procedures.**

(a) Prior to the hearing, the hearing officer shall give the parties an opportunity to file documents or motions regarding matters such as continuances, discovery, and any other preliminary matters. At the time of filing, a party shall serve a copy of all filed items on each other party.

(b) Motions for continuance shall be filed no later than seven (7) days before the date assigned for the hearing, unless the reason therefor is shown by affidavit to have occurred within the seven-day period.

(c) The hearing officer, upon request by any party or upon the hearing officer's own initiative, may issue subpoenas and discovery orders in accordance with the rules of procedure governing subpoenas and discovery in judicial proceedings. The party seeking the subpoena or order shall cause them to be served in accordance with these rules of procedure.

(d) The hearing officer, upon request by any party or upon the hearing officer's own initiative, may direct the parties to negotiate a compliance agreement in accordance with section 6 in lieu of conducting a hearing. If the parties are unable to reach a mutually acceptable compliance agreement within a reasonable period of time, the hearing officer may proceed with hearing procedures.

### **Sec. 8. Compliance agreements.**

The parties may elect to negotiate a compliance agreement which establishes a program and schedule to attain and maintain compliance, penalties and other provisions necessary to ensure compliance. The compliance agreement shall take effect upon approval by the hearing officer.

### **Sec. 9. Hearing procedures.**

(a) The hearing officer shall afford all parties the opportunity to participate in the hearing to the extent necessary for full consideration of all relevant facts and issues. A party may present evidence in the form of testimony, affidavits and documentation, engage in argument, and conduct cross-examination. A party may participate in person or by counsel at the party's own expense; if the party is not an individual or is incompetent to participate, then the party shall participate by a duly authorized representative.

(b) The department shall have the burden of proving the environmental violation and the burden may be sustained by a preponderance of the evidence.

(c) The hearing officer shall conduct the hearing in an informal manner and without strict adherence to the technical rules of evidence and procedure which govern judicial proceedings. The hearing officer shall rule on the admissibility of any offer of proof, and on other motions, and shall exclude evidence that is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds. The testimony of each party and witness shall be made under oath or affirmation.

(d) The hearing officer may take official notice of any resolution of the board, and any law or fact that could be judicially noticed in the courts.

(e) The hearing officer shall cause an audio recording of the hearing to be made at the expense of the department.

#### **Sec. 10. Stipulated penalties.**

(a) The decision of the hearing officer or the compliance agreement approved by the hearing officer may require the payment of stipulated penalties if the terms of the decision or compliance agreement are violated.

(b) The stipulated penalties for each violation shall not exceed:

(1) two thousand five hundred dollars (\$2,500) for the first violation; and

(2) seven thousand five hundred dollars (\$7,500) for a second and subsequent violations; in accordance with IC 36-1-3-8(a)(10)(B).

#### **Sec. 11. Decision.**

(a) Upon the conclusion of each hearing or within a maximum of forty-five (45) days after conclusion of each hearing, the hearing officer shall render a decision which shall include a determination whether the respondent violated the resolution as alleged, the amount of civil penalty that must be paid for each violation with instructions on when and how payment shall be made, and a statement of the parties' right to petition for review of the decision.

(b) The hearing officer's decision may include an order affirming, modifying or revoking any order issued by the board with the notice of violation or directing the abatement or cessation of the action described in the notice of violation.

(c) The hearing officer's decision may include a compliance order, establishing a program and schedule to attain and maintain compliance, stipulated penalties, and other provisions necessary to ensure compliance.

(d) The decision shall be based exclusively upon the evidence of record in the hearing and on matters officially noticed therein. The hearing officer's experience and specialized knowledge may be used in the evaluation of the evidence.

(e) The hearing officer shall cause each decision rendered pursuant to this section to be memorialized on a minute sheet or similar written entry into the record. A copy of the minute sheet or similar written entry shall be served upon the parties by United States mail or personal service.

(f) A decision rendered pursuant to this section may be modified by the hearing officer who rendered it, upon the hearing officer's own initiative or by motion of any party. Any motion to modify a decision shall be filed by a party within thirty (30) days after the date of the decision.

**Sec. 12. Record of the hearing.**

The record of each hearing under this article consists of the following:

- (1) The notice of hearing;
- (2) The notice of violation, if any;
- (3) Any documents, motions, or exhibits filed or entered into evidence;
- (4) Any written orders, subpoenas, and decision of the hearing officer;
- (5) Any compliance agreement negotiated by the parties and approved by the hearing officer or issued by the hearing officer as part of the decision; and
- (6) The audio recording of the hearing and a written transcript of same;
- (7) and shall constitute the complete and exclusive record for review of a hearing officer's decision.

**Sec. 13. Written transcript of hearing; preparation and cost.**

At the written request of respondent, the department shall provide a written transcript of the audio tape recording of the hearing. Respondent shall pay the reasonable cost of preparing the written transcript, unless respondent files with the hearing officer under oath and in writing, a statement of indigency as described in IC 33-37-3-2. Respondent may cause to be prepared, at his own expense, a written transcript which the department shall review and certify as to accuracy.

**Sec. 14. Petition for review of decision**

A party may petition for judicial review of the final determination of the department under this section. The petition must be filed in the Marion circuit or superior court not more than thirty (30) days after the department issues its determination.

**Sec. 15. Effective date**

This resolution shall be effective:

- (1) upon passage by the Board and in accordance with the procedures outlined in CWA Resolution 1-2011; and
- (2) not earlier than the closing date on which the sale of the wastewater system to CWA Authority is effective.

**CWA Resolution 3-2011**

Adopted this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by a vote of  
\_\_\_\_\_ ayes and \_\_\_\_\_ nays.

CWA AUTHORITY, INC.  
BOARD OF DIRECTORS

\_\_\_\_\_  
President

Attest:

\_\_\_\_\_  
Secretary