Appendix C

Summary of the Regulators' Consideration of the Sierra Club's Comments on the Defendants' March 25, 2009, Proposed Revised WWIP

The Sierra Club provided the Regulators with written comments on the Defendants' March 25, 2009, Proposed Revised Wet Weather Improvement Program (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. (Sierra Club's comments are attached hereto.) 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. As described below, the Regulators agree with a number of the comments, and persuaded the Defendants to revise the WWIP to address those comments. As is also explained below, the Regulators do not believe that the WWIP needed to be changed with respect to a number of the Sierra Club's other comments.

Comments That the Phased Approach is Inconsistent with the Global Consent Decree

The Sierra Club correctly noted that the phased approach set forth in both the March 2009 and the Final WWIP is inconsistent with Paragraph IX.B of the Global Consent Decree, which requires that the "deadline for completion of all remedial measures specified in the Long Term Control Plan Update and the [Capacity Assurance Program Plan] must be specified in the Plan(s)." The Final WWIP and the Regulators' conditional approval letter acknowledge that it will be necessary for the parties to seek a modification to the Global Consent Decree.[1] The proposed consent decree modification is currently being drafted, must be approved and signed by the relevant authorities, and will be lodged with the Court, to be followed by a 30-day public notice and comment period. If the public comments do not cause the Regulators to withdraw or otherwise change the modification, the Parties will present the proposed modification (as well as any comments received and the Regulators' response thereto) to the Court for approval.

Comments Related to Phase 1 Projects and Deadlines

The Sierra Club asserted that because the WWIP includes certain potential deadline extensions and modifications concerning the LMCPR, "even the Phase 1 deadlines [are] unenforceable." The WWIP has been revised to enhance Phase 1 and to tighten and clarify the approach in the March 2009 WWIP. However, except for the changes summarized below, the Regulators believe that the Defendants' approach to Phase 1 is appropriate.

Under the March 2009 Revised WWIP, the Defendants would have completed approximately $ 1.13 billion in projects by the later of December 31, 2019 or ten years after the WWIP is approved. The Final WWIP requires the Defendants to complete Phase 1 (which

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[1] In addition to changes to address Paragraph IX.B, the Parties will be proposing other minor changes to the decree consistent with the phased approach set forth in the WWIP, including revisions to the scheduling of the final remedy for SSO 700 (which is listed in Attachment 2 as a Phase 2 project), and certain technical changes to two of the CSO Consent Decree Exhibit 1 Capital Improvement Projects.

includes certain additional projects) by a fixed date, December 31, 2018, that is one year earlier than the Phase 1 end date in the March 2009 Revised WWIP. The projects set forth in Attachments 1A and 1B all have design and performance criteria and, except for the LMCPR in certain circumstances, fixed milestones that must be met.

As the Sierra Club notes, however, there are certain provisions that apply only to the LMCPR provisions that allow for a potential change in deadline or approach. The Regulators believe this flexibility is warranted because the LMCPR has been moved up from among the last set of projects to be built into the first phase of projects in response to the Regulators November 25, 2008 letter. The Defendants' original WWIP, submitted in June 2006, did not include a tunnel or other significant measures to address what the Regulators' believe are critical pollutant loads in the Mill Creek. In response to the Regulators' concerns, as part of the September 2008 proposed revised WWIP, the Defendants proposed a tunnel and suite of other measures as a "default" remedy, if necessary, at the very end of their implementation schedule. The Regulators disapproved the tentative nature of this approach in the November 2008 letter, requiring the Defendants to instead implement measures to "meaningfully reduce the large CSO discharges in the Lower Mill Creek sewershed" much earlier than the Defendants had proposed. As a result of this, in February 2009, the Defendants developed a "white paper" that proposed building a short deep tunnel and an Enhanced High Rate Treatment (EHRT) (without ballasted flocculation) facility, which was estimated to cost a total of $244 million, and which would be compatible with the Lower Mill Creek Final Remedy. However, because the LMC remedy had been split in two and pushed up considerably from what the Defendants had envisioned in the September 2008 proposed WWIP, the LMCPR is at a much more conceptual level than the other Phase 1 projects, which have received considerable planning and design work. There are several provisions concerning the LMCPR that have been designed specifically to address what the Regulators believe are valid concerns due to uncertainties in the project because of its current stage of development.

First, the Defendants have proposed a three-year study and detailed design period to examine whether green infrastructure or other measures could be used to obtain better results or lower the costs of the currently proposed LMCPR, or to otherwise refine the approach and cost estimates. The Defendants may propose a revised LMCPR as a result of this study, by December 31, 2012, as long as it will achieve equal or better CSO control and be completed in the same timeframe as the original LMCPR.

Second, because of the incipient stage of planning and cost-estimation for the LMCPR, the Defendants have concerns that increased costs of the LMCPR could affect their ability to complete the project by December 31, 2018. The Regulators have agreed to two potential extensions to address significant cost overruns. As noted, the current cost estimate for the project is $244 million. If the costs exceed $300 million, the Defendants may have an additional two years to complete the LMCPR. If the costs exceed $350 million ($110 million over the original cost estimate), they may request additional time if they can show that it is necessary and that the proposed schedule is as expeditious as practicable. This last extension provision was considerably narrowed, as a result of the Sierra Club's comment, from the broader provision that had been included in the March 2009 Revised WWIP, which would have allowed Defendants to request an additional extension for any reason. Under what is currently known about the

LMCPR and its cost estimates, it is unlikely that this extension provision will be accessed, but if costs rise that much more than anticipated, the Regulators believe the ability to request additional time is fair.

Finally, again in part because there has not yet been sufficient analysis of the LMCPR, there has been some concern whether or not the Defendants will be able to obtain a Permit to Install (PTI) for this project from the State. This concern is inherent in any project that requires a PTI, but the Defendants had hoped to have performed pilot testing and other analysis on the EHRT for the LMCPR to be more certain of its performance capabilities prior to seeking the PTI. Since the LMCPR has been moved up in the schedule, this will not be possible. Paragraph A.2 of the WWIP specifies a process for the Defendants to develop a Substitute LMCPR if the Original LMCPR does not receive a PTI from the State. However, because 1) the LMCPR represents a partial remedy for the Lower Mill Creek, with the final remedy to be implemented later, 2) the Regulators' requirement to move the LMCPR up displaced essentially $244 million of projects that were a higher priority for the Defendants, and 3) the Defendants were concerned about the "blank check" aspect of implementing a remedy that had not yet been developed and the further impact it could have on delaying their higher priority projects, the Regulators essentially agreed to a "fixed cost" Substitute LMCPR. That is, if the Defendants cannot implement the $244 million project that the Parties have agreed to because they are unable to get a PTI, they will get as much pollutant reduction they can from a project that costs essentially the same amount (less amounts they have already spent implementing the Original LMCPR). The Regulators believe that this is an appropriate negotiated approach for this interim partial remedy. Consistent with the November 2008 letter, this approach will "meaningfully reduce the large CSO discharges in the Lower Mill Creek sewershed" much earlier than Defendants had originally proposed, while giving the Defendants some certainty that they will be able to move forward with their higher priority projects, many of which are largely located in Hamilton County neighborhoods and are of high priority for their citizens. Further, because the Substitute LMCPR is not yet necessary and has thus not yet been developed, it is not possible at this point to specify a schedule for developing and implementing it. Instead, it is appropriate for the Defendants to propose a schedule that is "as expeditious as practicable" for the remedy's implementation once it has been developed.

Comments Related to Bond Covenants

The Sierra Club raised valid concerns about the March 2009 WWIP bond covenant provisions. Those provisions were included because the Defendants are concerned about being required to take actions or spend monies under the WWIP in such a way that it causes them to violate their bond covenants. The Regulators have reviewed the Defendants' existing bond covenants and do not believe that anything in the revised WWIP will cause the Defendants to violate their current covenants. However, as Sierra Club correctly pointed out, the blanket statement in the March 2009 Revised WWIP that the "Defendants shall not be required to take measures under this WWIP that will cause them to violate their bond covenants." could insulate them from complying with the WWIP in the future based on inappropriate bond covenants that they might negotiate in the future and over which the Regulators have no control. As Sierra Club explained, "[t]here is a hazard in accepting this condition[,] [as] MSD [would have] no incentive to bargain for a less restrictive covenant because they will be able to cut back on the WWIP

program." On the other hand, should the Defendants be faced in the future with the difficult choice of either violating the WWIP or their bond covenants, they may come to the Regulators to see if the WWIP should be modified to address their concerns. If the Defendants have negotiated inappropriate bond covenants to the detriment of the WWIP, the Regulators (or this Court in dispute resolution) can take this fact into consideration in deciding whether to grant the Defendants' requested relief. The WWIP has been modified to address Sierra Club's concerns as follows:

> ~~Defendants shall not be required to take measures under this WWIP that will cause them to violate their bond covenants.~~ The Regulators and Defendants do not presently expect that implementation of the WWIP will cause Defendants to violate their existing bond covenants. However, because of the expected significance of a violation of bond covenants, if facts or circumstances arise ~~which~~that suggest that implementation of the WWIP may result in Defendants violating their bond covenants, Defendants may submit to Regulators a request for a modification of the WWIP as necessary to avoid violating their bond covenants.

Comments Related to 2.8% Outer Boundary Cap and Residential Indictor Analysis

The Sierra Club had numerous criticisms of the March 2009 WWIP's 2.8% median household income (MHI) "outer boundary cap," asserting that it provided "openers" and "financial loopholes" that were inconsistent with EPA's Financial Capability Guidance.

To the extent that the March WWIP's provisions concerning the 2.8% MHI outer boundary cap could be read as relieving the Defendants of the obligation to complete all the projects necessary to come into compliance (Sierra Club commented that "MSD wants the right to *terminate* [the] entire Long Term Control Plan based on economic triggers that cannot, today, be predetermined," and that "MSD's proposal that there is a ratio of cost to income that makes the WWIP go away violates the Consent Decree."), the WWIP has been revised to clarify that:

> If this cap is exceeded, its effect (to extend the schedule(s) for implementing the WWIP) shall not relieve Defendants of the requirement ultimately to implement all WWIP measures under a schedule that is as expeditious as practicable.

However, as described in the Regulators' conditional approval letter, the Regulators' believe that the scheduling approach, including the 2.8% cap, provides appropriate flexibility given the $3.29 billion cost of the WWIP, the potential effects on the ratepayers, and the uncertainty of the current and future economic climate. Under the approach set forth, there is no loophole to compliance. The Defendants must implement all the projects necessary to come into compliance, which projects are set forth in Attachments 1 and 2, subject to a limited ability to propose different projects in appropriate circumstances that still result in compliance. The ability to propose a schedule in phases (with each phase being as expeditious as practicable), combined with a cap that serves to extend the schedule if the cap will be hit, is consistent with the Financial Capability Guidance's premise of flexible, phased implementation of CSO controls in accordance with a schedule that balances environmental, technical and financial considerations.

The Sierra Club made several other specific comments concerning how Allowances and asset management affect scheduling and the 2.8% cap:

- "MSD will be able, thru this loophole [of the 2.8% cap], to prioritize other work (such as asset management, system expansion, etc.) over the WWIP work."
- "[O]peners for asset management, allowances, and bond covenants[2] are inconsistent with USEPA Guidance."
- "MSD offers to perform WWIP projects only if they can spend $51 million for Asset Management (and no more) . . . ."

The Regulators believe that the provisions in the March 2009 WWIP concerning asset management and Allowances, including how expenditures for these are incorporated into the Residential Indicator (RI) analysis, were generally appropriate, although the final WWIP includes various modifications to better explain these programs and to tighten various aspects.

In addition to specific projects to bring the Defendants' sewer system into compliance, the WWIP includes eight programs referred to as "Allowances." Four of these programs were specifically included in the consent decrees. These are the Water-in-Basement (WIB), Sewer Relining, Manhole Rehabilitation, and Rainfall Derived Infiltration and Inflow (RDI/I) Programs. The other Allowance programs include the Home Sewage Treatment System Elimination Program (to bring new sanitary sewers to areas where existing home treatment systems, such as septic systems, are failing or inadequate and thus having a negative impact on water quality and/or public health); the Urgent Capacity Response Program (to provide funds to address urgent capacity problems in existing CSO communities, WIBs, or unpermitted discharges by providing funds for projects that either have not yet been identified on the list of WWIP projects or have been moved up from existing schedules because of need); WWIP Strategy Development Studies and Recreation Management (to fund ongoing evaluation of the progress of the WWIP and recreation management notice, reporting and information needs to protect public health from overflows); and the Defendants' Sustainable Infrastructure Program (or "Green Program"). Under the Green Program, the Defendants will use low impact development best management practices and other "green infrastructure" methods aimed at preventing or reducing storm water entering the sewer system in both CSO and SSO areas. The Defendants will pilot, study (included as part of a 3-year Lower Mill Creek study), and begin to implement various green infrastructure projects. Under Paragraph C.3 of the WWIP, the Defendants may propose adding or substituting "green infrastructure" for specified "grey infrastructure" WWIP projects. In some instances, it is anticipated that green infrastructure can achieve similar results to grey infrastructure for less money and with the added public benefit of a "greener" and more sustainable community environment.

The Allowance Programs complement the LTCP and CAPP projects as they also serve to address, reduce, and/or eliminate overflows and to otherwise improve water quality. However, due to the nature of the needs they address, allowance projects may often not be known in advance and allowance needs may vary somewhat from year to year.

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[2] The Regulators believe the changes to the bond covenant provisions described earlier in this document adequately address this comment.

As a general matter, the Regulators support the Allowances and believe that they are appropriate measures to be included in the WWIP. However, because of the $3.29 billion cost of the WWIP and the Defendants' assertion that such high costs may cause them to take longer to implement the WWIP projects, the Regulators required the Defendants to look hard at the needs and costs of these programs and to "scrub them" where possible. The annual and future budget estimates for these programs at Attachment 4 of the WWIP are considerably reduced from the Defendants' prior estimates in the 2006 and 2008 WWIP submittals.

Similarly, as a general matter, the Regulators also support the Defendants' expenditures for asset management. The U.S. Environmental Protection Agency's website defines "asset management" as "managing infrastructure capital assets to minimize the total cost of owning and operating them, while delivering the service levels customer's desire." [3] In other words, it is a comprehensive program for ensuring that the sewer system is maintained in adequate working order. A good asset management program can improve overall operational, environmental, and financial performance. In the Defendants' program, asset management measures are not included as Attachment 1 or 2 projects or as Allowances projects. Thus, asset management expenses are in addition to the $3.29 billion WWIP.

Because asset management and Allowances are, generally speaking, appropriate expenditures to be considered in the Residential Indicator analysis,[4] which is used for schedule setting purposes under EPA's guidance, but because money spent on these measures may have the effect of delaying other WWIP projects, the WWIP includes measures to limit the amount of asset management and Allowance money that can be included in the RI. The Defendants may include in the RI analysis up to $51 million per year in asset management expenses (a figure the Regulators believe is reasonable) and up to the annual average that MSD has spent on Allowances in Phase 1.[5] In addition, the Defendants must annually provide an accounting and a

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[3] See http://www.epa.gov/OW-OWM.html/assetmanage/. As EPA's website makes clear: "each utility is responsible for making sure that its system stays in good working order-regardless of the age of components or the availability of additional funds. Asset management programs with long-range planning, life-cycle costing, proactive operations and maintenance, and capital replacement plans based on cost-benefit analyses can be the most efficient method of meeting this challenge." In May 2006, EPA and six leading water and wastewater utility associations announced a major collaborative effort to improve water and wastewater utility performance on asset management through education, management tools and performance measures.

[4] Under EPA's Financial Capability Guidance, the first step in determining the Residential Indicator is to determine the permittee's total waste water treatment (WWT) and CSO costs "by adding together the current costs for existing wastewater treatment operations and projected costs for any proposed WWT and CSO controls," including operating and maintenance expenses. Financial Capability Guidance at p. 12. Because of the significant variation found among municipal systems and their compliance status, the guidance does not include or exclude particular types of WWT and CSO, but rather gives discretion to the Regulators to determine whether specific proposed WWT projects or CSO controls should be included in the projected costs. Id. As discussed above, the Regulators believe that the types of remedial measures included in the both the Allowances and Asset Management program are appropriate measures to be included in developing the "total WWT and CSO costs" estimate required by the guidance.

[5] MSD may spend more than $51 million on Asset Management, but it may not include these expenses in the schedule setting exercise unless they demonstrate that it is necessary to do so and the Regulators agree to allow it. Similarly, because MSD, Sierra Club, and the Regulators are all very interested in green infrastructure projects where such projects will be cost-effective and will achieve appropriate results, if MSD finds that it is necessary to spend more money on green projects than the average of what it has been spending annually in Phase 1, and the Regulators agree, they may include these increased Green Program Allowance expenses in the RI analysis.

list of work for which asset management and Allowance monies have been spent in the prior year as well as a 3-year estimate of future expenditures for each of these programs. In this way, the Regulators can review expenditures and projects, and if they believe the Defendants are incorrectly prioritizing their expenditures (e.g., spending too much money on asset management to the detriment of other projects[6]), the Regulators can require a course-correction. This approach strikes a balance that allows the Defendants to run their programs without micromanagement from the Regulators (which the Regulators are not equipped to do), but that gives the Regulators the ability to seek to control these expenses if necessary.

Finally, the Sierra Club asserted that the 2.8% cap "provides MSD with no incentive to seek other funding mechanisms or prioritize requests for use of state or federal funds for this purpose." In response, the Regulators believe that given the $3.29 billion cost of the program, even with the "cap" (which as discussed does not in fact cap the Defendants' obligations, merely potentially extend the time that Defendants have to meet them), the Defendants have significant incentives to try to lower the cost to their ratepayers by seeking grants, stimulus funding, loans at a lower interest rate than municipal bonds afford, or other funding mechanisms.

Additional Comments Related to Financial Capability

The Sierra Club also noted that the costs associated with the Phase I measures equate to a Residential Indicator of approximately 1.7%, which is below the 2% "high burden" level specified in that guidance. However, under EPA's Financial Capability Guidance, it is necessary to evaluate a community's financial capability and establish a scheduling approach based upon the costs of the entire remedial measures program that the specific community will be required to implement, not just a portion of those measures. Consequently, the scheduling approach must account for the fact that the Residential Indicator for the entire WWIP is substantially above the 2% "high burden" level (*i.e.*, 2.8% for a $3.29 billion program). It also is worth noting that the Residential Indicator associated with Defendants' Phase 1 measures is equal to or greater than the Residential Indicator for other comparably-sized communities for implementing their *entire* wet weather improvement programs. For example, Indianapolis and Washington, D.C., had Residential Indicators of 1.73% and 1.5%, respectively, for their entire programs; both were allowed to spread their burdens over 20-year implementation schedules; and the schedules in both of those cases were developed under far better economic conditions than those that exist today.

The Sierra Club further asserts that the City of Atlanta was required by its Clean Water Act consent decrees to implement $3.6 billion in improvements in approximately 12 years to address their CSO and SSO problems. The Regulators are not aware of the source of the Sierra Club's information, but the correct cost of the programs according to the City of Atlanta's

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[6] The Sierra Club also raises the possibility that MSD will prioritize "system expansion" over WWIP projects. However, none of the Allowances has a goal of significant "system expansion." The Urgent Capacity Program addresses capacity needs in existing CSO communities, and while the Home Sewage Treatment System Elimination Program will result in new sanitary sewers, these sewers will connect already built-up areas into the public sewers, and will be prioritized based on public health risk Further, construction projects under both these Allowances must undergo public review and evaluation, and approval by the Board of County Commissioners. Thus, there would be a public process and opportunity for Sierra Club, or other members of the public, to object to these sewer projects.

February 2002 CSO Remedial Measures Plan Financial Capability Assessment was actually approximately $2 billion, and—as with Indianapolis and Washington, D.C.—the schedule for implementing those measures was established under better economic conditions than today.

Comments Concerning Rate Setting and Transparency

The Sierra Club raised two issues concerning the "residential share" used in the Residential Indicator (RI) analysis and in setting the Defendants' rates. First, the Sierra Club asserts that the Defendants are not distributing the financial burden of the program equitably between residential users and commercial/industrial users, putting too much of a burden on the residential sector, which as an input in the RI analysis of EPA's Financial Capability Guidance can tend to produce a higher RI and thus potentially a longer schedule. (On a conference call between Sierra Club and EPA representatives and their respective financial experts to discuss this and other financial issues, Sierra Club's expert raised particular concerns about how infiltration and inflow (I/I) (vs. billed wastewater flows) were allocated to residential users.) Second, the Sierra Club noted that the Defendants are using a proprietary and non-transparent model for determining the residential share and for setting its rates and that this is inappropriate as it does not give the public sufficient understanding of the analysis.

EPA's Financial Capability Guidance (at p. 14) states that "[t]he residential share of total costs . . . is computed by multiplying the percent of total wastewater flows including infiltration and inflow attributable to residential users by the total costs . . . ." However, the guidance does not dictate how I/I should be attributed to residential users, and there are a variety of potentially appropriate ways to do so.

Similarly, EPA's Financial Capability Guidance does not dictate how a locality should set its rates; nor does it dictate how the user fees should be apportioned among residential, commercial, and industrial users in rate setting. In discussing sewer user fees as a source of funds for funding CSO controls, the guidance (p. 48) states that the permittee should analyze existing user fees and rate structures and should then:

> develop a new rate structure that includes recovery of the costs for CSO controls. Depending upon how CSO user fees are apportioned among residential, commercial, and industrial users, implementation of the LTCP may cause fees to increase significantly. In most cases, construction of the CSO controls occurs over an extended period allowing time for an orderly increase in the user fees.

Thus, the guidance recognizes that residential share is one of the inputs in the RI analysis, but it does not provide specific direction about how to calculate the residential share. The guidance also separates the issue of how a locality may recover the increased costs from a CSO program from the flow-based calculation of residential share, which can include an allocation of I/I.

The United States' financial expert has spent considerable time reviewing the Defendants' model and working with the Defendants' financial experts involved in this issue. Ultimately, the United States is satisfied that: 1) the Defendants have not invented some residential share analysis that they use exclusively for purposes of EPA's RI analysis in an

attempt to "game the system," but rather the method that the Defendants are using for RI purposes is the same one that they use for rate setting purposes; 2) the Defendants are performing the analysis in an appropriate way; and 3) the analysis has produced a relatively conservative and reasonable residential share number (currently the baseline is 59.5%).

As to the Sierra Club's second issue, the Regulators support transparency and public involvement in rate setting. Under Ohio law (§ 6117.02 ORC), the Board of County Commissioners has the authority to and is required to establish "reasonable rates" for users of the Hamilton County sewer system. Procedures for establishing rates are governed by the 1968 Management Agreement between the Board and the City of Cincinnati. Under this agreement, the County Commissioners are required to hold a public hearing on changes to sewer rates prior to adopting them. Prior to the hearing, notice of the hearing is published in the newspaper and on MSD's website (www.msdgc.org), and notice is mailed to interested parties as determined by MSD by using a variety of data bases and source material, including, but not limited to, City of Cincinnati community council and Hamilton County-wide public officials listings; environmental advocates; significant industrial users listings; development and engineering consultants listings; and various area Chambers of Commerce members listings. Defendants report that typical numbers of direct-mail notifications are 400-500.

In short, it appears to the Regulators that there is a process for public involvement in the rate-setting process, and the Sierra Club is encouraged to raise its issues in this forum and directly with the Defendants. Toward this end, the Defendants have informed the Regulators that they are willing to meet with the Sierra Club and their respective financial experts to discuss the questions and concerns that the Sierra Club has raised in its comments on the WWIP.

Comment Concerning Lowering of Water Quality Standards

The Sierra Club commented that the "unlimited extensions, loopholes and lack of deadlines create a *de facto* lowering of water quality standards for at least 30 years." A delay in achieving water quality standards is inherent in any consent decree where time is needed before any entity can achieve compliance, and was clearly contemplated by the SSO and Global Consent Decrees. As discussed above, the potential schedule extensions are a limited, targeted and appropriate response to address the $3.29 billion cost of the WWIP and the current economic times. Finally, it should be noted that despite the cost of the program, the Final WWIP and the Consent Decrees commit the Defendants to achieving water quality standards and otherwise complying with the Clean Water Act, and Ohio laws, and ORSANCO requirements. The WWIP sets forth the full complement of projects necessary to achieve compliance, in a priority order that the Defendants developed following close consultation with the Sierra Club.

Comments Pertaining Technical and Engineering Feasibility of WWIP Scheduling Approach

The Sierra Club noted that, although the Regulators' November 25, 2008 letter, had suggested that the Defendants' develop a schedule based upon technical and engineering feasibility, with frequent opportunities to modify the schedule to reflect financial considerations, the Defendants provided no documentation that the scheduling approach in the March WWIP

was necessary from a technical and engineering perspective. However, nothing in the November 2008 letter precluded the Defendants from proposing an alternative approach for addressing the Regulators' comments. Moreover, as described in the Regulators' conditional approval letter, the Regulators believe that the Defendants' proposed phased scheduling approach is preferable to the one suggested by the Regulators' November 2008 letter because it may well result in the Defendants implementing the WWIP more expeditiously than the approach that was suggested in the Regulators' November 2008 letter, and it will minimize the possibility of significantly increased financing costs. Finally, as was also described in the conditional approval letter, consistent with EPA's CSO Policy and 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." Consequently, there is no need for the Defendants to provide a strictly technical or engineering justification for the phased scheduling approach.

April 22, 2009

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RE: Sierra Club's Initial Comments in response to the MSD's March 25, 2009 Revised Wastewater Improvement Program ("WWIP")

Dear Ladies and Gentlemen:

As required by Judge Spiegel's December 3, 2008 Opinion and Order, the Sierra Club and Marilyn Wall ("Sierra Club") submit the following Initial Comments in response to the MSD's March 25, 2009 Revised Wastewater Improvement Program ("WWIP").

The WWIP returns to the illusory principles of the Interim Partial Consent Decree. As explained below, the MSD seeks to replace reasonable federal guidelines with loopholes that jeopardize the completion of even the first one-third of the MSD's "Phase 1" of the WWIP.

The MSD justification for this leap backward rests on the faulty premise that the ***Long Term*** Control Plan should be based on a **short term** economic downtown. To address the short term economic slowdown, MSD has decided that the ***long term*** decisions must be put off and re-openers must riddle MSD's ten year "deadline for a portion of the project." Further, the MSD wants the right to *terminate* entire ***Long Term Control Plan*** based on economic triggers that cannot, today, be predetermined.

The November 25, 2008 letter sets forth the means to deal with economic uncertainty. These means are based on national USEPA Policy, consistently applied across the country, to address economic distress caused by increased costs in achieving compliance with the Clean Water Act. Sierra Club supports USEPA's national policy and its November 25, 2008 letter. The Sierra Club agrees it is appropriate to set up milestones for the evaluation of future financial conditions and adjust schedules, if need be. However, MSD is currently within the national policy and there are currently no indicators that suggest projected rates will cause "widespread financial distress." Furthermore, MSD will not be borrowing all $3.3 billion at once. MSD has routinely issued bonds every year or so, successfully accessing the credit market and MSD can be expected to do so in the future.

MSD's proposed bond covenant provision to be incorporated into the WWIP would cause substantial delays in WWIP projects, prioritize bond funding mechanisms over WWIP projects, and create a non-transparent process in which MSD unilaterally determines what may or may not violate a bond covenant. The bond covenant provision states that "Defendants shall not be required to take measures under this WWIP that will cause them to violate their bond covenants." While the Sierra Club understands that there are a variety of legal issues that MSD must consider in administering its program, there is no need to reference them in the revised WWIP. If MSD believes complying with the Consent Decree and the WWIP would violate the law at some point in the future, MSD can seek relief from the court and ask for a modification of the consent decree. The WWIP should not contain terms that may be used to "authorize" violations of the Consent Decree and the Clean Water Act so that MSD may have greater "flexibility" in negotiating bond covenants. It creates a moral hazard to write into the revised WWIP the notion that MSD must agree to whatever bond covenants are offered.

In this vein, MSD does not propose any fairly shared increase in the financial burden to be borne by commercial or industrial sectors. MSD has proposed that the **entire** cost of the revised WWIP be borne by the ***residential sector***. Nor has MSD adequately considered other mechanisms to raise funds for sewers improvements.

After years of violations of water quality standards and years of delay in remedying these threats to public health, Sierra Club expected MSD's "revised WWIP" provided March 25, 2009 to comply with the Consent Decrees of 2002 and 2004.

The June 4, 2004 Consent Decrees state "If such capital costs are expected to exceed $1.5 billion, then ***the deadline for completion of all remedial measures specified in the Long Term Control Plan Update and the CAPP must be specified in the Plan(s)*** and must ***still*** be as expeditious as practicable, but may be later than February 28, 2022, if it is not practicable to complete the CAPP and Long Term Control Plan Update remedial measures by that date." [emphasis added]

These plans, the original Wastewater Improvement Plan, were submitted June 2006 and were disapproved by USEPA on November 25, 2008.

The WWIP does not comply with the Consent Decrees and the Clean Water Act and the regulators' letter of November 25, 2008. As noted in that letter, "Defendants have 120 days to alter the WWIP consistent with these written comments and resubmit it for ***final*** approval, or submit the matter for dispute resolution".

Sierra Club does not believe the plan can be approved for the following additional reasons:

1. The MSD plan fails to include deadlines for all remedial measures, which must be specified in the plans.
    a. Specifically the plan includes only $1.13 billion in scheduled projects (Phase I), out of an anticipated $3.29 billion, to be completed by 2019.
    b. Other projects would be scheduled by the later of either 8 years after the WWIP is approved or by Dec 31, 2017. However, MSD goes on to state, "Defendants may propose a Phase 2 schedule for only a subset of the remaining WWIP projects, with the remainder of the WWIP projects to be scheduled as part of an additional phase to be scheduled at a later specified date, ..."
    In other words, there would be a schedule that could include some, but not necessarily all, of the remaining WWIP projects. There is not even a final date for when the rest of the projects would be *scheduled.*

2. The WWIP provides MSD with 3 options to avoid completing the Phase I projects, thereby making even the Phase I deadlines unenforceable. They allow MSD to modify its partial remedy for lower Mill Creek:
    a. if MSD's PTI is denied in 2015 (in which case MSD can propose a substitute plan that is be done "as expeditiously as practicable"); or
    b. if the costs estimates for the partial remedy exceed current estimates (in which case MSD proposes that it has the "right" to two additional years) or
    c. if MSD determines more time is needed for the completion of the partial remedy.

    As a result of these barriers to completing Phase I, there is no date certain for which even Phase I projects will be completed. Should MSD's PTI be denied in 2015 and there be a dispute as to whether the substitute plan is "expeditiously as practicable," then under the WWIP's proposed approach this matter would be subject to dispute resolution.

3. MSD sets forth an outer boundary cap of 2.8% MHI, at which point MSD will not be required to continue, propose or implement any Phase II (the content of Phase II is undefined) or future (undefined) phase(s).
    a. The WWIP is not the MSD's only cost item. MSD will be able, thru this loophole, to prioritize other work (such as asset management, system expansion, etc.) over the WWIP work.
    b. This loophole also provides MSD with no incentive to seek other funding mechanisms or prioritize requests for use of state of federal funds for this purpose.

4. MSD provides no documentation that the limited schedule it has proposed is "as expeditious as practicable" from a technical and engineering perspective. Sierra Club believes that USEPA's assessment in its 11/25/2008 letter (i.e. that "there does not appear to be any technical basis for a thirty-year or greater schedule for the completion of the measures") is still valid.

5. MSD proposes financial loopholes inconsistent with the federal guidelines.
    a. MSD's Financial Residential Indicator Analysis is inconsistent with USEPA's Financial Capability Guidance.
    b. Specifically, openers for asset management, allowances, and bond covenants are inconsistent with USEPA's Guidance. MSD offers to perform WWIP projects only if they can spend $51 million for Asset Management (and no more) and keep any bond covenants. There is a hazard in accepting this condition. MSD has no incentive to bargain for a less restrictive covenant because they will be able to cut back on the WWIP program.
    MSD's proposal that there is a ratio of cost to income that makes the WWIP go away violates the Consent Decree.

6. Unlimited extensions, loopholes and lack of deadlines create a *defacto* lowering of water quality standards for at least 30 years, without even following the process allowed by law and the Consent Decree to lower water quality standards. This denies the current and

future generations the clean water they are entitled to by the CWA. To be clear, the Sierra Club does not support lowering the water quality standards and believes that MSD can achieve these standards.

MSD's WWIP continues the endless delays, endless re-negotiations and endless water quality violations that caused Sierra Club to begin this legal action in the first place. In contrast, Atlanta, Georgia's consent decree is requiring $3.6 billion be spent in approximately 12 years to correct their CSO/SSO problems. MSD has provided no rationale that MSD cannot meet a significantly more aggressive schedule and cannot raise sufficient funds through various measures (as Atlanta and other cities have). MSD's current and past sewer rates do not meet USEPA's economic burden test; MSD can currently raise more money and do more projects than MSD is doing.

The WWIP should not be approved by USEPA and the MSD should produce a schedule, as required by that Consent Decree, that is: (a) as expeditious as practicable (certainly less than 30 years); (b) achieves water quality standards by correcting the 'worst first'; (c) uses green infrastructure cost effectively; and (d) aggressively seeks alternative funding sources - including making the WWIP a regional funding priority and making the WWIP implementation a priority at MSD.

Sincerely,

Marilyn Wall

Marilyn Wall
Secretary, Sierra Club Board of Directors

cc: Mark Norman
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