

A “Phased Approach” to CSO Consent Decrees?

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Conventional CSO Decrees

- **Two basic types:**
 - **“Develop and Implement” Decrees**
 - LTCP not yet completed
 - Must develop LTCP and submit for EPA approval, then implement according to approved schedule
 - may contain interim requirements (e.g. nine minimum controls, WWTP improvements)
 - **“Implementation” Decrees**
 - LTCP approved
 - Implement according to schedule in decree
 - may have caps, reopeners, off-ramps

Two Recent Examples

- ***United States v. City of Indianapolis***,
No. 1:06-cv-1456 (N.D. Ind., Oct. 4, 2006)
 - city may seek extension of schedules if the estimated \$1.865 billion LTCP cost will exceed \$2.325 billion in light of revised cost estimates to be submitted every 5 years
- ***United States v. City of Fort Wayne***,
No. 2:07-cv-00445 (N.D. Ind., April 1, 2008)
 - city may seek extension of schedules if periodically submitted revisions to the estimated \$239 million LTCP cost exceed \$313 million
- Both decrees have provisions allowing the cities to seek revision of required CSO control measures

Procedures for Revision

- Both cities are required to implement specific CSO control measures in accordance with the criteria set forth in an Appendix to the decree, including:
 - Project Descriptions
 - Design Criteria
 - Dates for Completion of Bidding
 - Dates for Achievement of Full Operation
- Both cities are required to achieve the Performance Criteria specified for each control measure
 - criteria for each project are specified as number of overflow events and/or percent capture
- Both cities are seeking State WQS revisions to authorize the required level of control

Procedures for Revision (cont.)

- Cities can submit a “Workplan for Revising CSO Control Measures” if:
 - State fails to submit WQS revisions within 3 years,
 - EPA fails to approve the requested revisions, or
 - City chooses to submit one
- Overall level of control in the Workplan must be “no less stringent” for each watershed, in terms of reducing:
 - number of CSO occurrences, and
 - CSO discharge volumes
- Schedule must be “as expeditious as possible”

Procedures for Revision (cont.)

- If it is not possible to design and construct all measures simultaneously, cities may develop a “phased schedule” based on:
 - sequencing of activities,
 - engineering needs, and
 - relative importance of each measure
- Cities must implement the original schedule until a revised plan is approved by IDEM and EPA
- If agencies do not agree, cities can file a Rule 60(b) motion for relief from the decree, but must follow original schedule until court orders otherwise

A New Kind of Decree?

- **A different approach:**
 - **“Implement Some Now, Develop the Rest Later”**
 - Parties unable to reach agreement on scope of LTCP and/or schedule for implementation
 - Phase I requires implementation of initial control measures
 - Phase II to be determined later; contingent on:
 - economic factors
 - pilot projects
 - further studies (e.g. green infrastructure alternatives)
 - performance evaluation (adaptive management)

*United States v. Board of Comm'rs of Hamilton
County, Ohio, No. C-1-02-107 (S.D. Ohio)*

- **First Amendment to the Consent Decrees**
 - lodged 7/28/09

Background

- Two previous consent decrees, entered on 6/9/04:
 - Interim Partial Consent Decree on SSOs
 - Consent Decree on CSOs, WWTPs and Implementation of Capacity Assurance Plan for SSOs
- Decrees required MSD to develop:
 - Capacity Assurance Program Plan (CAPP), and
 - Long Term Control Plan Update (LTCPU)

- Construction for remedial measures in the CAPP and the LTCPU was to be
 - “as expeditious as practicable,”
 - in no event later than February 22, 2022,
 - unless MSD could demonstrate that the expected cost would \$1.5 billion (in 2006 dollars)
- In June 2006, MSD submitted a “Wet Weather Improvement Program” (WWIP) with estimated capital costs of \$1.99 billion
- Agencies asserted that further remedial measures were required
- In September 2008, MSD submitted a “Detailed Conceptual Outline Report” with a revised plan estimated to cost \$3.29 billion

- Agencies agreed that remedial measures were sufficient, but asserted that the proposed schedule was not “as expeditious as practicable”
- MSD submitted a revised WWIP on March 25, 2009
- Agencies requested further revisions
- Final WWIP submitted by MSD on June 4, 2009

Final Plan

- Contains a “phased approach”
 - requires completion of “Phase I” by December 31, 2018
 - estimated cost is \$1.145 billion
 - schedule for remaining projects to be determined later

- Rationale for phased approach was the “extremely high” cost relative to MSD’s service population:
 - total cost is \$3.29 billion (in 2006 dollars)
 - service population is 253,000 households
 - results in “unprecedented” level of burden at 2.8% of median household income
 - burden for Phase I alone is 1.7% of MHI
- EPA notes that 20-year schedules had been granted under “far better” economic conditions for other cities:
 - Indianapolis (1.73% of MHI)
 - Washington, DC (1.5% of MHI)
- By 2017, MSD must propose a schedule for “Phase II” that is “as expeditious as practicable,” but will not exceed an “outer boundary cap” of 2.8% of MHI

- MSD may propose a schedule for only a portion of the final WWIP projects (“Phase 2A”), with the remainder to be scheduled as part of an additional final phase (“Phase 2B”)
- Additional phases beyond Phase 2B may be requested only to avoid “severe financial hardship”
- Final Plan allows flexibility for MSD to request changes to the program based on “adaptive management” principles, and to request the inclusion of “green infrastructure” projects that may be identified in the future
- MSD will pilot two “EHRT” facilities using coagulant-assisted sedimentation rather than ballasted flocculation (goal is 70% TSS removal or 45 mg/l)