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Via First-Class and Electronic Mail

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**Re: Comments on Proposed Modified Consent Decree in
U.S. and the State of Maryland v. Mayor and City Council of Baltimore
(Case No. 1:02-cv-01524-JFM)**

Dear Sir or Madam:

These comments are submitted by Blue Water Baltimore and the Environmental Integrity Project (collectively, “Commenters”) on the proposed modification, as published in the Federal Register on June 7, 2016, of the Consent Decree in the case *U.S. and the State of Maryland v. Mayor and City Council of Baltimore* (Case No. 1:02-cv-01524-JFM) (“Proposed Modified Consent Decree” or “Modified Consent Decree”).¹ This Consent Decree, governing violations of the federal Clean Water Act (“CWA” or “Act”), was initially entered in 2002 among the U.S. Environmental Protection Agency (“EPA”), the Maryland Department of the Environment (“MDE”), and the City of Baltimore (“City” or “Baltimore”) (hereinafter “2002 Consent Decree”), and addresses unlawful pollution discharges from the City’s separate sanitary sewer system.² The 2002 Consent Decree requires that the City eliminate sanitary sewer overflows (SSOs), dry weather overflows and combined sewer overflows through corrective actions no later than January 1, 2016.³ It is beyond dispute that the City failed to comply with a substantial proportion of its requirements pursuant to the 2002 Consent Decree, not the least of which include dozens of projects to clean, repair, and rehabilitate failing sewer lines and eliminate structured sewage overflows. EPA, MDE, and Baltimore City are now proposing to extend the deadline for eliminating SSOs and other unlawful sewage discharges to 2031 and the deadline for certifying their elimination to 2033.

Commenters appreciate the opportunity to comment on the proposed Modified Consent Decree. These comments focus on compliance with the CWA, protection of public

¹ 81 Fed. Reg. 36584 (June 7, 2016).

² Sanitary sewer overflows are prohibited by the federal Clean Water Act. 33 U.S.C. § 1311(a)-(b)(1)(B).

³ Consent Decree at 8, Section VI.8.A., and at 11-12, Section VI.9., *U.S. and the State of Maryland v. Mayor and City Council of Baltimore* (Case No. 1:02-cv-01524-JFM, D. Md., Apr. 26, 2002), available at <https://www.epa.gov/sites/production/files/2013-09/documents/baltimore-cd.pdf> (hereinafter “2002 Consent Decree”).

health and safety, public participation, as well as transparency and accountability. The comments seek to address several fundamental concerns about the Modified Consent Decree, including:

- The proposed length of time to comply with the CWA;
- The goal or goals of the Modified Consent Decree and their relation to compliance with the Act;
- Whether the Modified Consent Decree adequately ensures achievement of its goals and compliance with the Act; and
- And how the Modified Consent Decree will verify that the goals have been achieved.

Before the Modified Consent is entered with the court for approval, EPA and MDE (“the Agencies”) should thoroughly address each of these concerns, as well as the specific questions and recommendations posed below, and justify their answers. Failure to do so could put all parties – including members of the public who rely upon and use Baltimore’s waterways – in the same position in 17 years as today, *again* facing substantially more work to eliminate sewer overflows in order to comply with the CWA and support safe waterways that are free from dangerous sewage contamination.

I. THE PARTIES TO THE MODIFIED CONSENT DECREE HAVE NOT PROVIDED JUSTIFICATION FOR THE PROPOSED 17-YEAR EXTENSION TO THE CITY’S TIMELINE FOR COMPLIANCE.

The Modified Consent Decree does not provide *any* explanation for why, after 14 years, the City of Baltimore and the Agencies require another 17 years to meet the requirements of the 2002 Consent Decree and to eliminate and adequately prevent SSOs to comply with the CWA, much less an explanation that would justify this drastic extension of time. The parties to the Modified Consent Decree should offer the public, especially the ratepayers served by Baltimore’s wastewater collection system, a written justification for the proposed extension of the final deadline for compliance to 2033 that details the specific technical or financial considerations relied upon to select the dates for interim and final deadlines. The written justification for the extension of the deadlines should also provide a 30-day period for public review and comment before the parties request that the court enter the Modified Consent Decree, because the public has not had an opportunity to evaluate and comment on any analysis that purportedly supports a 17-year extension.

II. THE MODIFIED CONSENT DECREE SHOULD BE REVISED TO PROHIBIT AND ELIMINATE ALL UNLAWFUL SEWAGE DISCHARGES BY THE EARLIEST POSSIBLE DATE.

The Modified Consent Decree should be revised to prohibit and require elimination of all dry- and wet-weather sewage overflows in order for the City to comply with the CWA by the earliest possible date, to achieve mandatory water quality standards for Baltimore’s waterways, and to protect public health. The Proposed Modified Consent Decree fails to require the elimination of all SSOs, and actually contemplates that SSOs will continue unabated past the final proposed deadline of 2033.⁴ The CWA prohibits all SSOs and many

⁴ MCD at 6, Section IV. and at 16-18, Section VI.9.c.(v).(a)-(f).

other federal consent decrees to resolve illegal sewer overflows expressly prohibit or require remedial measures to eliminate all SSOs.⁵ Here, the Modified Consent Decree should, likewise, expressly require the elimination of all dry- and wet-weather SSOs and require enforceable programs and practices sufficient to abate and prevent all SSOs.⁶

The hydraulic model required by the Modified Consent Decree should be utilized to determine and require the remedial measures necessary to eliminate all wet-weather SSO volumes. The elimination of all wet-weather SSOs should be achievable based upon the City's current hydraulic modeling for the application of the ten-year Level of Protection (LOP) across the entire collection system, which is not currently required by the Proposed Modified Consent Decree.⁷ Accordingly, the Modified Consent Decree should be revised to expressly prohibit and require remedial measures necessary to achieve elimination of all wet-weather SSOs, which the City has indicated is feasible based on city-wide application of the ten-year LOP.

Further, the LOP required under the Modified Consent Decree is insufficient because it does not ensure that the City will come into compliance with the CWA, that water quality standards will be achieved, or that public health will be protected. The Proposed Modified Consent Decree currently requires only that remedial measures meet either five- or ten-year LOP from SSOs.⁸ The Modified Consent Decree requires the higher, ten-year, LOP only for portions of the collection system that purportedly impact so-called Sensitive Areas, which are designated based upon the presence of important natural resources, waterways commonly used for recreational swimming, and potentially sensitive populations, among other categories.⁹ However, there is no apparent correlation between these seemingly arbitrary LOPs and any outcomes when it comes to water quality or health. In fact, the designation of Sensitive Areas is itself arbitrary, because the Modified Consent Decree does not state any specific goal or expected outcome for requiring a higher LOP for these

⁵ See e.g. Consent Decree at 41, Section V.F.27., *U.S. and Pennsylvania v. Capital Region Water and City of Harrisburg* (No. 1:15-cv-00291-WWC, M.D. Pa., Feb. 11, 2015) available at <https://www.epa.gov/sites/production/files/2015-02/documents/cityofharrisburg-cd.pdf> ("all SSOs are prohibited"); Consent Decree at 4-5, Section III., and at 25-27, Section VI.C., *U.S. and Louisiana v. City of Shreveport* (No. 5:13-cv-03065, W.D. La., Nov. 13, 2013) available at <https://www.epa.gov/sites/production/files/2013-11/documents/shreveport-cd.pdf> (including goal of eliminating all SSOs and requirement to identify remedial measures required to eliminate all SSOs); Consent Decree at 16, Section V.19., *U.S. and Pennsylvania v. Scranton Sewer Authority*, (No. 3:CV-09-1873, M.D. Pa., Dec. 13, 2012) available at <https://www.epa.gov/sites/production/files/documents/scantonsewer-cd.pdf> ("SSOs are prohibited"); Consent Decree at 14, Section V.7., *United States, et al v. Metropolitan St. Louis Sewer District* (No. 4:07-CV-1120, E.D. Mo., Aug. 4, 2011), available at <https://www.epa.gov/sites/production/files/2013-09/documents/stlouis-cd.pdf>; Consent Decree at 9, Section III., *United States et al v. City of Memphis* (No. 2:10-cv-02083-SHM-dkv, W.D. Tenn., Apr. 16, 2012), available at <https://www.epa.gov/sites/production/files/documents/memphis-cd.pdf>

⁶ Dry-weather sewage overflows account for a substantial amount of unlawful sewage discharges to Baltimore's waterways. For example, in the City's quarterly report ending on 9/30/2015, the City reported that 113 dry-weather sewer overflows discharged a total of 176,498 gallons of sewage, while 21 wet-weather overflows discharged 24,446 gallons of sewage. For further explanation, see *infra* Note 34.

⁷ *Id.*

⁸ Proposed Modified Consent Decree ("MCD") at 15-16, Section VI.9.b.(i).

⁹ MCD at 15-18, Section VI.9.b., and at 12, Section V.7.cc.

portions of the city.¹⁰ Additionally, there is no apparent correlation between the LOPs and quantifiable reductions in pollutants associated with untreated wastewater that are sufficient to support both actual and designated water-contact uses and water quality standards for Baltimore's waterways. The LOPs should be justifiable on the basis of their ability to achieve compliance with water quality standards, to support actual and designated uses, and to prevent negative impacts to public health.

III. THE MODIFIED CONSENT DECREE SHOULD BE REVISED TO ENSURE THAT BALTIMORE'S WATERWAYS ACHIEVE MANDATORY WATER QUALITY STANDARDS.

The goals of the CWA to restore waterways to meet their ecological functions and support safe uses, including water-contact recreation, should be supported by the Modified Consent Decree. Given that, major provisions of the Modified Consent Decree should be revised to ensure that these goals can be met for Baltimore's waterways.¹¹ To ensure that the goals of the Act can be achieved, revisions should be made to the Modified Consent Decree to ensure that water quality standards will be met and that progress towards those standards can be tracked. Without strengthened provisions to ensure adequate progress that will support compliance with water quality standards – and monitoring and tracking to verify progress that is made – then we may be in a position in 17 years where substantially more work is required to eliminate the persistent sewage contamination that makes our waterways unsuitable for human contact.

The Proposed Modified Consent Decree should be revised to require ongoing monitoring and assessment to observe trends for ambient water-quality in Baltimore's waterways until 2033. The required monitoring should include regular wet- and dry-weather sampling for instream concentrations of fecal indicator bacteria, such as *E. coli* and *Enterococcus*, and for quantitative microbial source tracking for human markers of fecal contamination.¹² Baltimore's waterways routinely exceed Maryland's bacteriological water quality standards for infrequent primary contact and EPA's recommended bacteriological standards to limit waterborne illness during both wet- and dry-weather conditions.¹³

¹⁰ *Id.*

¹¹ One of the goals of the federal Clean Water Act is to achieve water quality in the Nation's waterways that is sufficient to support designated uses such as water recreation, inclusive of fishing and swimming. CWA § 101(a)(2), 33 U.S.C. § 1251(a)(2). States must set water quality standards and numeric criteria sufficient to support these designated uses. CWA § 303(c), 33 U.S.C. § 1313(a).

¹² *E.g.* Consent Decree at 45-48, Section V.I., *United States and State of Texas v. San Antonio Water System* (No. 5:13-cv-00666-DAE, W.D. Tex., October 15, 2013), available at

<https://www.epa.gov/sites/production/files/2013-07/documents/saws-cd.pdf> (requiring a Water Quality Program Plan that includes fecal bacteria sampling and quantitative source tracking of receiving waterways and stormwater outfalls, dry- and wet-weather sampling, and water-quality assessment and reporting).

¹³ COMAR 26.08.02.03-3A(1), available at <http://www.dsd.state.md.us/comar/comarhtml/26/26.08.02.03-3.htm>; United States Environmental Protection Agency, *Recreational Water Quality Criteria, 2012*, at 6 (Office Of Water 820-F-12-058), available at <https://www.epa.gov/sites/production/files/2015-10/documents/rwqc2012.pdf> (The EPA threshold of 130 MPN/100mL is based on an estimated illness rate of 36/1,000. Illness rates upon which these recommendations are based use the National Epidemiological and Environmental Assessment of Recreational Water definition of gastrointestinal illness.). For recent and historic fecal bacteria data for Baltimore's waterways, See <http://harboralert.org>, and for historic fecal

Additionally, required monitoring should include, at a minimum, regular sampling for all constituents associated with contamination by untreated wastewater for which there are corresponding CWA 303(d) impairment listings for one of Baltimore's waterways.¹⁴ The required monitoring should also include biological and toxicity assessments for both water and sediment in receiving waterways.¹⁵ Finally, the Modified Consent Decree should also require targeted pre- and post- monitoring and modeling of receiving waterways for implementation of Phase I and Phase II Projects to demonstrate the observed and anticipated efficiency of required and proposed projects to reduce instream concentrations of wastewater pollutants and make necessary progress towards compliance with water quality standards.¹⁶

The Modified Consent Decree does not require monitoring that adequately ensures that the implementation of Phase I and Phase II remedial measures will result in improved water-quality for Baltimore's streams, rivers, and Harbor. Nor does the proposed Modified Consent Decree include provisions that require compliance with water quality standards to protect human health and the environment as a result of both planned and prospective remedial measures. Many federal consent decrees to resolve illegal sewer overflows require the implementation and development of long-term water quality monitoring and modeling studies of receiving waterways in order to ensure that the prevailing goal of the CWA is achieved through the implementation of remedial measures. Commenters' initial review has uncovered numerous such consent decrees, of which several were entered in the last few years alone.¹⁷ Long-term monitoring and modeling of the ambient

bacteria data, See <https://data.baltimorecity.gov/Public-Works/Stream-Impact-Sampling-and-Ammonia-Screening/39h2-7kjs>.

¹⁴ Maryland Department of the Environment, *Maryland's 2014 Integrated Report*, available at <http://www.mde.state.md.us/programs/Water/TMDL/Integrated303dReports/Pages/2014IR.aspx>. E.g. Consent Decree at 33-34, Section V.E.16., *United States and Commonwealth of Pennsylvania v. Capital Region Water and City of Harrisburg* (No. 1:15-cv-00291-WW, M.D. Pa., February 10, 2015), available at <https://www.epa.gov/sites/production/files/2015-02/documents/cityofharrisburg-cd.pdf> (requiring monitoring of waterways for 303(d) impairments and other pollutants of concern).

¹⁵ E.g. Consent Decree at 47-48, Section VI.17., *United States and State of Maine v. City of Bangor* (No. 1:15-cv-00350-NT, D. Me., August, 26, 2015), available at <https://www.epa.gov/sites/production/files/2015-12/documents/cityofbangor-cd.pdf> (requiring toxicity and sediment assessment and sampling).

¹⁶ E.g. Consent Decree at 24-27, Section XVI., *United States et al v. Sewerage and Water Board of New Orleans et al* (No. 93-3212, E.D. La., June 22, 1998), available at <https://www.swbno.org/docs/consentdecree.asp> (requiring pre- and post-project phase implementation monitoring of storm water drainage systems for fecal bacteria and other indicators to measure effectiveness of SSO remedial measures in receiving water-quality).

¹⁷ E.g., Exhibits 3 and 4, Consent Decree, *United States, et al v. Board of County Commissioners and City of Cincinnati* (No. C-1-02-107, S.D. Ohio, June 9, 2004), available at <https://www.epa.gov/sites/production/files/2014-09/documents/hamilton-cd2.pdf>; Consent Decree at 28, Section VI.17., *United States and State of Maine v. City of Bangor* (No. 1:15-cv-00350-NT, D. Me., August, 26, 2015), available at <https://www.epa.gov/sites/production/files/2015-12/documents/cityofbangor-cd.pdf>; Consent Decree at 33-34, *United States and Commonwealth of Pennsylvania v. Capital Region Water and City of Harrisburg* (No. 1:15-cv-00291-WW, M.D. Pa., February 10, 2015) available at <https://www.epa.gov/sites/production/files/2015-02/documents/cityofharrisburg-cd.pdf>; Consent Decree at 45-48, *United States and State of Texas v. San Antonio Water System* (No. 5:13-cv-00666-DAE, W.D. Tex., October 15, 2013) available at <https://www.epa.gov/sites/production/files/2013-07/documents/saws-cd.pdf>; Consent Decree at 20 and Exhibit G, *United States and Louisiana v. Baton Rouge* (M.D. La., Nov. 13, 2001) available at <https://www.epa.gov/enforcement/consent-decree-united-states-america-et-al-v-city>

concentrations of pollutants and water-quality constituents that are associated with sewage contamination is critical to determine the overall success of Baltimore's efforts to eliminate illegal sewage discharges to comply with the CWA.

IV. THE MODIFIED CONSENT DECREE SHOULD BE REVISED IN OTHER RESPECTS TO PROTECT PUBLIC HEALTH AND THE ENVIRONMENT.

- a. The definition and application of the Sensitive Area designation in the Modified Consent Decree is not sufficient to ensure public safety and compliance with the Clean Water Act.*

The Sensitive Area designation required by the Modified Consent Decree is not justified on the basis of any specific purpose and must therefore be revised to state and justify a basis on its ability to sufficiently ensure public safety and compliance with the CWA. The Proposed Modified Consent Decree requires that the City designate certain portions of the city as Sensitive Areas, which will obligate the City to meet the higher ten-year LOP for these regions through the process of Phase II Plan development and implementation.¹⁸ However, the Modified Consent Decree fails to state an appreciable purpose for the requirement to designate Sensitive Areas and to provide a corresponding ten-year LOP. Therefore, Commenters are left to presume that the purpose of these provisions is to adequately protect "important natural resources" and "potentially sensitive populations," among others, from exposure to sewer overflows. Likewise, Commenters are left to presume that a five-year LOP is required to adequately protect all other areas and their inhabitants.

These provisions are insufficient. The Modified Consent Decree does not demonstrate how the five-year LOP is technically adequate to prevent negative public health outcomes for populations that are not potentially sensitive. With respect to the ten-year LOP for Sensitive Areas, the Modified Consent Decree does not demonstrate that the Sensitive Area designation and corresponding LOP are adequate for their presumed purposes – to protect natural resources from degradation by and providing for adequate public safety from uncontrolled and untreated wastewater discharges.

In addition, the Sensitive Areas definition is *not* adequate to protect the public from sewage-contaminated waterways and ensure compliance with the CWA. As written, the definition includes waterways "where primary contact recreation is common." No definition is provided of "common," and it is, therefore, entirely unclear how frequent or widespread recreation must be in order constitute "common" recreation for purposes of triggering the Sensitive Area definition. This definition is also problematic because Baltimore's waterways are so sewage-contaminated that primary contact recreation is

baton-rouge-et-al. See also, The Waterfront Partnership of Baltimore and the Center for Watershed Protection, *Swimmable Cities: Lessons for Baltimore from five cities that have cleaned up their rivers, lakes, and estuaries* (2016), available at <http://baltimorewaterfront.com/wp-content/uploads/2016/02/Healthy-Harbor-Swimmable-Cities-Report.pdf> (discussing the waterway monitoring required in consent decrees for Atlanta, Los Angeles, and New Orleans that should be adopted for Baltimore's modified consent decree).

¹⁸ MCD at 15-18, Section VI.9.b-c., and at 12, Section V.7.cc.

largely avoided by the public.¹⁹ Regardless, the Sensitive Areas definition should be revised to include all waterways that are designated for secondary or limited-contact recreation or where such recreation actually occurs. Numerous public health studies have demonstrated that sewage-contaminated waterways pose a significant risk to individuals participating in secondary or limited-contact recreation, such as fishing and boating.²⁰ The Modified Consent Decree should be structured to achieve the actual and designated uses for Baltimore's waterways, as is the intent of the CWA.

Finally, the Modified Consent Decree should be revised to require a higher LOP for all portions of the City that drain to Sensitive Areas that is adequate to protect natural resources, comply with water quality standards, and support safe water-contact. The designation of Sensitive Areas and the corresponding application of the ten-year LOP does not adequately protect designated areas downstream of SSOs. For example, a Sensitive Area designation for Baltimore's Inner Harbor waterway, where formal and informal opportunities for water-contact recreation abound, would provide a ten-year LOP for SSOs originating in sewer infrastructure adjoining the Harbor but not elsewhere in its watershed.²¹ The designation and corresponding LOP do not account for the numerous and substantial dry- and wet-weather SSOs that occur outside and upstream of the Inner Harbor's designated area in portions of its watershed irrespective of their assigned LOP. The Jones Falls, for example, drains directly to the Harbor. Therefore, the Harbor would continue to receive the accumulated sewage flows occurring upstream in five- and ten-year LOP sewersheds, even though the SSOs would be limited to the ten-year LOP in the collection system adjacent to the Harbor. As a result, a ten-year LOP designation for the Inner Harbor would not ensure compliance with water quality standards and support safe water-contact recreation in the Harbor, among other receiving waterways designated as Sensitive Areas that are downstream of sewage-contaminated watersheds.

- b. The Modified Consent Decree should require achievement of adequate collection system capacity and peak flow management that accounts for projections of climate change and population dynamics.*

The Proposed Modified Consent Decree should be revised to account for likely changes to the collection system capacity due to increases in population using the system

¹⁹ The City has communicated that all contact with waterways should be avoided. *E.g.* Baltimore City Department of Public Works, Sewer Overflow Caused by Street Collapse, July 8, 2016, available at <http://publicworks.baltimorecity.gov/news/press-releases/2016-07-08-sewer-overflow-caused-street-collapse> ("The public is reminded to avoid contact with urban waterways due to the risk of pollution.").

²⁰ See *e.g.* Cynthia C. McOliver et al., *Assessing the Risks of Exposure to Cryptosporidium from Recreational Water Activities in Baltimore, Maryland*, *Am. Fish. Soc. Sym.* 67 (2008); Cynthia C. McOliver et al., *Risks of recreational exposure to waterborne pathogens among persons with HIV/AIDS in Baltimore, Maryland*, 99 *Am J Public Health* 6, 1116 (2009); Samuel Dorevitch et al., *Health Risks of Limited-Contact Water Recreation*, 120 *Environ Health Perspect.* 2, 192 (2012).

²¹ For example, the Maryland Department of Natural Resources has several locations in Baltimore's Harbor that are designated for license-free recreational fishing, and the Baltimore City Department of Recreation and Parks regularly offers canoe and kayak excursions in Baltimore's Harbor. See <http://dnr2.maryland.gov/fisheries/Pages/license-free.aspx> and <http://bcrp.baltimorecity.gov/recreation/outdoor>.

and increased precipitation cause by climate change. Currently, the Proposed Modified Consent Decree only requires the City to produce an evaluation of the Long-Term Capacity and Peak Flow Management of the collection system.²² This is insufficient because the City is not required to actually implement any changes to its plans based on that evaluation.²³ Producing a report is not sufficient if nothing is done to implement the findings in the assessment. If the collection system's capacity still does not adequately serve the future demand of sewer-system users after rehabilitative work is completed, then the hydraulic capacity will be overwhelmed and lead to continuing sewer overflows past the proposed final deadline in the Modified Consent Decree. Therefore, the Modified Consent Decree should be revised to include Phase II Plan provisions that require attainment of sufficient hydraulic capacity and peak flow management as identified by the required evaluation.²⁴

The Modified Consent Decree should also be revised to require hydraulic capacity and management of peak flows for a period of time that corresponds to the anticipated lifetime of required new, rehabilitated, and upgraded sewer infrastructure.²⁵ In doing so, the required evaluation should account for increases in the quantity and intensity of precipitation associated with climate change and the increase in regional population of potential sewer users. The Modified Consent Decree requires the City to evaluate the proposed Phase I and Phase II projects to determine how the projects will impact the hydraulic capacity and management of peak flows in the collection system based upon projected conditions for the year 2030.²⁶ This evaluation requires assessment of changed conditions only 14 years from the present date – and before the Modified Consent Decree is even scheduled to terminate. By comparison, the 2005 federal consent decree entered into between EPA, MDE, and Baltimore County (“2005 Baltimore County Consent Decree”) requires capacity and peak flow management for projected conditions 20 years from the date of its execution.²⁷

The Modified Consent Decree should require the City to factor in both observed increases in extreme precipitation events since 1910 and projected increases in precipitation amounts and intensity as a result of climate change in its evaluation to determine sufficient hydraulic capacity and management of peak flows for future, projected conditions beyond 2030.²⁸ Increased quantity and intensity of precipitation would have the

²² MCD at 20-21, Section VI.9.e.

²³ *Id.*; MCD at 14-18, Section VI.9.a-c.

²⁴ MCD at 16-18, Section VI.9.c.

²⁵ Sanitary sewer infrastructure, with preventative maintenance, can last for decades before requiring replacement. See e.g. U.S. Department of Housing and Urban Development, *Residential Rehabilitation Inspection Guide*, Appendix C page C-3 (cast-iron sanitary sewer pipes have an expected lifetime of 75 to 100 years).

²⁶ MCD at 20-21, Section VI.9.e.

²⁷ Consent Decree at 27-31, Section V.9.C.ii., *United States and State of Maryland v. Baltimore County* (No. 1:05-cv-02028-AMD. D. Md. Sept. 21, 2005) available at <https://www.epa.gov/sites/production/files/2013-09/documents/baltimoreco072605-cd.pdf>.

²⁸ David Easterling et al., *Climate Extremes: Observations, Modeling, and Impacts*, Science 22 Sep 2000: Vol. 289, Issue 5487, pp. 2068-2074, available at <http://science.sciencemag.org/content/289/5487/2068.full>; Intergovernmental Panel on Climate Change,

likely effect of increasing the frequency and magnitude of wet-weather SSOs and will contribute to degradation of the collection system. The Intergovernmental Panel on Climate Change has projected that the Mid-Atlantic region will experience an increase in precipitation of 5 to 10% by 2099 and that the intensity of precipitation will increase significantly over the same period of time.²⁹ These projections, based upon the best available climate science, demonstrate that precipitation conditions will change significantly beyond the year 2030. Therefore, the Modified Consent Decree should require that the rehabilitation and upgrading of the collection system's hydraulic capacity is both sustainable and cost-effective over the projected lifetime of the sewer infrastructure.

The Modified Consent Decree should also require the City to factor in future, projected population conditions beyond 2030 in its evaluation to determine sufficient hydraulic capacity and management of peak flows. As of 2013, Baltimore City had a population of 622,104.³⁰ The Maryland Department of Planning projects a trend of population growth in the Baltimore region over the next 25 years, with a substantial increase in population between 2030 and 2040, a portion of which will be served by Baltimore's wastewater collection and treatment system. Increases in population will put a strain on the hydraulic capacity and effective management of peak flows unless the population increases are properly accounted for in the engineering to rehabilitate and upgrade the collection system's hydraulic capacity. If demand by future sewer users exceeds hydraulic capacity of a rehabilitated and upgraded collection system, then SSOs will continue to foul Baltimore's waterways. Therefore, the Modified Consent Decree should require that the rehabilitation and upgrading of the collection system's hydraulic capacity is both sustainable and cost-effective over the projected lifetime of the sewer infrastructure.

- c. *The Modified Consent Decree should expressly require that the asserted 83% reduction in wet-weather sanitary sewer overflow volume is an enforceable deliverable for Phase I implementation.*

The Modified Consent Decree should require that the implementation of Phase I projects will eliminate at least 83% of wet weather sewer overflows, by volume, in order to ensure that progress is made towards compliance with the CWA and mandatory water

IPCC Fourth Assessment Report: Climate Change 2007: Working Group I: The Physical Science Basis - 11.5.3.2 Precipitation, available at https://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch11s11-5-3-2.html.

²⁹ Intergovernmental Panel on Climate Change, *IPCC Fourth Assessment Report: Climate Change 2007: Working Group I: The Physical Science Basis - 11.5.3.2 Precipitation*; Intergovernmental Panel on Climate Change, *IPCC Fourth Assessment Report: Climate Change 2007: Working Group I: The Physical Science Basis - 10.3.6.1 Precipitation Extremes*, available at https://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch10s10-3-6-1.html ("[P]recipitation is projected to be concentrated into more intense events, with longer periods of little precipitation in between. Therefore, intense and heavy episodic rainfall events with high runoff amounts are interspersed with longer relatively dry periods with increased evapotranspiration").

³⁰ Baltimore City had a peak population of 949,708 in 1950. See US Bureau of the Census, *Population of Counties by Decennial Census: 1900 to 1990 - Maryland*, available at <https://www.census.gov/population/cencounts/md190090.txt> (March 27, 1995); Maryland Department of Planning, *Historical and Projected Total Population for Maryland's Jurisdictions*, Revised July, 2014, available at <http://www.mdp.state.md.us/msdc/popproj/TotalPopProj.pdf>.

quality standards. The parties to the City's Consent Decree have all separately asserted to the public, outside of the Modified Consent Decree itself, that anywhere from 80 to 83% of wet weather sewer overflows, by volume, will be eliminated as a result of implementation of Phase I projects.³¹ The public can only assume that the projected 83% reduction constitutes the justification for the Phase I Plan and the deadline for its implementation by 2021. It should be noted that this projected reduction does not include the substantial proportion of sewage contamination that results from collection system exfiltration, dry-weather overflows, Sanitary Discharges of Unknown Origin (SDUOs), and wastewater treatment plant failures. This is because the City does not include sewage discharged from these sources in its reported volumes of sewer overflows. For example, in the quarterly report ending on 9/30/2015, the City reported that 113 dry-weather sewer overflows discharged a total of 176,498 gallons of sewage, while 21 wet-weather overflows discharged only 24,446 gallons of sewage.³²

d. The Modified Consent Decree should require post-construction compliance monitoring until the elimination of targeted sewer overflows can be certified.

The Modified Consent Decree should be revised to require post-construction compliance flow and rainfall monitoring for as long as is necessary to certify the elimination of SSO Structures and the approved outcomes for the Phase II Plan, including but not limited to, the elimination of prioritized SSOs and building backups caused by deficiencies in the collection system ("Building Backups"). The Modified Consent Decree requires that the City undertake a maximum of only 18 months of post-construction compliance monitoring to determine the effectiveness of remedial measures to eliminate SSO Structures and a maximum of only 6 months of post-construction compliance monitoring to determine the effectiveness of Phase II implementation to eliminate

³¹ See US Environmental Protection Agency, U.S., *Maryland Amend Agreement with Baltimore City to Curtail Sewer Overflows and Improve Water Quality*, June 1, 2016, available at <https://www.epa.gov/newsreleases/us-maryland-amend-agreement-baltimore-city-curtail-sewer-overflows-and-improve-water>; Maryland Department of the Environment, *Maryland, U.S. amend agreement with Baltimore City to curtail sewer overflows, improve water quality*, June 1, 2016, available at <http://news.maryland.gov/mde/2016/06/01/maryland-u-s-amend-agreement-with-baltimore-city-to-curtail-sewer-overflows-improve-water-quality/>; Baltimore City Department of Public Works, *Modified Consent Decree Provides Plan for Baltimore's Long-Term Sewer Solutions*, June 1, 2016, available at <http://publicworks.baltimorecity.gov/news/press-releases/2016-06-01-modified-consent-decree-provides-plan-baltimore%E2%80%99s-long-term-sewer>.

³² Commenters relied upon a threshold for distinguishing reported dry- vs wet-weather SSOs of 0.25 inches of rain, in accordance with the glossary terminology of a "precipitation event" in EPA's Combined Sewer Overflows Guidance for Permit Writers (EPA 832-B-95-008, 1995), because the City does not distinguish between wet- and dry-weather SSOs in its consent decree quarterly reporting. However, the City has separately provided historical reporting data, for which it *has* distinguished between dry- and wet-weather SSOs without providing reference to the threshold for precipitation it relied upon. See <http://publicworks.baltimorecity.gov/cso-ss0-notifications>. Based upon the City's assessment of dry- vs. wet-weather SSOs, it reported between the July, 2015 and June, 2016 period a total of 250 incidents of wet-weather SSOs, amounting to an estimated 381,663 gallons, compared to 273 incidents of dry-weather SSOs, amounting to an estimated 391,559 gallons. In either scenario, it is indisputable that dry-weather SSOs contribute a substantial quantity of sewage contamination to Baltimore's waterways.

prioritized SSOs, basement backups and collection system deficiencies.³³ By comparison, the 2005 Baltimore County Consent Decree requires post-construction compliance monitoring for as long as is necessary to certify the elimination of a structured sewer overflow.³⁴ A maximum of 6 or 18 months of rainfall and flow monitoring may not be sufficient to determine whether remedial measures are effective as designed to actually eliminate sewer overflows, especially if atypical peak flows and drought conditions result in low water volumes and thus fewer opportunities for sewage overflows during the relatively short period of compliance monitoring.

V. THE MODIFIED CONSENT DECREE SHOULD BE REVISED TO REQUIRE INCREASED TRANSPARENCY AND ACCOUNTABILITY TO THE PUBLIC.

The Modified Consent Decree should be revised to require the City to provide the public with fundamental information, in a clear and concise manner, about the City's progress to implement and comply with requirements of the Modified Consent Decree and CWA, to improve water quality, and protect the public from discharges of untreated wastewater. The City's current public reporting is highly inadequate and Baltimore City taxpayers, who shoulder the financial burden of compliance with the Consent Decree, are left in the dark about many important issues, including how their money is being spent and the progress of infrastructure projects.³⁵ Meanwhile, public health is jeopardized by the City's failure to properly report and provide notice of large sewage spills contaminating city streams, rivers and Harbor. The Modified Consent Decree should require the City to provide reports that address each of these issues, and the reports should be made available online in advance of the public forums already required under the proposed Modified Consent Decree. In this way, the public will be able to participate in the annual public forums in an informed and meaningful way.

- a. *The Public Forum provisions should be strengthened to provide advanced notice and meaningful participation by the public.*

The proposed Modified Consent Decree requires the City to hold a public informational forum within 120 days from the entry date of the consent decree and every 12 months thereafter, where the City is "to inform the public of the work achieved under the Consent Decree in the prior 12-month period."³⁶ However, additional requirements should be imposed to ensure that the public has notice of these meetings and can

³³ MCD at 13-14, Section VI.8.c., and at 23, Section VI.9.h.(iii). *N.B.* It could take at least ten additional years, if not twenty or longer, beyond the final deadline of the Modified Consent Decree to determine whether the City's Phase II improvements comply with the 10-year LOP.

³⁴ Consent Decree 9-11, Section V.7.C.i., *United States and State of Maryland v. Baltimore County* (No. 1:05-cv-02028-AMD. D. Md. Sept. 21, 2005) available at <https://www.epa.gov/sites/production/files/2013-09/documents/baltimoreco072605-cd.pdf>.

³⁵ The Baltimore City Department of Public Works ("DPW") posts on its website quarterly progress reports that it is required to send to EPA and MDE, but these reports are opaque and incomplete. The reports fail to disclose, for example, how much City ratepayer money is being spent on consent decree projects, or how many gallons of sewage the City is releasing from its SSO Structures into the Jones Falls and other urban waterways.

³⁶ MCD at 51, Section VII.27.

participate in them in a meaningful way. Other federal consent decrees require rigorous and enforceable measures to engage the public and ensure meaningful opportunities for participation.³⁷

The City should be required to provide 30-day public notice of the date, time, and location prior to each annual forum through specified means that include press releases and emails to community groups and environmental organizations, among other stakeholders. In addition, at least 30 days before each annual public forum, the City should be required to post online the recommended annual reports (described in detail below) on financial expenditures, infrastructure projects, and basement backups, the reporting already required pursuant sections VI and VII of the Modified Consent Decree, and pursuant to recommendations that appear elsewhere in this comment. The public notice for the forums should provide information on the availability of these reports and where exactly they may be accessed online. Finally, the City should be required to receive questions in advance of the public forum and include a question and answer period of up to two hours during each forum.

- b. The City should be required to report on all financial expenditures for Consent Decree projects to date and to file annual financial expenditures reports going forward.*

The “Public Information” conditions of the Modified Consent Decree should be revised to require the City to provide a report on financial expenditures for compliance with consent decree requirements over the past 14 years and annual reports going forward on all financial expenditures under the Modified Consent Decree. Baltimore City residents have expressed a great deal of frustration with the lack of information about how their money is being spent on this process. The City has raised almost \$1 billion for sewage upgrade projects – and yet, for 14 years, has failed to adequately report to the public how much work it has completed and what was spent on the endeavor. The City’s current quarterly reports to EPA and MDE, which are made available to the public on the City’s website, provide no sense of how much money the City has spent and no sense on what required projects the money was spent on to satisfy the 2002 Consent Decree.³⁸ The City should be required to post online an annual financial report with an accounting of the funds it has raised for consent decree work and a detailed list of the City’s financial expenditures on that work over the previous 12 months. The reports should include a list

³⁷ See e.g. Exhibit 2, Consent Decree, *United States, et al v. Board of County Commissioners and City of Cincinnati* (No. C-1-02-107, S.D. Ohio, June 9, 2004), available at <https://www.epa.gov/sites/production/files/2014-09/documents/hamilton-cd2.pdf>; Exhibit 5 – Outreach and Public Awareness Program, Consent Decree, *United States et al v. Sewerage and Water Board of New Orleans et al* (No. 93-3212, E.D. La., June 22, 1998), available at https://www.swbno.org/docs_consentdecree.asp (requiring numerous and specified public outreach deliverables, such as public meetings with various stakeholders groups, specific outreach materials and outreach programming).

³⁸ Baltimore City’s quarterly reports are available at <http://publicworks.baltimorecity.gov/pw-bureaus/water-wastewater/wastewater/consent/reports>. Weekly records of the Baltimore Board of Estimates, which reflect spending on public works projects, are already a matter of public record. However, these do separate out sewage Consent Decree projects and so tracking expenditures this way would be impractical.

identifying the specific companies that received money as contractors and the amount, date, and purpose of each payment.

- c. The City should be required to provide an annual infrastructure projects progress report to the public.*

The City should be required, under the “Public Information” conditions of the Modified Consent Decree, to post online annual summary reports describing and summarizing, in clear language that members of the public can easily understand, the infrastructure projects that the City has completed over the previous year pursuant to the Modified Consent Decree. These reports should include, at minimum, the number of miles of pipes rehabilitated, upgraded or replaced in the previous year and cumulatively since the entry of the 2002 consent decree; the number of miles of pipes that still remain to be rehabilitated, upgraded or replaced before the 2031 deadline; maps showing the location of pipes replaced and other work performed, and the location of pipes not yet rehabilitated, upgraded or replaced; and maps showing the location of both wet- and dry-weather SSOs, SSO structures, Building Backups, and SDUOs, which indicate the status of the City’s effort to eliminate or prevent their occurrence. The public is entitled to this basic information about the City’s progress in implementing the Consent Decree.

- d. The City should be required to provide annual reports on its efforts to comply with recommended measures to address Building Backups.*

The City should be required to post online an annual report of measures undertaken and progress made to comply with its Building Backup Response Plan, Building Backup Claims Program, Building Backup Education Program, and Building Backups Prevention Plan, which are described in Commentators’ separate comments submission.³⁹ This report should include the number, location, and date of each complaint about a Building Backup, and data for the City’s response, including cleanup efforts and response times, pursuant to the Response Plan. The report should also provide information on the number of damage claims filed, claims paid, dollars spent, and money remaining in the City’s Building Backup Claims Program, as well as money spent towards the Building Backup Prevention Plan, such as the number of backflow converters installed and the neighborhoods where the installation took place. Additionally, the City should be required to include in its annual report the progress made on infrastructure repairs aimed to alleviate Building Backups for the most affected properties and the efforts undertaken to conduct outreach and increase awareness pursuant to the Education Program. Similar reporting for building backup programs is required in other federal consent decrees to resolve illegal sewer overflows, including the 2005 Baltimore County Consent Decree and the 2004 federal consent decree for Cincinnati (“2004 Cincinnati Consent Decree”).⁴⁰

³⁹ Environmental Integrity Project and Blue Water Baltimore, *RE: Comments on Proposed Modified Consent Decree in United States and the State of Maryland v. Mayor and City Council of Baltimore (Case 1:02-cv-01524-JFM) – Building Backups*, submitted August 5, 2016.

⁴⁰ Consent Decree at 52-53, *United States, et al v. Board of County Commissioners and City of Cincinnati* (No. C-1-02-107, S.D. Ohio, June 9, 2004), available at <https://www.epa.gov/sites/production/files/2014-09/documents/hamilton-cd2.pdf>; Consent Decree at 66, *United States and State of Maryland v. Baltimore*

VI. THE MODIFIED CONSENT DECREE SHOULD BE REVISED TO PROVIDE OPPORTUNITY FOR PUBLIC PARTICIPATION IN REMEDIAL MEASURES.

In this case, public health, widespread dissatisfaction with both progress and spending, and significant, ongoing equity concerns weigh in favor of allowing more robust opportunities for public participation in the development of plans that are essential to implementation of the Modified Consent Decree. Specifically, the Modified Consent Decree provides that much of the work necessary to achieve compliance with the CWA will be spelled out in various plans, which are neither subject to any form of public comment nor approval by the Court.⁴¹

By contrast, other federal consent decrees to resolve illegal sewer overflows require some form of public review or comment. These other federal consent decrees either (1) include required plans for management programs and other remedial measures as appendices to or provisions within the consent decree, which subject these plans to public review and comment prior to entry with the court for approval,⁴² or (2) require a period of public review and comment before the plan is submitted by the defendant for review and approval by the plaintiff parties, if the federal consent decree included provisions for the development of a plan for a program or measure, or if there was no program prior to the consent decree.⁴³

The City has already developed plans for required management programs and remedial measures and in some cases several revisions of those plans have been made and submitted to the agencies over the past 16 years. The Modified Consent Decree should require a 60-day period for public review and comment before the Phase II Plan is submitted to the agencies for review and approval by December 31, 2022. The Modified Consent Decree should also be revised to strengthen required plan submissions for SDUOs, Operations and Maintenance (O&M), and the Emergency Response Plan (ERP), and should

County (No. 1:05-cv-02028-AMD, D. Md. Sept. 21, 2005) available at

<https://www.epa.gov/sites/production/files/2013-09/documents/baltimoreco072605-cd.pdf>.

⁴¹ The Modified Consent Decree allows for a 60-day written public comment period on the proposed modification. MCD at 73. This complies with, and goes slightly beyond, the minimum requirements set forth in 28 C.F.R. § 50.7, which mandate a 30-day comment period before the Court may enter the Modified Consent Decree. However, federal regulations set a “floor” for public participation, and agencies are fully authorized to go above and beyond minimum requirements.

⁴² See e.g. Exhibit 2, Consent Decree, *United States, et al v. Board of County Commissioners and City of Cincinnati* (No. C-1-02-107, S.D. Ohio, June 9, 2004), available at <https://www.epa.gov/sites/production/files/2014-09/documents/hamilton-cd2.pdf>; Appendix D, Consent Decree, *United States and South Carolina v. City of Columbia* (No. 3:13-2429-TLW, D.S.C., Sept. 9, 2013) available at https://www.epa.gov/sites/production/files/2013-09/documents/columbia-cd_0.pdf.

⁴³ See e.g. Appendix 4, Consent Decree, *United States v. City of Akron and Ohio* (No. 5:09-cv-00272, N.D. Ohio, Nov. 13, 2009) available at <https://www.epa.gov/sites/production/files/documents/cityofakron-cd.pdf>; Consent Decree at 65, Section VI., *United States and South Carolina v. City of Columbia* (No. 3:13-2429-TLW, D.S.C., Sept. 9, 2013) available at https://www.epa.gov/sites/production/files/2013-09/documents/columbia-cd_0.pdf; Consent Decree at 7-8, Section VI.9., *United States and Mississippi v. City of Greenville* (No. 4:16-cv-00018-DMB-JMV, N.D. Miss., Jan. 28, 2016) available at <https://www.epa.gov/sites/production/files/2016-02/documents/greenvillepartial-cd.pdf>.

include the plans in the Modified Consent Decree, subject to public review and comment, before it is entered with the court.

- a. *The Phase II Plan should be subject to a 60-day period for public review and comment before it is submitted for agency approval at the end of 2022.*

The Modified Consent Decree should be revised to require a 60-day public review and comment period for the Phase II Plan before it is submitted to the Agencies for review and approval. The Phase II Plan is a critical component of the Modified Consent Decree. This plan will include, among other requirements, work to identify SSOs, Building Backups, and collection system deficiencies that persist following Phase I implementation and monitoring; a prioritization and proposal to implement certain rehabilitation and corrective measures to eliminate a portion of the SSOs that persist following Phase I; the designation of Sensitive Areas requiring a ten-year LOP; and the identification of the SSOs that are expected to persist following implementation of the Phase II Plan.⁴⁴ As this summary of the work contemplated in Phase II suggests, it is beyond dispute that the Modified Consent Decree would leave the City far from compliance with the CWA in the absence of the Phase II work. A 60-day public comment period is thus appropriate. Indeed, other federal consent decrees require a period for public review and comment on long term control plans.⁴⁵ The Phase II Plan is analogous to a long term control plan, because it requires additional monitoring, study and design before implementation.

The 60-day period for public review and comment is justified by the numerous required elements and the highly technical nature of the Phase II Plan, as well as the substantial cost of the endeavor. The public should be permitted to review and comment on the Phase II Plan before its approval based upon the fact that the City failed to meet its obligations under the 2002 Consent Decree and has subsequently reported spending \$867.4 million on the consent decree as of February 2016.⁴⁶ Furthermore, the City projects an additional expense of at least \$630.1 million to complete the outstanding work pursuant to the proposed Phase I, as well as another \$548.4 million for the capital costs related to Phase II.⁴⁷ In all, the City projects at least another \$1.263 billion dollars at the expense of city sewer users will be needed to comply with remaining obligations under the proposed Modified Consent Decree.⁴⁸

Public review and comment is also likely to benefit the City and the Agencies in their development, review and approval of the Phase II Plan. For example, members of the public, as well as individuals and entities with expert knowledge, may be familiar with important natural resources and potentially sensitive populations that may be excluded

⁴⁴ MCD at 15-18, Section VI.9.b.-c.

⁴⁵ See e.g. Appendix 4, Consent Decree, *United States v. City of Akron and Ohio* (No. 5:09-cv-00272, N.D. Ohio, Nov. 13, 2009) available at <https://www.epa.gov/sites/production/files/documents/cityofakron-cd.pdf>

⁴⁶ Baltimore City Department of Public Works, *Modified Consent Decree Provides Plan for Baltimore's Long-Term Sewer Solutions*, June 1, 2016, available at <http://publicworks.baltimorecity.gov/news/press-releases/2016-06-01-modified-consent-decree-provides-plan-baltimore%E2%80%99s-long-term-sewer>.

⁴⁷ *Id.*

⁴⁸ *Id.*

from the City's proposed Sensitive Areas designations. Additionally, members of the public may be familiar with certain SSOs, flow-limited segments or other collection system deficiencies that the City may not detect through observation, monitoring or modeling pursuant to the Phase II Plan. Finally, the public has an important stake in the SSOs and Building Backups the City may prioritize for elimination and, just as importantly, the SSOs and Building Backups the City may exclude from remedial efforts pursuant to the Phase II Plan.⁴⁹

- b. The Sanitary Discharge of Unknown Origin Plan provisions should be strengthened and the Plan itself should be included in the Modified Consent Decree, subject to public review and comment, before it is entered with the court.*

The Modified Consent Decree should be revised to incorporate operative elements from the SDUO Plan as enforceable provisions, or at a minimum include the Plan as an appendix, subject to public review and comment prior to its entry with the court. SDUOs are a substantial problem for Baltimore's waterways and contribute significantly to nutrients and bacteria impairments.⁵⁰ The City already has programming and procedures in place to detect and resolve SDUOs. Pursuant to the consent decree process, the City proposed and the agencies approved a protocol for identification of SDUOs in 2010.⁵¹ To comply with its Municipal Separate Storm Sewer (MS4) permit, the City has an Illicit Discharge Detection & Elimination (IDDE) plan and procedures for source tracking illicit discharges, SDUOs included, in its MS4. However, the Modified Consent Decree requires that the City develop and submit a plan for the investigation and elimination of SDUOs 60 days after the date of entry of the Modified Consent Decree.⁵²

The Modified Consent Decree includes only one enforceable timeline (60-days) to ensure progress towards elimination of only a limited quantity of some SDUOs, by requiring the City to submit a plan and schedule for each SDUO it determines to be caused by a cross-connection from the collection system.⁵³ However, the Modified Consent Decree fails to include requirements that ensure the City will actually make progress towards the detection of SDUOs and the identification of their sources in the first place, including for example requirements for minimum required efforts for SDUO detection, what levels or indicators of contamination constitute positive detection of a SDUO, and an enforceable

⁴⁹ MCD at 17-18, Section VI.9.c.(v).(f). (requiring the City to evaluate and report in the Phase II Plan "expected remaining overflows" after implementation of Phase I and Phase II plans).

⁵⁰ Based upon 2010 study of one city stream, researchers estimate that if the City were to eliminate MS4 illicit discharges, inclusive of SDUOs, that it would be able to meet 21%, 43% and 51% of the applicable waste load allocations for phosphorus, nitrogen and *E. coli*, respectively, for that waterway. Lori A. Lilly, et al, *Pollution Loading from Illicit Sewage Discharges in Two Mid-Atlantic Subwatersheds and Implications for Nutrient and Bacteria Total Maximum Daily Loads*, Watershed Science Bulletin, Journal of the Association of Watershed & Stormwater Professionals, Vol. 3, Issue 1, Spring, 2012, pg. 7-17.

⁵¹ Referenced in MCD at 38, Section VI.15.g.

⁵² MCD at 37, Section VI.15.a.

⁵³ MCD at 37, Section VI.15.b. SDUOs can be caused by sources other than cross connections, such as illegal connections.

timeline for tracking and identifying sources of SDUOs once they have been detected.⁵⁴ Other similar federal consent decrees include enforceable schedules for these actions necessary to eliminate MS4 illicit discharges, which are inclusive of SDUOs⁵⁵ Rather, the agencies have left these most operative procedures outside of the Modified Consent Decree. Without a clear and enforceable schedule for SDUO source investigation and identification, the City is incentivized to delay source identification, because, should the source of the SDUO originate in the collection system, the City would be subject to daily-accruing stipulated penalties for SSOs identified as the source of the SDUO.⁵⁶ As a result, it is ambiguous whether the City's future, proposed timelines for procedures to detect and investigate SDUOs and proposed schedules for elimination of cross-connections will be technically adequate or enforceable.

To this point, some of the procedures that the City has used to detect and resolve SDUOs are technically inadequate and not justified. For example, the City has used an assessment threshold value of 1,500 CFU/100 mL *E. coli* to designate as SDUO any illicit discharge that is otherwise above-threshold with the agency-approved procedure for assessing Ammonia-Nitrogen.⁵⁷ This assessment procedure has the effect of inflating the quantity of false-negative SDUOs and the practical effect of deferring or otherwise avoiding necessary source tracking to find and eliminate sources of wastewater and fecal contamination in the MS4. The City is unable to provide any technical assessment or reference to justify its use of the 1,500 CFU/100 mL threshold to designate SDUOs, nor does the value correspond to Maryland's bacteriological standards.⁵⁸ By comparison, the 2002 federal consent decree for Boston to resolve illegal sewer overflows ("2002 Boston Consent Decree") prescribes an IDDE program that requires numeric screening thresholds that correspond to Massachusetts's bacteriological standards (i.e. 61 CFU/100mL freshwater and 104 CFU/100mL saltwater).⁵⁹

⁵⁴ The requirements should include technically-justifiable assessment threshold values for identifying SDUOs and their sources, and should include enforceable schedules for outfall screenings and source tracking within corresponding storm-sewersheds sufficient to either locate the source(s) or to document that a source is not present.

⁵⁵ See e.g. Consent Decree at 14-20, Section VII.A.-C., *Conservation Law Foundation and United States v. Boston Water and Sewer Commission and Massachusetts* (No. 10-10250-RGS, D. Mass., Aug. 23, 2012) available at <https://www.epa.gov/sites/production/files/documents/bwsc-cd.pdf> (requiring outfall screening and comprehensive investigations and elimination of verified illicit discharges by dates and schedules enforceable under the consent decree).

⁵⁶ MCD at 56, Section IX.32.

⁵⁷ Section 3.6 and Appendix - Bacteria Sampling Method, Baltimore City Department of Public Works, Pollution Source Tracking Sampling SOP, SWMD -WQMI - 2, Effective date: 11/28/13. See supra note 52.

⁵⁸ Letter transmitted via electronic mail from James Phillips-Farley, Baltimore City Department of Public Works, to David Flores, Blue Water Baltimore, Aug. 25, 2014 (indicating that the City does not have records responsive to Flores' request for, "all documentation generated and relied upon, including but not limited to references to pertinent scientific research and literature, for supporting the City's *Enterococcus*/fecal bacteria enumeration threshold assessment value ... for the initiation of pollution source tracking and investigations of illicit discharges and SDUOs."); Reference to COMAR standards

⁵⁹ Consent Decree at 14, Section VII.A., *Conservation Law Foundation and United States v. Boston Water and Sewer Commission and Massachusetts* (No. 10-10250-RGS, D. Mass., Aug. 23, 2012) available at <https://www.epa.gov/sites/production/files/documents/bwsc-cd.pdf>; See also supra Note 6.

- c. *The Operations and Maintenance Plan provisions should be strengthened and the Plan itself should be included in the Modified Consent Decree, subject to public review and comment, before it is entered with the court.*

The Modified Consent Decree should be revised to incorporate operative elements of the O&M Plan as enforceable provisions, or at a minimum include the Plan as an appendix, subject to public review and comment prior to its entry with the court. The Modified Consent Decree requires that the City review and revise its O&M Plan and submit for approval a proposed revised draft 120 days after entry of the Modified Consent Decree.⁶⁰ The City developed and submitted for agency approval an O&M Plan over the last 14 years of the 2002 Consent Decree period.⁶¹ However, some elements of the City's O&M Plan have been inadequate in their design or implementation, including, for example, the City's grease control program (see below). Regardless, the revision and approval of an O&M Plan would benefit substantially from public input, and the inclusion of the revised O&M Plan as an appendix to the Modified Consent Decree before its entry would ensure that its operative elements, including timelines for inspections and enforcement, for example, are clearly enforceable.

Public review and comment on the revised O&M Plan would likely benefit both the City's O&M programming and the agencies' review and approval of an adequate plan. For example, private property owners may be familiar with small-diameter sewer lines that contribute to dry-weather backups or overflows, especially in portions of the collection system that have not been monitored or maintained by the City to date.⁶² Furthermore, the City's revised O&M Plan should be subject to public review and comment before agency approval to ensure that the proposed public education and outreach plans and practices are effective and appropriately-tailored.⁶³

The Modified Consent Decree requires the City to submit information about its grease control program as part of the required O&M Plan submission, including protocols for inspections and enforcement.⁶⁴ However, some of the procedures that the City already uses to inspect and control fats, oil, and grease (FOG) in the collection system are technically inadequate and not justified. The City was required under the 2002 Consent Decree to submit a proposed grease control program plan to the agencies in 2003 and begin implementation of the program 18 months following agency approval.⁶⁵ It was not until late 2013 that the City finally began implementation of its grease control program.⁶⁶

⁶⁰ MCD at 32, Section VI.13.b.

⁶¹ 2002 Consent Decree at 36, Section VI.13.B.-C.

⁶² MCD at 31, Section VI.13.a.(i).(b).

⁶³ MCD at 32, Section VI.13.a.(x).

⁶⁴ MCD at 31-32, Section VI.13.a.(iv).

⁶⁵ 2002 Consent Decree at 35, Section VI.13.A.vii.

⁶⁶ Baltimore City Department of Public Works, *DPW Launches Fats, Oils and Grease (FOG) Program*, November 20, 2013, available at <http://publicworks.baltimorecity.gov/news/press-releases/2013-11-22-dpw-launches-fats-oils-and-grease-fog-program>. See also Baltimore City Paper, *Grease Patrol: The city steps up enforcement on restaurants dumping grease in the sewers*, March 17, 2015, available at <http://www.citypaper.com/news/mobtownbeat/bcp-grease-patrol-the-city-steps-up-enforcement-on-restaurants-dumping-grease-in-the-sewers-20150317-story.html>.

Under the City's FOG program, inspectors will undertake three inspections before issuing a penalty for chronic violations, including, for example, grease-generating facilities that do not have a working grease-control device installed.⁶⁷ After the first round of city-wide inspections, the City found that almost a third of inspected facilities were noncompliant and that as many as 15% of inspected facilities lacked a grease-control device altogether.⁶⁸ When the City does finally assess a penalty, after several years of inspections, it plans to fine violators as little as \$250, a sum that is substantially smaller than the likely cost of purchasing and maintaining a grease-control device and the cost of contracting for third-party disposal of collected grease.⁶⁹

EPA has found that uncontrolled FOGs discharges to sewer collection systems cause more than a third of reported wet- and dry-weather sewer overflows.⁷⁰ Many federal consent decrees for sewer overflows recognize the critical importance of effective grease control programs by including both grease control plans as appendices and specific and enforceable inspection and enforcement deadlines as provisions.⁷¹ By comparison, the 2005 Baltimore County Consent Decree requires the County to evaluate and report the effectiveness of its inspections and enforcement actions for reducing pipe blockages and to develop a database of grease generating facilities to ensure that all facilities are inspected, and enforcement action is taken as necessary, to abate blockages caused or contributed to by illicit grease discharges.⁷² Several consent decrees to resolve illegal sewer overflows include specific requirements for the frequency of inspections, enforceable timelines for enforcement actions, and specific deliverables related to public outreach and education.⁷³

⁶⁷ Baltimore City Paper, Grease Patrol: The city steps up enforcement on restaurants dumping grease in the sewers, March 17, 2015, available at <http://www.citypaper.com/news/mobtownbeat/bcp-grease-patrol-the-city-steps-up-enforcement-on-restaurants-dumping-grease-in-the-sewers-20150317-story.html>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ EPA has found that 74% of SSOs reported were caused by blockages, of which 47% were attributable to grease, in jurisdictions that experience at least 100 SSOs per year. United States Environmental Protection Agency, Office of Water, *Report to Congress - Impacts and Control of CSOs and SSOs* (EPA 833-R-04-001 August, 2004), Pg. 4-28, available at https://www.epa.gov/sites/production/files/2015-10/documents/csosortc2004_full.pdf.

⁷¹ See e.g. Consent Decree at 35-42, Section V.11., *United States and State of Maryland v. Baltimore County* (No. 1:05-cv-02028-AMD. D. Md. Sept. 21, 2005) available at <https://www.epa.gov/sites/production/files/2013-09/documents/baltimoreco072605-cd.pdf>; Appendix G, Consent Decree., *United States and South Carolina v. City of Columbia* (No. 3:13-2429-TLW, D.S.C., Sept. 9, 2013) available at https://www.epa.gov/sites/production/files/2013-09/documents/columbia-cd_0.pdf; Consent Decree at 26-33, Section V.3., *United States et al v. Washington Suburban Sanitary Commission* (No. PJM-04-3679, D. Md., July 26, 2005) available at <https://www.epa.gov/sites/production/files/2013-09/documents/wssc072605-cd.pdf>.

⁷² Consent Decree at 35-42, Section V.11., *United States and State of Maryland v. Baltimore County* (No. 1:05-cv-02028-AMD. D. Md. Sept. 21, 2005) available at <https://www.epa.gov/sites/production/files/2013-09/documents/baltimoreco072605-cd.pdf>.

⁷³ See e.g. Consent Decree at 45-46, Section IX.106., *United States et al v. City of Los Angeles* (No. 01-191-RSWL, C.D. Cal., Oct. 27, 2004) (including stipulated penalties for failure to inspect by required inspection frequency, i.e. 95% of facilities per year; failure to follow enforcement protocols, e.g. follow-up inspections; and for incidence of SSOs caused by FOGs); Consent Decree at 22-24, Section VII.6. *United States v. City of San Diego* (No. 03-CV-1349K, S.D. Cal., Oct. 12, 2007) available at <https://www.epa.gov/sites/production/files/2013->

- d. *The Emergency Response Plan itself should be included in the Modified Consent Decree, subject to public review and comment, before it is entered with the court.*

The Modified Consent Decree should be revised to incorporate operative elements of the ERP as enforceable provisions, or at a minimum include the Plan as an appendix, subject to public review and comment prior to its entry with the court.⁷⁴ The Modified Consent Decree requires that the City review and revise its ERP and submit for approval a proposed revised draft 60 days after entry of the Modified Consent Decree.⁷⁵ The City developed and submitted for agency approval an ERP and annual revisions over the last fifteen years of the consent decree period.⁷⁶ However, some elements of the City's ERP have been inadequate in their design or implementation, including, for example, the City's program for SSO public notifications (see below) and its utilization of measures to minimize sewer overflow volumes.⁷⁷ Regardless, the revision and approval of a revised ERP would benefit substantially from public input, and the inclusion of the revised ERP as an appendix to the Modified Consent Decree before its entry would ensure that its operative elements, including timelines for SSO response, cleanup and notification, for example, are clearly enforceable.

VII. THE PROVISIONS FOR PUBLIC NOTIFICATIONS SHOULD BE STRENGTHENED.

The Modified Consent Decree requires that the City provide in its ERP "a detailed description of the actions Baltimore will undertake to immediately provide notice to the public (through local news media, online and/or other means) of the unpermitted discharge of pollutants from the wastewater treatment and Collection System[.]" We applaud the requirement that the City provide public notifications for *all* SSOs. However, the City has a long history of providing inadequate public notifications for SSOs, and in some cases, the City fails to provide any notification at all. For example, an examination of City records obtained through a Maryland Public Information Act ("PIA") request found that the City notified the public only 19 percent of the time between January, 2011, and September, 2015, for sewage discharges of more than 10,000 gallons, even though the

[09/documents/sandiego-cd.pdf](#) (requiring specific outreach deliverables; inspections for each facility once during each two year period; and specified deadlines for enforcement action).

⁷⁴ Many federal consent decrees include SSO response plans for public review and comment. *E.g.* Consent Decree, Exhibit 4 – "Sewage Overflow Action Plan", *United States et al v. Sewerage and Water Board of New Orleans et al* (No. 93-3212, E.D. La., June 22, 1998), available at <https://www.swbno.org/docs/consentdecree.asp>

⁷⁵ MCD at 38, Section. VI.16.

⁷⁶ 2002 Consent Decree at 41-44, Section VI.16.

⁷⁷ Letter transmitted via electronic mail from David Flores, Blue Water Baltimore, to Lynn Buhl, Maryland Department of Environment, and Jon Capacasa, US Environmental Protection Agency, Jul. 11, 2016 (documenting City's failure to provide timely public notification for an ongoing SSO; the City's inaccurate statements to the public that the SSO had been abated, when it had not; and the City's failure to use interim measures to mitigate an ongoing, continuous SSO, resulting in adverse water-quality conditions to downstream waters)

City's policy is to provide notifications for all overflows that meet or exceed 10,000 estimated gallons.⁷⁸

As a result of the City's failure to provide consistent and timely public notifications, public safety is put at risk when individuals encounter uncontrolled sewage and engage in even limited-contact recreation downstream of SSO discharges. While the Modified Consent Decree provides for a stipulated penalty (\$500) for each failure by the City to respond to a SSO or SDUO incident in conformance with its ERP, the Modified Consent Decree does not adequately define what constitutes immediate notice to the public for SSOs. As a result, the Modified Consent Decree does not ensure that the requirement for public notification is clear and therefore enforceable.

The Modified Consent Decree should be revised in the following ways to strengthen public notification requirements in order to ensure timely and meaningful public notifications:

- Define immediate notice to the public as notification that follows no later than 24 hours following the first detection and verification of a SSO or SDUO.
- Require immediate public notification (i.e., within 24 hours) for SDUO incidents following the first detection and verification.
- Revise Paragraph 8 provisions to clearly require public notification for SSO Structure discharges in accordance with Paragraph 16, which requires public notification for all unpermitted discharges from the collection system, which is inclusive of SSO Structures that cannot be permitted.⁷⁹
- Require 24-hour public notification by specified means, including, for example, an email list-service; a webpage with a list and/or map of all SSO and SDUO incidents (including location, estimated flow/volume, and status of repair); and all physical locations at and downstream of the SSO or SDUO where water quality is or is likely to be adversely impacted, in accordance with the definition of "adverse impact" provided in the Modified Consent Decree.⁸⁰

⁷⁸ Environmental Integrity Project, *Stopping the Flood Beneath Baltimore's Streets* (Dec. 15, 2015) pg. 12, available at <http://environmentalintegrity.org/wp-content/uploads/FINAL-SEWAGE-REPORT.pdf>

⁷⁹ Paragraph 8 provisions for SSO Structures require reporting subject to the requirements of paragraph 17 only. This is particularly important, because an examination of public records, obtained through a Maryland PIA request, found that the City metered 335 million gallons of structured discharges into the Jones Falls from SSO Structures 67 and 72 in 119 separate discharge incidents over the last five years. The City failed to report these unlawful and substantial sewage discharges to the public 97 percent of the time.⁷⁹ The total volume of sewage discharged but not reported from these two SSO Structures alone is 15 times greater than the 22 million gallons of sewage the City told the public that it had discharged from all other locations in Baltimore, combined, over this same time period. This 97% failure rate was for metered discharges of more than 10,000 gallons of sewage. See MCD at 13, Section VI.8.b.(ii); see also Environmental Integrity Project, *Stopping the Flood Beneath Baltimore's Streets* at 12-13.

⁸⁰ MCD at 39, Section VI.16.a.(i).

- Require the City to issue press releases to the news media for all sewer overflows and discharges from SSO Structures and SDUOs where (1) the discharges have exceeded or are likely to exceed 10,000 gallons total, including any intentional releases, or (2) the discharges have caused or are likely to cause an adverse impact on water quality in accordance with its definition in the Modified Consent Decree.
- Require the City to install temporary warning signs at the Inner Harbor and along other waterways, such as neighborhood streams, used by the public when levels of fecal bacteria exceed amounts considered safe by EPA for limited contact water recreation.⁸¹ The posting of these signs should follow these minimum requirements:
 - Posted within 24 hours of the City’s receipt of notice of a sewage discharge that is likely to threaten human health if people come in contact with the water;
 - Located near the contaminated waterway in a place where it is easily visible; and
 - Clearly inform the public of the risk.⁸²

VIII. STIPULATED PENALTIES SHOULD ADEQUATELY DETER VIOLATIONS THAT ENDANGER PUBLIC SAFETY.

The Modified Consent Decree should be revised to provide for substantial stipulated penalties regarding failures to comply with requirements of the revised ERP. The Modified Consent Decree provides for stipulated penalties for a variety of other required remedial measures and reporting obligations. Although the Modified Consent Decree assesses a \$500 one-time stipulated penalty for failure to respond in accordance with the City’s ERP, we feel strongly that daily penalties are warranted.⁸³ Given the modest penalty amount, and the fact that penalties do not accrue daily, this stipulated penalty provision is unlikely to deter noncompliance. In fact, it may have the effect of sanctioning a pay-to-violate scenario. For example, \$500 – even if it is assessed – is not likely to exceed the costs, in

⁸¹ The City has never, to Commenters’ knowledge, placed any warning sign at or near the Inner Harbor, which is frequently used by the public for kayaking and paddle boat recreation, among other water-contact activities. This is despite the fact that the City’s own water quality monitoring data shows levels of *Enterococcus* bacteria reaching as high as 400 times the level considered safe for limited contact water recreation. Sampling data obtained through a Public Information Act (PIA) request submitted to DPW in November, 2015. Data examined was for April 1, 2009, to December 10, 2014, at the Light Street location on the Inner Harbor. 35 percent of 128 samples over this time period had *Enterococcus* bacteria at concentrations that exceeded 500 MPN/100 ml (a conservative standard, for infrequent body contact recreation in salt water). The Inner Harbor is a mixture of fresh and salt water. The standard for fresh water is 151 MPN/100 ml. Fifty-six percent of the samples at the Light Street location on the harbor exceeded that threshold. COMAR 26.08.02.03-3A(1), available at <http://www.dsd.state.md.us/comar/comarhtml/26/26.08.02.03-3.htm>.

⁸² EPA and MDE may refer to the 2011 federal consent decree for St. Louis’s illegal sewer overflows, which includes similar requirements. See Consent Decree at 16, Section V.A.9.d.i., *United States, et al v. Metropolitan St. Louis Sewer District* (No. 4:07-CV-1120, E.D. Mo., Aug. 4, 2011), available at <https://www.epa.gov/sites/production/files/2013-09/documents/stlouis-cd.pdf>.

⁸³ MCD at 57, Section IX.33.

some cases, required to deploy staff and acquire equipment to adequately clean up wastewater debris, provide timely public notifications, or deploy mitigating measures such as bypass pumping. Furthermore, a one-time penalty for a violation of the ERP does not deter multi-day delays. By comparison, other similar federal consent decrees assess daily stipulated penalties for each day a failure continues with regard to requirements related to public notifications, basement backups, and public participation.⁸⁴

IX. THE MODIFIED CONSENT DECREE SHOULD BE REVISED TO REQUIRE A SUPPLEMENTAL ENVIRONMENTAL PROJECT.

The Modified Consent Decree does not require a civil penalty for the City's substantial failure to comply with the requirements and final deadline of the 2002 Consent Decree or a Supplemental Environmental Project (SEP) in lieu of payment of a monetary penalty. The overwhelming majority of federal consent decrees that resolve illegal sewer overflows require the defendant to undertake a SEP and expend a specified amount (generally hundreds of thousands or several millions of dollars) for the design, implementation and maintenance of the project or projects.⁸⁵ Violations of the terms of the 2002 Consent Decree have been occurring for 14 years. A civil penalty should be assessed for these violations and a substantial SEP that addresses some of the harm caused by the violations should be pursued in lieu of a monetary civil penalty. Replacement of clogged or deteriorated lateral sewage lines would be an obvious SEP that would have the dual benefit of reducing inflow and infiltration to the collection system and the occurrence of some Building Backups.

X. THE PARTIES TO THE MODIFIED CONSENT DECREE HAVE NOT PROVIDED JUSTIFICATION FOR HOW A PROPOSED 2031 DEADLINE FOR IMPLEMENTATION OF REMEDIAL MEASURES WILL ENSURE COMPLIANCE WITH THE 2025 DEADLINE FOR THE BAY TMDL.

The Modified Consent Decree does not provide an explanation for how and whether the proposed remedial measures will permit compliance with the water quality goals for

⁸⁴ *E.g.* Consent Decree at 62-63, Section XVII.F. *United States, et al v. Board of County Commissioners and City of Cincinnati* (No. C-1-02-107, S.D. Ohio, June 9, 2004), available at <https://www.epa.gov/sites/production/files/2014-09/documents/hamilton-cd2.pdf> (including a \$2,000/day stipulated penalty for all enforceable provisions, including public notification, water in basement, public participation, etc.)

⁸⁵ *See e.g.* Consent Decree 78, Section X., *United States and State of Maryland v. Baltimore County* (No. 1:05-cv-02028-AMD. D. Md. Sept. 21, 2005) available at <https://www.epa.gov/sites/production/files/2013-09/documents/baltimoreco072605-cd.pdf> (requiring \$750,000 SEP); Consent Decree at 33-35, Section XXI., *United States et al v. Sewerage and Water Board of New Orleans et al* (No. 93-3212, E.D. Louisiana, June 22, 1998), available at https://www.swbno.org/docs_consentdecree.asp (requiring \$2M SEP to restore wetlands and other projects to improve water-quality to support swimming designated uses); Consent Decree at 23, Section X., *United States v. City of Akron and Ohio* (No. 5:09-cv-00272, N.D. Ohio, Nov. 13, 2009) available at <https://www.epa.gov/sites/production/files/documents/cityofakron-cd.pdf> (requiring \$900,000 SEP); Consent Decree at 48, Section XIV., *United States, et al v. Board of County Commissioners and City of Cincinnati* (No. C-1-02-107, S.D. Ohio, June 9, 2004), available at <https://www.epa.gov/sites/production/files/2014-09/documents/hamilton-cd2.pdf> (requiring \$5.3M SEP); Consent Decree at 70, Section VIII., *United States and South Carolina v. City of Columbia* (No. 3:13-2429-TLW, D.S.C., Sept. 9, 2013) available at https://www.epa.gov/sites/production/files/2013-09/documents/columbia-cd_0.pdf (requiring \$1M SEP).

the Chesapeake Bay Total Maximum Daily Load (TMDL) by its deadline of 2025. The Bay TMDL sets specific water quality goals for reductions of nitrogen, phosphorus and sediment pollutants and achievement of water quality standards for other constituents in the Bay and its tidal tributaries. The Agencies should provide justification for how the State will meet its specific obligations under the Bay TMDL to reduce concentrations of nutrients and sediment and how exactly the Bay TMDL's water quality goals will be met by 2025 and before the proposed Modified Consent Decree deadline of 2033. More specifically, the Agencies should provide justification for how the Bay TMDL will meet water quality targets and achieve compliance with water quality standards in the Patapsco River Mesohaline and Back River Oligohaline segments, if sewer overflows continue until 2031 and beyond.

Thank you for your attention to and consideration of our comments.

Sincerely,



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