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Re: United States et al. v. Board of County Commissioners of Hamilton County and the City of Cincinnati, D.J. Ref. 90-5-1-6-341A.

An Obligation without a Deadline is a Nullity

Pursuant to their public comment rights under 28 CFR 50.7, the Sierra Club and Marilyn Wall submit these public comments in the matter of United States et al. v. Board of County Commissioners of Hamilton County and the City of Cincinnati, D.J. Ref. 90-5-1-6-341A. The comments concern the United States Environmental Protection Agency's ("US EPA") proposed modification ("Proposed Modification")[1] of the Global Consent Decrees[2] ("Global Decree").

The purpose of the Global Decree is to stop the sewage discharges from the huge number of illegal sanitary sewer overflows ("SSOs") and combined sewer

[1] The term "Proposed Modification" as used in these Comments includes the proposed changes to the Global Decree and the conditionally approved changes to the "Wet Weather Improvement Program" ("WWIP") that are being offered for inclusion in the Global Decree.

[2] "Global Decree" refers to the Interim Partial Consent Decree on Sanitary Sewer Overflows ("SSO Decree") and the Consent Decree on Combined Sewer Overflow, Wastewater Treatment Plants and Implementation of Capacity Assurance Program Plan for Sewer Overflows ("CSO Decree"). The SSO Decree and CSO Decree were entered by the Court on June 9, 2004.

overflows (“CSOs”) that plague the area covered by Hamilton County and Cincinnati’s Metropolitan Sewer District (“MSD”).[3]

To remedy decades of MSD inaction on stopping these repeated violations of the Clean Water Act (“CWA”), the United States District Court for the Southern District of Ohio (the “Court”), insisted on enforceable deadlines in the Global Decree. The MSD’s obligation under the Decree is to eliminate SSOs and CSOs as “expeditiously as practicable, but in no event later than February 28, 2022.”[4] (both aspects of the deadline are collectively referred to as the “2022 deadline”) This 2022 deadline is in sharp contrast to the earlier proposed 2002 Interim Partial Consent Decree ("IPCD"), which did not include ***enforceable deadlines and which was never approved by the Court until it was incorporated into the Global Decree and its 2022 deadline.*** The Court expressly noted the 2002 IPCD’s deadline deficiency when it labeled the 2002 IPCD as an "illusory” agreement.[5]

By this basic standard the Proposed Modification of the Global Decree would render two thirds of the Global Decree’s deadline obligations to be a nullity.

Since the Global Decree was approved by the Court in 2004, *all* of the projects covered by the Decree have been subject to a 2022 deadline. The Proposed

[3] “MSD” or “Defendants” collectively refer to the Metropolitan Sewer District of Greater Cincinnati, the City of Cincinnati, and the Hamilton County Board of County Commissioners.

[4] The 2022 deadline is subject to a $1.5 billion reopener, discussed below on p.4 herein.

[5] The Court found the 2002 IPCD illusory in that there were no fixed dates or enforceable rights establishing who would provide relief to those affected. August 23, 2005, Opinion and Order (Doc. 144) at p. 32.

Modification purportedly meets the deadline for only one third of the Decree's projects ("Phase 1"). What is more, the Proposed Modification merely requires the MSD to submit a ***schedule*** for the remaining two thirds of the projects ("Phase 2"), instead of obligating the MSD to *complete* the projects by a firm deadline. Further, MSD's obligation to submit a Phase 2 schedule is inexplicably extended for an ***additional eight years***. [6]

In addition, the one third of the Decree that *appears* to still be within the 2022 deadline is subject to "reopeners" and/or other barriers to expeditious compliance that call into question when Phase 1 projects will ever be completed.[7] Among others, these reopeners or barriers to expeditious compliance include the following:

- If MSD has underestimated the cost of the Lower Mill Creek Partial Remedy ("LMCPR" or "Tunnel") at $244 million and later projects that this major project will cost more than $350 million, then construction can be delayed to an uncertain date;

[6] The eight year period coincides with the expiration of the City/County joint MSD operating agreement.

[7] Two changes discussed below are proposed amendments to the actual text of the Global Decree (i.e., the provisions allowing Defendants to submit the Phase 2 Schedule in "sub-phases" and placement of the WWIP schedule into the Decree). The remaining reopeners and fallacies discussed in these comments are provisions in the conditionally-approved Wet Weather Improvement Program ("WWIP"). An approved WWIP will be incorporated into the Global Decree and will therefore become part of the Global Decree. Thus, phrases such as "in conformance with the terms of the [Global Decree]" will not prevent abusive practices memorialized in the WWIP.

- If the PTI for the Tunnel is not approved by Ohio EPA with conditions acceptable to MSD, then the scheduling and construction of the Tunnel or a substitute LMCPR may be further delayed to an uncertain date;
- If there is a mere suggestion that somehow MSD's performance of Phase 1 projects might conflict with bond covenants negotiated by MSD, then Phase 1 projects can be further delayed; and
- Misapplication of the Residential Indicator guidance so that MSD artificially reaches the threshold level of financial capability before completing Phase 1 projects.

At the fairness hearing in 2004, the Sierra Club made the Court aware that ***the MSD had already estimated*** that the range of cost for the MSD to comply with the CWA would be ***from $1.1 billion to over $3 billion***.[8] The Sierra Club also predicted that the $1.5 billion proposed reopener in the Global Decree would lead to an extension of the 2022 compliance deadline.[9] The Court was given many assurances by the other parties that the reopener would not necessarily lead to an extension of the 2022 deadline and that all projects would have to be completed as expeditiously as practicable within the applicable deadline.[10] Indeed, the scope and urgency of the MSD's violations was acknowledged by the US EPA in 2004 by both the US EPA and

[8] See May 25, 2004, transcript (Doc. 132-4) at p. 155. See also May 25, 2004 transcript (Doc. 132-2) at pp. 67-68, Leslie Allen, Counsel for the United Stated stating "[T]he defendants have cost estimates ranged from 1.2 billion to 3.6 billion dollars for compliance. The 1.2 billion was at the low end." See also May 25, 2004, transcript (Doc. 132-3), Peter Murphy, counsel for Hamilton County and the City of Cincinnati stated that "[E]stimates have ranged between 1.5 billion to 3.6 billion."

[9] See May 25, 2004, transcript (Doc. 132-4) at pp. 146 and 168.

[10] See e.g. May 25, 2004 Hearing on the Motion for Entry of the Consent Decree (Doc. 132-4), transcript at p. 169.

the DOJ.[11] Attorney Pritchard labeled the MSD sewer overflow problems "one of the largest, if not the largest throughout the country." [12]

Since the scope of the MSD's problems and the cost to fix them were recognized in 2004, these factors, alone, do not explain the Proposal. It is fair to ask what has changed between the Court's 2004 approval of the Global Decree and today that would provide any basis for such a radical change in the Decree. ***The US EPA and its hired consultants acknowledge that the driving force behind the proposed changes to the Global Decree is the economy and the bond market.*** The decisions about the proposed changes were made during the 6-month period -- from October 2008 through March, 2009 -- when money was flowing out of the municipal bond market and the economy was on the verge of collapse. [13] During this period, the US EPA hired a bond market professional. Despite the dire conditions at the time, she found positive signs emerging in the economy and the bond market and ultimately projected a two-year recovery period. As noted below, that is likely to be an overly conservative prediction.

During the post-November 2008 discussions between the MSD and the US EPA, the US EPA reversed its November 25, 2008 position – i.e., that a short term crisis

[11] Gary Pritchard, Counsel for the United States, said the following: "Both the combined sewer overflows and sanitary sewer overflows are clear violations of the Clean Water Act." May 25, 2004 Hearing on the Motion for Entry of the Consent Decree (Doc. 132-1), transcript at pg. 18. Leslie Allen, counsel for the United States, said that "CSOs discharge over 6 billion gallons of untreated water and the SSOs contribute hundreds of millions of gallons…" May 25, 2004 Hearing on the Motion for Entry of the Consent Decree (Doc. 132-2), transcript at p. 79).

[12] At the May 25, 2004 hearing (Doc. 132-1) Gary Pritchard, said the following: "[I] know there are very few communities out there that have the significant numbers of overflows and volumes of overflow that approach those in Hamilton County. I mean, that is one of the largest. If not the largest, it's certainly one of the very top in terms of numbers of overflows throughout the country." (Transcript at p. 45).

[13] See Goldman Sachs' chart on p.8 herein.

should **not** lead to the sacrifice of firm deadlines.[14] The rationale behind US EPA's November 2008 decision would therefore only support a short Phase 2 delay in scheduling.

To attempt to better justify the extreme nature of the Proposed Modification, the US EPA adopted MSD's circular argument that it would be harder for the MSD to issue and sell bonds if the projected $3.2 billion cost of the fix required by the CWA was under ***firm, enforceable schedules*** of completion that apply to the Phase 2 projects. Hence, the proposal calls for elimination of the Phase 2 deadlines. To the Sierra Club this is tantamount to saying that one of the biggest sewer-related problems in the country is too large to be subjected to an enforceable schedule of firm deadlines for fixes.

The DOJ, the US EPA, and the Court should not allow short-term uncertainties to be used to permanently unravel enforceable obligations for two-thirds of the projects required by the Global Decree. Further, control of the Decree should not to be placed in the hands of third parties that have a close relationship with the MSD[15] and the Decree should not be changed to incorporate the series of fallacies, noted below, that mask the true ability of the MSD to stop the CWA violations as expeditiously as practicable.

The Sierra Club submits that a **two-year** delay in establishing deadlines for the remaining two thirds of the projects (i.e., Phase 2) is more than sufficient to evaluate the economic recovery and to require the submission of schedules and project completion deadlines that are enforceable.

[14] November 25, 2008 U.S. EPA disapproval letter to MSD.

[15] Such as MSD's own bond underwriters.

The Eight-Year Delay is Unjustified

There has been no demonstration as to why a lengthy ***8-year*** delay in scheduling any of the remaining two thirds of the overflow fixes is required. The CWA provides no exemption from its requirements during periods of economic downturn.

In November 2008 the Regulators[16] found that schedule adjustments based on uncertain economic conditions in the future are not "as expeditious as practicable," and rejected an "economic firewall" proposed by MSD.[17]

Even assuming *arguendo* that economic and bond market conditions could be appropriate reasons to delay the scheduling of any Phase 2 fixes, short-term economic and bond market conditions fail to support substantial delays in the long-term plan.

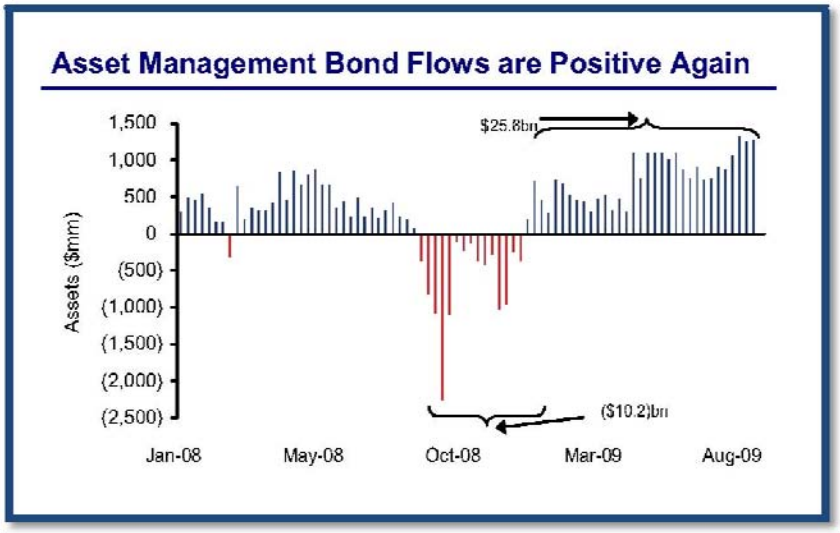
The economy and the bond market continue to show improvement. As early as January 30, 2009, U.S. EPA's financial consultant noted the following positive signs: (a)"[E]ven in the face of recession and the associated state and local fiscal distress, water and sewer ratings have been trending up;" (b) "[I]t is likely that the relationship between the tax-exempt and taxable markets will gradually move in the direction of their historic norms;" (c) "[T]he market disruption seen in the last half of 2008 should not persist;" (d) "We expect that any permanent upward shift in the relative cost of tax-exempt funds as compared to taxable borrowing to be relatively modest;" and (e) "[I]ssuers have been able to maintain high ratings while implementing large capital plans

[16] The term "Regulators" refers to the United States/U.S. EPA, State of Ohio, and the Ohio River Valley Water Sanitation Commission.

[17] See November 25, 2008, U.S. EPA disapproval letter to MSD, p. 10, attached as Exhibit A.

and managing a significant degree of uncertainty regarding regulatory demands." Consistent with these noted positive developments in the bond market, US EPA's financial consultant, continues to find positive signs in the bond market. In June 2009, she opined that in two years the bond market would be closer to the norm.[18] Consistent with this opinion, in August 2009, she estimated that recessionary conditions would last about another year with the bond market conditions lagging behind to adjust to the economic improvement.[19] She also noted that the bond market for borrowers was showing steady but modest improvement.[20]

The following chart, supplied by the US EPA's bond professional, illustrates the condition of the bond market at the time the Modified Proposal was developed and the current trend.



Source: Goldman Sachs, August 2009 Market Update

[18] June 16, 2009, US EPA's financial consultant, Renee Boicourt's comments during phone conference with Sierra Club counsel and counsel for the United States.

[19] August 27, 2009 US EPA's financial consultant, Renee Boicourt's comments during phone conference with Sierra Club counsel and counsel for the United States.

[20] Id.

At a July 27, 2009 Hamilton County Commission meeting that was open to the public, MSD and/or their consultants represented that (a) the market for issuing bonds was a good one; (b) that MSD was selling the strongest type of revenue bonds in the market; (c) traditional relationships are back between tax and tax exempt bonds; and (d) that there are more investors through the "Build America" Bonds program (which is part of a stimulus bill that allows tax-exempt issuers to issue "Build America" taxable tax-credit bonds). The audio of the Hamilton County Commission meeting can be found at http://www.hamiltoncountyohio.gov/hc/bocc_meetings.asp.

Further, according to an August 5, 2009 analysis by Fifth Third Institutional Services, the financial picture in July 2009 was one of "continued easing of pressures" for the economy, corporate balance sheets and financial markets. Some of the areas where this was evident are in the bullet points below:

- Leading Economic Indicators index was higher for three consecutive months in June – something that had not occurred since 2004.
- S&P / Case Shiller home price index for 20 major metropolitan areas increased in May after falling for 34 consecutive months. In addition, New Home Sales and Existing home Sales both increased more than expected in June.
- Monthly job losses have moved from -741,000 in January to -419,000 in April; to an expected -350,000 decline in June. In addition, initial weekly unemployment claims fell from a high of 674,000 that last week of March to 584,000 this last week of July.
- S&P 500 profits for the second quarter are beating expectations from 3 out of 4 companies – the largest such ratio ever seen, while capital raised by companies needing to do so are being placed successfully.
- Record U.S. Treasury issuance of new debt continued to be absorbed with little impact on yields.
- Stocks saw a fifth consecutive month of gains.

While the bond market impacts the cost of MSD's borrowing, MSD is borrowing incrementally throughout the WWIP. Therefore, most of the borrowing over the long-term will not be subject to *current* bond market conditions. In other words, any increased costs in the current bond market only affects the funding for the limited subset of projects for which the money is borrowed. Accordingly, even if one were to assume that the bond market should be considered in developing a date to submit a proposed schedule, there is no need for wholesale lengthy delays in scheduling Phase 2 projects when most are not subject to today's bond market conditions.

The foregoing facts underscore the wisdom of the Sierra Club's proposal to defer the Phase 2 schedule for two years, as opposed to eight years, to confirm the recovery of the bond market throughout those two years, and to consider expanding Phase 1 in the interim, all in recognition of the fact that an approvable WWIP should have been submitted to the US EPA in 2006. Unfortunately, the Proposed Modification includes a series of additional reopeners and affordability fallacies that should not be approved as submitted. Individually and collectively these provisions will allow the illegal discharges to continue and obliterate the enforceability of the deadlines in the Global Decree.

Phase 2 Reopener

Tying Phase 2 Implementation to a Single Phase 1 Project

Implementation of Phase 2 projects (which amount to two-thirds of the projects in the WWIP schedule) is tied irrationally to a project in Phase I – the Tunnel.

The provision at issue, found at Par. B.4. of the WWIP (Doc. 355-3, page 10 using the Clerk's pagination), provides:

> If, between the date that Defendants submit a proposed Phase 2 Schedule to the Regulators and the date that Defendants complete construction of the LMCPR, ***the costs of the LMCPR increase substantially beyond the costs used in calculating the RI in support of the proposed Phase 2 schedule such that there is a substantial effect on the Phase 2 schedule, Defendants may submit to the Regulators a proposal to modify the Phase 2 schedule to account for the cost increases, as long as the proposed modified schedule remains as expeditiously as practicable.***

(emphasis added). Thus, implementation of Phase 2 projects could be further delayed if Defendants underestimate *by* ***an undefined amount[21] the cost of one project***. No basis for delaying Phase 2 projects based on a single Phase 1 project is offered. Further, such a provision is inconsistent with the aims of the CWA, to eliminate illegal discharges of pollutants to the nation's waters. Accordingly, Phase 2 implementation should not be tied to a Phase 1 project; rather the Phase 2 schedule should be submitted in two years and have firm deadlines that are not tied to the costs associated with a Phase 1 project.

The WWIP permits Defendants to only submit a partial Phase 2 schedule in 8 years.

Under the WWIP, at ¶ B.1.b. and the Proposed Modification, Defendants are not required to submit a complete schedule for all Phase 2 projects by June 30, 2017. Rather, Defendants may submit the Phase 2 schedule in at least two "sub-phases", ***with Defendants specifying the date by which the second phase of the schedule must be submitted***. Yet, Defendants may further delay scheduling Phase 2 by

[21] The WWIP and Proposed Modification do not define terms such as "substantially" and "substantial."

breaking down the second part of the Phase 2 schedule (referred to as Phase 2B) into additional scheduling subparts, if they demonstrate it is "necessary to avoid severe financial hardship."

Simply stated, there is no firm deadline by which Defendants must submit a complete Phase 2 schedule. If there is no firm deadline for a Phase 2 schedule, then obviously there is no firm deadline for Phase 2 project implementation. A WWIP that defers the Phase 2 schedule for eight years to potentially arrive at only a partial Phase 2 schedule is not in the public interest, is not "as expeditious as practicable," and will only serve to further delay CWA compliance. Therefore, the Regulators should remove this provision from the Proposed Modification and instead require that Defendants submit, in two years, a complete schedule that includes firm deadlines.

Phase 1 Reopener

Further, the proposed December 31, 2018 completion date for Phase 1 projects is not a firm deadline due to reopeners in the WWIP.

The LMCPR or Tunnel is a project in Phase 1 that is expected to reduce untreated CSO discharges by two billion gallons per year.[22] MSD presently estimates the cost of the Tunnel to be $244 million. This particular project has a completion deadline of December 31, 2018 in the Phase 1 schedule. However, due to three openers, completion of the Tunnel by that date is doubtful.

[22] See June 5, 2009, U.S. EPA conditional approval letter to MSD, p. 5.

First, if MSD demonstrates that the projected costs of the Tunnel will exceed $300 million, then MSD has the "right" to extend the schedule for an additional two years. (Doc. 355-3, Par. A.2.c.). Second, MSD may seek more than two years from the Regulators if MSD demonstrates that the Tunnel will cost more than $350 million, that more time is necessary, and that the requested schedule is as expeditious as practicable. (Id.)

There has been no demonstration that the current $244 million MSD estimate for the Tunnel, which serves as the baseline for the $300 million and $350 million reopeners, is valid. Past experience in this case shows that it is hazardous to make future cost projections without a valid factual foundation. Most notably, the Global Decree has a reopener for the requirement to complete construction of all projects by 2022 if the costs are expected to exceed $1.5 billion (in 2006 dollars). As the Sierra Club attempted to explain at the fairness hearing, there was no valid foundation for the $1.5 billion reopener in the Global Decree. Yet, this reopener resulted in substantial delays in the WWIP schedule and decree implementation. The Proposed Modification should not repeat this error.

Further, even if the $244 million estimate was a reasonable projection, there has been no demonstration as to the validity of the $300 million or $350 million reopeners. In fact, even if one assumes a conservative 2.5% inflation rate, adjusting the $244 million estimate for inflation, alone, is likely to trigger one or both of these reopeners before the Tunnel is completed.

Finally, in the third reopener, if MSD's Permit to Install is not granted and a substitute LMCPR is required, then scheduling and construction of the LMCPR

(including $244 million or more Phase 1 dollars) may be delayed beyond the December 31, 2018 Phase 1 projected completion date to an uncertain date. The Regulators, in part, approved MSD's plan because of their desire to have the Lower Mill Creek addressed in Phase 1. Yet, this permit opener allows MSD to address the Lower Mill Creek in later phases.[23]

These reopeners should be removed from the Proposed Modification in order to make the December 31, 2018 date a firm deadline for Phase 1 completion.

The "Adaptive Plan Alterations" Reopener

Another opener is found In Paragraph C.2. of the conditionally-approved WWIP. The language of this provision is so broad that the entire Phase 1 and/or Phase 2 schedule could be altered under "Adaptive Management." The "other matters" language places no limitation on what Defendants (e.g., the entire schedule) could seek to modify or what the Regulators could approve under this provision. Further, the provision makes any approved modification, no matter the scope of such modification, effectively unreviewable. While it is understandable that there would be a provision for necessary changes based on unforeseen events, the scope of this provision is unacceptably broad in the context of what has transpired in the past several decades in Hamilton County, Ohio. Therefore, the Regulators should narrow this provision and provide for public and/or judicial oversight of any such modification.

[23] Moreover, a economic moral hazard is created. If MSD wants to delay the WWIP all it needs to do is submit a defective PTI application, obtain a PTI denial and extend the schedule. This perverse incentive interferes with expeditious compliance. It should not be in the Global Decree.

Bond Covenants Should Not Be a Reason for CWA Violations to Continue During Any WWIP Phases.

While the above Phase 1 and Phase 2 reopeners will delay compliance with the CWA, the Proposed Modification impermissibly allows bond convents to do the same. Bond covenants provisions should not be used to determine whether compliance will be achieved under the CWA or under the Global Decree. The conditionally-approved WWIP contains a bond covenant provision that applies to all phases in the WWIP. The Global Decree, which is intended to bring MSD into compliance with the CWA, should not make a bond funding provision more important than protecting human health and the environment. Lenders are not charged by Congress with regulating water quality. While the Regulators regulate water quality issues, they do not regulate bond convent issues falling outside their area of regulatory expertise.[24]

Aside from the above-described fundamental problems with any bond covenant provision in the WWIP or Global Decree, the bond covenant provision fails to address Sierra Club's concerns about the economic "moral hazard" in accepting bond covenant provisions that remove MSD's incentive to bargain for less restrictive covenants because MSD will be able to cut back on the WWIP program. The language does not address the Sierra Club's concern:

> The Regulators and Defendants do not presently expect the implementation of the WWIP will cause Defendants to violate their existing bond covenants. However, because of the expected

[24] For the same reasons, the proposed WWIP requirement to consider Defendants' financing in the tax exempt market to determine what is "as expeditiously as practicable" for Phase 2 projects is inappropriate. See June 5, 2009 Final WWIP U.S. EPA approval letter, Appendix A, WWIP, p. 6.

> significance of a violation of bond covenants, **if fact**s or circumstances arise that **suggest that implementation of the WWIP may result in Defendants violating their bond covenants, Defendants may submit to Regulators a request for a modification of the WWIP** as necessary to avoid violating their bond covenants.[25]

Defendants can seek this delay if they believe that the facts "suggest that implementation of the WWIP may result in Defendants violating their bond covenants." It is alarming that WWIP and CWA obligations can be avoided at the mere suggestion that that there might be a conflict with bond covenants. As written, this provision is not expressly limited to only existing bond covenants. There is also an unsupported assumption that any bond covenant issues in the future would be solely attributable to WWIP expenditures, as opposed to other MSD program expenditures, MSD's failure to adequately raise sewer rates, or MSD's desire to save additional money in its Surplus Fund.

Fallacies Associated with and the Misapplication of the "As Expeditiously As Practicable" Standard.

In addition to the above Phase 1 and 2 reopeners and the bond convent provision, other barriers to expeditious compliance arise through the proposed WWIP's attempt to define "as expeditiously a practicable" in setting a Phase 2 compliance schedule for projects. The WWIP definition and MSD's misapplication of the "as expeditious as practicable standard" are inconsistent with the CWA.

> *Uncertain impacts on Defendants' financing ability should not determine when sewer overflow violations are remedied.*

The Proposed Modification allows delays through a WWIP provision requiring that the "as expeditious as practicable" determination be based in part on "the impact

[25] June 5, 2009 Final WWIP U.S. EPA approval letter, Appendix A,p. 9-10.

that the ***cost and length of the schedule*** of Phase 2 will have on Defendants' financing in the tax exempt market." [26] (emphasis added) This reopener impermissibly authorizes delays in stopping CWA violations based on uncertain future conditions in the bond or financial market. Similar to bond covenant issues, the Regulators also should not make compliance decisions based on matters outside their area regulatory area of expertise.

> *WWIP projects should not be delayed by reopening debate on cost/benefit issues to determine the obligation to stop Clean Water Act violations.*

In determining what is "as expeditiously as practicable" in Phase 2, the proposed WWIP also expressly requires consideration of "[l]ocal and national experience with time, cost, economics and practicability of CSO/SSO program implementation." [27] The hazard of this provision is that it allows MSD to delay WWIP projects, violate the CWA, deviate from the Financial Capability Guidance, and be treated differently than the rest of the regulated community. While cost/benefits analyses are generally appropriate when legislation is being developed, it is inappropriate to use a consent decree to reopen congressional debates. Here Congress has spoken through the Clean Water Act. The CWA expressly **prohibits** CSO and SSO overflows. Unwarranted delays through reopening debates interfere with the diligent prosecution of these violations. Given that Hamilton County has one of the largest, if not the largest overflow problems in the country, there can hardly be any debate that these overflows must be eliminated.

[26] June 5, 2009 Final WWIP U.S. EPA approval letter, Appendix A, WWIP, pg. 6.

[27] June 5, 2009 Final WWIP U.S. EPA approval letter, Appendix A, WWIP, pg. 6.

Lessening MSD's obligations through the proposed provision given these circumstances is especially inappropriate.

Failure to consider what is technically feasible in determining what is "As Expeditious as Practicable."

Technological feasibility, among other factors, must be considered in determining what it is "as expeditiously as practicable." While the WWIP requires consideration of the US EPA Financial Capability Guidance and other specific economic/financial considerations, the WWIP has no specific provision requiring the consideration of technological feasibility. MSD has presented no schedule that identifies how long it would take to perform **all** the fixes based on technical and engineering feasibility. Although the Regulators in November 2008 rejected a proposed minimum 30 year schedule as not being technically "as expeditious as practicable,"[28] the Proposed Modification accepts an incomplete schedule with no end date in sight. Instead of starting with a schedule based on technical and engineering feasibility and then making adjustments based on certain financial considerations as the Regulators advised MSD in November 2008, this Proposed Modification simply dispenses with the consideration of technical feasibility. Without a specific provision requiring the consideration of technological feasibility, the Sierra Club is concerned about this factor continuing to be ignored in the scheduling of projects.

Fallacies and Misapplication of the Residential Indicator

Inflating the Residential Indicator through Allowances and Asset Management

[28] See November 25, 2008 disapproval letter to MSD, p. 10, attached as Exhibit A.

The conditionally-approved WWIP skews the Residential Indicator analysis by factoring in unsubstantiated, large values for Asset Management[29] and Allowances.[30] The result is that MSD's financial capability is artificially lowered so that MSD stops performing additional WWIP projects. As the Regulators' acknowledge, four of the eight programs referred to as "Allowances" [31] are not included or even referenced in the Global Decree.[32] Nonetheless, the Proposed Modification allows **all** of these programs in the Residential Indicator Analysis. The inclusion of all of these programs in the Residential Indicator Analysis has not been justified. This unwarranted adjustment serves as an additional barrier to compliance because it artificially inflates the Residential Indicator and makes it appear as though MSD has less financial capability than it actually has. Further, this reopener is not contemplated by the U.S. EPA Financial Capability Guidance.

Likewise, the Proposed Modification's inclusion of $51 million in Asset Management as a default input into the Residential Indicator Analysis is not supported. MSD has not explained why $51 million dollars in Asset Management should be a

[29] Asset management generally refers to an approach to the long-term management of assets as tools for the delivery of services. In simple terms, it is the management of assets involving the cost to operate and maintain the MSD sewer system. The proposed WWIP defines it as "those same expenditures by MSD that are not formally considered WWIP projects or Allowance expenditures." Asset Management budgets are submitted as part of annual capital budgets. See Proposed Final WWIP at p. 11.

[30] Allowances are MSD programs that are generally intended to address water quality and overflow issues. Proposed Final WWIP at p. 12.

[31] In addition to the projects required to bring the Defendants' sewer system into compliance, the WWIP also includes eight programs referred to as "Allowances." The four programs that are referenced in the Global Consent Decree include the Water-in-Basement, Sewer Relining, Manhole Rehabilitation, and Rainfall Derived Infiltration and Inflow Programs. The other Allowance programs which are not even referenced in the Consent Decree include the Home Sewage Treatment System Elimination Program; the Urgent Capacity Response Program; and the Defendants' Sustainable Infrastructure Program or "Green Program."

[32] June 5, 2009, U.S. EPA approval letter to MSD, p. 5.

default input in the Residential Indicator Analysis. Instead, Sierra Club suggests that each time an input for Asset Management is used in the Residential Indicator, the Regulators and Sierra Club should review that input for reasonableness. There should be no "default" input. Additionally, the WWIP in the Proposed Modification contains an ambiguous clause that allows MSD to seek to increase this default value if it is "necessary." This allows MSD to potentially divert even more funds from its "pot of money" available for WWIP projects. Finally, while the proposed WWIP has this express provision to increase Asset Management, there is not a like corresponding provision to reduce expenditures on Asset Management.

Additionally, the $51 million set-aside for Asset Management closely resembles the $50 million "minimum surplus" fund balance "firewall" that the Regulators ***rejected*** in November 2008. In that firewall, MSD sought to delay WWIP projects if MSD's minimum surplus fund dipped to $50 million. The Regulators found that MSD failed to offer convincing support for this firewall. Further, the Regulators noted that the firewall was largely dependent on Defendant's willingness and ability to manage and increase revenues. Finally, the Regulators also noted the following concern, which applies to the Asset Management and Allowances set-a-sides in the Proposed Modification:

> **[T]he Regulators are concerned, given Defendants' assertions about lack of financial capability, that Defendants propose to spend so much money on Asset Management, 'Allowances**,' and Green Infrastructure **without sufficient plans proposed at this juncture as to how much will be spent on which particular projects and when**. . . .Without a more detailed proposal for each of these categories of expenses, **it is not appropriate to 'reserve' such large amounts of money to be spent on as yet unspecified projects that may not be as environmentally beneficial as the**

'grey projects' that have been selected and listed for implementation to address specific CSOs and SSOs.

Reserving large amounts of money for Asset Management and Allowances leaves limited funding for WWIP projects. For example, in 2010, Assessment Management and Allowances would account for over $82.5 million in spending alone.[33] Reserving so much money for these programs diverts funding from WWIP projects no matter how beneficial they may be in addressing CSOs and SSOs. If the Residential Indicator is triggered, it will likely be because of spending on Asset Management and Allowances - not the WWIP. There is no reason why Asset Management and all eight programs in the Allowances should take priority over WWIP projects. The mechanisms that the Regulators plan to use to monitor the expenditures in the Asset Management and Allowances programs are so undefined that they will not allow for effective regulatory oversight or judicial review. Based on the Sierra Club's attempts to work with MSD to obtain information to track WWIP, Asset Management, and Allowance expenditures and the status of projects, obtaining information for effective oversight is an extremely difficult, if not an impossible, task. Much of the critical information is kept in a disorganized and/or disjointed manner. This interferes with timely tracking of the progress and spending of these programs. The result is a lack of accountability and MSD effectively being able to operate without oversight or judicial review. MSD should not be able to run its own show given the magnitude and duration of the CWA violations.

[33] See U.S. EPA June 5, 2009 conditional approval letter, Appendix A, p. 8 and Attachment 4 of Appendix A.

MSD should be, and is capable of, doing more Phase I projects.

Under EPA's Financial Capability Guidance MSD can and should do more than what it has proposed in Phase 1. The costs associated with Phase 1 measures is below the "high burden" level specified in EPA's Financial Capability Guidance. In Appendix C of the Regulators' conditional WWIP approval, the Regulators noted the Sierra Club's concern that the costs associated with Phase I measures equate to a Residential Indicator of approximately 1.7%, which is below the 2% "high burden" level specified in the Guidance. However, under EPA's Financial Capability Guidance, the Regulators asserted that it is necessary to evaluate a community's financial capability and establish a scheduling approach based on the costs of the entire remedial measures program that the specific community will be required to implement, not just a portion of those measures. Consequently, the Regulators concluded the scheduling approach must account for the fact that the Residential Indicator for the entire WWIP is substantially above the 2% "high burden."

However, the Regulators' approach fails to consider income at the end of the WWIP (twenty plus years into the future). This is what the Guidance requires. By failing to consider income at the end of the WWIP in accordance with the Guidance, the Regulators have made an invalid assumption that there will be no income growth in the next twenty plus years. However, for a portion of the program (i.e. Phase 1), the Guidance allows a comparison to today's income. That is why it is entirely appropriate to conclude that MSD is not paying at the "high burden" level for Phase 1 and to require more under the Guidance. As a result, MSD has not scheduled as many WWIP projects in Phase 1 as it should be given MSD's financial capability.

Sewer Overflow Deadlines in the Face of Pandemic

With the concern about an economic crisis, it is easy to lose sight of the importance of stopping raw sewage from escaping into the environment. According to the US EPA:

> A pandemic is a global disease outbreak. A flu pandemic occurs when a new influenza virus emerges for which people have little or no immunity, and for which there is no vaccine. The disease spreads easily person-to-person, causes serious illness, and can sweep across the country and around the world in very short time. In June 2009, the World Health Organization declared a global H1N1 influenza pandemic.[34]

Long before the discovery of the danger of the H1N1virus, the record of this case explained the relationship between the Global Decree and public health:

> The issues presented on this appeal are important to Rivers Unlimited [[35]] because sanitary sewer overflows (SSOs) release ***untreated,*** highly damaging sewage into the areas and waters that Rivers Unlimited seeks to protect and revitalize.
>
> The illegal SSOs, which were and are the main focus of the Sierra Club in the district court, circumvent the Clean Water Act's (33 U.S.C. §1251, et. seq.) (CWA's) secondary treatment requirements. Secondary sewage treatment is necessary to protect public health. Allowing discharges of inadequately treated sewage from a municipality's publicly-owned sewer system at SSOs expands health threats to the public from waterborne pathogens.[36] Researchers from

[34] Draft 2009 US EPA: Office of Water. "Pandemic Influenza Fact Sheet for Water Sector."

[35] [Rivers Unlimited is an Ohio not-for-profit group of organizations and individuals founded in 1972. Its mission is to restore, maintain and improve Ohio's rivers and streams, their water quality, their scenic beauty, their multiple economic uses and their effect upon Ohio's quality of life. The organization works directly with groups in Hamilton County to protect the Little Miami, Great Miami, Mill Creek and the Ohio River by eliminating threats from, among other issues, illegal sewer overflows.]

[36] Waterborne disease outbreaks are generally preceded by wet weather events, and pose a serious threat to public health. (See Frank Curriero, Jonathan Patz, Joan Rose & Subhash Lele, *The Association Between Extreme Precipitation and Waterborne Disease Outbreaks in the United States, 1948-1994*, in 91 *American Journal of Public Health* 1194 (August 2001)).

the Centers for Disease Control (CDC) have estimated that as many as 940,000 Americans become ill and 900 die from waterborne infections each year.[37] EPA has estimated that between 1.8 and 3.5 million Americans become sick every year just from swimming in waters contaminated by sanitary sewer overflows.[38]

Public health impacts of inadequately treated sewage.

Although advances in water treatment have eliminated major outbreaks of typhoid fever and cholera in the U.S., the threat to public health has not been eradicated. It has merely evolved…

Scientists foresee a growing threat in the future from human exposure to sewage-contaminated waters. "Pathogenic bacteria have evolved defense mechanisms that make their destruction increasingly more difficult. This is the ultimate challenge confronting wastewater treatment specialists of the future. Given the fact that pathogenic microorganisms have the remarkable ability to adapt and to survive, it follows that advanced biological treatment [is not only necessary], but will have to evolve and to adapt as well."[39]

Importance of biological treatment for waterborne pathogen control.

Not only has biological treatment of wastewater been required by law in the United States for the past 30-plus years, but science has shown that it is vital to protecting human health.[40] Unlike primary treatment and disinfection, biological treatment is *very* effective at removing viruses and other pathogens from wastewater. Studies have shown that the activated sludge process generally removes at least 90% of viruses from raw wastewater.[41] Follow-up disinfection removes an

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[37] J. Bennett, et al., *Infectious and parasitic diseases*, in *Closing the gap: the burden of unnecessary illness* 102 (Robert Amler & H. Bruce Dull eds., Oxford University Press 1987).

[38] U.S. EPA, *Preamble to Proposed Sanitary Sewer Overflow Rule* 20-21 (January 2001)

[39] Frank R. Spellman, *Microbiology for Water/Wastewater Operators* 133 (Technomic Publishing Co., Inc. 2000).

[40] Although primary treatment plus disinfection successfully removes *some* pathogens (primarily bacteria), it is not consistently effective in removing viruses or protozoa. Further, "viruses are protected from most chemical treatment processes because of the very nature of their own chemical composition. Protozoans and helminths are also often able to resist destruction." Spellman, Microbiology for Water/Wastewater Operators at 138.

[41] Otis J. Sproul*, Removal of Viruses by Treatment Processes* in *Viruses in Water* 174 (Gerald Berg, Howard Bodily, Edwin Lennette, Joseph Melnick & Theodore Metcalf, eds., American Public Health Assoc., Inc. 1976); Gabriel Bitton, *Wastewater Microbiology* 162,164 (Wiley-Liss, Inc. 1994) (reporting field studies showing removal rates for viruses between 90% and 99% for activated sludge processes).

additional 50% of viruses remaining in the biological treatment effluent, for a total removal of 95%.[42] Scientists estimate that between 50%-90% of gastrointestinal illnesses are viral, not bacterial.[43]

If waste water treatment experts face these challenges when treating sewage *at* sewer treatment plants, it is chilling that Hamilton County Metropolitan Sewer District's (MSD's) reported and unreported SSOs discharge highly dangerous sewage ***without any treatment***. It is disquieting that it took a citizen suit and an intervention by the Sierra Club and Marilyn Wall to obtain specific recognition of these acute SSO dangers in the final consent decree and final order issued by the district court. Likewise, it is disturbing that the National Association of Clean Water Agencies' (NACWA) (a trade group for municipal sewer authorities) argues in its Amicus Brief (NACWA Brief) that the CWA exempts water-in-basement SSOs (WIB-SSOs), which are *directly tied* by pipes to the MSD's publicly owned treatment works (POTW).

The Sierra Club suggests that the magnitude of the public health threat has been overlooked by the Proposed Modification. Thirty years of MSD's avoidance and delay needs to be addressed with the urgency, not unnecessary reopeners.

If there are any questions regarding these comments, please contact D. David Altman at D. David Altman Co., L.P.A. (513-721-2180).

Sincerely,

Marilyn Wall

Marilyn Wall
Secretary, Sierra Club Board of Directors

cc: Gary Prichard, USEPA Region V
Leslie Allen, US DOJ

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[42] Sproul, *Removal of Viruses by Treatment Processes* at 175-176.
[43] *See generally* Gunther F. Craun, *Statistics of Waterborne Outbreaks in the U.S. (1920-1980)* in *Waterborne Diseases in the United States* 108, 110-112 (Gunther F. Craun, ed., CRC Press, Inc. 1986).