

# Wet Weather *Consent Decrees* Protecting POTWs in Negotiations

2009 Supplement

Wet Weather Consent Decrees  
Protecting POTWs in Negotiations

A NATIONAL ASSOCIATION OF  
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# Introduction

In 2003, NACWA released *Wet Weather Consent Decrees: Protecting POTWs in Negotiations (Handbook)*. This *Handbook* was extremely well received by the membership and provided an unmatched resource on municipal consent decrees. An electronic *Consent Decree e-Library* was also created on the NACWA website where the various decrees are posted for reference. The *Consent Decree e-Library* remains a popular destination on the Association's website.

In 2006, NACWA published a *Supplement* to update the original *Handbook* to ensure that NACWA members have the most up-to-date information regarding municipal wet weather consent decrees. The *2006 Supplement* provided summaries and analysis of consent decrees entered since the publication of the original *Handbook*. The *Handbook* and *Supplement* together provided a valuable tool to municipal agencies preparing to negotiate and enter their own consent decrees.

Given the increasing number of municipal wet weather consent decrees and the evolving nature of these decrees, NACWA is publishing a second *Supplement* to compliment the original *Handbook* and previous *Supplement*. The *2009 Supplement* includes information and analysis on key municipal decrees since 2006. As with the original *Handbook* and the *2006 Supplement*, the *2009 Supplement* was created with the help of NACWA Legal Affiliate Squire, Sanders & Dempsey, L.L.P. and the resources of the Association's Targeted Action Fund (TAF). NACWA would particularly like to thank David Burchmore and John Lazzaretti of Squire Sanders for their work on this project.

NACWA hopes that this *Supplement*, used in conjunction with the original *Handbook* and *2006 Supplement*, will provide our members and other clean water agencies with a valuable information tool when dealing with consent decrees. Additionally, users of this *Supplement* are encouraged to frequently check the *Consent Decree e-Library* on the NACWA website ([www.nacwa.org](http://www.nacwa.org)) to find the most up-to-date list of consent decrees involving clean water agencies.

# Section One

## Wet Weather Legal and Regulatory Background

### A. Combined Sewer Overflows (CSOs)

In September of 2007, U.S. EPA released its *Report to Congress on Combined Sewer Overflows to the Lake Michigan Basin*.<sup>1</sup> This *Report* provides an assessment of the occurrences of combined sewer overflows from POTW collection systems in Illinois, Indiana, Michigan and Wisconsin into the Lake Michigan basin. The *Report* also provides information about the enforcement of existing regulations concerning such discharges and the future steps the EPA plans to take to minimize such overflows. It was prepared and submitted in response to a Congressional directive in H.R. Report No. 108-674 (Sept. 9, 2004). The *Report* discusses the impact to Lake Michigan from 18 CSO communities in Indiana, 11 in Michigan (all of which have approved Long Term Control Plans), 1 in Wisconsin (the City of Milwaukee, which has reduced overflows to 3 per year), and 1 in Illinois (the City of Chicago, which has not had a CSO discharge to the Lake since 2003).

In February of 2008, U.S. EPA published the final draft of its *Screening Assessment of the Potential Impacts of Climate Change on Combined Sewer Overflow Mitigation in the Great Lakes and New England Regions*.<sup>2</sup> This report notes that CSO mitigation measures are usually designed to handle precipitation events of a given intensity, duration or frequency, and that climate change projections, if realized, may present a significant risk to future performance of CSO infrastructure. The goal of the report was to determine the extent to which CSO mitigation may be under-designed, if based on historical precipitation, by estimating changes in the frequency of the historical benchmark event under future climate conditions. In the Great Lakes region, projected long-term (2060-2099) changes in precipitation suggest that many systems could experience increases in the frequency of CSO events beyond their design capacity, resulting in increases in overflow volumes. In the New England region, projected near-term (2025-2050) changes are inconsistent and the results were found to be inconclusive. Long-term (2060-2099) projections of change in the New England region were not available for analysis. Over all, the report concludes that systems may be vulnerable to future climate change and that there is a need for more detailed, site-specific analyses.

### B. Sanitary Sewer Overflows (SSOs)

The draft “Fact Sheet” and “Model Permit Language” for SSOs that were informally circulated by EPA in April of 2005 [see *2006 Supplement*] were released by the Agency in final form on August 20, 2007.<sup>3</sup> The goal of these documents is to explain that NPDES permit authorities should be improving implementation of NPDES permit requirements for SSOs and sanitary sewer collection

1 EPA-833-R-07-007 (September 2007), available at: [http://www.epa.gov/npdes/pubs/cso\\_reporttocongress\\_lakemichigan.pdf](http://www.epa.gov/npdes/pubs/cso_reporttocongress_lakemichigan.pdf).

2 EPA-600-R-07-033F (February 2008), available at: <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=188306>.

3 The final documents are available at: [http://www.epa.gov/npdes/pubs/sso\\_fact\\_sheet\\_model\\_permit\\_cond.pdf](http://www.epa.gov/npdes/pubs/sso_fact_sheet_model_permit_cond.pdf) and [http://www.epa.gov/npdes/pubs/sso\\_model\\_permit\\_conditions.pdf](http://www.epa.gov/npdes/pubs/sso_model_permit_conditions.pdf), respectively.

systems by clarifying how conditions in NPDES permits for discharges from POTWs apply to the collection system serving the treatment works.

## C. Blending

As of this writing, the revised wet weather blending policy for POTWs serving separate sanitary sewer systems, which was released for public comment by U.S. EPA in December of 2005,<sup>4</sup> has not been finalized by the Agency.

Blending for CSO systems continues to be governed by Section II.C.7 of the 1994 *CSO Policy*, which requires the permittee to submit a “no feasible alternatives” (NFA) analysis demonstrating that the secondary treatment system is properly operated and maintained, that the system has been designed to meet secondary limits for flows greater than the peak dry weather flow, plus an appropriate quantity of wet weather flow, and that it is either technically or financially infeasible to provide secondary treatment at the existing facilities for greater amounts of wet weather flow. The feasible alternative analysis must include consideration of enhanced primary treatment (e.g., chemical addition) and non-biological secondary treatment. Furthermore, the permit must require that all wet weather flows passing the headworks of the POTW treatment plant will receive at least primary clarification and solids and floatables removal and disposal, and disinfection, where necessary, and any other treatment that can reasonably be provided.

Recent negotiations over NFA analyses in some cities have become increasingly complex, as permittees and regulators struggle with the issue of what “other” forms of treatment can “reasonably be provided” for flows that exceed the secondary capacity of the treatment works. High Rate Treatment using proprietary systems for ballasted flocculation are gaining favor with some state permitting authorities and EPA regions.

- The 2007 consent decree for the Allegheny County Sanitary Authority (ALCOSAN) contains extensive requirements in Section VI.L and Appendix C for the preparation and submittal of a “Wet Weather routing Plan,” as well as a detailed “Bypass Demonstration” in the event that ALCOSAN wishes to propose that it be allowed to bypass all or part of the primary or secondary treatment process at its POTW. In addition to incorporating the basic principles from the *CSO Policy* described above, Appendix C specifies that ALCOSAN shall consider additional treatment including chemically-assisted clarification, ballasted flocculation, lamella clarification, micro filtration, and dissolved air flotation. The peak flows generated by the sanitary sewer system, plus 125% of peak dry weather flow from the combined sewer system, must receive full secondary treatment.

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4 70 Fed. Reg. 76013 (December 22, 2005).



# Section Two

## Policies and Guidance Relevant to Wet Weather Negotiations

- A. 2000 Compliance and Enforcement Strategy for CSOs and SSOs
- B. 1998 Final SEP Guidance and 1999 Model SEP Agreement
- C. 1995 EPA Interim CWA Settlement Penalty Policy
- D. 1994 CSO Policy Considerations
- E. 1990 Guidance on Use of Stipulated Penalties in EPA Settlement Agreements
- 4 F. 1988 Guidance on Certification of Compliance with Enforcement Agreements
- G. 1983 Guidance for Drafting Judicial Consent Decrees
- I. [2006 SUPPLEMENT] 2003 Memorandum on Negotiation of CSO Consent Decrees
- J. [2006 SUPPLEMENT] 2005 Memorandum on Guidelines for Federal Enforcement in CSO/SSO Cases
- K. [NEW] 2005 Guide for Evaluating CMOM Programs

On January 1, 2005, EPA's Office of Enforcement and Compliance Assurance published its *Guide for Evaluating Capacity, Management, Operation, and Maintenance (CMOM) Programs at Sanitary Sewer Collection Systems*.<sup>5</sup> This guide (developed by EPA's Office of Enforcement and Compliance Assurance) identifies some of the criteria used by EPA to evaluate a collection system's management, operation, and maintenance (CMOM) program activities. The guide is intended for use by EPA and state inspectors as well as the regulated community (owners or operators of sewer systems collecting domestic sewage as well as consultants or other third-party evaluators or compliance assistance providers). Collection system owners or operators can review their own systems by following the checklist in Chapter 3 to reduce the occurrence of sewer overflows and improve or maintain compliance. The guide is applicable to small, medium, and large systems; both publicly and privately owned systems; and both regional and satellite collection systems.

5 EPA 305-B-05-002; available at: [http://www.epa.gov/npdes/pubs/cmom\\_guide\\_for\\_collection\\_systems.pdf](http://www.epa.gov/npdes/pubs/cmom_guide_for_collection_systems.pdf).



**L. [NEW] 2007 Memorandum on Using Green Infrastructure in Stormwater, CSO, and Nonpoint Source Programs**

On March 5, 2007, EPA’s Assistant Administrator for Water, Benjamin Grumbles, issued a memorandum on “Using Green Infrastructure to Protect Water Quality in Stormwater, CSO, Nonpoint Source and Other Water Programs.”<sup>6</sup> Common green infrastructure approaches cited in the memorandum include green roofs, trees and tree boxes, rain gardens, vegetated swales, pocket wetlands, infiltration planters, vegetated median strips, reforestation, and protection and enhancement of riparian buffers and floodplains.

**M. [NEW] 2007 Memorandum on the Use of Green Infrastructure in NPDES Permits and Enforcement**

On August 16, 2007, EPA’s Water Permits and Water Enforcement divisions jointly issued a memorandum on “The Use of Green Infrastructure in NPDES Permits and Enforcement,” to clarify how green infrastructure can be incorporated into existing regulatory programs.<sup>7</sup> The memorandum was circulated to regional EPA water division directors and enforcement coordinators, as well as to all state NPDES directors. The memo states that, “In developing permit requirements, permitting authorities may structure their permits, as well as guidance or criteria for stormwater plans and CSO long-term control plans, to encourage permittees to utilize green infrastructure approaches, where appropriate, in lieu of or in addition to more traditional controls.” For enforcement activities, the memo states that EPA will consider the feasibility of using green infrastructure as a pollution control option and encourages states to do this as well.

6 Available at: [http://www.epa.gov/npdes/pubs/greeninfrastructure\\_h2oprograms\\_07.pdf](http://www.epa.gov/npdes/pubs/greeninfrastructure_h2oprograms_07.pdf)

7 Memorandum from Linda Boornazian and Mark Pollins (August 16, 2007); available at: [http://www.epa.gov/npdes/pubs/gi\\_memo\\_enforce.pdf](http://www.epa.gov/npdes/pubs/gi_memo_enforce.pdf)

# Section Three

## Tailoring Standard Wet Weather Decree Provisions to Suit Your Agency

### A. “Definitions”

1. “Wet Weather”
2. “SSOs”
3. “Unauthorized Discharge”
4. “POTW”
5. “Excessive Inflow & Infiltration”
6. [NEW] “Capacity”
  - The Capacity Assurance Program in § 16.B of the 2008 Lexington-Fayette consent decree requires the county to identify each sewershed with insufficient capacity under either average conditions or the “One Hour Peak Flow,” which is defined in § 8 of the decree as the greatest flow in a sewer averaged over a 60-minute period expected to occur as the result of a 2-year, 24-hour storm event.

### B. “Compliance Program”

1. Typical Compliance Programs

One trend that has emerged in recent consent decrees is a requirement to achieve higher levels of control (less than 4 overflows per year) on certain CSO receiving waters that have a higher potential for public recreational use. Several recent decrees have incorporated a combination of CSO and SSO controls (e.g. Columbus and Indianapolis) and at least two have also included programs to reduce pollution from municipal stormwater discharges (Nashville and Lexington).
- a. CSOs
  - Under the consent decree for the City of Indianapolis, the city will pay a penalty of \$1,117,800 (divided evenly between the U.S. and the State of Indiana), implement a Long Term Control Plan (LTCP) designed to greatly reduce overflows from its combined sewer system, and implement another plan designed to eliminate overflows from its sanitary sewer system, and perform various other remedial measures. The consent decree provides that the city can reduce the portion of the penalty to be paid to the state by undertaking further reductions in the number of failing septic systems. The injunctive relief in the decree (requiring an estimated \$1.86 billion worth of improvements) is among the highest-cost municipal Clean Water Act settlements to date and is expected to reduce the volume

of Indianapolis' untreated discharges by 7.2 billion gallons in an average year. Indianapolis owns two large municipal advanced wastewater treatment plants (AWTP), the Belmont AWTP and the Southport AWTP, as well as nearly 246 square miles of sewers that feed into the treatment plants. The sewer system, which serves approximately 866,000 people, transports the city's sewage for treatment at the two plants prior to being discharged into area rivers and streams. Approximately 27 percent of the sewer system is a combined system located primarily in the central, older parts of the city. The remaining 73 percent of the sewer system is a sanitary sewer system. Approximately 8 billion gallons of untreated sewage is currently discharged each year into the White River and its tributaries from approximately 133 CSOs, and a lesser number of SSO and bypass locations. Under the consent decree, the city is expected to achieve 97% capture (2 events per year) on Fall Creek and 95% capture (4 overflows per year) on its other receiving waters.

- The consent decree for the City of Fort Wayne, Indiana requires the city to make an estimated \$250 million worth of improvements to reduce overflows from its sewer system, which serves approximately 220,000 people. Overflows from the city's collection system currently number approximately 60 per year. The improvements to the city's sewer system, to be implemented under the consent decree, will reduce the number of overflows to approximately one per year on the St. Joseph River and four per year on the St. Mary's and Maumee Rivers. The city will pay a penalty of \$538,380, which will be divided evenly between the United States and the State of Indiana. The city will also spend \$400,000 on a supplemental environmental project to eliminate failing septic systems, and it can reduce the portion of the penalty to be paid to the state by undertaking further reductions in the number of failing septic systems. The injunctive relief provided under the settlement will reduce the volume of Fort Wayne's untreated combined sewer overflow discharges by 900 million gallons in an average year.
- On July 18, 2008, Ohio EPA issued its draft approval for the \$2.45 billion Wet Weather Management Plan (WWMP) submitted by the City of Columbus pursuant to its 2002 SSO and 2004 CSO consent decrees with the State of Ohio. The WWMP will address SSOs by constructing two deep-sewer tunnels totaling 25 miles. It will address CSOs with a deep 18-foot tunnel to be built from the city's Arena District to the Jackson Pike WWTP. A new high-rate treatment facility near the Jackson Pike plant will treat those flows. To treat additional flows, the city's Jackson Pike and Southerly plants will increase treatment capacity by nearly 50 percent by 2010, expanding from 330 to 480 MGD. Twelve "Priority Areas" have been identified to receive additional attention to solve localized sewer issues, including basement backups. The plan is expected to achieve an estimated 1.4 billion gallons of annual overflow reduction. The 40-year schedule calls for significant reductions of overflows by 2010, and over 85 percent of the average annual reduction will occur in the first 20 years. CSOs will be substantially reduced by 2010 and by more than 99 percent by 2025.

#### b. SSOs

- The 2007 consent decree for the City of San Diego is the third and final settlement that

addresses current violations in the city's sewer system, and will require the city to continue to undertake capital projects and perform operations and maintenance through 2013, to prevent future spills of raw sewage from San Diego's Municipal Wastewater Collection System. The system collects wastewater from approximately 1.2 million residents over 330 square miles. The system has an estimated 2,800 miles of sewer lines and 84 pumping stations. According to the terms of this \$1 billion consent decree, the city will continue its enhanced inspection and maintenance programs in the city's wastewater collection system; system-wide cleaning, root control, sewer pipe inspection, repair or replacement; and grease control blockage programs. San Diego will also complete a number of capital projects to repair or replace the aging sewer system. Among these projects, it will be required to repair, replace or rehabilitate 250 miles of pipeline by 2013. It has already repaired or replaced 200 miles of pipeline under earlier settlements entered into in 2005 and 2006. The city will also upgrade and repair a number of pump stations in the system and secure all 5800 manhole covers throughout the city. Further, the city will implement an educational program in order to educate residents of the Fats, Oils, and Grease Blockage Control Program and conduct a sewer capacity assessment.

- The Metropolitan Government of Nashville and Davidson County (Metro), will invest approximately \$300 to \$400 million to control a combination of CSO, SSO and stormwater discharges under its consent decree. Metro currently has over 200 million gallons of SSO and billions of gallons of CSO discharges to the Cumberland River and its tributaries. The settlement is expected to achieve a reduction of approximately 1.3 million pounds of pollutants per year. The major features of the consent decree will require Metro to comply with four specific corrective action plans. Metro must propose and implement corrective action plans to bring CSOs into compliance with water quality standards; it must create and carry out additional corrective action plans to eliminate SSOs. The worst SSOs, representing approximately 50% of the total, must be addressed within the next 2 years. Metro must also make improvements to its management operation and maintenance or MOM programs to prevent future overflows; and it must implement a plan to respond to overflows attentively when they occur. The decree requires Metro to pay civil penalties of \$282,019 to the U.S. and to the State of Tennessee. The State will use this money to fund a local environmental group that promotes pollution prevention, pollution reduction, public health avenues, and environmental education, restoration and protection. Finally, Metro will also perform two SEPs at a cost of \$2.8 million to extend sewer service to areas currently served only by septic systems.
- The Lexington-Fayette Urban County Government (LFUCG) (Kentucky) consent decree will require more than \$290 million to eliminate SSOs and to reduce pollution levels in urban stormwater. LFUCG will pay a civil penalty of \$425,000 to the United States and implement \$2.73 million in SEPs. LFUCG owns and operates a sanitary sewer system, with two major wastewater treatment plants, serving a population of almost 250,000. It also owns and operates a municipal separate storm sewer system (MS4). The major features of the consent decree relating to SSOs require LFUCG to identify and quantify its SSOs; evaluate the capacity, design and condition of the components of its sanitary

sewer system including pumping stations and treatment plants; develop and implement remedial measures to eliminate recurring SSOs within 11 to 13 years; and improve its MOM programs to prevent future overflows and respond to overflows when they occur. The decree also contains provisions requiring LFUCG to substantially upgrade its MS4 programs. LFUCG must establish a funding mechanism for its storm water management programs and adopt ordinances to better address sources of pollution to the MS4, such as construction sites, developed areas and industrial sites. LFUCG will need to meet minimum levels of inspection, screening and monitoring to identify and better address sources of pollution in its storm water system.

## 2. Deadlines

### 3. Connection Bans and Moratoriums on New Development

- Under Section 28 of the consent decree for the City of Winchester, Kentucky, “Capacity Certifications” are required before the city can authorize any new sewer service connection or additional flow from an existing sewer service connection. Detailed standards for certification of “Adequate Treatment Capacity,” “Adequate Transmission Capacity,” and “Adequate Collection Capacity” are set forth in the decree.
- Section 26(d) of the Amended Consent Decree for the Louisville and Jefferson County MSD has an extensive provision prohibiting new sewer service connections and/or any increases in flow from existing connections unless specific conditions are met, including the submission of a written demonstration that the new or increased flow was the direct result of a project in which an equal or greater amount of flow is eliminated, and an additional amount equal to three times the increase has been eliminated by I/I removal activities within the affected portion of the collection system.

## 4. Compliance Standards

### 5. Water Quality Standards Reviews

- Sections 84-91 of the Fort Wayne, Indiana consent decree contain extensive provisions for the submittal, review and potential approval by EPA of a “Workplan for Revising CSO Control Measures” in the event that the state fails to adopt, or EPA fails to approve, certain new or revised water quality standards that were requested by the city as part of its long term control plan.

## 6. [2006 SUPPLEMENT] “Watershed” Approach

### 7. [2006 SUPPLEMENT] Caps and Reopeners

- The 2007 consent decree for the City of Fort Wayne, Indiana, contains an extensive series of reopener provisions in Part XXI of the decree (Modification). As mentioned above, the city may submit a workplan for revision of its proposed CSO control measures in the event that certain water quality standard revisions are not implemented. It may seek extension of certain deadlines if periodically submitted revisions to the estimated capital cost of its



program (estimated at \$239 million in 2005 dollars) exceed \$313 million. It may also seek modification of the decree if the city experiences significant adverse changes to its financial circumstances, if future NPDES permit proceedings warrant, or if the state fails to submit or EPA fails to take action on its requested water quality standards revisions within three years after the decree is lodged with the court. The city may seek extension of the deadlines for achieving certain performance criteria if it needs additional time to implement additional remedial measures to achieve those criteria. Finally, the city may seek modification of the performance criteria if it cannot achieve those criteria without additional remedial measures that are cost-prohibitive, infeasible, or otherwise inappropriate.

- A similar series of reopener provisions will be found in Part VI of the 2006 consent decree for the City of Indianapolis, including the right to seek modification of the decree if the estimated \$1.865 billion cost of the city's control plan will exceed \$2.325 billion in light of the revised cost estimates that are to be submitted by the city every 5 years under the decree.

#### 8. [2006 SUPPLEMENT] Public Notification

The focus on public notification has gained heightened attention as the result of recent Congressional proposals. The Sewage Overflow Community Right-to-Know Act (H.R. 2452) was introduced by Rep. Tim Bishop (D-NY) in May 2007, and was intended to provide a uniform and national standard for notification and reporting of CSOs and SSOs. Sen. Frank Lautenberg (D-NJ) introduced a similar bill, S. 2080, in the Senate. A revised version of H.R. 2452 was passed by the full House on June 23, 2008. The Senate Environment and Public Works Committee approved an amended version of the bill on September 17, 2008, including key improvements suggested by NACWA, but the entire Senate failed to take up the bill before the close of the 2008 legislative session. The bill is expected to be reintroduced in Congress sometime in early 2009.

#### 9. [NEW] Incorporating Green Infrastructure

Green infrastructure requirements are being incorporated into increasing numbers of wet weather consent decrees, both as part of the compliance program and as supplemental environmental projects (SEPs). On April 19, 2007, U.S. EPA, NACWA, and a number of other groups signed a statement of intent to promote the use of green infrastructure to help solve stormwater runoff and sewer overflow problems.<sup>8</sup> The statement of intent pledges cooperation among these groups to promote the use of various green infrastructure techniques such as rain gardens, bioretention cells, infiltration swales, green parking lot design, rain barrels, and many others. The agreement supplements an early statement supporting green infrastructure that has been signed by over 60 national, regional, and local organizations. One of the objectives of the statement is to explore opportunities and incentives for the use of green infrastructure in CSO long term control plans. This strategy has been further underscored in the March 5, 2007 and August 16, 2007 EPA policy memos discussed in Section II, above.

- The proposed consent decree for the Lexington-Fayette Urban County Government includes a \$230,000 SEP project requiring the county to manage stormwater runoff at one or more sites in the Lexington area using green infrastructure principles, such as rain gardens, porous

<sup>8</sup> Available at: [http://www.epa.gov/npdes/pubs/gi\\_intentstatement.pdf](http://www.epa.gov/npdes/pubs/gi_intentstatement.pdf).

pavements, green roofs, infiltration planters, trees and tree boxes and rainwater harvesting for non-potable uses such as toilet flushing and landscape irrigation.

- The Fort Wayne consent decree includes a SEP provision allowing the city to offset its penalty to the State of Indiana by participation in a rain garden demonstration and incentive program.
- The 2008 state consent decree for the City of Milwaukee includes a \$255,000 SEP to design and construct green parking lots along the Milwaukee River corridor.

C. “Interim Effluent Limitations”

D. “Civil Penalties”

E. “Stipulated Penalties”

F. “Effect of Settlement/Reservation of Rights”

G. “Covenant Not to Sue”

H. “Force Majeure”

I. “Dispute Resolution”

J. “Right of Entry”

K. “Reports and Certifications”

L. “Modification”

M. “Termination”

N. [2006 SUPPLEMENT] “Review of Submittals”

- Under Section VI.C of the Nashville and Davidson County decree (which contains several pages of detailed requirements for the submission and review of deliverables under the decree), the county may seek dispute resolution if EPA does not agree that a delay in review and approval of any deliverable is grounds for automatic extension of an applicable deadline or milestone date under the decree.



- Sections 103-109 of the Fort Wayne consent decree govern state and EPA review and approval of submissions by the city. If the state or EPA fails to act on a submittal within 60 days, any subsequent milestone date dependant on that submittal shall be extended by the number of days beyond 60 that the state or EPA use to act on the submittal.
- Section 7 of the Stipulation and Order for the city of Milwaukee provides that the subsequent enactment of state or federal legislation which significantly impairs the city’s financial ability to meet it obligations in light of its other governmental responsibilities (defined a “Financial Impairment”) shall be sufficient basis for the court to entertain a motion to reopen the judgment.

# Section Four

## Wet Weather Decree Negotiating Strategies

### A. Building the Negotiating Team

1. The Attorneys
2. The Technical Experts
3. Working Together

### B. Raising Economic Impacts

Affordability continues to be one of the leading issues in recent consent decree negotiations, particularly given the economic downturn experienced nationally during 2008. On August 1, 2008, Ohio Senators George Voinovich (R) and Sherrod Brown (D) introduced bipartisan affordability/financial capability legislation (S. 3443) that calls on EPA to update its 1997 *Combined Sewer Overflows – Guidance for Financial Capability Assessment and Schedule Development*. The bill aims to encourage a realistic approach for defining a utility's financial capability regarding long-term control plans to address CSO and SSO controls. Voinovich has said that the goal of the proposed legislation is "to ensure that such control programs are truly affordable for the utility's ratepayers." NACWA has been urging the EPA to make these changes for some time, and the proposed legislation is based in part on the more flexible and site-specific principles espoused by NACWA in its November 2007 publication entitled *Principles for Assessment and Negotiation of Financial Capability: A Compilation of Resources*, available on the Association's website.

### C. Conducting Penalty Negotiations

### D. Incorporating Supplemental Environmental Projects

### E. Reducing the Risk of Overfiling

1. Overfiling Authority
2. EPA Overfiling Considerations

# Appendix

## Municipal Wet Weather Decree Summaries

A summary table of federal and state wet weather consent decrees and administrative orders issued since August 2006 is attached.

CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
REGION I			
<i>United States of America, the Commonwealth of Massachusetts v. Town of Billerica, Massachusetts, Case No. 07-cv-11015-RWR (D. Mass. August 1, 2007) (Consent Decree)</i>	<ul style="list-style-type: none"> <li>\$250,000 in three installments</li> <li>\$125,000 to the United States</li> <li>\$125,000 to the Commonwealth of Massachusetts.</li> </ul>	<ul style="list-style-type: none"> <li>\$50,000</li> <li>\$25,000 to test lead levels in school drinking water;</li> <li>\$25,000 to test for N-nitrosodimethylamine (NDMA) in the Billerica public drinking water system.</li> </ul>	<ul style="list-style-type: none"> <li>Compliance with all applicable laws and regulations;</li> <li>Compliance with operation and maintenance plan for existing facilities;</li> <li>Develop and comply with an operation and maintenance plan for new facility;</li> <li>Perform a capacity, management, operation and maintenance program self-assessment;</li> <li>Submit and comply with a plan to address deficiencies;</li> <li>Submit and comply with a revised infiltration/inflow control plan adopting the recommendations in an earlier sewer system evaluation survey;</li> <li>Submit quarterly and annual reporting of progress on the infiltration/inflow schedule;</li> <li>Monthly reporting of documents, reports, and records developed pursuant to its permits for one year;</li> <li>Retain an independent third party auditor to conduct an environmental compliance audit.</li> </ul>

CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
<i>United States, State of Connecticut v. City of Shelton, Connecticut</i> , Case No. 3:08-cv-00919-SRU (D. Conn. June 18, 2008) (Consent Decree lodged with the district court pending approval)	\$142,000 ■ \$71,000 to the United States; ■ \$71,000 to the State of Connecticut.		<ul style="list-style-type: none"> <li>■ Perform previously approved wastewater treatment plant upgrades;</li> <li>■ Submit a capacity, management, operation and maintenance program self-assessment; Submit a wastewater treatment plant and wastewater collection and transmission system staffing assessment and, if necessary, a schedule for hiring additional staff;</li> <li>■ Submit a capacity, management, operation and maintenance corrective action plan with a schedule for implementing improvements;</li> <li>■ Consolidate its wastewater collection and transmission system preventative and reactive maintenance programs and capital improvement plans into a single CMOM Program document;</li> <li>■ Design and implement a long-term preventative maintenance program;</li> <li>■ Submit and implement a plan for initial wastewater collection and transmission system cleaning;</li> <li>■ Submit and implement a wastewater collection and transmission system rehabilitation plan;</li> <li>■ Submit an inflow removal report identifying extraneous flow sources and including a schedule for eliminating specified inflow sources;</li> <li>■ Eliminate all capacity-related sanitary sewer overflows by July 30, 2010;</li> <li>■ Submit and implement an emergency response plan for sanitary sewer overflows;</li> <li>■ Report on all building/private property backup incidents within the past five years and actions taken to prevent future incidents.</li> </ul>

CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
<i>United States of America, Commonwealth of Massachusetts v. Greater Lawrence Sanitary District, Case No. 06-11975-PBS (D. Mass. February 5, 2007) (Consent Decree)</i>	<ul style="list-style-type: none"> <li>\$254,000</li> <li>\$127,000 to the United States;</li> <li>\$127,000 to the Commonwealth of Massachusetts.</li> </ul>		<ul style="list-style-type: none"> <li>Construct CSO controls identified in its Long Term Control Plan;</li> <li>Upgrade its wastewater treatment plant consistent with its Recommended Improvement Plan;</li> <li>Submit and implement a post-construction monitoring plan;</li> <li>Submit and implement a plan for monitoring biochemical oxygen demand and total suspended solids from wastewater treatment plant discharges;</li> <li>Comply with the biochemical oxygen demand and total suspended solids requirements in its NPDES permit or submit interim flow and mass discharge limits;</li> <li>Submit quarterly progress reports.</li> </ul>
<i>United States of America v. Metropolitan District Commission, et al.; Conservation Law Foundation of New England, Inc. v. Metropolitan District Commission, et al., Case Nos. 85-0489-RGS &amp; 83-1614-RGS (D. Mass. July 1, 2008) (Consent Decree)</i>	<ul style="list-style-type: none"> <li>\$305,000 to the United States</li> </ul>	<ul style="list-style-type: none"> <li>\$305,000 for three projects: <ul style="list-style-type: none"> <li>Marine debris/floatables cleanup for the Neponset River, the Belle Isle Inlet, the Mystic River, the Malden River, the Fore River, the Town River Bay, the Chelsea River, and the Charles River;</li> <li>Provision of a sewage pumpout boat to service commercial vessels;</li> <li>Installation of low flow toilets in municipal buildings.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Maintain a secondary process limit of at least 700 MGD at the Deer Island Treatment Plant;</li> <li>Provide notice of any diversion of wastewater around the secondary treatment facilities at the Deer Island Treatment Plant.</li> </ul>

CASE	CIVIL PENALTY	SEP REGION 3	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
<i>United States of America, Commonwealth of Pennsylvania, Department of Environmental Protection, Allegheny County Health Department v. Allegheny County Sanitary Authority, Case No. 2:07-cv-00737-GLL (W.D. Pa. January 24, 2008) (Consent Decree)</i>	<ul style="list-style-type: none"> <li>\$1,200,000</li> <li>\$400,000 to the United States;</li> <li>\$400,000 to the Commonwealth of Pennsylvania;</li> <li>\$400,000 to the Allegheny County Health Department.</li> </ul>	<ul style="list-style-type: none"> <li>\$3,000,000</li> <li>Stream restoration activities in accordance with EPA's May 1, 1998 EPA Supplemental Environmental Projects Policy.</li> </ul>	<ul style="list-style-type: none"> <li>Submit and implement a wet weather plan;</li> <li>Submit a sewage treatment plant operating plan for wet weather flow events;</li> <li>Implement a conveyance and treatment system operation and maintenance program;</li> <li>Submit a revised Nine Minimum Controls Plan and conduct annual reviews of its revised Nine Minimum Controls Plan;</li> <li>Implement measures to reduce water quality impacts on receiving waters from industrial users;</li> <li>Implement a solids and floatables control program;</li> <li>Implement a dry weather discharge elimination program;</li> <li>Implement a sewer pipe operating and maintenance program;</li> <li>Map and develop an inventory of the conveyance and treatment system and Regional Collection System;</li> <li>Conduct flow monitoring of the regional collection system;</li> <li>Submit a plan for the development of a computerized hydrologic and hydraulic model of the conveyance and treatment system;</li> <li>Submit and implement a plan for development of one or more receiving water quality models;</li> <li>Obtain information from customer municipalities relevant to development of its wet weather plan;</li> <li>Develop a public participation plan for development of the wet weather plan;</li> <li>Create a Customer Municipality Advisory Committee;</li> <li>Implement a public educational outreach program on the location of outfalls, possible health and environmental effects of discharges of sewage, and limitations on recreational activities as a result of such discharges.</li> </ul>
<i>In re: Upper Southampton Sewer Authority, Case No. CWA-03-2008-0116 (U. S. EPA Reg. III March 17, 2008) (Consent Agreement and Final Order)</i>	<ul style="list-style-type: none"> <li>\$27,000</li> <li>\$16,200 to the United States;</li> <li>\$10,800 to supplemental environmental projects.</li> </ul>	<ul style="list-style-type: none"> <li>\$10,800</li> <li>Public education on the proper disposal of prescription drugs.</li> </ul>	<ul style="list-style-type: none"> <li>Maintain copies of any documentation and underlying data for any reports submitted to EPA pursuant to the Consent Agreement, including documents necessary to demonstrate compliance with the required supplemental environmental projects.</li> </ul>

CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
<i>Commonwealth of Virginia Department of Environmental Quality v. Spotsylvania County, State Water Control Board Enforcement Action</i> (August 3, 2007) (Special Order by Consent)	\$1,600 to the State of Virginia.	<ul style="list-style-type: none"> <li>\$14,400 to be donated to the Tri-County/City Soil and Water Conservation District for water quality monitoring and non-point source pollution control.</li> </ul>	<ul style="list-style-type: none"> <li>Construct and place into operation 4 pump station diversions as listed in the administrative order;</li> <li>Submit monthly progress reports until pump station conversions are constructed;</li> <li>Limit interceptor connection to 25% of the connections diverted in its pump station diversion projects;</li> <li>Develop and submit a transmission capacity management system;</li> <li>Provide monthly progress reports on line replacement;</li> <li>Submit a water quality monitoring program for impacts of SSOs on Massanox Creek;</li> <li>Implement a public awareness plan;</li> <li>Report all SSO events;</li> <li>Submit an Infiltration and Inflow Program report.</li> </ul>
REGION 4			
<i>United States of America, Commonwealth of Kentucky v. Lexington-Fayette Urban County Government,</i> Case No. 5:06-cv-386 (E.D. Ky. ---) (Consent Decree rejected by the Court pending appeal)	<ul style="list-style-type: none"> <li>\$425,000 (rejected by the Court as too high).</li> </ul>	<ul style="list-style-type: none"> <li>\$2,730,000               <ul style="list-style-type: none"> <li>\$1,230,000 for supplemental environmental projects:                   <ul style="list-style-type: none"> <li>\$1,000,000 for Goldstream Park stream corridor restoration;</li> <li>\$230,000 for green infrastructure.</li> </ul> </li> <li>\$1,500,000 for commonwealth environmental projects:                   <ul style="list-style-type: none"> <li>\$1,300,000 for Blue Sky Package Treatment Plan Elimination;</li> <li>\$200,000 for flooding evaluation.</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Implement the storm water quality management program provided in the consent decree;</li> <li>Maintain sufficient staff to complete the storm water quality management program;</li> <li>Establish a funding mechanism to ensure adequate funding for the storm water quality management program;</li> <li>Carry out an assessment and engineering analysis of measures needed to ensure sanitary sewer compliance with all statutory and regulatory requirements;</li> <li>Complete sanitary sewer system capital improvement projects;</li> <li>Install sewer flow, WWTTP flow, groundwater level and rainfall monitoring equipment;</li> <li>Conduct monitoring and field investigative activities;</li> <li>Develop a computerized hydraulic model of the sanitary sewer system;</li> <li>Submit a hydraulic model report;</li> <li>Submit sanitary sewer system and WWTTP remedial measures plan for each sewer shed group;</li> <li>Submit a capacity, management, operation and maintenance program self-assessment.</li> </ul>



CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
<i>United States of America, State of Tennessee v. Metropolitan Government of Nashville and Davidson County</i> , Case No. 3:07-1056 (M.D. Tenn. October 24, 2007) (Consent Decree)	<ul style="list-style-type: none"> <li>• \$564,038</li> <li>• \$282,019 to the United States;</li> <li>• \$282,019 due to the State but to be used as directed by the State on a “State Project.”</li> </ul>	<ul style="list-style-type: none"> <li>• \$2,800,000</li> <li>• \$2,600,000 to construct a sewer extension to eliminate 329 septic systems;</li> <li>• \$200,000 to construct a sewer extension to eliminate an additional 12 septic systems.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Prepare and submit a corrective action plan/engineering report that addresses the conditions causing sanitary sewer overflows, maps known SSOs, and provides flow measurement data, a project schedule, and an evaluation of the frequency and severity of SSOs, the proximity of SSOs to public areas and the complexity of corrective action necessary to eliminate SSOs;</li> <li>▪ Continue implementation of its capacity, management, operation and maintenance program, including an updated spill and overflow response plan as provided in the consent decree;</li> <li>▪ Submit additional components of its CMOM program, including: <ul style="list-style-type: none"> <li>• An inter-jurisdictional agreement program to delineate the minimum provisions for municipal satellite sewer system and large volume sewer customer collection, conveyance, and treatment agreements;</li> <li>• A capacity assurance program;</li> <li>• A pump station operation plan for power outages.</li> </ul> </li> </ul>

CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
<i>United States of America, Commonwealth of Kentucky v. Winchester Municipal Utilities, City of Winchester, Kentucky,</i> Case No. 06-102-KSF (E.D. Ky. April 10, 2007)	\$75,000 in 2 installments.	\$230,000 for design and construction facilities for “first-flush” treatment of Town Branch overflow.	<ul style="list-style-type: none"> <li>▪ Develop a capacity, management, operation and maintenance program to eliminate all SSOs;</li> <li>▪ An acquisition consideration program to establish procedures for acquisition of new or existing sewerage infrastructure;</li> <li>• A continuous sewer system assessment program to assess and establish priorities in sewer infrastructure, detect corrosion problems, and establish routine manhole inspections and flow monitoring, as well as establishing procedures for evaluating pump station performance;</li> <li>• An infrastructure rehabilitation program, including rehabilitation of all gravity sewer lines, manholes, pump stations, and force mains identified as needing rehabilitation under the continuous sewer system assessment program;</li> <li>• A system capacity assurance program including evaluation of the system’s wet weather capacity, and provisions to allow new sewer service connections or additional flow only after certification that there is adequate collection, transmission, and treatment capacity, except for the provision of essential services as provided in the consent decree;</li> <li>• A program to enforce inter-jurisdictional agreements;</li> <li>• A fats, oils, and grease control program;</li> <li>▪ Expand the treatment capacity of its wastewater treatment plant pursuant to a pre-approved facilities plan update;</li> <li>▪ Update its sanitary sewer overflow plan.</li> </ul>
<i>Commonwealth of Kentucky v. Louisville and Jefferson County Metropolitan Sewer Dist., United States of America v. Louisville and Jefferson County Metropolitan Sewer Dist.,</i> Case. No. 3:05-CV-236-5 (E.D. Ky. lodged Nov. 20, 2008) (Amended Consent Decree) [supersedes original Decree entered on April 25, 2005]	\$230,000 (addition to \$1,000,000 penalty paid under 2005 Consent Decree).	Completion of \$1,450,00 in SEPs required under 2005 Consent Decree; Additional \$400,000 SEP for Stream Restoration Project.	<ul style="list-style-type: none"> <li>▪ Submission of Final LTCF;</li> <li>▪ Process Controls Plan, Comprehensive Performance Evaluation, Composite Correction Plan and Elimination Plan for certain WWTPs;</li> <li>▪ Restrictions on new connections;</li> <li>▪ Continuous flow monitoring and bypass reporting for certain WWTPs.</li> </ul>

CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
		REGION 5	
<i>United States of America, State of Indiana v. City of Fort Wayne, Indiana</i> , Case No. 2:07-cv-00445-PPS-APR (N.D. Ind. April 1, 2008) (Consent Decree)	<ul style="list-style-type: none"> <li>• \$538,380</li> <li>▪ \$269,190 for the United States;</li> <li>▪ \$269,190 for the State of Indiana.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Federal SEP               <ul style="list-style-type: none"> <li>• \$400,000 over 4 years for the City of Ft. Wayne's Septic System Elimination Program.</li> </ul> </li> <li>▪ Optional State SEP               <ul style="list-style-type: none"> <li>• In lieu of payment of \$242,271 of a \$269,190 civil penalty, payment of \$26,919 to the State as a civil penalty and, at a 2:1 offset, provide:                   <ul style="list-style-type: none"> <li>- Additional support for the City of Fort Wayne Septic System Elimination Program; and</li> <li>- Participation in the Rain Garden Demonstration and Incentive Program.</li> </ul> </li> <li>• Good faith estimates for these projects was \$546,000.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>▪ Compliance with the Clean Water Act and its current NPDES permit in accordance with an established schedule;</li> <li>▪ Compliance with Nine Minimum Controls;</li> <li>▪ Implement CSO control measures and perform post-construction monitoring in conformance with its Long Term Control Plan;</li> <li>▪ Meet the performance criteria established in the Long Term Control Plan;</li> <li>▪ Eliminate all sanitary sewer discharges in accordance with the schedule provided in the consent decree;</li> <li>▪ Submit semi-annual status reports;</li> <li>▪ Submit monthly monitoring reports and reports relating to CSOs, SSOs, and bypasses (to be submitted to EPA on a semi-annual basis).</li> </ul>
<i>State of Wisconsin v. Milwaukee Metropolitan Sewerage District, et al.</i> , Case No. 05-CX-0013 (Milwaukee County Cir. Ct. May 19, 2008) (Stipulation and Order for Judgment) (this stipulation supplements a 2002 stipulation adopting a 2020 Facilities Plan requiring \$319,000,000-\$699,000,000 in improvements)	<ul style="list-style-type: none"> <li>• \$245,000 to the State of Wisconsin.</li> </ul>	<ul style="list-style-type: none"> <li>▪ \$255,000</li> <li>▪ To design and construct green parking lots along the greater Milwaukee River corridor;</li> <li>▪ Compliance Program/Injunctive Relief.</li> </ul>	

CASE	CIVIL PENALTY	SEP	COMPLIANCE PROGRAM/INJUNCTIVE RELIEF
		REGION 6	
<i>United States, et al. v. City of Baton Rouge, Louisiana et al.</i> , Civ. No. 01-978-B-M3 (M.D. La., Nov. 10, 2008) (Agreement and Order Regarding Modification of the Consent Decree)			<ul style="list-style-type: none"> <li>Amendment of original 2002 consent decree to incorporate Second Remedial Measures Action Plan; shifts focus from storage of excess flows towards comprehensive sewer rehabilitation and closes one WWTP.</li> </ul>
		REGION 9	
<i>United States of America v. City of San Diego; San Diego Baykeeper, et al v. City of San Diego</i> , Case No. 03-CV-1349K (POR) (the City had already entered into 2 earlier partial consent decrees to implement short-term capital improvement projects and had previously committed to paying \$2,115,500 in civil penalties and performing \$4,134,400 in supplemental environmental projects for spills occurring prior to October 1, 2004).			<ul style="list-style-type: none"> <li>Provide crews capable of responding to SSOs at any time;</li> <li>Respond to sanitary sewer backups in the same way the City responds to sanitary sewer overflows;</li> <li>Maintain a flow metering alarm system;</li> <li>Clean the sewer pipes in the City's gravity municipal collection system every 5 years;</li> <li>Report annually on sewer pipe cleaning;</li> <li>Utilize annual chemical and mechanical root control and report annually on progress;</li> <li>Perform sewer pipe inspection and condition assessment using CCTV;</li> <li>Implement a fats, oils &amp; grease blockage control program including public education, inspection, and enforcement;</li> <li>Complete a Canyon Economic and Environmental Analysis on the need to relocate sewer lines out of canyon bottoms;</li> <li>Report annually on canyon sewer inspection and cleaning;</li> <li>Implement a program to address other causes of SSOs, including requiring contractors to develop approved SSO response plans;</li> <li>Perform capacity improvement projects pursuant to a schedule provided in the consent decree and report annually on progress.</li> </ul>



A Clear Commitment to America's Waters

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