

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:
WC-15J

June 5, 2009

Hamilton County Board of County Commissioners
County Administration Building
138 East Court Street, Suite 603
Cincinnati, Ohio 45203

Ms. Deborah Wyler Allison
Assistant City Solicitor for the City of Cincinnati
801 Plum Street, Suite 214
Cincinnati, Ohio 45202

Mr. James A. Parrott
Metropolitan Sewer District of Greater Cincinnati
1600 Gest Street
Cincinnati, Ohio 45204

Re: Final Wet Weather Improvement Program

Dear Commissioners, Ms. Allison and Mr. Parrott:

On September 16, 2008, the Board of County Commissioners of Hamilton County, Ohio, and the City of Cincinnati, Ohio (Defendants) submitted a 2008 Revised Wet Weather Improvement Program Detailed Conceptual Outline Report (WWIP), which set forth approximately \$3.29 billion (in 2006 dollars) in projects for addressing the Defendants' combined sewer overflows (CSOs) and sanitary sewer overflows (SSOs). On November 25, 2008, the U.S. Environmental Protection Agency, Ohio Environmental Protection Agency (Ohio EPA), and Ohio River Valley Water Sanitation Commission (the Regulators) issued a letter that indicated that the measures set forth in the September 16, 2008 submission were approvable means of achieving compliance with (1) the Long Term Control Plan Update requirements of the 2004 Consent Decree on Combined Sewer Overflows, Wastewater Treatment Plants and Implementation of Capacity Assurance Program Plan for Sanitary Sewer Overflows (Global Decree) and (2) the Capacity Assurance Program Plan requirements of the 2002 Interim Partial Consent Decree on Sanitary Sewer Overflows (SSO Decree). Nevertheless, the Regulators declined to approve the WWIP, and indicated that the WWIP would not be approvable unless the Defendants revised the schedule for implementing the WWIP to ensure that

(1) those measures are implemented as expeditiously as practicable and (2) measures are taken to meaningfully reduce the large CSO discharges in the Lower Mill Creek sewershed much earlier in the schedule than is contemplated by the . . . WWIP.

Although the letter contained a number of suggestions for how the Defendants could revise the WWIP in a manner that would address the Regulators' comments, nothing in the letter precluded the Defendants from proposing other approaches for addressing these comments.

On March 25, 2009, the Defendants submitted a Revised WWIP. The Regulators reviewed the March 2009 Revised WWIP and Sierra Club's April 22, 2009 comments on that submittal. Based upon that review and Sierra Club's comments, the Regulators requested that Defendants make a number of changes to the March 2009 Revised WWIP, which they did, resulting in the Final Wet Weather Improvement Program (Final WWIP) that was submitted to the Regulators on June 4, 2009. The Final WWIP is enclosed with this letter as Appendix A. A summary of the changes in the Final WWIP that were made from the March 2009 Revised WWIP is enclosed as Appendix B. A summary of the Regulators' consideration of the Sierra Club's comments is enclosed as Appendix C. As described below, the Regulators believe that the Final WWIP adequately addresses the Regulators' November 2008 comments, and so the Regulators are conditionally approving the Final WWIP, conditioned on the parties agreeing to, and the court entering, certain consent decree modification described below. This letter is being sent on behalf of all of the Regulators.

I. Schedule that is as Expeditious as Practicable

Consistent with EPA's CSO Policy (59 *Federal Register* 18688, April 19, 1994) and EPA's CSO Guidance for Financial Capability Assessment and Schedule Development, EPA 832-B—97-004, Mar. 1997 ("Financial Capability Guidance"), the Global Decree requires that both technical and financial capability be considered in evaluating whether the schedule for implementing the WWIP is "as expeditious as practicable." The Regulators' November 2008 letter suggested one possible scheduling approach the Defendants could pursue that would take both technical and financial capability into account. Under that approach, the WWIP would include a schedule for implementing the entire WWIP by a fixed end date that would be based solely on technical and engineering feasibility, with opportunities throughout the course of implementing the measures to seek Regulator approval of modifications to the schedule whenever the projected costs of near term future work (*e.g.*, 3 years) would result in a Residential Indicator calculated in accordance with EPA's Financial Capability Guidance of greater than 2%. The November 2008 letter indicated that, from a purely technical and engineering perspective, the schedule could be implemented in a substantially shorter timeframe than the thirty years proposed by the Defendants. However, in light of the \$3.29 billion estimated cost of the entire WWIP, the Regulators fully expected that the Defendants would reach the "greater than 2%" threshold, and so would need to avail

themselves of the right described in the November 2008 letter to seek a schedule modification, well before the Defendants completed implementation of the WWIP.

After the November 2008 letter, the Defendants and the United States each retained individuals with expertise on municipal financing to assist in evaluating the impact that various scheduling approaches could have on the Defendants' ability to obtain financing through the municipal bond market to fund the WWIP. Both experts agreed that, under any scenario, given (1) the magnitude of the costs of the WWIP, (2) the fact that the Residential Indicator calculated in accordance with the Financial Capability Guidance for a \$3.29 billion (in 2006 dollars) WWIP would reach an unprecedented high level of 2.8%, and (3) the fact that the country is experiencing a serious economic downturn, the Defendants are likely to pay greater financing costs to fund wastewater projects than they historically have been required to pay. Furthermore, as described more fully below, both experts agree that, in light of these three factors, the resulting increase in financing costs would be much worse if, as suggested in the Regulators' November 2008 letter, the Defendants were required to agree to a fixed-date schedule for implementing the entire WWIP in a substantially shorter timeframe than thirty years.

The Defendants are concerned about any approach that could increase the cost of their \$3.29 billion WWIP. Consequently, the Defendants proposed a phased scheduling approach in their March 2009 Revised WWIP and in their Final WWIP. Under that approach, the Defendants would be required to implement the WWIP in phases, with a first phase of specified projects being implemented in accordance with a fixed schedule to be completed by December 31, 2018; and the remaining WWIP projects being implemented during the subsequent phase in one or two subparts in accordance with schedules that would be developed later; with the first of those schedules being submitted to the Regulators by June 30, 2017.¹ The Defendants estimate that the cost of the Phase 1 measures is approximately \$1.145 billion (in 2006 dollars), consisting of a number of specified projects to address CSOs and SSOs, as well as a number of specified "Allowance" programs, such as the Water-in-Basement program required under the Global Consent Decree. The schedule and estimated project costs in 2006 dollars for Phase 1 projects appear in Attachments 1A and 1B of the Final WWIP. Both parties' experts agreed that the risks of the Defendants incurring excessive financing costs associated with implementing their WWIP are much lower under the Defendants' proposed approach than under the approach that was described in the Regulators' November 2008 letter.

Specifically, although the November 2008 letter provides a potential outlet for schedule relief, bond rating agencies would still be more likely to lower the Defendants'

¹ As described in Appendix A to this letter, the Defendants agreed in their Final WWIP to expedite their work on the Phase 1 measures by one year, so that the Phase 1 measures will be completed by December 31, 2018, rather than December 31, 2019, as had been proposed in the March 2009 WWIP. The Defendants have also added \$15 million in projects to the Phase 1 measures. The Defendants agreed in the Final WWIP to limit the "Phase 2" schedule to no more than two subparts, except where necessary to avoid "severe financial hardship."

current “AA” bond rating under the approach described in the November 2008 letter than they would under the Defendants’ proposed phased-scheduling approach. Under the phased-scheduling approach, bond rating agencies would likely factor the impact of the expected costs of only the scheduled, first phase of measures into their rating analysis, and defer considering the impact of the balance of the program until those measures are scheduled as part of Phase 2. As a result, a rating downgrade in the short-term would be less likely. In contrast, the larger \$3.29 billion (in 2006 dollars) program that would be factored into the rating analysis if Defendants’ were required to follow the approach described in the November 2008 letter would pose a significant risk of a downgrade to the Defendants’ bond rating in the near term. Under current market conditions, the difference in borrowing costs for a utility rated “A” and “AA” is approximately 85 basis points, or nearly 1%. This credit quality penalty has been extraordinarily high for the last 18 months due to broader financial market disruption. Between 2002 and 2007, the penalty was approximately 15 to 20 basis points. Bond market expert opinions vary as to whether and how long the current credit quality penalty will persist, and whether it will return to historic levels. If it were to average 50 basis points over the life of the WWIP, the additional interest costs would be approximately \$12.5 million annually. This could amount to hundreds of millions of dollars in additional costs. Those increased costs would not only increase the burden on the Defendants’ ratepayers, but they could also result in the need for a lengthier schedule.

Given the likelihood that the scheduling approach described in the November 2008 letter could substantially increase the costs that the Defendants’ ratepayers would be required to pay for the \$3.29 billion WWIP, the Regulators agree that, in the unique financial circumstances of this case, the Defendants’ proposed phased scheduling approach is a better means of ensuring that the WWIP will be implemented as expeditiously as practicable than the approach described in the November 2008 letter. Moreover, as noted above, consistent with EPA’s CSO Policy and EPA’s Financial Capability Guidance, the Global Decree requires that financial capability be taken into account in establishing a schedule that is as expeditious as practicable. The Regulators believe that, rather than locking into a schedule with a fixed end date for the entire WWIP in the current economic and credit climate, it is appropriate to lock into a schedule for the first one-third of the WWIP, and to wait eight years to establish the schedule for Phase 2 of the WWIP at a time when the economy and credit market will hopefully have improved. Assuming that conditions improve, there should be a stronger basis for selecting a more expeditious schedule for completing the remainder of the WWIP than if the schedule were selected now.

As noted in the Final WWIP, the phased scheduling approach proposed by the Defendants is not consistent with Paragraph IX.B of the Global Decree, which currently requires that the “deadline for completion of all remedial measures in the Long Term Control Plan Update and the [Capacity Assurance Program Plan] must be specified in the Plan(s).”² For the reasons described above, the Regulators believe that, under the

² In addition, it will be necessary to revise the scheduling for the final remedy for SSO 700 (SSO Decree Paragraph VI.C) to conform to the phased approach set forth in the WWIP, and make certain technical changes to two of the Global Consent Decree Exhibit 1 Capital Improvement Projects.

circumstances of this case, the phased approach is a better means of ensuring that the WWIP will be implemented as expeditiously as practicable than the fixed-end date approach currently required by the Global Decree. Consequently, the Regulators believe that the Global Decree needs to be modified consistent with scheduling approach in the Final WWIP, and so this approval is conditioned on the parties agreeing to, and the Court ultimately entering, the necessary consent decree modifications.

II. Measures to Meaningfully Reduce CSO Discharges Into the Lower Mill Creek Earlier in the Schedule

The Final WWIP includes a Lower Mill Creek Partial Remedy (LMCPR) consisting of approximately 7600 feet of 30-foot diameter tunnel, an Enhanced High Rate Treatment Facility with a capacity to treat approximately 84 million gallons per day, and other measures. The LMCPR is scheduled to be completed by December 31, 2018, as part of Phase 1 of the WWIP. The LMCPR is expected to cost approximately \$244 million (in 2006 dollars), and will reduce untreated CSO discharges by two billion gallons per year. The Final WWIP also requires that additional measures be taken to fully address CSO discharges into the Lower Mill Creek during Phase 2. The Regulators believe that the Final WWIP sufficiently addresses the Regulators' comment in the November 2008 letter that the WWIP must be revised to ensure that measures are taken to meaningfully reduce large CSO discharges into the Lower Mill Creek watershed earlier in the schedule.

III. Differences Between the March 2009 Revised WWIP and the Final WWIP

Although the Final WWIP is similar in most respects to the March 2009 Revised WWIP, the Defendants made a number of changes in response to comments from the Regulators and the Sierra Club, as well as to address additional issues that the Regulators and the Defendants determined needed to be addressed as part of the Final WWIP. A summary of those changes is enclosed as Appendix B.

IV. Sierra Club Comments

The Sierra Club provided the Regulators with written comments on the March 2009 Revised WWIP on April 22, 2009, and supplemental written comments on May 7 and May 22, as a follow-up to a May 4 phone conversation between the Regulators and the Sierra Club regarding financial issues. The Regulators appreciate the Sierra Club's efforts and involvement in this matter, and the Sierra Club's thoughtful comments on the March 2009 Revised WWIP. A summary of the Regulators' consideration of the Sierra Club's comments is enclosed as Appendix C.

The Regulators and the Defendants intend to continue keeping the Sierra Club apprized of developments throughout the course of implementation of the Final WWIP. The Sierra Club will continue to be sent copies of formal submittals and correspondence required by the consent decrees and the Final WWIP. The Regulators also intend to contact the Sierra Club from time-to-time to solicit their input at key points throughout

implementation of the consent decrees and Final WWIP. Finally, the Regulators anticipate that the Sierra Club will contact the Regulators to express their viewpoints if issues arise as the Final WWIP is implemented.

V. Conclusion

As noted above, the Regulators are conditionally approving the Final WWIP. The Regulators' approval is conditioned on (a) the parties lodging with the United States District Court for the Southern District of Ohio, Western Division, a document that would effectuate the consent decree modifications described in this letter; (b) a public notice and comment period on the modifications; and, (c) following the filing of a motion by the United States seeking entry of the lodged document, the District Court entering such modifications.

This conditional approval of the Final WWIP shall not be construed as replacing the need to obtain a Permit to Install or other permits or approvals from Ohio EPA as required by O.R.C. 6111.03, 6111.44, and the rules promulgated thereunder including Ohio Administrative Code 3745-42 for each project. Construction on a specific project shall not be initiated until a Permit to Install, including approval of detailed plans, is obtained from Ohio EPA for that project. All Permit to Install/plan approval applications shall include detailed plans and be in accordance with applicable laws and rules including O.A.C. 3745-42, (or its successor), at the time of action by the Director of Ohio EPA on a specific PTI/plan approval application. The emergence of new information or technology may require revisions to projects in the Final WWIP to assure compliance with applicable rules and laws.

Thank you for working cooperatively with us in making the additional changes that are reflected in the Final WWIP. Please contact either Duane Heaton of my staff at (312) 886-6399, or Gary Prichard from our Office of Regional Counsel at (312) 886-0570, if you have any questions about this letter.

Sincerely,



Sally K. Swanson, Chief
Water Enforcement and Compliance Assurance Branch

Enclosures

cc: George Elmaraghy, Ohio EPA
Paul Novak, Ohio EPA
Alan Vicory, ORSANCO
Marilyn Wall, Sierra Club