



Hamilton County

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VIA OVERNIGHT DELIVERY

July 20, 2018

Mr. Patrick Kuefler, Chief
Water Enforcement and Compliance Assurance Branch (WC-15J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Re: Phase 2 Wet Weather Improvement Program Schedule
United States, et al. v. Board of County Commissioners of Hamilton County, OH, et al.,
Case No. 1:02CV107, U.S. District Court, Southern District of Ohio

Dear Mr. Kuefler:

Thank you for your letter of July 17, 2018. Your letter accurately quotes certain sections of the Consent Decree on Combined Sewer Overflows, Wastewater Treatment Plants and Implementation of Capacity Assurance Program Plan for Sanitary Sewer Overflows ("Consent Decree") entered by the U.S. District Court for Southern District of Ohio on June 9, 2004, and the Final WWIP approved by Regulators in August 2010.

However, your letter misses the most important point on this subject: the Board of County Commissioners for Hamilton County ("Board" or "BOCC") is by the terms of the Consent Decree the "principal" and thus lead defendant and, further, the City of Cincinnati ("City") is only a party to the Consent Decree in its role as the "agent" for the Board. U.S. EPA, Ohio EPA and ORSANCO (collectively, the "Regulators") should and must deal with the Board as the principal and lead defendant and, in a dispute between the Board and City, defer to the Board as the party which has authority for both Defendants.

Simply put, the Regulators cannot force the Board—as owner and principal of MSD—to submit a plan that its agent wants rather than which it wants. Likewise, the Board (and MSD ratepayers) cannot be held hostage to face potential stipulated penalties or other actions because its agent refuses to follow directives and the Regulators refuse to acknowledge, let alone accept, the lawful relationship between the Board and the City.

As a result, we respectfully dispute your letter of July 17, 2018 and its actions. We request that you accept receipt of the Board's Phase 2A submittal and review it as the sole Phase 2A plan proposal on behalf of both Defendants. We again request, as we did in our letter of June 29, 2018 (attached), that you reject the City's Phase 2A proposal

Mr. Patrick Kuefler, Chief
July 20, 2018
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as being unauthorized by the Board. If the Regulators do not promptly take these actions, the Board will be forced to invoke Dispute Resolution under Section XXI of the Consent Decree.

While the Board does not wish to belabor this point, it is worth supplementing the Board's June 29, 2018 letter by noting that the Regulators (U.S. EPA, Ohio EPA, ORSANCO) did not bring claims against the City in its individual capacity. The City was sued, and is identified in both the Amended Complaint and in the Consent Decree, as being named only in its capacity as the County's agent. The Consent Decree specifically provides that:

- "The **County . . . is responsible** for operating the County's Wastewater Treatment Plants and Sewer System. The County has established the MSD, a county sewer district established pursuant to Chapter 6117 of the Ohio Revised Code, **and acts as the principal of MSD**, including maintenance and funding authority for the MSD."¹
- "[T]he **City also serves as the agent for the County** in the management and operation of MSD. **It is in this capacity that the City is named as Defendant.**"²

The only way these provisions can be reconciled with the "one plan" submittal requirement in your letter is if there is one primary defendant responsible for providing that submittal. As the "principal" and "responsible" party under the Consent Decree, it is the Board's positions which control.

Please confirm that you will accept submission of the Board's plan—and only the Board's plan—by July 27, 2018. Alternatively, please contact the County Administrator if you are unable or unwilling to accept the Board's submission to by that date to discuss the dispute resolution process.

Sincerely,



Todd Portune
President



Denise Driehaus
Vice President



Chris Monzel
Commissioner



Jeffrey W. Aluotto
County Administrator

Enclosure

¹ (Doc. 130, §II, ¶C; Doc. 131, §II, ¶D) (emphasis added).

² (Doc. 130, §II, ¶D; Doc. 131, §II, ¶E) (emphasis added).

Mr. Patrick Kuefler, Chief
July 20, 2018
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cc: (via US Mail)

The Honorable Michael R. Barrett
Hon. John Cranley, Mayor, City of Cincinnati
Members of City of Cincinnati City Council
Hon. Patrick Duhaney, Acting City Manager, City of Cincinnati
Diana Christy - Interim MSD Director
Terrance Nestor - Deputy City Solicitor, City of Cincinnati Law Department
Mayors, Councils, and Trustees of Hamilton County communities served by MSD
Marilyn Wall - Sierra Club

Ohio EPA Southwest District Office
ATTN: DSW Enforcement Group Leader
401 East Fifth Street
Dayton, OH 45402-2911

ORSANCO
Richard Harrison, P.E.
Executive Director and Chief Engineer
5733 Kellogg Avenue
Cincinnati, OH 45228-1112

U.S. Department of Justice
Chief, Environmental Enforcement Section
Environment and Natural Resources Division
601 D ST NW
Washington, DC 20530
Reference DJ # 90-5-1-6-341A

Chief, Environmental Enforcement Section
Ohio Attorney General's Office, 25th Floor
30 E. Broad Street
Columbus, OH 43215-3428



Hamilton County

BOARD OF COMMISSIONERS

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ADMINISTRATOR

Jeff Aluotto

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VIA OVERNIGHT DELIVERY

June 29, 2018

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Water Division (WCC-15J)
U.S. EPA, Region V
77 West Jackson Blvd.
Chicago, IL 60604

U.S. Department of Justice
Chief, Environmental Enforcement Section
Environment and Natural Resources
Division
601 D ST NW
Washington DC 20530
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ORSANCO

Richard Harrison, P.E.
Executive Director and Chief Engineer
5733 Kellogg Avenue
Cincinnati, OH 45228-1112

Re: Metropolitan Sewer District of Greater Cincinnati ("MSD") Wet Weather Improvement Program ("WWIP") Phase 2A Schedule of Work and Plan U.S., et al. v. Board of County Commissioners of Hamilton County, OH, et al., Case No. 1:02CV107, U.S. District Court, Southern District of Ohio

Dear Reviewers:

Per the requirements of the Consent Decree on Combined Sewer Overflows, Wastewater Treatment Plants and Implementation of Capacity Assurance Program Plan for Sanitary Sewer Overflows ("Consent Decree") entered by the U.S. District Court for Southern District of Ohio on June 9, 2004, and the Final WWIP approved by Regulators

in August 2010, the Board of County Commissioners for Hamilton County ("Board" or "BOCC"), submits the enclosed MSD WWIP Phase 2A Schedule of Work and Plan.

The Board understands that, contrary to Board directives, the City of Cincinnati ("City") submitted its own Phase 2A Plan. The Board does not approve of that Plan. It is wrongly submitted by an entity that is neither the owner nor principal of MSD, an Ohio Revised Code 6117 County Sewer District. If the Regulators consider an unauthorized submission from the City, it would be assisting in what the Board believes to be an unlawful act. The Board requests that you do not review the City's Phase 2A Plan and instead return all documentation directly to:

Joseph T. Deters
Hamilton County Prosecutor
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202

The Board has had to litigate the principal-agent issue against the City previously. In issuing its Order enjoining the City from violating the Consent Decree, the District Court found, among other things, that:

- The City "serves as the agent for the County in the management and operation of MSD. It is in this capacity that the City is named as Defendant" in the Consent Decree litigation.¹
- "authority and control of the sewer system shall remain vested in the Board",² and
- "The . . . City's authority as agent is specifically limited and is subject to the direction and control of the County as principal."³

Finally, the Court held that:

[I]n accordance with the plain terms of the 1968 Agreement, the City is the agent of the County for the operation and maintenance of the sewer system and is subject to the control and direction of the County in all matters related to those functions."

¹ (Doc. 725, p. 3).

² *Id.* at p. 7.

³ *Id.* at p. 19.

The City did not appeal this decision and it is final. Thus, the City must follow the Board's directions and control with respect to MSD and the Consent Decree. That includes determining the Phase 2A Schedule of Work to be submitted to the Regulators.

The Regulators have previously requested "consensus" positions by the County and City. As the principal and owner of MSD, however, it is the Board's position that controls.

MSD was established by the County pursuant to R.C. 6117.03. Pursuant to R.C. 6117.02 and 6117.311 and the MSD Operating Agreement, the Board sets sanitary rates and issues bonds to cover activities within MSD. The monies collected by the Board are required to be kept in a "separate and distinct sanitary fund established by the board" and "[m]oneys in the sanitary fund shall not be expended other than for the use and benefit of the district." R.C. 6117.02(C)(4). These funds are collected and controlled by the Board the statutory owner and principal of MSD. Moneys from the Sanitary Fund are not City funds. They are expended by MSD only with the Board's authority. Hence, the Regulators negotiating with the City or over anything other than a Board-approved Phase 2A Plan is akin to allowing the City to negotiate with money that is not City money and over which the City has no authority.

We look forward to discussing the Board's Phase 2A Schedule of Work and Plan with you. As stated in the Conclusion to the Board's Phase 2A submission:

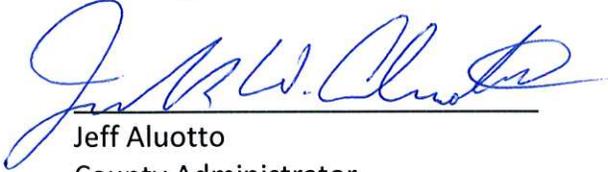
The proposed Phase 2A is the right program at the right time at the right cost for the MSD community. It includes a schedule of major work with milestones for a 5-year period of time that is affordable and will achieve substantial human health and environmental benefits. Phase 2A sets the stage for better Phase 2B solutions that will achieve compliance with the Consent Decree much quicker than projected and at a lower cost.

In accordance with Section 16.0 of the Consent Decree, I hereby submit the following certification for this submission:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are

significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Sincerely,



Jeff Aluotto

County Administrator

6/29/18
Date

Enclosure

cc (with attachment) (via US Mail):

Marilyn Wall - Sierra Club

Diana Christy - Interim MSD Director

Terrance Nestor - Deputy City Solicitor, City of Cincinnati Law Department

cc (without attachment) (via US Mail or Hand Delivery):

Todd Portune - Commissioner

Denise Driehaus - Commissioner

Chris Monzel - Commissioner

The Honorable Michael R. Barrett