

**BOARD OF THE METROPOLITAN SEWERAGE DISTRICT
SEPTEMBER 15, 1999**

1. Call to Order and Roll Call:

The regular monthly meeting of the Board of the Metropolitan Sewerage District was held in the Boardroom of MSD's Administration Building at 2:00 p.m., Wednesday, September 15, 1999. Chairman Selby presided with the following members present: Aceto, Blackburn, Bryson, Field, Graham, Pace, Sobol, Spell and Venable. Mr. Kelly was absent.

Others present were: W. H. Mull, General Manager, William Clarke, General Counsel, Gary McGill of McGill Associates, Tom Hartye, Jim Fatland, Stan Boyd, Ann LeMieux and Sondra Honeycutt, MSD.

2. Approval of Minutes of the August 18, 1999 Meeting:

Mr. Pace moved that the minutes of the August 18, 1999 meeting be approved as presented. Mr. Venable seconded the motion. Voice vote was unanimous in favor of the motion.

3. Discussion and Adjustment of Agenda:

Mr. Aceto asked if topics for the Planning Retreat would be discussed at today's meeting. Mr. Selby stated that this issue would be discussed under Committee Reports.

4. Report of General Manager:

Consolidated Motion Agenda

a. Consideration of Compensation Chart - Fairfax Avenue, AMP.

Mr. Mull reported that the Right of Way Committee recommends approval of the Compensation Chart for Fairfax Avenue, AMP, which is based on 1999 tax values.

b. Consideration of Compensation Chart for Trotter Place to Middlemont, AMP.

Mr. Mull reported that the Right of Way Committee recommends approval of the Compensation Chart for Trotter Place to Middlemont AMP, which is based on 1999 tax values.

c. Acceptance of Developer Constructed Sewer System - Oakbrook Phase 1 at Biltmore Park:

Mr. Mull reported that the Oakbrook Phase 1 project is located off Long Shoals Road adjacent to Interstate 26 and included installation of 1,543 linear feet of 8" sanitary sewer at an approximate cost of \$72,165.00. He further reported that staff recommends acceptance of the developer constructed sewer system and that all MSD requirements have been met.

d. Acceptance of Developer Constructed Sewer System - Jefferson Associates:

Mr. Mull reported that this project is located off of Brevard Road and included installation of 77 linear feet of 8" sanitary sewer pipe at an approximate cost of \$15,000.00 and that all MSD requirements have been met.

e. Acceptance of Developer Constructed Sewer System - Upper Grassy Meadows:

Mr. Mull reported that the Upper Grassy Meadows project is located off Riceville Road on Upper Grassy Branch Road and included installation of 835 linear feet of 8" sanitary sewer pipe at an approximate cost of \$28,000.00 and that all MSD requirements have been met.

f. Consideration of Monthly Investment Report for Period Ended July 31, 1999:

Presented as information only.

g. Consideration of Approval of Surplus Property List:

Mr. Mull reported that staff recommends approval of the Surplus Property List for Disposal and that the General Manager be authorized to enter into an agreement with the City of Asheville to participate in their annual auction. He further reported that the first item on the list (wall mount water cooler) will be deleted from the list and utilized in another location. He stated that these items will go through the City of Asheville auction process with all funds to be deposited into the District's "Replacement Fund" account.

With no discussion, Mr. Spell moved that the Board approve the Consolidated Motion Agenda items a. through g. as presented. Mr. Pace seconded the motion. Roll call vote was as follows: 10 Ayes; 0 Nays.

h. Consideration of Budget Amendment - Billing & Collections:

Mr. Mull reported that the Board, at the June 9, 1999 meeting, adopted a Budget Resolution, which included a Revenue and Expenditure line item for Billing and Collections in the amount of \$400,000.00. He stated that in order to ensure that the Expenditure Billing and Collection line item is equal to the Revenue Billing and Collection line item, the Board is asked to approve an increase or decrease in the annual budget in an amount necessary to reflect the actual billing and collections by the member agencies. Also, that the Amendment be entered in the minutes of the District. Following a brief discussion, Mr. Aceto moved that the Board approve the Budget Amendment as presented. Ms. Graham seconded the motion. Voice vote was unanimous in favor of the motion.

i. Consideration of Bids for Streets and Right of Way Restoration:

Mr. Mull reported that the following bids were received on August 24, 1999 for Streets and Right-of-Way Restoration following maintenance performed by the District: Paving Enterprises with a total base bid of \$311,190.06 and APAC with a total base bid of \$249,417.38. He further reported that staff recommends award of the bid to APAC subject to legal review. Regarding Bid Sheet #2, Mr. Aceto asked why the unit prices for items b, d, f and h are higher than those of Paving Enterprises, but where a lump sum amount is shown, APAC's bids are lower. Ms. LeMieux stated that the quantities shown are anticipated for the entire year. A brief discussion followed regarding the difference in square foot and lump sum costs; whether the bids were higher this year, and the number of bidders last year. With no further discussion, Ms. Graham moved that the Board approve the bid of APAC in the amount of \$249,417.38. Mr. Venable seconded the motion. Roll call vote was as follows: 10 Ayes; 0 Nays.

j. Consideration of Change Order for Current Contract with APAC:

Mr. Mull reported that the original contract with APAC in the amount of \$302,547.07, was approved by the Board on April 16, 1997 and the first change order in the amount of \$30,000 occurred on August 20, 1999. He further reported that this change order in the amount of \$30,000 is necessary in order for the System Services Division to complete their current work. He stated that this change order will increase the contract amount to \$362,547.07 and that funds are available in the FY 99-00 Operations Budget. With no discussion, Mr. Blackburn moved that the Board approve the Change Order with APAC in the amount of \$30,000. Ms. Bryson seconded the motion. Roll call vote was as follows: 10 Ayes; 0 Nays.

k. Consideration of Bids for Standby Generators - Pump Stations:

Mr. Mull reported that all but five of the District's pump stations have back-up power (generators) on site and that this project entails the procurement of two (2) portable 60 KW Generators to serve as a back-up power supply for these pump stations. He stated that the following bids were received on September 1, 1999: Carolina Power & Light Company with a total bid of \$55,016.00; King Service Group with a total bid of \$73,333.00 and Palmer Electrical Contracting, Inc. with a total bid of \$82,500.00.

He further reported that staff recommends that the District award the contract to Carolina Power & Light Company in the amount of \$55,016.00, contingent upon attorney review and approval. A discussion followed regarding the total number of pump stations; if the District currently has portable standby generators, and how long the pump stations will run without back-up power. Mr. Hartye stated that currently each pump station is equipped with dialers that call the plant when a system is down, but when the new SCADA/telemetry system is in place, the operators will be in constant communication with each system. With no further discussion, Mr. Blackburn moved that the Board award the bid to Carolina Power & Light Company in the amount of \$55,016.00, contingent upon attorney review and approval. Mr. Pace seconded the motion. Roll call vote was as follows: 10 Ayes; 0 Nays.

l. Consideration of Cost Participation Project: Sweeten Creek Apartments:

Mr. Mull reported that the proposed Sweeten Creek Apartment project involves the relocation and upgrade of a 6" sewer line crossing the property and will be done at the expense of the developer. He further reported that since the existing 6" line, off-site and downstream, has been identified as a future MSD rehabilitation project, and the development will add an additional flow of 10,100 GPD, the project has been pushed forward with the developer participating in 50% of the estimated cost of \$40,480.00. Mr. Spell asked whether the developer would do the engineering plans and bids for the offsite portion of the project. Mr. Hartye stated that the District will do the easements, engineering and bids on the project and the developer will reimburse the District 50% of the total costs. Ms. Graham asked whether the District's participation is based on a not to exceed amount of \$20,240.00, or on a participation basis up to 50% of the total costs. Following a brief discussion regarding the wording, Ms. Graham moved that the Board approve up to 50% of the cost of the project. Mr. Pace seconded the motion. Mr. Spell asked how this project would be funded. Mr. Mull stated that since this is not a major sewer rehab project, funds would come out of the CIP contingency line item for FY 99-00. With no further discussion, voice vote was unanimous in favor of the motion.

m. Consideration of Cost Participation Project - Wind Ridge Apartments - Mountain Housing Opportunities, Inc.:

Mr. Mull reported that the proposed Wind Ridge Apartment project at Eliada Home by Mountain Housing Opportunities, Inc would add 9,000 GPD to MSD's sewerline. He further reported that 2,325 linear feet of existing off-site (6") sewer needs to be rehabilitated/upgraded to an 8" line at an estimated cost of \$141,310.00. He stated that staff recommends that the District participate in the cost of this project in a not to exceed amount of \$70,655.00. Mr. Spell asked whether this project will go out for public bid. Mr. Clarke stated that since the District is spending less then \$100,000.00, advertisement for bid is not required. However, the District can make the public bid laws a condition of participation with private developers and public entities. He further stated that he would do some research on this issue and report back to the Board. With no further discussion, Ms. Graham moved that the Board approve the recommendation of staff. Mr. Pace seconded the motion. Roll call vote was as follows: 10 Ayes; 0 Nays.

n. Consideration of Proposed Cell Tower:

Mr. Mull reported that currently the District has a 100 foot radio tower that is no longer being used and is considering the lease of property to Crown Atlantic near the existing tower to build a monopole tower, provided the issuance of a Conditional Use Permit by the Town of Woodfin. He further reported that in return for the lease, Crown Atlantic will pay the District approximately \$1,200 per month and furnish space on the new tower for future use as needed. Mr. Sobol asked if Crown Atlantic can lease space on the new tower. Mr. Clarke stated that the Town of Woodfin may require that space be leased as a condition of the permit, but expressed a concern that the initial term of the lease is for 25 years, with three 25-year renewals. A discussion was held regarding the lease; how it compares with similar leases, and the number of connections that are allowed. Ms. Field stated that only three connections can be placed on the tower and that the District should negotiate for as much money as it can. She further stated that in her opinion the length of the lease is too long and suggested that if the District wants to look at marketing property for additional towers that it contact Metro Management (recommended by the League of Municipalities) to give a presentation on all aspects of the issue. Mr. Clarke stated the lease prohibits location of other towers on the property within a specified distance and from a standpoint of negotiations, it would be helpful to have some input from Mr. Spell on cost comparisons. Mr. Spell stated that other issues include the storage of equipment and provisions in the agreement for other services such as cell phones, pagers, etc. With no further discussion, Mr. Sobol moved that the Board approve proceeding with Crown Atlantic's application for a Conditional Use Permit with the Town of Woodfin and negotiation of the lease, with a recommendation to the Board on site development. Mr. Spell seconded the motion. Voice vote was unanimous in favor of the motion.

o. Consideration of Potential Grant to Replace Tile Roof on CP&L Building:

Mr. Mull reported that because the CP&L Building was approved for the "National Register of Historic Places", it is eligible for additional historic designations. He further reported that the District is applying for a Grant to replace the tile roof, which would be 75% of the difference in cost between the planned metal roof and cost to replace the existing tile roof with duplicate tile. He presented a letter from Architectural Resource Collaborative regarding

the cost of the tile roof and stated that the 25% cost split to the District is estimated at \$22,250.00, with a contingency of \$10,000.00. A discussion followed regarding the life of the tile roof compared to the metal roof and the cost estimates provided by the Architects. Mr. Selby suggested that the Construction Committee review the costs involved, with a recommendation to the Board and that a budget report be prepared. With no further discussion, Ms. Field moved that the Board approve submittal of the Grant Application. Ms. Graham seconded the motion. Voice vote was unanimous in favor of the motion.

p. Consideration of Declaration of Intent to Adopt Amendment to the Sewer Use Ordinance - Delegation of Permitting for Sewer Systems:

Mr. Clarke reported that Amendment of the Sewer Use Ordinance would allow the District to issue permits for extensions and additions to the Sewer System within the District's boundaries. He further reported that the technical portion of the District's Permitting Program has been approved by the State. Mr. Clarke asked that the Board adopt a Declaration of Intent to Amend the Sewer Use Ordinance as proposed with the following changes: Section 22.05 *Judicial Review*, second paragraph, line three, change the word "Wake" to "Buncombe", and Section 22.07 *Remission of Penalties*, last paragraph, line three, change "DGMO" to "General Manager". He stated that the Declaration of Intent (attached) and the proposed Amendment will be forwarded to each of the political subdivisions for comment and will become effective, including any changes suggested by the political subdivisions and agreed to by the District, sixty days after receipt by the political subdivisions. Mr. Aceto moved that Board approve the Declaration of Intent to Adopt Amendments to the Sewer Use Ordinance. Mr. Spell seconded the motion. Voice vote was unanimous in favor of the motion.

5. Committee Reports:

Right of Way Committee

Mr. Pace reported that the Committee met August 25, 1999 to discuss items previously presented in the Consolidated Motion Agenda. He further reported that in other business, the Committee reviewed the new Right of Way Policy Books, which were updated to add the Project Engineer's position and new procedures for notification to neighborhood associations. Also, the Committee discussed use of prescriptive rights.

Regarding the Quarterly Reports, Mr. Aceto asked why some condemnation amounts are considerably higher than the approved compensation amounts. Mr. Clarke stated that the approved compensation amounts are based on one-half the tax value while amounts deposited for condemnations are based on appraised values, which are generally higher.

Mr. Sobol asked if there is an update on the Kenilworth Project. Mr. Clarke stated that notices of condemnation were sent September 1, and that only one property owner has signed. A discussion followed regarding the time extension; the number of properties involved and re-routing of the project.

Planning Committee

Mr. Aceto reported that although the Planning Committee did not meet this month, the Board voted at the August meeting that time would be set-aside at today's meeting to discuss agenda items and format for the Planning Retreat. He

stated that for purposes of discussion, he recommends that the Board follow the consultants advice and devote a session to planning and consider issues such as how the Master Plan fits into the planning process. He suggested that the Consultants prepare a work session agenda for presentation at the October meeting, with the work session scheduled for late October.

6. Old Business:

Mr. Selby reported that he, Mr. Sobol, Mr. Mull and Mr. Clarke recently met with two members of the Avery Creek Sanitary District Board, along with their Attorney, Mr. Long and Engineer, Mr. Lyda. He stated that the purpose of the meeting was to discuss the Moratoriums that are in place and to reach some resolution as to the lack of contractual agreement between Avery Creek and the MSD. He further reported that the meeting concluded with the understanding that the District would receive comments regarding the Agreement and that the moratoriums would be lifted when some movement toward resolving the issue was made. He stated that since that meeting three developers have applied for allocations in Avery Creek, with a fourth planning to apply.

Mr. Mull reported that to date, nothing has been done; the agreement has not been looked at and grant applications have not be filed as suggested in their meeting. Mr. Clarke stated that in a conversation with Mr. Long, he promised that a response would be forthcoming. Mr. Mull stated that he expressed a concern to Mr. Padgett about lifting the moratorium prior to resolving the issue of the agreement. He further stated that he is not against growth, but the District does not want to continue with individual contracts. A lengthy discussion followed regarding available grant funds to assist Avery Creek in providing sewer to residential areas currently on septic service, and how the District should proceed in this matter. Mr. Clarke stated that he feels Avery Creek will sign the Agreement and the District should receive comments within the next couple of weeks. With no further discussion, Mr. Selby suggested that no action be taken until Mr. Clarke has received comments from Mr. Long.

In other business, Mr. Selby read a letter of appreciation from Mr. David Gray of Robinson-Humphrey regarding the Board and Staff involvement in the Series 1999 Revenue Bond Issue.

7. New Business:

Closed Session

At 3:50 p.m., Mr. Venable moved that the Board go into closed session to consider a personnel matter. Mr. Pace seconded the motion. Voice vote was unanimous in favor of the motion.

At 4:21 p.m., the regular meeting was reconvened.

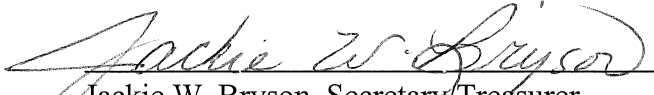
Mr. Spell moved that the Board accept the recommendation of the Grievance Committee upholding the termination of Donna Sharpe. Mr. Aceto seconded the motion. Voice vote was unanimous in favor of the motion.

8. Informal Discussion and Public Comment:

None

9. Adjournment:

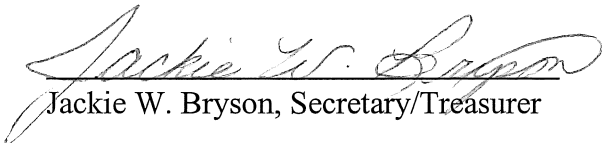
At 4:23 p.m., Mr. Blackburn moved for adjournment. Mr. Aceto seconded the motion. Voice vote was unanimous in favor of the motion.

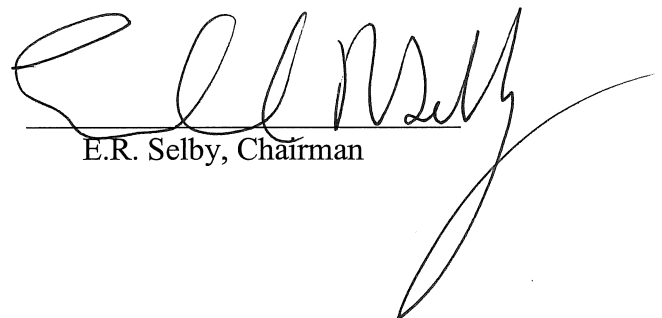

Jackie W. Bryson, Secretary/Treasurer

**DECLARATION OF INTENT TO ADOPT
AMENDMENT TO SEWER USE ORDINANCE**

The District Board of the Metropolitan Sewerage District of Buncombe County, North Carolina, hereby declares its intent to adopt an Amendment to the Sewer Use Ordinance of the Metropolitan Sewerage District. The purpose of the Amendment is to allow the District to become the permitting agency for extensions of and additions to the District Sewerage System. A copy of the proposed Amendment is attached to this Declaration of Intent.

Adopted by the District Board this fifteenth day of September, 1999.


Jackie W. Bryson, Secretary/Treasurer


E.R. Selby, Chairman

**SECTION 22 ORDINANCE TO ESTABLISH THE SEWER EXTENSION PERMIT
PROGRAM**

PERMITS FOR EXTENSIONS OR MODIFICATIONS OF THE SEWER SYSTEM

Section 22.01 Definitions

Unless the context specifically indicates otherwise, the following terms and phrases, as used in this Article, shall have the meanings hereinafter designated:

- (a) “Application” - means the form provided by MSD and completed by the Design Engineer responsible for preparing the plans and specifications.
- (b) “Commission” means the North Carolina Environmental Management Commission.
- (c) “DENR” means the North Carolina Department of Environment and Natural Resources.
- (d) “Director” refers to the MSD Manager of Engineering Services.
- (e) “District” or “MSD” shall refer to the Metropolitan Sewerage District of Buncombe County, North Carolina.
- (f) “Documents” includes writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained and translated if necessary through detection devices into reasonably usable form.
- (g) “General Manager” or “GM” refers to the chief administrative officer of MSD.
- (h) The verb “to include” in all its forms is used without limitation.
- (i) MSD Sewer System - shall mean the portion of the facilities owned by the District which are used to collect and carry wastewater to a Publicly Owned Treatment Plant but does not include such plant, pumping stations and force mains.
- (j) “MSD Standards” shall mean those standards set forth in a document entitled “SEWER EXTENSION MANUAL” dated _____, 19__ and as the same may be amended from time to time subject to the approval of the NCDENR.
- (k) “Permit” - means the written document issued by MSD, pursuant to this Section 22, describing the specific approved construction activity allowed, providing for operation of the facilities and conditions for construction and operation.
- (l) “Person” - means an individual, corporation, partnership, limited liability company or any other legal entity.

- (m) "Sewer Extension Policy" - a written policy adopted by MSD governing the extension of and additions to the MSD Sewer System, together with any amendments thereto.
- (n) "Sewer System" - shall be as defined in G.S. 143-213(15) or as the same may be amended from time to time.
- (o) "Stop Work Order" - means an order issued by the General Manager or his designee to stop construction of a sewer system due to a violation or risk of immediate violation of this ordinance.

Section 22.02 Permits for Extension or Modification of the Sewer System

- (a) No person shall do any of the following things or carry out any of the following activities concerning a Sewer System which is proposed to become a part of the MSD Sewer System or modify any existing portion of the MSD Sewer System unless such person shall have applied for and shall have received a permit from MSD:
 - (1) Construct or operate any Sewer System;
 - (2) Alter, extend, or change the construction or method of construction of any Sewer System; or
 - (3) Enter into a contract for the construction and installation of any Sewer System or for the alteration or extension of a Sewer System.
- (b) Any person proposing to undertake any activity described in sub-section (a) of this Section shall make timely and proper application on such form(s) as may be prescribed by the Director and provide such information as may be required by the Director. MSD shall not undertake any activity set forth in sub-section (a) of this Section unless MSD first complies with the provisions of this Section. A copy of all applications for permits subject to this Section and of all approved permits and plans (including applications and related documents submitted by MSD) shall be provided to the DENR.
- (c) All Sewer Systems proposed for inclusion in the MSD Sewer System and all proposed modifications to any existing portion of the MSD Sewer System shall be designed, constructed and installed in conformance with the MSD Standards and in accordance with the Sewer Extension Policy. The plans and specifications for Sewer Systems shall be prepared by or under the direct supervision of an engineer licensed to practice in North Carolina. The Director shall maintain a copy of the current MSD Standards for public inspection.

No modifications to the MSD standards shall be effective until approved in writing by NCDENR. Connection to the MSD Sewer System by a system that will not be

maintained by the District shall not be subject to the provisions of this section, however, the District reserves the right to regulate the flows from such systems.

Section 22.03 Processing of Applications

- (a) Each application for a permit shall be accompanied by a fee in the amount which would apply, if the application were being submitted to DENR under such schedule or fees as it may establish. A copy of the current fee schedule for DENR shall be maintained by the Director and made available for inspection upon request. Any application not accompanied by a fee in the proper amount may be considered incomplete.
- (b) MSD shall review the fee, plans, specifications and other project data accompanying an application and shall determine if the application and accompanying material are complete and in a form acceptable to MSD. MSD shall acknowledge receipt of a complete application.
- (c) The Director shall take final action on all applications not later than 90 days following receipt of a complete application. All permits shall be issued in writing. A permit may include such conditions as the Director determines to be reasonably necessary, considering the MSD Sewer System, the MSD Standards, the Sewer Extension Policy, and the applicable laws, rules, and regulations.
- (d) If the application is not complete, the application shall be returned to the applicant. MSD shall advise the applicant in writing:
 - (1) How the application can be modified to make it complete and acceptable; and
 - (2) That the time for MSD to take final action on an application does not begin until receipt of a complete, corrected application.
- (e) Any permit issued by MSD pursuant to Section 3 is subject to revocation or modification upon 30 days written notice by the Director in whole or in part for good cause including, but not limited to:
 - (1) Violation of any term or condition of the permit;
 - (2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts;
 - (3) Refusal of the permittee or its contractors, agents or employees to allow authorized employees of MSD, upon presentation of credentials, to inspect or observe any activity, facility or other work required by the permittee's permit.

- (f) The denial of an application for a permit subject to the provisions of this Section shall be made in writing and shall contain each reason for the denial and a statement of the changes in the applicant's proposed activities or plan which will be required in order that the applicant may obtain a permit. Nothing in such statement shall preclude or otherwise bar MSD from denying a permit which incorporates such changes, based upon changed circumstances or information not previously known by MSD.
- (g) A notice of revocation or modification issued pursuant to Section 3 (e) shall contain the reason(s) for the revocation or modification.

Section 22.04 Enforcement

- (a)
 - (1) Any person who violates, fails to comply with or continues to violate any provision of Section 22.02 or a permit issued thereunder, shall be liable to the MSD for a maximum civil penalty of Ten Thousand Dollars (\$10,000), per violation for each day the violation(s) continue. Each day on which a violation(s) occurs or continues shall be deemed a separate and distinct offense. In determining the amount of any civil penalty, the MSD shall take into account all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the magnitude and duration of the violation, any economic benefit resulting from the violation, efforts to correct the violation, the compliance history of the person against whom the violation is assessed, cost of enforcement to the MSD, including reasonable attorneys' fees, whether the violation was committed willfully or intentionally, and such other factors as justice may require.
 - (2) MSD shall provide written notification to any person assessed a civil penalty of the assessment and the reasons therefor. The written notification shall be served by Certified Mail.
- (b) If any person violates the provisions of Section 22 or the terms or conditions of any permit issued pursuant thereto, or fails to pay a civil penalty, a civil action may be commenced in the General Court of Justice in the name of the District for such legal and equitable relief as may be appropriate.
- (c) The remedies provided herein are not exclusive. The MSD may take any one, all or any combination of these actions against any person in violation of this ordinance.

Section 22.05 - Administrative Review; Judicial Review

- (a) *Right to Administrative Review.* The following persons are entitled to administrative review: (1) any applicant denied a permit or any permittee whose permit is made subject to conditions which are unacceptable to the applicant; (2) any permittee that has received

notice that its permit has been suspended, revoked, or modified; and (3) any person assessed a civil penalty pursuant to Section 12-108(c).

Any person entitled to administrative review pursuant to this Section 22.05 shall serve a demand for administrative review on the Director within thirty days of the date of service of the notice of the action complained of, or the administrative review shall be deemed waived. The demand must be in writing and must be served on the General Manager by mail or by delivery to the MSD administrative offices.

- (1) For the administrative review to consider the denial of a permit, the applicant must identify separately each reason for denying the permit that the applicant contends to be improper and every basis for such contention;
- (2) For the administrative review to consider a permit granted subject to unacceptable conditions, the applicant must identify separately each unacceptable condition and every basis for such contention;
- (3) For the administrative review to consider the modification or revocation of a permit, the permittee must state separately each reason for modifying or revoking the permit that the permittee contends to be improper and every basis for such contention;
- (4) For the administrative review to consider a civil penalty assessment, the person to whom such penalty was assessed must state separately each reason why such penalty should not be assessed, or if the person contends that the civil penalty was assessed in an improper amount, each reason why the amount of the penalty is improper.

The person seeking review shall be deemed to have waived the right to raise any reason, basis, or allegedly improper condition that is required to be stated in the demand for review unless it is specified in the demand.

- (b) *Nature of Administrative Review; Procedure.* The administrative review shall include a hearing conducted by the General Manager or some other unbiased person designated by the General Manager (the "Hearing Officer"). The person seeking review may appear personally and through representatives and may arrange for persons with pertinent knowledge to provide information to the Hearing Officer. The hearing shall be held and a decision issued by the Hearing Officer within ninety (90) days of the receipt of the written demand for administrative review. If the hearing is to consider the suspension, modification, or revocation of a permit, the Hearing Officer shall attempt, but is not required, to hold the hearing and issue a decision within thirty (30) days of the receipt of the written demand for a hearing. The Hearing Officer may affirm, reverse, or modify the action appealed from and shall serve notice of the decision on the person who sought the hearing. If the person who sought the administrative review is dissatisfied with the decision and desires to preserve the right to judicial review, then such person must serve

the Hearing Officer within ten (10) days of the date of the decision with a “notice of dissatisfaction and request for findings.” Within fifteen (15) days of the service of said Notice of Dissatisfaction, the Hearing Officer shall prepare and shall serve on said person, by regular mail or by hand delivery, Findings with respect to the decision. The Hearing Officer’s decision, including findings if any, shall constitute the final decision of MSD.

- (c) *Transcript of Administrative Review Hearing.* The Hearing Officer may, and if requested by the person seeking review shall provide for any part of the hearing to be recorded. The Hearing Officer may select audio, video, or writing as the means of recording. A transcript of any hearing, or part thereof, which is recorded need not be prepared unless requested. If the person seeking review requests that a transcript be prepared, MSD shall arrange for the preparation, and the person seeking review shall bear the preparation cost. If a transcript is prepared, a licensed court reporter shall prepare the transcript, unless all parties and MSD agree otherwise. MSD shall require the person seeking review to post an advance deposit sufficient to defray said cost. If the person seeks judicial review in Superior Court, said person shall provide the original transcript to MSD at no cost to MSD.
- (d) *Judicial Review.* Any person who had a right to administrative review pursuant to Section 22.05 may petition for judicial review, if any only if, such person exhausted administrative review, including giving a “notice of dissatisfaction and request for findings.” For purposes of the right to petition for judicial review, making a remission request pursuant to Section 22.05 shall not be considered part of administrative review. If the person made a request for remission of a civil penalty pursuant to Section 22.07, there shall be no judicial review of the civil penalty.

Judicial review shall be had by filing a written petition within thirty (30) days after the service of the Hearing Officer’s Findings regarding the action complained of, but not thereafter, with the Superior Court of Buncombe County. The petition shall specifically and with particularity state the grounds for claiming that the decision of the Hearing Officer is contrary to law. If not previously requested, said person shall request in writing, at or before the date of filing, the petition with the Superior Court, that a transcript be prepared for every part of the administrative hearing that was recorded. A copy of the petition shall be served on MSD in the manner required by law. Within thirty (30) days after service of a copy of the petition upon MSD or such other time as may be ordered by the Court, MSD shall prepare and transmit to the Court the original or a certified copy of the official record of the hearing as hereinafter set forth. Unless MSD and the persons seeking judicial review agree otherwise, the official record of the administrative hearing shall include:

- (1) the documents presented by the petitioner at the administrative hearing;
- (2) the documents considered by the Hearing Officer in reaching the decision complained of;

- (3) the decision and Findings of the Hearing Officer; and
- (4) the transcript of each part of the hearing that was recorded, if available at the time the remaining portion of the official record is transmitted to the Court. If the transcript is not available at that time, it shall be transmitted to the Court as soon as reasonably possible after the transcript has been prepared.

Except to the extent otherwise required by law, the judicial review shall be limited to contentions properly raised in the administrative review. The General Manager shall have the authority to settle and compromise, on behalf of MSD, any of said proceedings filed in the Superior Court.

Section 22.06 Permits Not Transferable

Permits issued pursuant to this Article are issued to a specific applicant. A permittee may not assign, transfer, or sell a permit, or any right or obligation in a permit, to another person.

Section 22.07 Remission of Penalties

- (a) (1) The GM may consider petitions for remission of civil penalties assessed pursuant to this Article. A petition for remission shall be in writing and shall be signed by the person against whom the civil penalty was assessed. The petition shall include: a waiver of any and all rights of the petitioner to a hearing and judicial review of the assessment; and a stipulation that the facts are correct as set forth in the documents assessing the civil penalty. The decision of the GM on the petition shall be final and shall not be subject to further administrative or judicial review. In determining whether a petition for remission will be approved, the GM shall consider the following factors:
 - (A) whether one or more of the factors concerning the assessment of a civil penalty in Sec. 4(a) were wrongly applied to the detriment of the petitioner;
 - (B) whether the petitioner promptly abated continuing environmental damage resulting from the violation giving rise to the assessment;
 - (C) whether the violation giving rise to the assessment was inadvertent or the result of an accident;
 - (D) whether the petitioner has been assessed civil penalties for any prior violations pursuant to this Article or by any State or Federal authority enforcing substantially similar provisions;

- (E) whether payment of the civil penalty by the petitioner will prevent payment for any remaining, necessary remedial action.
- (2) After submitting a petition for remission, the petitioner shall provide such additional information and records as may be reasonably necessary or convenient to the GM consideration of the petition. The GM may remit the entire amount of a civil penalty only when the petitioner has not been assessed civil penalties for any prior violation of this Article or by State or Federal authority enforcing substantially similar provisions and the payment of the civil penalty will prevent payment of any remaining, necessary remedial action.

Section 22.08 Effective Date

This ordinance shall take effect on January 1, 2000, provided that prior to said date this ordinance shall have been approved by the North Carolina Environmental Management Commission and by DEHNR in accordance with applicable law.