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Emerging Issues & Modification Approaches

NACWA

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Negotiating the CD is really just the beginning…

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Time and Circumstances Change

Decree implementation schedules are typically lengthy:

- High burden = 15 years
- Recent decrees/order = 20+

Circumstances change over time:

- Increased costs (labor/supplies/ etc…)
- Additional projects
- Changed financial circumstances (inability to raise rates, decreased usage, population changes, bond rating) = higher economic burden
- New technologies/ Green vs Gray
- New policies (integrated planning/adaptive management)
- New requirements (stormwater, nutrients, emerging contaminants)
- Third party pressures

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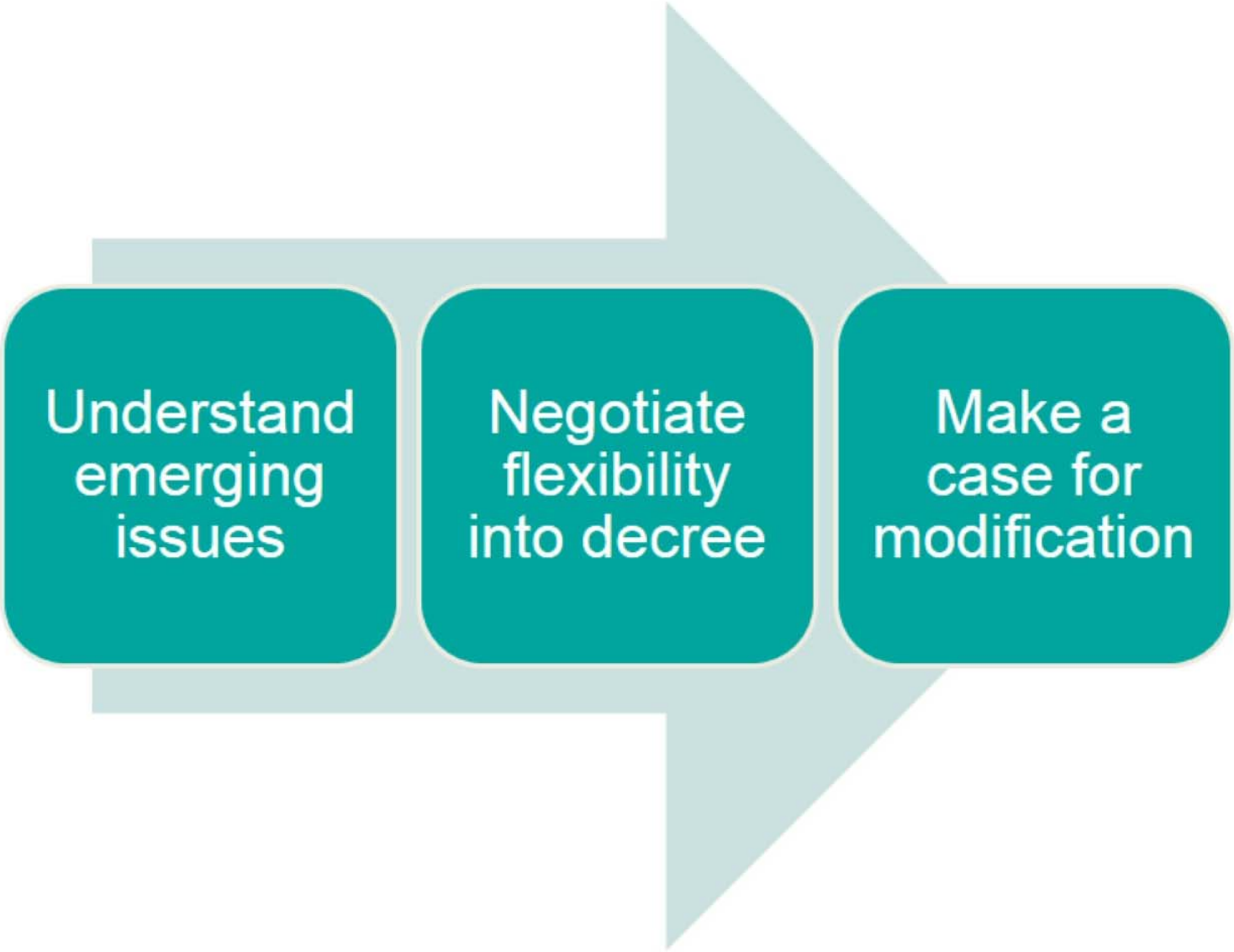
How do you adapt?



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Emerging Issues

- Stormwater
- Third Party Pressures
- Economic Burden
- Regionalization
- Satellites/Private Sources
- Nutrients
- Contaminants of Emerging Concern
- Climate

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Stormwater

EPA deferring development of national stormwater rule in lieu of more "targeted" measures to help utilities control stormwater

But stormwater remains significant enforcement priority

Number of recent decrees contain stormwater requirements

- MS4 sampling
- MS4 mapping
- BMP
- Site inspections
- Illicit Discharge Detection and Elimination plans

Examples:

Boston Water and Sewer Commission

Unified Government of Wyandotte County/ Kansas City

Sewerage and Water Board of New Orleans

Lexington Fayette (KY)

Revere (MS)

Newport (RI)

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Third Party Pressures

Public Participation

- Comments on decree
- Alternative selection
- Scope of decree

Citizen Suits

- Requires 60-day notice
- Diligent prosecution by feds or state bars
- *Examples*: **Columbus (OH)**

Intervention

- Seeks participation in CD negotiations to influence terms
- Judicial entry of decree if "fair and reasonable"
- *Examples*: **Chicago** and **Miami-Dade**

Judicial Activism

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Economic Burden

EPA's *1997 Financial Capability Assessment Guidance*

- Focuses primarily on the 2% MHI factor
- Prior to 2007-no major metropolitan community considered High Burden

Shift in EPA's Position on Financial Capability:

- Economic Downturn
- Integrated Planning/Adaptive Management (holistic view)
- Flexibilities of Guidance
- Numerous "High Burden" designations with 20+ year schedules

Future: Guidance revisions?

Opportunities for revisiting financial capability analysis or presenting expanded analysis in integrated plan to justify CD revisions

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Regionalization

Benefits:

- Beyond political boundaries
- Economies of scale/ Efficiency opportunities
- Potential cost savings
- Holistic watershed planning

Challenges:

- Politics
- Rate challenges
- Annexation issues
- Liability risks

Examples: **Allegheny County Sanitary Authority (PA)** and **Hampton Roads Sanitation District (VA)**

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Satellites and Private Sources

Both can be significant sources of I/I	Incentive programs that motivate reductions	CD Negotiations
• Satellites and private parties difficult to control • Political and Expensive	• Grants programs • Surcharge programs • Property Transfer programs • Disconnection programs	• Try to carve out private laterals from SSO issues

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Nutrients and Emerging Contaminants

Nutrients:

- Nationwide focus/ State based management
- Significant costs expected for nutrient management by POTWs
- Not currently seeing in many CDs

Emerging Contaminants:

- Pharmaceuticals / Triclosan
- Currently being evaluated
- Contribute to WET test failures
- Future requirements?
- Not currently seeing in CDs

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Climate

Impacts from changing climate

- Extreme storm events that result in increased overflows
- Rising sea/river levels that may impact infrastructure
- Drought conditions

Improvements for resiliency of utilities will be costly

- Estimates range from $450 to $950 billion nationwide
- Funding?

Examples: **Miami-Dade (FL)**

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Modification Approaches

Rely on general modification language

Express provisions that allow for modification based upon:

- Financial Capability
- Adaptive Management

Reopener Provisions

Financial Caps

Use of Minor Modifications Procedures

Integrated Planning

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Financial Capability/ Adaptive Management

- **Mishawaka (IN)-** allows for reconsideration of schedule based upon financial capabilities every 5 years. Total time of all extensions cannot exceed 5 years. Treated as a minor modification.
- **South Bend (IN)-** similar provision
- **Seattle (WA)** and **King County (WA)-**may request modification of schedule up to 5 years based upon financial circumstances
- **Elkhart (IN)-** allows for reconsideration of schedule between years 9 and 13 of the CD based upon financial circumstances
- **Chattanooga (TN)/ Evansville (IN)/Springfield (MS)-** expressly permit requests for extension of schedule based upon revised financial capability assessment.
- **Cincinnati (OH)-**permits requests for "significant" changes to projects because of changes in watershed approaches, priorities technologies, methods and "adaptive management"

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Reopeners and Financial Caps

- **Fort Wayne (IN)**– reopener if costs exceed certain threshold, if future NPDES permit proceedings warrant, or if requested water quality standards are not approved within 3 years
- **Indianapolis(IN)**- reopener if costs exceed certain threshold
- **Cincinnati (OH)-** financial cap and if costs exceed cap, schedule for completion may be extended.

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Minor Modification Procedures

- Modifications to certain plan submittals are incorporated into CD upon approval of EPA/ Court approval not required.
  - **Unified Government of Wyandotte County and Kansas City (KS)**
  - **Scranton Sewer Authority (NJ)***
  - **Nashville and Davidson County (TN)***
  - **Knoxville (TN)**

    *Final deadlines to LTCPs still considered major modifications
- Parties can decide what constitutes a "minor modification"
  - **San Antonio Water System**

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Integrated Planning

- **Seattle (WA) and King County (WA)**- permits submittal of an Integrated Plan that includes a schedule that is as "expeditious as possible"
- **Unified Government of Wyandotte County and Kansas City (KS)-** submittal of Integrated Overflow Control Plan for CSO and SSOs
- **Evansville (IN)** –submittal of Integrated Overflow Control Plan with final deadline of 2032 unless demonstration is made on financial capability that warrants reconsideration

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Success Stories- Recent Modifications

City of Knoxville (TN)-

- Original decree: 2005
- Modification: 2009
- Extension of final compliance deadline from 11 years to 16 years
- Expressly told not to make $ an issue
- Extension granted on construction phasing grounds

Atlanta (GA)-

- Original SSO decree 1999 (has a separate CSO decree)
- Modification: 2012
- Extension of final compliance deadline from 12 years to 25 years
- Demonstrated that it had completed the majority of requirements under the CD, raised rates by 252% over ten years, adopted a 1% municipal sales tax to help fund
- Facing competing requirements for updating its drinking water infrastructure
- Extension granted solely on financial capability grounds

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Success Stories- Recent Modifications

Sewerage and Water Board of New Orleans (LA)

- Original decree: 1998
- Modifications: 2010 and 2013
- Extension of final compliance deadlines to 23 years
- Modifications due to continuing impacts from Katrina
- Third modification lodged in 2014 seeks further extension of schedule through 2025 for a total of 27 years

Louisville and Jefferson County Metropolitan Sewer District (KY)

- Original decree: 2005
- Modification: 2009
- Modification for submission of an Integrated Overflow Abatement Plan to address obligations of CD
- Plan includes a mix of green and gray infrastructure

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Success Stories- Recent Modifications

Indianapolis (IN)

- Original: 2006
- Modifications: 2009, 2011 and 2013
- 1st and 2nd Modifications granted to modify control measures to allow flexibility and cost savings/and schedule for project implementation
- 3rd Modification was to extend CD to new operating entity of system

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Other Modifications:

- Onondaga County Department of Drainage and Sanitation (NY)- green infrastructure
- Hampton Roads Sanitary District (VA)
- Gloucester (MA)
- Baton Rouge (LA)
- Anderson (IN)
- Portsmouth (NH)
- Toledo (OH)

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Wrap-Up

- Seek flexibilities in your CD to allow for future events
- Use shift in position on financial capabilities to reassess your circumstances
- Use integrated planning tools to assist in justifying modifications
- Consider now—timing is good