

TRANSMITTAL LETTER FOR BOARD MEETING OF APRIL 21, 2011

COMMITTEE ON JUDICIARY

Mr. Kevin J. Fitzpatrick, Acting Executive Director

..Title

Authority to enter into a consent decree with the United States and the State of Illinois to settle alleged violations of the Clean Water Act and the District's NPDES Permits

..Body

Dear Sir:

The District holds National Pollutant Discharge Elimination System ("NPDES") permits for the Calumet, North Side and Stickney Wastewater Reclamation Plants ("WRP") issued by the Illinois EPA pursuant to Section 402 of the Act, 42 U.S.C. § 1342 and 35 Ill. Adm. Code § 309.101 *et seq.* In addition to controlling discharges from the WRPs those permits impose conditions upon discharges directly from the combined sewer systems tributary to the WRPs (hereinafter "combined sewer overflows," or "CSOs").

In compliance with those NPDES permits, the District developed the Tunnel and Reservoir Project ("TARP") as the District's Long Term Control Plan to control CSOs. Illinois EPA approved TARP as the District's Long Term Control Plan on June 28, 1995, and prior to and following that approval the District has diligently prosecuted the construction of TARP. All TARP tunnels were completed and in operation by 2006. Construction of Phase II of TARP, the Thornton Composite Reservoir and the McCook Reservoir, continues with the Thornton Composite Reservoir scheduled to commence operation on December 31, 2015 and the McCook Reservoir scheduled to commence operation of Stage 1 on December 31, 2017 and of Stage 2 on December 31, 2029.

The U.S. Environmental Protection Agency has alleged that discharges from the District's CSO systems have and continue to violate the following permit requirements: (1) the requirement to provide the equivalent of primary treatment for at least ten times the average dry weather flow for the average design year and (2) the prohibition on discharging pollutants into waters of the United States that cause or contribute to violations of applicable water quality standards for dissolved oxygen, solids, and floatables. Illinois EPA has joined the federal agency in alleging the stated water quality violations.

It is the agencies' position, stated in EPA's Combined Sewer Overflow Control Policy ("CSO Policy"), dated April 19, 1994 and memorialized at 33 U.S.C. §1342(q)(1), that all communities with combined sewer systems operating in violation of applicable water quality standards must be made subject to an enforceable schedule for the implementation of their Long Term Control Plans. Here, as with other major CSO communities, the agencies interpret "enforceable" to require a judgment or a consent decree entered in federal District Court.

The District has been in discussions with the agencies on these claims for nearly a decade and, more recently, has engaged in concrete and extended settlement discussions with the state and federal parties. Those negotiations have now produced a proposed Consent Decree for entry by the U.S. District Court for the Northern District of Illinois. If agreed to by the District, the United States and the State of Illinois and subsequently entered by the court, that consent decree would resolve the federal and state claims associated with discharges from the District's combined sewer system. The major terms of the proposed consent decree, a copy of which has been provided to the Board, are summarized below.

TARP Construction Schedule

The decree establishes a construction schedule with interim milestones for the completion and operation of the Thornton Composite Reservoir and the McCook Reservoir. That schedule adopts the District's own milestone and completion dates. The decree also recognizes that the rate of progress of mining operations and of construction managed by the United States Corps of Engineers (the "Corps") is not under the District's control. As a result, the decree provides for extensions of the fixed schedule dates for contingencies including market-driven variations in the rate of mining and construction delays on Corps-controlled projects.

The decree does not excuse Corps delays caused by insufficient appropriations if the advancement of sufficient funds by MWRD is not precluded by law. This term effectively obligates the District to advance funds to the Corps (subject to reimbursement of advancements in excess of 50% of the portion of the total project cost eligible for local contribution) in the event of the unavailability of federal funds necessary to complete Corps TARP projects by the stated deadlines. According to current estimates and assuming a worst case of no further federal appropriations, this would constitute an additional obligation of \$104 million.

If an extension request for mining work results from the insolvency of one of the mining contractors, or if the governments' determine (subject to dispute resolution) that an extension request results from an action or inaction by a mining operator that materially affects the District's ability to complete the applicable reservoir within a reasonable amount of time, then the governments may require the District to develop for approval and subsequently to implement a revised work plan to complete the affected excavation work as expeditiously as practicable. The range of options that must be considered in developing such a revised work plan is limited only by the constraint that actions prohibited or precluded by law need not be evaluated. Options that require the District to seek to void existing contracts must be considered.

Performance Criteria

The decree establishes performance criteria that must be satisfied by the Calumet and Mainstream/Lower Des Plaines TARP Systems upon completion of their respective reservoirs. These performance criteria become effective upon the commencement of full operation of each system and require the District to maximize its utilization of TARP for the reduction of CSO discharges. The decree does not establish a minimum number of CSO events. Compliance with the Performance Criteria must be demonstrated for a period of at least one year. Thereafter, while the District is expected to continue to operate efficiently, it may petition for the termination of a number of decree requirements, including stipulated penalties associated with the Performance Criteria.

Floatables Control

The decree requires that the District continue its existing seasonal operation of its debris boat and pontoon boats to control floatables in the Chicago Area Waterways. In addition, it requires that the District replace two existing pontoon boats with skimmer boats (at an estimated cost of approximately \$100,000 per boat) and implement a new year-round program to respond to rainfall events that trigger CSO discharges from District outfalls. The decree also obligates the District to pursue the placement of a floating boom in Addison Creek to collect floatables released from the Westchester Pump Station.

Post-Construction Monitoring

The decree requires the District to develop Post-Construction Monitoring Plans for the Calumet and Mainstream/Lower Des Plaines TARP Systems. The purpose of these plans is to provide data sufficient to determine whether each System is in compliance with the water quality standards requirements incorporated in the applicable NPDES permits. EPA and Illinois EPA must approve these plans and the District must demonstrate that their position is arbitrary and capricious or contrary to law in the case of a dispute.

Following implementation of the Post-Construction Monitoring Plan for each portion of the System the District is required to develop a report containing an analysis of the impact to water quality by discharges from CSO Outfalls in the immediate vicinity of those CSOs. EPA and Illinois EPA will review those reports and make a determination whether the District's CSOs in the Calumet or Mainstream/Lower Des Plaines TARP System are violating CSO requirements of the applicable permit(s). The District may contest those findings under the Dispute Resolution provisions of the consent decree.

If EPA and Illinois EPA make such a finding the District is required to develop a plan analyzing the range of alternatives available to come into compliance with such requirements and identifying the actions the District proposes to take to meet such requirements, along with a schedule for those actions. EPA and Illinois EPA will review and approve or disapprove that report, but only as to whether it contains the information required of it by the decree. The governments are not authorized to approve or disapprove or otherwise take action on the substance of the report(s). As a result, the District and not the governments will control decisions concerning the appropriate response to continuing non-compliance with water quality standards and the schedules on which those actions or projects will proceed.

Termination

The District may seek Partial Termination separately for the Calumet and Mainstream/Lower Des Plaines TARP Systems upon completion of the construction schedule, one year's satisfactory compliance with the Performance Criteria for that portion of the system, and payment of any accrued stipulated penalties. Partial Termination terminates various obligations associated with the construction of the system as well as the Performance Criteria for that portion of the system and the stipulated penalty provisions associated with those requirements.

Final Termination of the decree also can be obtained separately for the Calumet and Mainstream/Lower Des Plaines TARP Systems. In addition to the requirements for Partial Termination, Final Termination requires satisfactory compliance with the CSO requirements of the then effective Calumet, North Side, or Stickney NPDES Permit, as applicable, including all applicable water quality standards requirements incorporated therein. Thus the term of this decree extends until the District's CSOs no longer cause or contribute to violation of any water quality standards incorporated in the respective NPDES permits.

Civil Penalty and Supplemental Environmental Project

The consent decree imposes a total civil penalty of \$675,000, of which \$350,000 is payable to the U.S. Treasury and \$325,000 is payable to the State of Illinois.

The consent decree also requires the District to expend an additional \$325,000 on a Supplemental Environmental Project ("SEP") in lieu of an additional civil penalty. The District may propose one or more SEPs for review and approval by EPA and the Illinois EPA. A SEP must be a stormwater runoff reduction project that employs specified green infrastructure and other technologies. Once the SEP has been completed, the District must report to the agencies which will determine whether the District has satisfactorily completed the SEP(s). Stipulated penalties apply if the agencies determine that the District has not satisfactorily completed the SEP(s). This determination is subject to the Dispute Resolution provisions of the consent decree.

Reporting Requirements

The consent decree requires the District to submit annual reports on its compliance with terms of the decree, including its compliance with construction schedules, the Performance Criteria for the completed TARP Systems, provisions related to the control of floatables, development and

implementation of Post-Construction Monitoring Plans, its development of a post-construction report, and its development of a post-construction plan, if required.

Stipulated Penalties

The consent decree imposes stipulated penalties for violations of decree requirements, including those that are subject to the decree's reporting requirements. In most cases the stipulated penalties increase in severity based on the length of time the violation persists.

Settlement Process

Settlement of an enforcement action with the United States is unlike settlement of commercial litigation. Consistent with the practice of the United States in its settlement of all federal environmental claims, the sequence of events that will lead to entry of the proposed consent decree here is as follows:

- Negotiating teams reach agreement on settlement terms [COMPLETED];
- District's Board of Commissioners reviews, approves and authorizes execution of the proposed consent decree;
- U.S. (Department of Justice and EPA) and State of Illinois (Office of the Attorney General; IEPA) review, approve and execute proposed consent decree;
- EPA files complaint and simultaneously lodges fully executed consent decree with the court;
- Public notice period of at least 30-days to receive comments on lodged consent decree;
- EPA develops a written response to comments and files in support of its motion for entry of the consent decree; and
- Court enters decree assuming that it is satisfied with the comments in support of the decree.

Conclusion

The Acting General Counsel requests that the Board authorize the District to enter into a consent decree with the United States of America and the State of Illinois to resolve alleged violations of the Clean Water Act and the District's NPDES permits, and that the Board further authorize the Acting Executive Director to execute a consent decree consistent with the decree presented to the Board and the terms and conditions set forth herein.

Requested, Ronald M. Hill, Acting General Counsel

Respectfully Submitted, Terrence J. O'Brien, Chairman Committee on Judiciary

Disposition of this agenda item will be documented in the official Regular Board Meeting Minutes of the Board of Commissioners for April 21, 2011