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District of Columbia Water and Sewer Authority

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# NACWA 2011 Developments in Clean Water Law Seminar

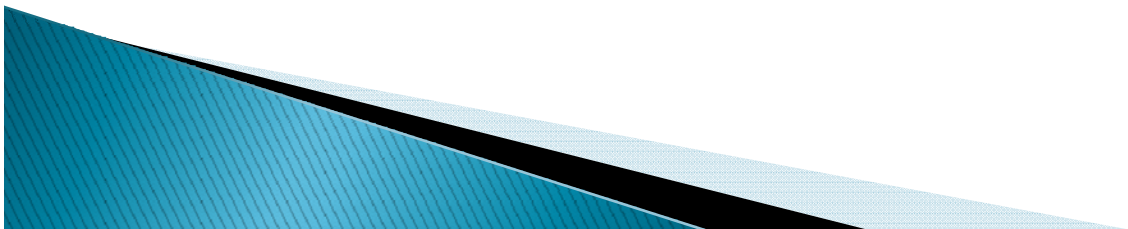
Every Utility Needs a Do-over:  
Pursuing Reopeners in Wet  
Weather Consent Decrees

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# Topics

- ▶ **DC Water's Long-Term Control Plan**
- ▶ **DC Water's LTCP Consent Decree**
- ▶ **Proposed Modifications to the LTCP Consent Decree**
- ▶ **General Rules Governing Consent Decree Modifications**
- ▶ **Modification-Related Provisions in the LTCP Consent Decree**
- ▶ **NY Green vs Gray - Model CSO Modification**
- ▶ **Path Forward**



# DC Water's Long-Term Control Plan

► Selected controls consist of:

- Anacostia tunnel system;
- Potomac tunnel system;
- Rock Creek tunnel system;
- Upgrades to Blue Plains WWTP to treat additional wet weather flows;
- Limited combined sewer separation; and
- Limited LID and LIDR (DC Water can downsize [but not eliminate] Potomac and Rock tunnels based on results of LID/LIDR demonstration projects).

- Controls are currently estimated to cost approximately \$2.6 billion and, when completed, will achieve 96 % overall reduction in CSO volume in average year (98 % in the Anacostia).

# D.C. Water's LTCP Consent Decree

- ▶ Entered March 23, 2005 by the U.S. District Court for the District of Columbia.
- ▶ Although environmental groups were plaintiffs in the litigation, they are not parties to the consent decree.
- ▶ Contains schedules for implementation of the selected CSO controls in D.C. Water's LTCP.
- ▶ Nine Minimum Controls schedules are in a separate October 2003 consent decree.

# D.C. Water's LTCP Consent Decree (Cont.)

- ▶ Consent decree schedules call for all controls to be placed in operation by 2025:
  - Construction on the Anacostia tunnel system is now underway and it will be placed in operation in two phases:
    - 1<sup>st</sup> Phase – by 2018
    - 2<sup>nd</sup> Phase – by 2025
  - Current consent decree schedules call for facility planning for Potomac and Rock Creek tunnels to start in 2015 and 2016, respectively, and for both tunnels to be placed in operation by 2025.

# Proposed Modifications to LTCP Consent Decree

- ▶ DC Water is proposing two sets of modifications:
  - The first would change the projects and schedules to reflect a new Chesapeake Bay-derived nitrogen limit adopted after the LTCP consent decree was entered.
  - The second would give DC Water the time to evaluate the feasibility of substituting green infrastructure (LID and LIDR) for the Potomac and Rock Creek tunnels now required by the consent decree.

# Proposed Modifications to LTCP Consent Decree (Cont.)

- ▶ **Proposed first modification would:**
  - Add a new “Blue Plains” tunnel to reduce peak wet weather flows to the Blue Plains WWTP;
  - Change the upgrades to the Blue Plains WWTP to accommodate compliance with both the LTCP wet weather treatment requirements and the new nitrogen limit;
  - Adjust some of the schedules to reflect the added controls; and
  - Leave the final 2025 deadline unchanged.
- ▶ EPA and DOJ have agreed to the first modification, leaving only some details to be worked out before it is finalized.





# Proposed Modifications to LTCP Consent Decree (Cont.)

- ▶ **Proposed second modification would:**
  - Endorse the concept of substituting green for gray infrastructure on a large scale if shown to be feasible:
    - The current consent decree provides for only limited use of green infrastructure.
    - Proposed modification seeks to build on greater support for more widespread use of green infrastructure now than existed in 2004 when the current consent decree was negotiated.
  - Provide the time needed to complete evaluation of green infrastructure demonstration projects, public participation, review by EPA and District officials, and consent decree modification to incorporate green infrastructure in lieu of the Potomac and Rock Creek tunnels.
- ▶ **Discussions with EPA and DOJ about this modification started this month.**



# General Rules Governing Consent Decree Modifications

- ▶ Consent decrees are final orders so FRCP 60(b) governs unilateral modification motions in the absence of agreement between the parties and controlling modification language in the consent decree.
- ▶ FRCP 60(b) provides, in relevant part, that “[o]n motion and just terms, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence ...; (5) ...applying [the order] is no longer equitable; or (6) any other reason that justifies relief”.

# General Rules Governing Consent Decree Modifications (Cont.)

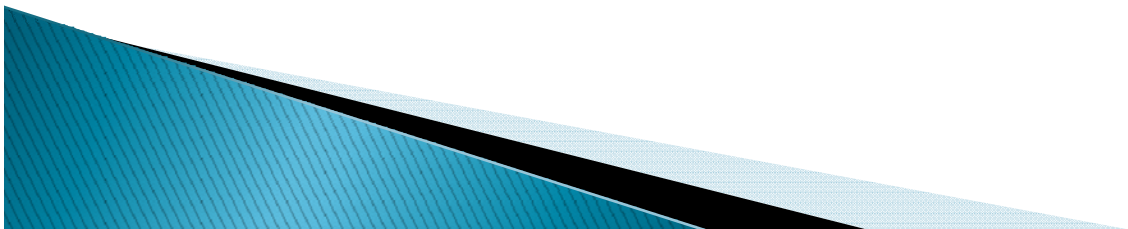
- ▶ The Supreme Court has ruled that a motion to modify a consent decree should be granted where the decree is not achieving its “principal objectives” or accomplishing its intended results. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251-52 (1968).
- ▶ However, the Supreme Court also ruled in *Rufo v. Inmates of the Suffolk Jail*, that “a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree.” 502 U.S. 367, 383 (1992).
- ▶ Courts have harmonized these two rulings by differentiating between motions brought by the party enjoined by the consent order and the party which sought the original equitable relief. See, e.g., *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 168-69 (DC. Cir. 2008), *Western Electric*, 46 F.3d at 1202. Thus, where the party which sought the original relief brings the motion, the courts have applied the *United Shoe* standard, whereas motions brought by the enjoined party are generally subject to the higher standard in *Rufo*.

# General Rules Governing Consent Decree Modifications (Cont.)

- ▶ Consent decrees are also contractual in nature.
- ▶ Thus, the express terms of any particular decree may impact a court's consideration of a motion for modification. *See, e.g., Pigford v. Veneman*, 292 F.3d 918, 923 (D.C. Cir. 2002) (noting the 'hybrid' nature of consent orders, which impacts the court's authority).

# Modification–Related Provisions in the LTCP Consent Decree

- ▶ The LTCP contains two modification provisions:
  - one with general application; and
  - one that is specific to material modifications to the selected CSO controls and/or schedules in the consent decree.



# Modification–Related Provisions in the LTCP Consent Decree (Cont.)

- ▶ The general modification provision provides that non-material modifications may be incorporated into a written agreement between the parties. Agreed upon material modifications have to be approved by the court.
- ▶ This provision does not apply to either of the modifications proposed by DC Water because both involve changes to the selected CSO controls and/or schedules.

# Modification–Related Provisions in the LTCP Consent Decree (Cont.)

- ▶ **Material modifications to the selected CSO controls and schedules:**
  - Consent decree provides for modification of the selected CSO controls and or schedules “based on a significant change in the information currently available to [DC Water] or [DC Water’s] current assumptions or projections, whether or not such change is anticipated, that renders the Consent Decree no longer feasible or equitable”.
  - Consent decree sets forth procedures (prior consultation and public participation) that DC Water must follow before submitting requested modification.
  - Agreed upon requests for modifications are submitted to the court for approval.
  - Disputed requests are subject to dispute resolution and judicial review.



# Modification–Related Provisions in the LTCP Consent Decree (Cont.)

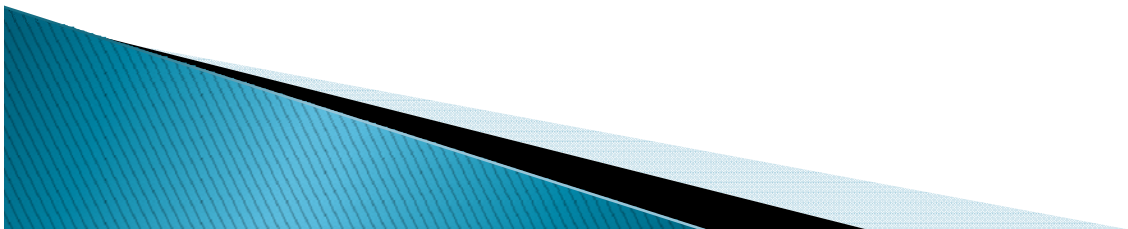
- ▶ The consent decree procedures for material modifications to the selected CSO controls and schedules govern both modifications proposed by DC Water:
  - DC Water has completed the consultation and public participation process for the first modification.
  - The process is just starting for the second modification.





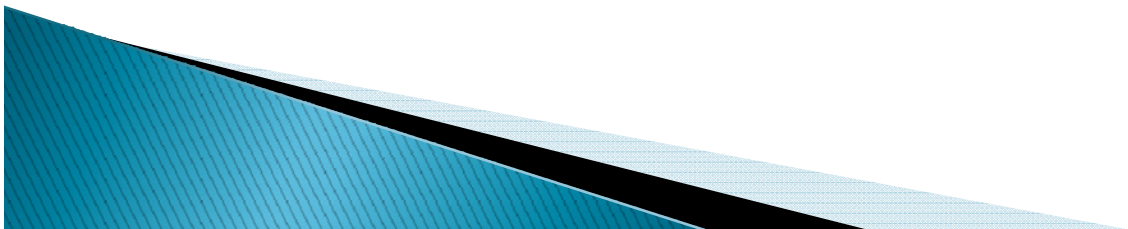
# NY Green vs Gray – Model CSO Order Modification

- ▶ On October 19, 2011, NY State Dept. of Environmental Conservation and NY City Dept. of Environmental Protection reached a draft agreement to:
- ▶ Invest \$2.4 Billion in public and private funds on green infrastructure projects over 20 yrs.
- ▶ Spend \$1.6 Billion in traditional gray infrastructure projects, but will delay 2 gray infrastructure projects totally \$2 Billion until 2017.
- ▶ Achieve \$1.4 Billion in cost savings for more efficient gray infrastructure projects.



# Path Forward

- ▶ First Modification – DC Water's objective to finalize this modification and have it entered by the court in early 2012.
- ▶ Second Modification – Although this modification process is just starting, it is on a tight schedule in light of the current consent decree deadline to begin facility planning for the Potomac tunnel in 2015.



# Questions or Comments?