

US EPA ARCHIVE DOCUMENT

**Project XL
Phase 1 Project Agreement**

**Louisville and Jefferson County
Metropolitan Sewer District**

United States Environmental Protection Agency, Region 4

Commonwealth of Kentucky, Department for Environmental Protection

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TABLE OF CONTENTS

I. Parties 1

II. Purpose of the Phase 1 Agreement 1

III. Description of the Project 2

IV. Stakeholder Involvement Process 2

V. MSD’s Current Pretreatment Program 3

VI. Implementing MSD’s Redesign of the Pretreatment Program 6

VII. Project XL Acceptance Criteria 8

 A. Superior Environmental Performance 8

 B. Cost Savings and Paperwork Reduction 9

 C. Stakeholder Support 9

 D. Innovation/Multi-Media Pollution Prevention 10

 E. Transferability 10

 F. Feasibility 10

 G. Monitoring, Reporting, and Evaluation 10

 H. Shifting of Risk Burden 11

VIII. Implementing Project XL for MSD 11

 A. EPA Intentions 11

 B. MSD Intentions 11

 1. Enforceable 11

 2. Voluntary 11

 3. Aspirational 12

 C. Project XL Performance Targets for MSD 12

 D. Proposed Milestones 12

IX. Project Implementation 12

 A. Legal Basis 12

 B. Applicability of Other Laws or Regulations 13

 C. Authority to Enter Agreement 13

 D. Rights to Other Legal Remedies Retained 13

 E. Reporting/Annual Reports 14

 1. Mid-year Reports 14

2. Regulatory Reporting 14

3. Use of Information 14

F. Unavoidable Delay 15

G. Dispute Resolution 15

H. Duration 16

X. Withdrawal or Termination 16

 A. Expectations Concerning Withdrawal or Termination 16

 B. Withdrawal or Termination Procedures 16

XI. Failure to Achieve Expected Results 17

XII. Periodic Review 17

XIII. Signatories and Effective Dates 17

List of Appendices 19

I. Parties

The Parties to this Project XL Phase 1 Agreement (Agreement) are the United States Environmental Protection Agency (EPA), the Commonwealth of Kentucky Department for Environmental Protection, and Louisville and Jefferson County Metropolitan Sewer District (MSD). Other entities may be parties to the Final Project Agreement.

II. Purpose of the Phase 1 Agreement

Project XL is a pilot program to test new approaches for meeting environmental goals and responsibilities. This site-specific Agreement will allow EPA to gather data and evaluate experiences that will help the Agency make sound decisions as it considers ways to improve the current regulatory system. While EPA, working with state and local agencies, hopes to transfer flexible new approaches in this Agreement that are determined to be successful into the current system of environmental protection, careful analysis of the results of the Project is a necessary prerequisite for broader implementation. In this Project, the use of flexibility to make programmatic changes to the General Pretreatment Regulations such as the definition of Significant Noncompliance; monitoring and inspections frequencies; reporting; and definition of Significant Industrial User may be requested by MSD; however, MSD has not determined the details of the flexibility which will be needed. These issues and uncertainties will require extensive post-implementation analysis before EPA can determine whether such flexibility can or should be offered to MSD and other entities in the future. Therefore, as with all XL Projects, the flexibility granted in connection with this Agreement, in and of itself, establishes no precedent with regard to other redevelopment projects. Entities contemplating projects requiring equivalent or similar flexibility to proceed should be aware that EPA does not intend to consider additional requests for flexibility until the results of this Agreement have been received and analyzed.

The Parties enter into this Project XL Phase 1 Agreement to accomplish 2 principal purposes. They are:

1. MSD will develop a baseline of current pollutant loadings in the Chenoweth Run watershed. Once MSD has collected and assessed this comprehensive data and developed Performance Measures, then MSD will be in a position to make commitments to Superior Environmental Performance based on anticipated pollutant reductions.

2. Using the information obtained from data collection and analyses, MSD and the Stakeholders will identify and evaluate more environmentally desirable pollutant loading patterns. MSD will craft new pretreatment program elements which will have two primary objectives: (a) achieve additional reductions in key pollutant loadings; and (b) identify areas of ineffective resource utilization to free-up resources that can be applied to achieve greater environmental benefits. The elements will be evaluated to determine what regulatory flexibility will be needed to implement these new elements.

III. Description of the Project

MSD plans to redesign its pretreatment program at the Jeffersontown WWTP, establishing links between wastewater programs (such as collection system, storm water, sludge), and move towards a more holistic watershed protection strategy (Chenoweth Run watershed). Information gathering and sharing are important aspects of this proposal. Resources will be shifted from the pretreatment program and applied towards other environmental programs for greater environmental gain within the watershed. Before redesigning its pretreatment program, MSD will expend extensive resources collecting data in the watershed and developing performance measures. MSD's requested flexibility will be finalized once data is analyzed and performance measures identified. Expected flexibility to be requested includes a redefinition of significant industrial user (SIU), flexibility on SIU inspection and monitoring, a redefinition of significant noncompliance and general permits.

MSD has proposed this project for a watershed which is not currently meeting its use designation. In an effort to reduce pollutant loadings and reach use designation, MSD will identify desirable loading patterns within the watershed, including loadings to the collection system and treatment plants, stormwater facilities, and from plants and facilities to receiving waters. MSD data collection and evaluation will work closely with its ongoing collection system analysis and rehabilitation projects as well as storm water programs in communities within the watershed. MSD may use pretreatment program requirement tradeoffs to encourage industry's aid in funding non-traditional water quality controls such as creating riparian zones and planting trees.

The current MSD XL proposal defers any request for Agency consideration of regulatory flexibility until the completion of data collection activities scheduled during the first phase of the project. As a result, the current MSD proposal does not provide enough information for the XL team to analyze what the sponsor might be requesting/offering by way of regulatory flexibility or superior environmental performance (SEP). However, the proposal, and supplemental information provided to EPA, does set forth the following regulatory areas as potentially requiring regulatory flexibility in the next phases of the project: significant noncompliance; monitoring and inspections; reporting; and definition of SIU. Upon the completion of the data gathering activities, and consistent with other XL pretreatment projects, EPA will work with MSD to develop and articulate more specifically the environmental benefits associated with the flexibility considered in MSD's proposal (e.g., pollution prevention measures or other environmental improvements). An FPA will be negotiated upon receipt of sufficient data for the team to evaluate the proposed SEP and associated regulatory flexibility.

IV. Stakeholder Involvement Process

Stakeholder involvement is considered essential by both MSD and EPA and has been an important part of the concept and development of this project since 1998. MSD began reaching out to stakeholders shortly after EPA's June 1998 announcement of pretreatment pilot opportunities under Project XL. This outreach continued as MSD developed its pre-proposal and proposal.

MSD conducted a series of meetings over several months with key stakeholders and professionals at other WWTPs, culminating in a formal Stakeholder Orientation Meeting. MSD has since identified additional stakeholders and has begun holding stakeholder meetings. MSD will structure the stakeholder process to match the three project phases. The phases themselves entail different activities, with different needs and opportunity for stakeholder involvement and input. MSD's Stakeholder Participation Plan, Appendix A, is intended to supplement previous activities and describe the basic method by which additional input can continue to be solicited and received throughout the duration of the project. Stakeholder input and community goals will be considered as MSD redevelops its pretreatment program for the Jeffers town WWTP. MSD will maintain and update the Plan to provide for continued stakeholder involvement over the duration of this XL Project. Stakeholders who have been identified and asked to participate in the development of this Project are listed in Appendix B.

V. MSD's Current Pretreatment Program

The Federal Water Pollution Control Act of 1972 initially defined the National Pretreatment Program. Section 307 of the Act required the EPA to develop pretreatment standards designed to prevent the discharge of pollutants from Industrial Users (IUs) to Publicly Owned Treatment Works (POTWs) "which interfere with, pass through, or are otherwise incompatible with such works." The Act was amended in 1977 to require POTWs to establish local pretreatment programs to ensure compliance with the pretreatment standards. The General Pretreatment Regulations (found at 40 CFR 403) were developed to enable the EPA to implement the requirements of the Act. These regulations outline the purpose and objectives of pretreatment programs and the minimum responsibilities of Federal, State and local authorities, and IUs. The Commonwealth of Kentucky retains the primary authority to ensure the implementation of the federal pretreatment regulations. These requirements are prescribed to the local authority in its National Pollutant Discharge Elimination System permit and its approved pretreatment program.

The minimum requirements specified in the General Pretreatment Regulations for approval of a pretreatment program are legal authority to apply and enforce program requirements, procedures to ensure compliance, sufficient funding and personnel, development of local limits, and enforcement. These elements of a pretreatment program are summarized below:

The POTW must have *legal authority* in the form of a statute, ordinance, contracts or agreements which allows the POTW to apply and enforce the pretreatment requirements of the Act, including denying or conditioning discharges into the POTW; requiring compliance with applicable pretreatment standards by IUs; issuing permits to significant industrial users, inspecting and monitoring industrial users; and enforcing any noncompliance by IUs. See 40 CFR 403.8(f)(1).

The POTW must have *procedures* to ensure compliance with pretreatment program requirements, including identifying and notifying all industrial users subject to program requirements, receiving and analyzing reports, sampling and surveillance activities, investigation of noncompliance, and public participation and notification. See 40 CFR 403.8(f)(2).

The POTW must have *sufficient funding and personnel* to implement the pretreatment program as described in the NPDES permit. See 40 CFR 403.8(f)(3).

The POTW must develop *local limits* or demonstrate why local limits are not necessary. See 40 CFR 403.8(f)(4).

The POTW must develop and implement an *enforcement* response plan describing how the POTW will investigate and respond to instances of noncompliance. See 40 CFR 403.8(f)(5).

The POTW is screened for compliance with these requirements during yearly inspections and audits once every five years by the Commonwealth of Kentucky or EPA, and through submittal of an annual performance report to the Commonwealth of Kentucky or EPA

MSD began implementation of its pretreatment program in 1976. Specifically, the pretreatment program is managed by MSD's Industrial Waste Department. Even though MSD owns and operates thirty-nine (39) WWTPs; MSD currently has four WWTPs to which the pretreatment regulations apply. That is, only four of the WWTPs have permitted industrial discharges in their collection systems. MSD meets or exceeds the minimum requirements for an approved pretreatment program as described below:

MSD identifies its industrial users through numerous activities including canvas inspections, referrals from other MSD departments; the Department of Health, the State, Louisville Water Company, City/County tax assessor office, the public; regular phone book and newspaper review, and building permit plan review. MSD issues SIU permits, general permits, hauled waste permits and unusual discharge request permits to industrial dischargers. In the Chenoweth Run watershed, MSD considers an IU to be significant if the discharge:

- ! is subject to Categorical Pretreatment Standards (under 40 CFR 403.6 and 40 CFR Chapter I, Subchapter N); or
- ! is an average of 5,000 gallons per day of process wastewater; or
- ! contributes a process waste stream which makes of five percent or more of the average dry

weather hydraulic or organic capacity of the WWTP; or

! is designated by MSD as having a reasonable potential to adversely impact the WWTP operation or to violate any pretreatment standard or requirement.

In addition, MSD also issues Hazardous Materials Use and Spill Prevention Control plans to local companies that use or store a reportable quantity of a RCRA listed hazardous material.

MSD has developed local limits for each WWTP which receives industrial wastewater. They are technically based on several factors including Water Quality, Inhibition Criteria, and Treatment Plant Removal Efficiency. Information regarding industrial loadings, non-industrial loadings, and the treatment plant removal efficiency are also factored into the calculation. MSD currently allocates the local limits by uniform distribution. For industries subject to categorical standards, MSD applies the most stringent of the categorical and local limits to the categorical industry.

MSD inspects and samples its industries as required by regulation, at least once per year. MSD's inspectors interface routinely with WWTP personnel on plant performance and special projects. In addition, the inspectors are responsible for reviewing and entering the self monitoring data; developing and evaluating loading data; performing slug control inspections; reviewing permit applications, and developing facility maps using CAD. The inspector assists in enforcing local and federal regulations; assists legal staff during enforcement proceedings, identifies pollution prevention targets for industry; and tracks correspondence and milestones of compliance.

MSD tracks compliance with a data management system and determines SNC rates as prescribed in 40 CFR 403. Enforcement response is based on the Enforcement Response Plan.

In addition to the minimum monitoring requirements prescribed by 40 CFR 403, MSD uses a risk based methodology to determine the frequency of sampling and inspections for SIUs, general permittees and WWTPs. Thus, MSD generally exceeds the minimum monitoring requirements. Three SIUs are continuously monitored for Lower Explosive Limits. MSD also conducts additional Quality Charge tests and compliance sampling events throughout the year at various locations to assess applicable Quality Charge fees. Conventional pollutants are used for the Quality Charge assessment.

MSD reports its performance to the state on a semi-annual basis. MSD strives to keep the public informed of its successes with the pretreatment program through a quarterly pretreatment newsletter, periodic seminars, presentations to the local chamber of commerce and an awards program.

VI. Implementing MSD’s Redesign of the Pretreatment Program

MSD will proceed with this XL Project in three phases: Data Collection and Development of Pretreatment Program Performance Measures; Program Redevelopment; and Program Implementation.

Phase 1: Data Collection and Development of Pretreatment Performance Measures

MSD will collect more data and better data in this phase of the XL Project. MSD will collect/analyze samples and collect flow data from “strategic” points in the sewer collection system and also from the WWTP influent/effluent/biosolids, from the receiving stream, and from industrial discharges. These “strategic” points are identified on the map in Appendix C. Year One baseline monitoring will be conducted as depicted in the following table:

Table 1. Year One Baseline Monitoring Pattern

Collection System Monitoring Point	Company Name	Month Composite Sampling to Be Conducted											
		J	F	M	A	M	J	J	A	S	O	N	D
1	Adam Matthews			X									
1	Beechmont Press			X									
1	Brandeis Machinery			X									
1	Courier Carton			X									
1	Cummins Cumberland			X									
1	Derby Cone			X									
1	Dispenser's Optical			X									
1	Jones Plastics & Engineering			X									
1	Southern Standard Carton			X									
1	Waukesha Cherry-Burrell			X									
1	Winston Products			X									
2	Clarke Detroit Diesel						X						
2	Midland Communications Pkg						X						
2	Ryder Truck & Car Rental						X						
2	White Castle Distributing						X						
3	Innovative Electronic Design								X				
4	DCE, Inc.												X
4	H L Lyons												X
4	Condea Vista Co												X
	Jtown WWTP Influent			X			X		X				X
	Jtown WWTP Effluent			X			X		X				X
	Jtown WWTP Biosolids			X			X		X				X
	Chenoweth Run (upstream)			X			X		X				X
	Chenoweth Run (downstream)			X			X		X				X
	Collection System #1			X			X		X				X
	Collection System #2			X			X		X				X
	Collection System #3			X			X		X				X
	Collection System #4			X			X		X				X

Collection System Monitoring Point	Company Name	Month Composite Sampling to Be Conducted											
		J	F	M	A	M	J	J	A	S	O	N	D
	Collection System #5			X			X			X			X
	Collection System #6			X			X			X			X

Samples will be collected and analyzed over a 4 day period using 40 CFR Part 136 methodology and will be tabulated in a report entitled *Year One Baseline Monitoring Data*.

Using this new monitoring pattern, MSD will account for pollutant loads coming from key points in the collection system. MSD also will compare the total pollutant loading from the permitted dischargers in a particular section of the collection system to the pollutant loading at the collection system monitoring point. This type of information will provide MSD with a better strategy for determining non-permitted pollutant sources. Using this data, stakeholders will assist MSD to develop Pretreatment Performance Measures appropriate for the assessment of the effectiveness of the Pretreatment Program in the Jeffersontown system. Once MSD has collected and assessed this comprehensive data and developed performance measures, then MSD will be in a position to make commitments to Superior Environmental Performance based on anticipated pollutant reductions. Also, because MSD will collect receiving stream data, it will also examine other point and nonpoint source impacts on the watershed. This type of information will be the foundation for MSD to move away from compartmentalized NPDES programs to a more holistic environmental protection program in the watershed.

Phase 2: Program Redevelopment

Using the information in Phase 1, MSD and its stakeholders will identify and evaluate more environmentally desirable loading patterns - including loadings to the collection system and treatment plants, stormwater facilities, and from plants and facilities to receiving waters. MSD will then craft new pretreatment program elements. New and modified program elements will have two primary objectives: (1) achieve additional reductions in key pollutant loadings; and (2) identify areas of ineffective resource utilization to free-up resources that can be applied to achieve greater environmental benefits.

Phase 3: Program Implementation and Evaluation

Once MSD identifies target areas, MSD will apply resources to reduce the majority of the pollutant. MSD may reallocate some resources to focus on a particular section of the industrial users or on residential contributions or on some other source such as stormwater runoff, pollution prevention or stream restoration. MSD will reallocate resources according to a “prioritization strategy.” This strategy will be detailed in the FPA.

VII. Project XL Acceptance Criteria

A. Superior Environmental Performance

MSD proposes to better manage its pretreatment program through a holistic watershed approach, leading to improved pollutant loading trends in the watershed. MSD will develop a specific strategy to achieve SEP which includes additional monitoring and pollutant source identification, pollution prevention outreach, education and technical assistance, and reinvestment of cost-savings in watershed based improvements. Specifically, MSD will establish a baseline for pollutant loadings using existing pollutant data and data collected during the first phase of the project. MSD is not requesting regulatory flexibility until an agreed upon baseline has been developed. Once the baseline is established, MSD will develop loading projections and reductions, performance measures, and redevelop its pretreatment program. EPA will work with MSD to develop and articulate more specifically the environmental benefits associated with the flexibility considered in MSD’s proposal (e.g., pollution prevention measures, and other environmental improvements). The final phase of the project will be the new pretreatment program implementation and evaluation. MSD’s strategy for SEP will provide the basis for:

- a premise for prioritizing resources according to environmental benefits;
- a more holistic understanding of the environmental stressors on the watershed;
- opportunities for expanded and meaningful pollution prevention;
- potential opportunities to partner with industry to focus on water quality improvements;
- permanent flow monitoring in the sewer collection system which will enhance planning and operations; and
- stream sampling information which MSD can use to determine WWTP impact to the stream.

B. Cost Savings and Paperwork Reduction

While MSD may see a short term increase in costs (collection system monitoring, receiving stream monitoring, administration and stakeholder interaction) during the initiation of this project, the following cost savings and reinvestments are expected over the long-term:

<u>Cost Savings/Paperwork Reduction</u>	<u>Reinvestments</u>
Less permitting	Additional monitoring
Fewer inspections	Source identification
Less data entry	Special investigations
Less time spent on compliance issues	Pollution prevention
	Outreach, technical assistance and education
Reductions in monitoring, sampling, reporting for selected users	Watershed based improvements

C. Stakeholder Support

MSD has developed a stakeholder strategy which will be developed into a stakeholder involvement plan for attachment to the FPA. MSD plans to use existing and new mechanisms to involve stakeholders and citizens in building a bridge between the pretreatment program and watershed

management programs under this XL project. MSD has conducted a series of meetings with key stakeholders and two formal meetings with all stakeholders invited. MSD plans to invite stakeholder participation in the XL project through the use of meetings, special interest meetings, special education and outreach sessions involving specific groups and site visits.

D. Innovation/Multi-Media Pollution Prevention

The integration of the pretreatment program with other environmental monitoring and management programs will allow more efficient use of resources while providing SEP. MSD will test several of the 18 results-oriented measures for assessing performance of Pretreatment Programs developed by a special AMSA committee in 1994, under a cooperative agreement grant with EPA. MSD will reinvest cost-savings into pollution prevention activities, including outreach, education, and technical assistance, first within the pretreatment program, then in other watershed based programs.

E. Transferability

Other municipalities will be able to draw valuable lessons from MSD's experience, as it relates to implementing a performance-based program in individual facilities, and ultimately across a multi-plant, multi-watershed sewer district. MSD's XL project confronts the operational, data collection and analysis, and environmental challenges posed by a regulatory structure that compartmentalizes programs that in practice would benefit from a more holistic approach and will attempt to build links between the pretreatment program and the rest of the system. Almost every sewer agency confronts this same challenge and will benefit from MSD's exploration and investigation of viable technical solutions and management approaches.

F. Feasibility

MSD can demonstrate that this project is financially, technically, and administratively feasible. MSD's Executive Director has made a commitment to ensure that sufficient resources are made available for the appropriately qualified staff, along with the labor and non-labor expenses to implement this project. This project will not involve any unproven techniques or environmental concepts.

G. Monitoring, Reporting, and Evaluation

MSD will make some enforceable commitments, voluntary commitments, and articulate additional project aspirations during FPA negotiations in the project's final phase. EPA expects these commitments and aspirations to be further defined and added to upon the completion of the data collection and analysis phase of the FPA development.

MSD's project is based upon extensive data collection and analysis. MSD SEP strategy will incorporate measures of environmental outcomes and results along with specific project milestones. The performance measures will be based on pollutant loadings, programmatic activities, environmental

projects, and assessment checks. MSD commits to submitting semi-annual reports describing the progress of the project, presenting papers regarding the project at conferences, and posting results on the Internet.

H. Shifting of Risk Burden

MSD's project is expected to have no negative environmental impacts and no adverse shifts in loadings across media. Environmental benefits will be evenly distributed across the community and watershed. MSD's current pretreatment program requirements to protect worker health and safety will remain in place.

VIII. Implementing Project XL for MSD

A. EPA Intentions

- ! EPA will work with MSD and Stakeholders to encourage and facilitate the Pretreatment Program reinvention process.
- ! EPA will review MSD's data analyses and development of Pretreatment Program performance measures.
- ! EPA will review MSD's Pretreatment Program reinvention to determine whether they will result in superior environmental performance.
- ! EPA will review MSD's performance of the activities in this Agreement.
- ! EPA will continue to provide resources to maintain the schedules set forth in this agreement.
- ! EPA intends to propose and issue (subject to applicable procedures and review of public comments) a site-specific rule, amending 40 CFR 403, and/or to propose a permit modification that applies specifically to MSD's Jefferstown WWTP. The site-specific rule and/or permit will also provide for withdrawal or termination and a post-Project compliance period consistent with the FPA.
- ! EPA intends to work with the Commonwealth of Kentucky to issue (also subject to applicable procedures and review of public comments) a permit or a permit modification under 40 CFR 402 that applies specifically to MSD's Jefferstown WWTP. The permit will also provide for withdrawal or termination and a post-Project compliance period consistent with the FPA.

B. MSD Intentions

MSD will make the commitments outlined below. This XL project will be implemented in several phases, the first of which it is anticipated will greatly increase the quantity and quality of data available for assessment and decision making. As a result, MSD will refine and elaborate upon these commitments in the subsequent phase of FPA development.

1. Enforceable

MSD will commit to additional monitoring and analysis as a condition of MSD's NPDES permit for the Jeffersontown WWTP. The specific monitoring pattern will be determined with stakeholder involvement.

2. Voluntary

MSD will voluntarily commit to developing a SEP strategy, according to the stepwise processes and priorities established therein, as laid out in Section VII.A.

MSD will voluntarily commit to entering into agreements with indirect dischargers who are eligible and who desire to receive flexibility under this project to reinvest approximately half of their resulting cost-savings in MSD-approved environmental protection and improvement activities that will be implemented as part of MSD's SEP strategy. All indirect dischargers will be screened for eligibility using prescribed enforcement screening criteria to be developed by EPA, the Commonwealth of Kentucky, MSD, and stakeholders and will be included in the FPA.

3. Aspirational

MSD will strive to reduce pollutant loadings for selected pollutants below baseline levels on an average basis in Chenoweth Run. Projected pollutant loading reductions will be clearly articulated after sufficient data is available for this assessment. The loading reductions will be developed as part of the FPA.

C. Project XL Performance Targets for MSD

- ! MSD to complete data collection and analyses and development a baseline of pollutant loadings to its Jeffersontown WWTP.
- ! MSD to develop Pretreatment Program performance measures.
- ! MSD and stakeholders to make recommendations regarding appropriate pretreatment program redevelopment.

D. Proposed Milestones

This project will occur in three phases - data collection and development of pretreatment performance measures, program redevelopment, and program implementation and evaluation. The FPA will be negotiated prior to phase 3.

Phase 1: Data Collection and Development of Pretreatment Performance Measures

Data collection and analyses began in 1998

Development of performance measures will begin in 1999

Phase 2: Program Redevelopment

Redevelopment of pretreatment program will begin in 2000

Phase 3: Program Implementation and Evaluation

Implementation of reinvented pretreatment program to begin in 2000

Program evaluation to begin in 2001

IX. Project Implementation

A. Legal Basis

This Phase 1 Agreement states the intentions of the Parties with respect to MSD's Project XL proposal for its pretreatment program. The Parties have stated their intentions seriously and in good faith, and expect to carry out their stated intentions.

The Phase 1 Agreement does not create legal rights or obligations and is not a contract or a regulatory action such as a permit or a rule and is not legally binding or enforceable against any Party. This Agreement expresses the plans and intentions of the Parties without making those plans and intentions into binding requirements. This applies to the provisions of this Agreement that concern procedural as well as substantive matters. Thus, for example, the Agreement establishes procedures that the parties intend to follow with respect to dispute resolution and termination under the Agreement. However, while the parties fully intend to adhere to these procedures, they are not legally obligated to do so.

Because this Agreement does not create binding legal requirements, the EPA intends to propose for public comment any rules, permit modifications or legal mechanisms needed to implement portions of this project. Any rules, permit modifications or legal mechanisms that implement this project will be enforceable as provided in, and to the same extent as, applicable law.

This Agreement is not an Agency "action" by the EPA because this Agreement does not create legal rights or obligations and is not legally enforceable. No action or omission by any Party that is at variance with a provision or provisions of this Agreement, or that is alleged to be at variance with a provision or provisions of this Agreement, can serve as the basis for any claim for damages, compensation or other relief against any Party.

B. Applicability of Other Laws or Regulations

Except as provided in any rules, compliance orders, permit provisions or other implementation mechanisms that may be adopted to implement the Project, the parties do not intend that this Phase 1 Agreement or the Final Project Agreement will modify or otherwise alter the applicability of existing or future laws or regulations to the project sponsor.

C. Authority to Enter Agreement

By signing this Phase 1 Agreement, EPA and MSD acknowledge and agree that they have the respective authorities, discretion, and resources to enter into this Agreement and to implement all of the applicable provisions of this Project.

D. Rights to Other Legal Remedies Retained

Except as expressly provided in the legal implementation mechanisms described above in Section VII.C., nothing in this Phase 1 Agreement affects or limits either MSD's legal rights, or EPA's rights to seek legal, equitable, civil, criminal or administrative relief regarding the enforcement of present or future applicable federal and state code, rules, regulations, or permits.

Although MSD does not intend to challenge actions implementing the project that are consistent with this Agreement, MSD reserves its right otherwise to appeal or challenge an EPA action implementing the project. Nothing in this Agreement is intended to limit MSD's right to administrative or judicial appeal or review of modification, withdrawal or termination of those legal mechanisms in accordance with the applicable procedures for such review.

E. Reporting/Annual Reports

For the duration of this Project XL Phase 1 Agreement, MSD will provide an annual summary report to EPA and, upon request to Stakeholders. MSD will make all backup data and reports available to Stakeholders on request. MSD will post the summary reports on its Internet web site at <http://www.msdlouky.org>. The first summary report will be due February 1, 2001.

In each report, MSD will provide a summary of environmental performance data related to the performance measures and will describe MSD's progress toward development of performance measures and redevelopment of the pretreatment program as described in this Phase 1 Agreement and the Final Project Agreement. The report should describe progress on all of the enforceable and voluntary commitments contained in Section VIII.B of this Agreement as well as information on the status of the schedule goals in Section VIII.C. Other reports produced as part of the project which address these subjects (such as reports for the 104(b)(3) Performance Measures Grant or the annual Pretreatment Performance Report for the NPDES permit) may be used as appropriate. An annual public meeting will be scheduled during the month of February of each year beginning February 2001. Reasonable advance meeting notice will be provided to the Agencies and Stakeholders. MSD or its representative will present the report to the Stakeholders at the public meeting.

1. Mid-year Reports

MSD will also submit a written report at mid-year. The mid-year report will include an update of the status of pretreatment program redevelopment and implementation. The mid-year report will be provided by June 30 for each of the first two years after FPA approval. After two years, and upon agreement by the Parties, reporting may be extended to annual reporting as described above. The mid-year report will be submitted to the EPA Region 4 Administrator and to the Kentucky Department for Environmental Protection Director.

2. Regulatory Reporting

One of the Parties' goals is to reduce the burden of unnecessary paperwork and obtain resulting cost savings without compromising the integrity of regulatory controls. In addition, the project is intended to

simultaneously enhance Stakeholder ability to understand the environmental benefits of the project and track the project's compliance with regulatory requirements and goals articulated in this Agreement. At this time, however, no flexibility in regulatory reporting requirements has been specifically identified. EPA and MSD will work with other regulating entities (the Commonwealth of Kentucky) to identify opportunities for consolidation of reporting requirements to move toward attainment of these goals. Any reporting requirements not specifically identified in this Phase 1 Agreement or the Final Project Agreement are unaffected.

3. Use of Information

Nothing in this Agreement reduces or affects MSD's rights to copyright, patent, or license the use of any proprietary or business confidential information or data contained in or created in the course of the implementation of its vision.

F. Unavoidable Delay

This section applies to provisions of this Phase 1 Agreement that do not encompass enforceable, regulatory mechanisms. Enforceable mechanisms, such as permit provisions or rules, will be subject to modification or enforcement as provided in applicable law.

“Unavoidable delay” for purposes of the project described in this Agreement is defined as any event arising from causes beyond the control of any Party or Parties that delays or prevents the implementation of the project described in this Agreement despite the Parties' best efforts to put their intentions into effect. An unavoidable delay event includes but is not limited to delay arising from fire, unusual storm events, acts of war, vandalism, or legislative or judicial bars to performance.

When any event occurs that may delay or prevent the implementation of this project, whether or not it is unavoidable, the Party with knowledge of the event will provide verbal notice to the designated representatives of the remaining Parties. Within ten (10) days of the Party providing initial notice to the event, a written confirmation will be provided. The confirming notice will include the reason for the delay, and the party's rationale for considering such a delay to be unavoidable. The Party providing notice will include appropriate documentation supporting the claim that the delay was unavoidable.

If the Parties, after reasonable opportunity to confer, agree that the delay is attributable to an unavoidable delay then the time for performance of obligations that are affected will be extended to cover the period lost due to the delay. If the Parties agree the Parties will document their agreement in a written amendment to this Agreement. If the Parties do not agree then the following provisions for Dispute Resolution will be followed.

G. Dispute Resolution

Any dispute which arises under or with respect to this Agreement will in the first instance be subject to informal negotiations between the Parties to the dispute. The period of informal negotiations will not exceed twenty (20) calendar days from the time the dispute arises unless that period is extended by a

written agreement of the Parties to the dispute. The dispute will be considered to have arisen when one Party sends to the other Parties a written Notice of Dispute.

In the event that the Parties cannot resolve a dispute by informal negotiations, the Parties may invoke non-binding mediation by setting forth the nature of the dispute with a proposal for resolution in a letter submitted to the Regional Administrator for EPA Region 4. Prior to issuance of an opinion, the Regional Administrator may request an additional, informal mediation meeting. If so requested, the Regional Administrator will attempt to resolve the dispute by issuing a written opinion. Any opinion, verbal or written, expressed by the Regional Administrator, will be non-binding.

H. Duration

This Phase 1 Agreement will be in effect for the period of two years, unless it is terminated earlier. This Agreement does not affect the term of any permit or rule or other enforceable regulatory mechanism.

X. Withdrawal or Termination

A. Expectations Concerning Withdrawal or Termination

This Agreement is not a legally binding document and any Party may withdraw from the Agreement at any time. However, it is the desire of the Parties that this Agreement should remain in effect through the expected duration, and be implemented as fully as possible. Accordingly, it is the intent of the Parties that they will not withdraw and that this project will not be terminated unilaterally during its expected duration of two years unless one of the conditions set forth below occurs:

1. Failure (taking into account its nature and duration) by any Party to (a) comply with the provisions of the implementation mechanisms for this project, or (b) act in accordance with the provisions of this Agreement.
2. Discovery of the failure of any Party to disclose material facts during development of the Agreement.
3. Failure of the project to provide superior environmental performance consistent with the provisions of this Agreement.
4. Enactment or promulgation of any environmental, health or safety law or regulations after execution of this Agreement which renders the project legally, technically or economically impracticable.

In addition, EPA does not intend to withdraw from the Agreement based on non-compliance by MSD with this Agreement or the implementation mechanisms, unless such non-compliance constitutes a substantial failure to comply with intentions expressed in this Agreement and the implementation mechanisms, taking into account its nature and duration. MSD will be given notice and a reasonable opportunity to remedy any non-compliance prior to an EPA withdrawal. If there is a disagreement

between the Parties over whether a “substantial failure to comply” exists, the Parties will use the dispute resolution mechanism identified in Section VIII.G. of this Agreement. EPA, along with the Commonwealth of Kentucky, retain their discretion to address non-compliance through existing enforcement authorities, including withdrawal or termination of this project, as appropriate.

B. Withdrawal or Termination Procedures

The Parties agree that the following procedures will be used to withdraw from or terminate the Project prior to the minimum project term, and further that the implementation mechanism(s) shall provide for withdrawal or termination consistent with these procedures:

1. Any Party desiring to terminate or withdraw from the Project is expected to provide written notice of its intent to withdraw or terminate to the other Party at least sixty (60) days prior to withdrawal or termination.
2. If requested by any Party during the sixty (60) day period noted above, the dispute resolution proceedings provided in this Agreement may be initiated to resolve any dispute relating to the intent to withdraw or terminate. If, following any dispute resolution or informal discussion, the Party still desires to withdraw or terminate, the withdrawing or terminating Party will provide written notice of final withdrawal or termination to the other Party.
3. The withdrawal or termination procedures set forth in this Section apply to the decision to withdraw or terminate participation in the Agreement. Procedures to be used in modifying or rescinding the legal mechanisms used to implement the Project will be governed by the terms of those legal mechanisms and applicable law.

XI. Failure to Achieve Expected Results

Most Project XL Agreements include a section describing steps which would be taken if the project fails to achieve the anticipated environmental performance despite good faith efforts. In most cases, failure to achieve anticipated environmental performance would result in an orderly return to compliance with regulatory requirements which would have been in effect absent the flexibility provided through Project XL. During this phase of the project, MSD is not requesting flexibility of any regulatory requirements. This issue will be fully prescribed in the FPA.

XII. Periodic Review

The Parties will confer, on a periodic basis, to assess their progress in implementing this project. Unless it is agreed otherwise, the date for Periodic Performance Review Conferences will occur concurrently with the annual Stakeholder meeting. No later than thirty (30) days following a Periodic Performance Review Conference, MSD will provide a summary of the minutes of that conference to all direct Stakeholders. Any additional comments of participating Stakeholders will be reported to EPA.

XIII. Signatories and Effective Dates

A. The signatories to this Phase 1 Agreement will be the EPA Regional Administrator for Region 4, the Commissioner of the Kentucky Department for Environmental Protection and the Executive Director of MSD.

B. Each party has designated a representative to serve as its contact person for inquiries concerning the Project. These representatives are as follows:

1. For MSD:

Sharon K. Worley, P.E., Project Manager
Metropolitan Sewer District
700 West Liberty Street
Louisville, KY 40203

2. For EPA:

Melinda Mallard Greene, Pretreatment Coordinator
U.S. EPA Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street
Atlanta, GA 30303

3. For Kentucky:

Allan Bryant
Kentucky Department for Environmental Protection
Division of Water
Frankfort Office Park
14 Reilly Road
Frankfort, KY 40601

C. This Phase 1 Project XL Agreement is effective on the date it is dated and signed by EPA’s Regional Administrator for Region 4, the Commissioner of the Kentucky Department for Environmental Protection, and the Executive Director of MSD.

Date: _____
John H. Hankinson, Jr.
Regional Administrator
U.S. Environmental Protection Agency, Region 4

Date: _____
Robert Logan
Commissioner
Kentucky Department for Environmental Protection

Date: _____
Gordon Garner
Executive Director
Louisville and Jefferson County MSD

List of Appendices

- Appendix A: Stakeholder Participation Plan
- Appendix B: Chenoweth Run Watershed Map

