

NACWA Law Seminar

NEGOTIATING FEDERAL CONSENT DECREES

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AQUALAW 10 Years of Excellence

Overview

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- Key consent decree issues
- Approaches to address those issues
- Negotiating leverage

Key CD Issues

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- ❑ Avoiding Federal Enforcement
- ❑ Knowing Your Enemy
- ❑ Types of Negotiating Leverage
- ❑ Understand What Litigation Means
- ❑ Relentlessly Push the Edge
- ❑ Program Planning Time Matters

Key CD Issues

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- ❑ Don't cut your program planning time short
- ❑ Level of Control/Performance Measures
- ❑ Schedule
- ❑ Financial Capability
- ❑ Environmental Justice Issues
- ❑ Avoid Redlining Your CD
- ❑ State Role in Federal Consent Decrees

Avoiding federal enforcement

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- Federal enforcement is unnecessarily:
 - ▣ Antagonistic
 - ▣ Comprehensive
 - ▣ Irrational
 - ▣ Detailed
 - ▣ Inflexible
 - ▣ Cumbersome

Avoiding federal enforcement

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- State Enforcement Can Avoid These Structural Disadvantages
- Get to the State early and stay close
 - ▣ Consider Partial State Order/Decree

Know your enemy

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- Sun Tzu's "The Art of War"
- Have people on your team who know agency:
 - ▣ Limitations
 - ▣ Needs
 - ▣ Wants
- But not too familiar....

Negotiating leverage

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- Political
- Legal
- Financial
- Citizens

Understand What Litigating Means

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- Sewer courts and judges?
- Timing considerations
- Agency loss of unilateral authority
- Agency-identified remedy?
- Court-imposed remedy and continuing jurisdiction

Relentlessly Push the Edge

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- Don't just copy prior CD language
- Each CD needs to push the edge of the envelope
- Client lawyers can particularly provide this backbone/perspective
- Just because communities before you agreed does not mean it is appropriate
 - ▣ Ex: Force majeure; information retention
- Each CD has its own set of critical issues....

Program Planning Time Matters

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- ❑ Sewer (wastewater and stormwater) System Improvements are complicated and expensive
- ❑ System Rehabilitation
- ❑ New generation of sewer infrastructure
- ❑ Ensuring adequate capacity for a system that evolved over 100 or more years
 - ▣ Even more challenging for disparate regional systems

Program Planning Time Matters

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- ❑ Often ongoing evaluations and planning lead to cheaper and more cost-effective programs
- ❑ Renavigation is essential
- ❑ Need team members with strong understanding of regulatory issues to craft most cost-effective and approvable program

Don't cut program planning time short

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- Measure twice, cut once....
- Public dollars and impacts
- The right solution can save you tens if not hundreds of millions of dollars
- Agencies have a poor track record in modifying consent decrees
 - ▣ Do not assume they will let you freely substitute a cheaper alternative to achieving the same level of control

Don't cut program planning time short

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- You are better off litigating than accepting too short a planning period
 - ▣ Litigation will likely yield the necessary time
 - ▣ Most Judges will defer to your “commercially reasonable schedule.”
- Negotiate from
 - ▣ A detailed schedule (gant chart if necessary)
 - ▣ Not from a theoretical time period

Don't cut program planning time short

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- Note the progress you will make during the planning period to help justify necessary planning time.
- Consider committing to a number of early action projects to make reasonable further progress during planning time

Don't cut program planning time short

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- How about an interim conceptual or preliminary draft plan
 - Advantages and disadvantages
 - Make sure this is a limited obligation
 - Number of pages
 - Only certain sections
 - For review and comment by agencies, not approval

Don't cut program planning time short

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- Highlight use of evolving technologies/management approaches as a basis for planning time
 - ▣ Green infrastructure & piloting thereof
 - ▣ Integrated Planning (especially for CSO systems)
- NB: Some states require periodic renavigation by statute (such as Indiana)

Level of Control/Performance Measures

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- Avoid committing to a LOC until plan is done
- CD must identify proper range of alternatives for study during plan development

Level of Control/Performance Measures

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- For CSOs make sure presumption approach criterion of percent wet weather capture is an express option
 - ▣ Most flexible option to meet
 - ▣ Couple presumptive level of control with future use review for approvable LTCP
- Okay to mix presumption and demonstration for different waterbodies within you service area

Level of Control/Performance Measures

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- For SSOs your range of alternatives should bracket where you think you will end up
- ▣ NB: Storm or peak flow return frequency?
- ▣ How you define (or not) “adequate capacity”

Schedule

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- Don't commit to fixed end date for a yet-to-be-determined overflow control program

Schedule

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- Don't count on unrealistic reopeners in the hope of getting more than 20 years
 - ▣ High rates as a percent of MHI, using EPA guidance
 - ▣ "We'll be reasonable"
- Schedule Myths regarding 20 years
- Schedule negotiations focus on type of programs, affordability, sequencing, etc.

Financial Capability

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- EPA Guidance
 - ▣ Snapshot only
 - ▣ Inadequate
- Missouri HB 89 – great approach
- Insist on right to submit additional/alternate info

Financial Capability

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- Rates
 - ▣ Where the rubber meets the road
 - ▣ Further diminish regional competitiveness
 - ▣ Rate fatigue
 - ▣ Loss of businesses
 - ▣ Loss of satellite customers
- Include all CWA costs (storm water fees, keeping utility lights on, set aside for non-OCP capital, O&M increases, etc)

Financial Capability

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- Bottom line negotiating: what are we willing to self-impose for this program in our community?
 - ▣ What pace of rate increase?
 - ▣ How high?

Environmental Justice Issues

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- Becoming a more common factor in system-wide programs
- Can be a consideration in level of control, prioritization of improvements, etc.

Avoid Redlining Your CD

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- ❑ If everything is a priority, nothing is
- ❑ Don't let yourself be worked into a position where you are committed to do everything better from the outset
- ❑ Agencies take silo approach to a large number of CD issues
- ❑ If you redline your commitment to each you will collapse under the overall weight

State role in federal consent decrees

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- Dynamics of State participation
- Rash of states siding with local governments
 - ▣ Used to be rare....
 - ▣ Missouri (Hancock Amendment concerns)
 - ▣ Political considerations

Takeaways

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- If enforcement appears inevitable – State action
- If federal CD – negotiate tough
 - ▣ Right team
 - ▣ Know agencies' needs
 - ▣ Decide what makes sense for your community
 - ▣ Make your case effectively
 - ▣ Stand firm

Good Luck!