



August 5, 2016

***Via E-mail and Certified Mail Return Receipt Requested***

Assistant Attorney General

U.S DOJ-ENRD

P.O. Box 7611

Washington, D.C. 20044-7611

[pubcomment-ees.enrd@usdoj.gov](mailto:pubcomment-ees.enrd@usdoj.gov)

**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**

Dear Sir or Madam:

These comments are submitted by the Environmental Integrity Project (“EIP”) and Blue Water Baltimore (“BWB”) (collectively, “Commenters”) on the proposed modification, as published in the Federal Register on June 7, 2016,<sup>1</sup> of the Consent Decree in the case *United States v. Mayor & City Council of Baltimore*, No. 1:02-cv-01524-JFM (D. Md. June 1, 2016) (“Proposed Modified Consent Decree” or “Draft Modified Consent Decree”). This Consent Decree, governing violations of the federal Clean Water 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”) (“2002 Consent Decree”), and it addresses unlawful pollution discharges from the City’s separate sanitary sewer system. The 2002 Consent Decree required that all such discharges be eliminated by January 1, 2016. EPA, MDE, and Baltimore City are now proposing to extend the deadline for eliminating discharges to 2031. Commenters appreciate the opportunity to comment on the Proposed Modified Consent Decree.<sup>2</sup>

The focus of these comments is on backups of raw sewage from Baltimore’s sanitary system in private homes and other buildings. These backups have serious adverse effects on the health and finances of Baltimore residents who experience them. Backups have also increased in recent years, since Baltimore City began closing outfalls in other locations. In fact, the City has

---

<sup>1</sup> 81 Fed. Reg. 36,584 (June 7, 2016).

<sup>2</sup> Commenters’ concerns about this matter are widely shared. A shorter set of comments to EPA and MDE on the Proposed Modified Consent Decree was signed by 1,239 individuals, including 784 Baltimore City residents, and 35 community, environmental, and health organizations. Among other things, these comments urge the agencies to:

Assist residents and institutions whose homes and properties have been damaged by basement backups caused by the City’s sewage system. At minimum, this should include rapid response and property cleanup by the City, financial assistance from the City with cleanup costs and property losses caused by backups, and prioritization of infrastructure projects that will benefit the communities experiencing the most backups.

acknowledged that its actions have contributed to the increased frequency of these backups. In addition, many Clean Water Act Consent Decrees governing sanitary sewage discharges in other locations address building backups,<sup>3</sup> including two entered in federal courts in the State of Maryland. For all of these reasons, Commenters find it extremely troubling that EPA and MDE have not addressed building backups in the Proposed Modified Consent Decree, and we strongly urge both agencies to revise the Modified Consent Decree in order to help Baltimore residents.

As discussed in more detail below, Commenters urge EPA and MDE to address building backups in the Modified Consent Decree, as EPA has in many other Consent Decrees, by requiring at minimum:

- A plan mandating rapid and effective response by the City to building backups in order to minimize risks to human health and property;
- A claims program to reimburse residents for financial loss incurred because of these backups;
- An educational program to ensure that citizens are informed about the health risks of contact with sewage backups and how to engage in proper cleanup, where attempted; and
- A prevention program targeting the neighborhoods most impacted by building backups to ensure that structural improvements are prioritized that will assist these communities.

#### **I. Building Backups Threaten Human Health and It Appears that City Actions Have Caused Many of These Backups**

Sewage backups in Baltimore City buildings pose a serious and unacceptable risk to human health and quality of life. The burden to residents is compounded by the City's frequent failure to provide assistance with cleanup or reimbursement for financial losses caused by backups. In addition, City officials have acknowledged that closure of outfall pipes elsewhere in the system has contributed to the increased frequency of backups.

##### **A. Building Backups Threaten Public Health and Residents' Financial Well-Being**

As early as 2006, EPA recognized the severity of the threat caused by raw sewage backups (and its own legal authority to respond) in a 2006 enforcement alert titled *EPA Enforcement: Preventing Backup of Municipal Sewage into Basements*, in which EPA describes the issue as "a top EPA enforcement priority."<sup>4</sup> This alert explains in detail the health effects of sewage backups, stating:

Sewage backups into homes and neighborhoods are of special concern to EPA due to the increased chance of human exposure. Raw sewage often contains a variety of microorganisms, viruses, bacteria and intestinal parasites that can

---

<sup>3</sup> Of the nine federal consent decrees governing sewage discharges that EIP reviewed while conducting research for these comments, only one (Seattle, 2013) did not address basement backups.

<sup>4</sup> EPA, OFFICE OF ENFORCEMENT AND COMPLIANCE, ENFORCEMENT ALERT VOL. 8, NO. 1, EPA ENFORCEMENT: PREVENTING BACKUP OF MUNICIPAL SEWAGE INTO BASEMENTS (2006) at 1, <https://www.epa.gov/sites/production/files/documents/enfpreventingbackups-basement0609.pdf> (Appendix A hereto).

cause serious illnesses, including cholera, dysentery, hepatitis, cryptosporidiosis and giardiasis. Sensitive populations -- children, the elderly and those with weakened immune systems-- can be at a higher risk of illness from exposure to sewage . . . .

Exposure to disease may persist for months after a sewage backup affects a building. Walls, floors, and furniture can remain saturated, creating an environment for non-sewage related organisms to grow, including *Clostridium tetani* (tetanus). Toxic fungi and molds can also thrive in moist environments. In many cases, removal of damaged material such as rugs, furniture and dry wall is the only viable option, and, in some cases, a building may become uninhabitable.<sup>5</sup>

The health burden imposed on Baltimore City residents by sewage backups is compounded by the City's frequent decisions not to provide help with cleanup or to pay for property damage caused by backups. The City Law Department received 413 claims related to damages to private property from sewage overflows between July 1, 2012 and July 1, 2015.<sup>6</sup> Of these, only 38 claims had been paid by the City (9 percent) as of July 1, 2015. Meanwhile, as of that date, Baltimore had denied 223 of the claims submitted (54 percent) while 152 claims remained open and unpaid (37 percent). In addition, 122 of the 152 open claims were over one-year old.<sup>7</sup>

Paying the out-of-pocket costs to clean up and replace property is particularly difficult for low-income residents of Baltimore.<sup>8</sup> Cleanup costs can be significant, and it is not an option to forego replacement of essential yet expensive fixtures that are frequently located in basements, like hot water heaters or furnaces. Baltimore City's glaring failure to undertake the expense and work needed to respond to and eliminate these serious health threats is unacceptable.

#### B. City Actions Appear to Have Caused Many of the Backups

In addition, it appears that backups in Baltimore City have increased substantially since the 2002 entry of the initial Consent Decree, and that this increase is likely due to the City's closure of outfall pipes elsewhere in the sewage system. An investigative report published in

---

<sup>5</sup> *Id.* at 2.

<sup>6</sup> Data regarding claims is based on records received by Commenters in response to an information request sent to the City under the Maryland Public Information Act on June 22, 2015. They likely represent only a fraction of the total complaints about sewage backups submitted to the City during this time period as many residents use the City's 311 complaint hotline to report problems.

<sup>7</sup> Additional information on the effects of building backups on Baltimore residents is available in the letter attached hereto as Appendix B, which was sent to EPA and MDE on November 20, 2015 on behalf of improvement associations in three neighborhoods in Northwest Baltimore that have been particularly impacted by the building backups. Letter from Mary Greene, Deputy Dir., EIP, to Shawn M. Garvin, Admin., EPA Region III and Benjamin H. Grumbles, Secretary, MDE (Nov. 20, 2015), supporting attachments thereto, and transmittal email [hereinafter "EIP November 2015 Backups Letter"].

<sup>8</sup> Three neighborhoods in Baltimore City that have experienced repeated problems with backups – the Grove Park, West Arlington, and Glen communities – have median household incomes below \$37,000. In Grove Park and Glen, the median household income is below \$30,000. See Attachment A to EIP November 2015 Backups Letter (Appendix B).

May 2016 in the Baltimore Sun, the area’s leading newspaper, found that backups “occur significantly more often [now] than before the city closed the dozens of relief valves [that once allowed sewage to discharge into waterways].”<sup>9</sup> Specifically, the article found that there were 622 backups in 2004, but that “[r]esidents have reported more than 7,500 backups since February 2015” and that “[l]ast year was the first in a decade during which such backups didn’t number more than 5,000 in the city.”<sup>10</sup>

City officials have also made statements acknowledging that the City’s closure of 60 out of the 62 sewage outfall pipes that, at one point, discharged sewage into waterways played a role in the increased number of building backups. While sometimes claiming that resident actions are causing the backups,<sup>11</sup> City officials have, at other times, acknowledged that the City’s actions contribute as well. For example, on November 13, 2015, Dana Cooper, Chief of Legal and Regulatory Affairs at the Baltimore City Department of Public Works (“DPW”) made the following statement during a tape-recorded interview with Tom Pelton, Communications Director for EIP: “We didn’t really know the right order to do things in, necessarily. And so when we closed those 60 overflows, that actually increased the number of basement backups that we saw in the city – again, because the sewage has to go somewhere.”<sup>12</sup>

The City’s apparent role in increasing the frequency of backups makes it even more important that it provide assistance to citizens who need it. Commenters recognize that the City has limited funds and that those funds are collected from Baltimore taxpayers. However, providing real and effective assistance to residents, especially low-income residents, who struggle with basement backups should be treated as a top priority, not an afterthought, under the Modified Consent Decree.

## **II. The Consent Decree Must Be Revised to Include Specific Requirements That Will Address Sewage Backups in Buildings**

The Draft Modified Consent Decree is woefully inadequate with regard to building backups. It mentions backups only once, requiring only that remaining collection system deficiencies that contribute to building backups are one factor for the City to consider in prioritizing projects for Baltimore’s Phase II Sewershed Plan.<sup>13</sup> The Phase II plan would be implemented, at earliest, starting in 2022. This is an egregious deficiency in the Draft Modified Consent Decree that will have deleterious and far-reaching effects on human health and welfare

---

<sup>9</sup> Scott Dance, *Sewage Soiling Thousands of City Basements, but Another Decade of Repairs Looms*, BALT. SUN (May 14, 2016, 7:36 PM), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-sewer-backups-20160514-story.html>.

<sup>10</sup> *Id.* The article also notes that actions by individuals, such as flushing grease and “flushable wipes” down the toilet, can cause or contribute to backups and that the City’s position is that many backups are caused by such acts, for which it is not legally responsible. Commenters note that the City has taken this position frequently in the public, but has never offered an explanation for how private actions could have caused such an increase in the number of backups over the years or why the City should not be held responsible under the Modified Consent Decree for assisting residents with backups caused by the sewer collection system.

<sup>11</sup> See Fern Shen, *Basement Sewage Backups Victims: Nothing in Consent Decree for Us*, BALT. BREW (June 8, 2016, 11:30 AM), <https://www.baltimorebrew.com/2016/06/08/basement-sewage-backup-victims-nothing-in-consent-decree-for-us/>.

<sup>12</sup> Pelton Decl. para 7(a), Aug. 3, 2016 (Appendix C hereto).

<sup>13</sup> Draft Modified Consent Decree, para. 9.c.v.c, at 17.

in Baltimore City. The lack of provisions addressing backups is particularly worrisome given that EPA had entered into many consent decrees in other parts of the country that address building backups. It is imperative that the Draft Modified Consent Decree be revised substantially and that the final version incorporate conditions providing relief from backups. As discussed in detail below, this should include a response plan, a financial claims program, an education program, and a prevention plan.

A. EPA and MDE Possess the Legal Authority to Require Action Addressing Building Backups

EPA and MDE each have clear authority to require conditions under this Consent Decree that will provide relief to residents experiencing building backups caused by conditions in the collection system (“Building Backups”).<sup>14</sup> Representatives of EPA asserted, at a public informational meeting held on June 7, 2016 on the Consent Decree modification, that the Agency has limited authority to address residents’ complaints about sewage backups in their homes. While it may be true that EPA’s authority is not unlimited, EPA can certainly address Building Backups caused by Baltimore’s collection system, as it has in multiple consent decrees addressing sanitary sewer system discharges in jurisdictions throughout the country. Two of these consent decrees were entered in federal courts in Maryland, and MDE was a plaintiff in each case. In addition, MDE has separate authority to address Building Backups. In fact, MDE is *required* to order corrective action if it finds that (1) Baltimore’s sewage system is causing a nuisance, is a menace to health or comfort, or is not producing reasonable results from a sanitary viewpoint; and (2) that this is due to inefficient operation or incompetent supervision of the system.

Thus, both agencies are fully authorized to address Building Backups in the conditions of the present Modified Consent Decree, and it would be unconscionable to refuse to assert that authority to assist the residents of Baltimore. Either agency could elect to proceed pursuant to its primary authority to address unpermitted discharges or could rely upon emergency authority to address imminent threats to human health, as discussed in more detail below.

i. EPA and MDE May Address Building Backups Without Invoking Emergency Authority

EPA and MDE both have full authority (which they should use) to address Building Backups as a human health emergency, as discussed in more detail below. However, even without invoking such authority, the agencies can address Building Backups under their primary authority to seek relief for unpermitted discharges of pollutants to waters of the U.S. or waters of

---

<sup>14</sup> The term “Building Backups” hereinafter mean backups that are caused by conditions in the collection system and not by malfunctions or other conditions occurring solely in the privately owned sections of the system, including private laterals. Each consent decree reviewed by Commenters that addressed backups into private property set requirements only for such backups that were caused by the collection system at issue therein. For example, the Consent Decree entered into in 2009 governing sewage discharges in Akron, Ohio defines “Building/Property Backup” as “a Sanitary Sewer Overflow or CSS Release in the form of wastewater release or backup into a building or onto private property that is caused by blockages, flow conditions, or other malfunctions in the Sewer System. A wastewater backup or release that is caused by blockages, flow conditions, or other malfunctions of a Private Service Connection Lateral is not a Building/Property Backup for purposes of this Decree.” Consent Decree, para 9, at 9; *United States v. City of Akron*, No. 5:09-cv-00272 (N.D. Ohio, Nov. 13, 2009) [hereinafter “Akron Consent Decree”] (excerpts provided at Appendix D hereto).

the State. Specifically, EPA may address Building Backups pursuant to Section 309(b) and (d) of the Clean Water Act, 33 USC § 1319(b) and (d), which authorize it to seek relief, including injunctive relief or civil penalties, for the unpermitted discharge of a pollutant into waters of the United States in violation of Clean Water Act section 301, 33 U.S.C. § 1311. MDE may enforce Sections 9-322 and 9-323 of the Environment Article, Annotated Code of Maryland,<sup>15</sup> prohibiting unpermitted discharges into “waters of this State [of Maryland]” without a permit. In fact, MDE’s authority to address Building Backups under the Environment Article is broader than EPA’s authority under the comparable provisions of the Clean Water Act because “waters of this State” is defined as “both surface *and* *underground waters* within the boundaries of this State subject to its jurisdiction . . . .”<sup>16</sup>

EPA and MDE each asserted authority under these respective laws, without relying upon either agency’s emergency authority, in a 2005 complaint<sup>17</sup> initiating an action that resulted in a 2005 consent decree between EPA, MDE, and Baltimore County (hereinafter “Baltimore County Consent Decree”).<sup>18</sup> As discussed below, that consent decree includes conditions that require Baltimore County to submit to EPA and the state plans that includes procedures for responding to, investigating, mitigating, correcting, and preventing Building Backups.<sup>19</sup>

Thus, EPA and MDE can address Building Backups under the Modified Consent Decree with Baltimore City without the need to assert emergency authority.

ii. EPA May Address Building Backups Using Emergency Authority and Has Done so in Several Prior Consent Decrees

EPA is also unquestionably authorized to address Building Backups pursuant to its emergency authority under Section 504(a) of the Clean Water Act, 33 U.S.C. § 1364(a). Under that provision:

EPA, upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons . . . may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

---

<sup>15</sup> The federal court system has supplemental jurisdiction over these claims because they are so related to EPA’s claims, over which the court has original jurisdiction, that “they form part of the same case or controversy . . . .” 28 U.S.C. § 1367(a) (2012).

<sup>16</sup> MD. CODE ANN., ENVIR. § 9-101(1)(1) (emphasis added). Claims for discharges into locations that constitute “waters” of this State” but do not meet the federal definition of “waters of the United States” are still part of the same case or controversy and, therefore, properly in front of a federal court. *See Complaint United States v. Baltimore County*, No. 1:05-cv-02028-AMD (D. Md. Sept. 21, 2005), Doc. 1 at para. 3, at 2. [hereinafter “Baltimore County Complaint”] (Appendix E hereto) (“This Court has jurisdiction over the claims of the State of Maryland asserted under the Environment Article pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction).”).

<sup>17</sup> Baltimore County Complaint para 1-2, at 1, paras. 13-14, 3, paras. 16-22, 3-4 (Appendix E).

<sup>18</sup> Consent Decree, *United States v. Baltimore County*, No. 1:05-cv-02028-AMD (D. Md. Sept. 21, 2005) [hereinafter “Baltimore County Consent Decree”] (excerpts provided at Appendix F).

<sup>19</sup> *Id.* at para. 15.B.ix, at 60, para. 17.h., at 63.

EPA has been in receipt of information regarding the health (and financial) threats posed to Baltimore residents by sewer backups since at least November 20, 2015, when EIP, on behalf of three Baltimore City neighborhood improvement associations, e-mailed and mailed EPA and MDE a well-supported letter explaining these concerns.<sup>20</sup> Moreover, EPA has invoked its authority under section 504(a) in several consent decrees that include conditions requiring the respective system operator to address Building Backups. Examples include a 2005 consent decree entered in federal district court in Maryland with the Washington Suburban Sanitary Sewer Commission (“WSSC”) (hereinafter “WSSC Consent Decree”)<sup>21</sup> and a consent decree entered in 2012 with City of St. Louis (hereinafter “St. Louis Consent Decree”).<sup>22</sup>

In the complaint filed in the WSSC matter, EPA specifically found that untreated sewage presents the level of endangerment necessary to invoke emergency authority under Section 504(a) of the Clean Water Act. EPA stated:

Untreated sewage can carry bacteria, viruses, parasitic organisms, intestinal worms and borroughs (inhaled mold and fungi). The diseases these may cause range in severity from mild gastroenteritis (causing stomach cramps and diarrhea) to life-threatening ailments such as cholera, dysentery, infection hepatitis, and severe gastroenteritis. *Untreated sewage, therefore, presents an ‘imminent and substantial endangerment to the health of persons’ who may come into contact with it.* Groups facing greater risks are elderly, immunocompromised groups, and pregnant women. The endangerment from untreated sewage remains imminent until the area impacted by the sewage is adequately cleaned and disinfected.<sup>23</sup>

EPA thereafter sought, pursuant to section 504(a), an order requiring WSSC to take actions, when releases are caused by its system, including clean up and disinfection of affected property as promptly as possible and minimization of sewage releases into “streets, yards, parks, buildings, and other areas where persons may come into contact with it.”<sup>24</sup> As described below, the final WSSC Consent Decree requires WSSC to prepare and implement a response plan and an education plan to address Building Backups.

---

<sup>20</sup> EIP November 2015 Backups Letter (Appendix B). EIP also sent a second letter in January 2016, requesting that EPA and MDE ask Baltimore City to complete a Supplemental Environmental Project (“SEP”) to assist residents with basement sewage backups. Letter. from Mary Greene, Deputy Dir., EIP, to Shawn M. Garvin, Admin., EPA Region III and Benjamin H. Grumbles, Secretary, MDE (Jan. 20, 2016) (Appendix G hereto).

<sup>21</sup> Consent Decree, *United States v. Washington Suburban Sanitary Commission*, No. PJM-04-3679 (D. Md. July 26, 2005) at 2 [hereinafter “WSSC Consent Decree”] (excerpts provided at Appendix H) (“[T]he United States alleged in its Complaint that . . . certain of WSSC’s [sanitary sewer overflows], namely those that occur in streets, playground areas and buildings, pose an imminent and substantial endangerment to the health of persons, in violation of [Clean Water Act] Section 504(a), 33 U.S.C. §1364(a).”).

<sup>22</sup> Consent Decree, *United States v. Metropolitan St. Louis Sewer District*, No. 4:07-CV-1120 (E.D. Mo. Aug. 4, 2011) at 1 [hereinafter “St. Louis Consent Decree”] (excerpts provided at Appendix I) (“[T]he United States also alleged a claim under Section 504(a) of the [Clean Water Act] . . . requiring [the system operator] to take such actions as may be necessary to abate the imminent and substantial endangerment to the health of persons presented by MSD’s sewer system, resulting from discharges of untreated sewage to homes, yards, parks, playgrounds, and streets.”).

<sup>23</sup> Complaint, *United States v. Washington Suburban Sanitary Commission*, No. PJM-04-3679 (D. Md. Nov. 18, 2004) para. 57, at 16 (Appendix J) (emphasis added).

<sup>24</sup> *Id.* para. 58, at 16.

In the WSSC matter, EPA recognized the severe human health threat posed to communities in Montgomery and Prince George’s Counties by exposure to raw sewage,<sup>25</sup> and it used its authority to reduce those risks. Baltimore City residents deserve no less.<sup>26</sup> EPA should take whatever steps are necessary to assert authority under section 504(a) of the Clean Water Act to ensure that Building Backups into homes in Baltimore are addressed promptly and that other assistance is provided, as described in more detail in Section II.B below.

iii. MDE Has Emergency Authority to Address Building Backups and Must Take Action if it Finds that Baltimore’s System is Causing a Nuisance, is a Menace to Health and Comfort, or is Not Producing Reasonable Results

MDE possesses similar emergency authority under Section 9-339 of the Environment Article that should be invoked in the present matter. For violations of any provision under Subtitle 3 of Title 9 of the Environment Article, MDE may seek injunctive relief to stop the activity causing danger “[i]f an emergency arises from imminent danger to the public health, to the public welfare, or to the environment.”<sup>27</sup>

In addition, MDE is *required* to order corrective action under Section 9-220 of the Environment Article if it determines that “because of incompetent supervision or inefficient operation,” Baltimore’s sewer system is “causing a nuisance[,]” is “a menace to health or comfort[,]” or is “not producing reasonable results from a sanitary viewpoint.”<sup>28</sup> MDE’s corrective order “*shall* require that the . . . sewerage system . . . produce specific, reasonable results within a time that [MDE] sets” and, if does not achieve these results within the required time, MDE may order “the owner or person in charge to appoint . . . a person approved by the Secretary to take charge of and operate the system in a manner that will secure the results demanded by [MDE].”<sup>29</sup> MDE asserted this authority in the WSSC case, alleging in its Complaint in Intervention that “[un]treated sewage [from WSSC’s system] presents a nuisance and a menace to health or comfort of persons who may come into contact with it, and the menace to health or comfort from untreated sewage remains imminent until the area impacted by the sewage is adequately cleaned and disinfected.”<sup>30</sup>

Before the Modified Consent Decree is entered, MDE should make a determination that (1) untreated sewage from Baltimore’s system is causing a nuisance, is a menace to health and comfort, and is not producing reasonable results from a sanitary viewpoint; and (2) that this is the result of inefficient operation or incompetent supervision. Upon such a determination, MDE is compelled to order corrective action and may include provisions in the Modified Consent Decree that will address Building Backups. Should MDE fail to make such a determination, the

---

<sup>25</sup> *Id.* para. 56, at 15.

<sup>26</sup> EPA also invoked Section 504(a) authority in the following Consent Decrees, all of which address building backups: Akron Consent Decree (para 3, pg. 6) (Appendix D); Consent Decree, *United States v. Knoxville Utilities Board*, No. 3:03-cv-497 (E.D. Tn. Dec. 1, 2004) para. A, at 4; Consent Decree, *United States v. Miami-Dade County*, No. 1:12-cv-24400-FAM (S.D. Fl. June 6, 2013) para. 1-2, at 9-10; Consent Decree, *United States v. Evansville Water and Sewer Utility Board*, No. 3:09-CV-128 WTL-WGH( S.D. In., Nov. 30, 2012) at 1.

<sup>27</sup> MD. CODE ANN., ENVIR. § 9-339(d).

<sup>28</sup> MD. CODE ANN., ENVIR. § 9-220(a).

<sup>29</sup> MD. CODE ANN., ENVIR. § 9-220(b)(c) (emphasis added).

<sup>30</sup> Complaint in Intervention, *Maryland v. Washington Suburban Sanitary Commission*, No. 8:04-cv-03680-PJM (D.Md. Nov. 18, 2004) para. 108, at 25 (Appendix K hereto).



agency should articulate to the public in writing why the unhealthy conditions borne by residents of Baltimore City do not rise to this level.

**B. The Final Modified Consent Decree Should Include Specific Plans and Programs to Address Building Backups**

The Draft Modified Consent Decree should be revised to include specific provisions that address the worst impacts that Baltimore City residents experience because of Building Backups. As stated above, EPA has included provisions to address Building Backups in multiple consent decrees addressing sanitary sewer system discharges in jurisdictions throughout the country, with two involving MDE as a co-plaintiff. Commenters have reviewed a number of these consent decrees. Below, we list a sample of the consent decrees from our review, along with examples of provisions found within each respective consent decree that address Building Backups.

**Examples of Federal Consent Decrees that Address Building Backups and Select Provisions**

**The 2004 Cincinnati Consent Decree<sup>31</sup>**

- *Response Plan:* Cincinnati must staff and operate a 24 hour per day, seven day per week hotline with actual personnel to take calls concerning Building Backups.
  - Once notified by occupants of a potential Building Backup, the city must have a customer service representative onsite at the affected property within four hours.
  - The City of Cincinnati must promptly clean up Building Backups and otherwise assist occupants who experience these backups with cleanup activities. Offered cleanup activities include:
    - wet vacuuming or other removal of spillage,
    - mopping bare floors and walls with cleaning solution and disinfectant,
    - flushing out and disinfecting plumbing fixtures,
    - basic carpet cleaning, and
    - the removal and disposal of damaged personal property by an authorized sanitation company at Cincinnati's expense.
- *Claims Program:* The city must use a dedicated claims program and fund to paying for the cleanup of all Building Backups at no cost to the property owner, including the cost to restore and repair the real property and for personal property loss. At locations that have experienced a Building Backup within the previous two years and where the city failed to resolve the capacity issue, there is a presumption that the backup is the city's responsibility. In such cases, the city must pay for claims without further investigation.
- *Prevention Plan:* The city must offer to eligible properties a program utilizing a variety of remedial measures to prevent Building Backups, including but not limited to, installation of grinder pump systems, and property purchase.

---

<sup>31</sup> Consent Decree, *United States v. Bd. Of Cnty. Comm'rs of Hamilton Cnty*, No. C-1-02-107 (S.D. Ohio June 9, 2004), sec. XIII, para. B.1, at 46-47; Ex. 6-8 [hereinafter "Cincinnati Consent Decree"] (excerpts provided at Appendix L hereto).

### **The 2011 St. Louis Consent Decree<sup>32</sup>**

- *Response Plan:* St. Louis must respond to and stop Building Backups within four hours of receiving notice.
- *Claims Program:* The city must provide monetary reimbursement to occupants affected by Building Backups.
- *Education Program:* The city is required to produce a cleanup guide recommending procedures necessary to disinfect and remove items potentially contaminated by the Building Backup, descriptions of potential health and safety issues resulting from contact with sewage, and information on how to minimize exposure. This cleanup guide must be available on the sewer authority's website, distributed to occupants and property owners on site in response to a Building Backup call, and otherwise disseminated through appropriate methods, including a website, brochures, billing inserts, and door hangers.
- *Prevention Plan:* St. Louis must create and implement a prevention program that describes the activities the city will take to prevent backups, including the installation of individual grinders, pump stations, and backflow preventers.

### **The 2009 Akron Consent Decree<sup>33</sup>**

- *Response Plan:* Akron must develop an emergency response plan that describes the city's methods to carry out procedures for responding to Building Backups, including the timeframe for responses and the cleanup measures.
- *Education Program:* The city must develop emergency response plans that include descriptions of methods for communicating with customers about how to report Building Backups and how to obtain cleanup.

### **The 2005 WSSC Consent Decree<sup>34</sup>**

- *Response Plan:* WSSC must develop follow-up procedures to insure adequate Building Backup cleanup in its emergency response plan.
- *Education Program:* WSSC Consent Decree must include in emergency response plans, descriptions of methods for communicating with customers about how to report Building Backups and how to obtain cleanup.

### **The 2005 Baltimore County Consent Decree<sup>35</sup>**

- *Response Plan, Prevention Plan:* Baltimore County must submit to EPA and the State an operation and maintenance plan as well as an emergency response plan that includes procedures for responding to, investigating, mitigating, correcting, and preventing backups.

---

<sup>32</sup> St. Louis Consent Decree, sec. L, at 43-45 (2012) (Appendix I).

<sup>33</sup> See Akron Consent Decree, sec. VII, para. 22; see also Akron Consent Decree, Attach. C, at 8-9 (Appendix D).

<sup>34</sup> WSSC Consent Decree, Art. 12, para. B.2.c., at 57-58 (2005) (Appendix H).

<sup>35</sup> Baltimore County Consent Decree, para. 15.B.ix, at 60, para. 17.h., at 63 (2005) (Appendix F).

In the final Modified Consent Decree, EPA and MDE should use their authority to require (1) a plan mandating rapid and effective response by the City to Building Backups in order to minimize risks to human health and property; (2) a claims program to reimburse residents for financial loss incurred because of these backups; (3) an educational program to ensure that citizens are informed about the health risks of contact with sewage backups and how to engage in proper cleanup, where attempted; and (4); a prevention program targeting the neighborhoods most impacted by Building Backups to ensure that structural improvements are prioritized that will assist these communities. The Modified Consent Decree should require Baltimore to submit each of these plans and programs to EPA and MDE, for approval by EPA and review by MDE, within 45 days of the effective date of the Modified Consent Decree.

i. Building Backup Response Plan

The Modified Consent Decree should require Baltimore to submit to EPA and MDE a Building Backup Response Plan that mandates procedures for a rapid response by the City or a City contractor to eliminate and clean up backups as quickly as possible. Health and property risks from exposure to sewage increase significantly the longer the sewage is present.<sup>36</sup> For this reason, it is essential that response by Baltimore City is rapid, and Commenters believe that a reasonable response time is four hours, as required under the St. Louis and Cincinnati Consent Decrees.<sup>37</sup>

Whenever sewage backups of significant volume occur during or immediately after rain events, the City should be required to remove sewage from real property and perform cleanup and sanitation services within 24 hours, unless the City can prove within a defined timeframe that deficiencies in the City's Collection System did not contribute to the backup. The implementation of the Building Backup Response Plan should be at the City's expense.

Like the Cincinnati Consent Decree, the Baltimore City plan should require the City to create a telephone hotline devoted to taking calls from occupants who experience Building Backups. Operators of this hotline should be trained to take reports of these backups, to answer questions concerning health risks, and to inform callers about the cleanup, claims, education, and prevention programs that we believe should be developed by the City, as discussed here and in the sections below.

ii. Building Backup Claims Program

The Modified Consent Decree should require Baltimore to pay for restoration, real property repairs, personal property loss, and cleanup of buildings damaged by Building Backups, as required under the Cincinnati and St. Louis consent decrees.

---

<sup>36</sup> EPA, SUGGESTED GUIDELINES FOR REMEDIATION OF DAMAGE FROM SEWAGE BACKFLOW INTO BUILDINGS, App. E, at 1, 5, <http://www.oseh.umich.edu/pdf/guideline/fdrappe.pdf> ("Sewage poses a very significant threat to human health. However, the severity of the health threat depends on the content of the sewage and the degree and extent of penetration into the building environment. The degree of penetration is dependent on the porosity of contaminated materials, the quantity of sewage, and the amount of time the sewage remains in contact with materials.").

<sup>37</sup> St. Louis Consent Decree, sec. L., para. 47.a, at 43 (2012) (Appendix I); Cincinnati CD, sec. XIII, para. B.1, at 47; Ex. 7, at 2 (Appendix L).

As discussed above in Section II.A, EPA and MDE can define “Building Backups” to cover only backups that were caused, in whole or in part, by Baltimore’s collection system, as has been done in every other consent decree reviewed by Commenters that addressed backups. Cleanup expenses should be paid directly by Baltimore if the City is notified of a Building Backup through the dedicated telephone hotline. Otherwise, the City should reimburse victims within three months of the filing of claims for cleanup services and to cover damages to real and personal property.

In addition, there should be a presumption that sewage backups are caused by the capacity problems in the Collection System if they occur (1) during or immediately after rainfall; or (2) at locations that experienced a Building Backup within the previous two years, which is similar to the presumption required under the Cincinnati Consent Decree.<sup>38</sup> This is particularly true because, as discussed above, the City DPW has admitted, in a recorded interview, that it may have caused many of these backups due to mistakes in planning and performing collection system upgrade projects.

Despite this, the City’s performance in responding to sewage backup claims is abysmal, as discussed above in Section I. Paying the out-of-pocket costs to clean up and replace property is difficult for many Baltimore residents, especially low-income residents. Therefore, when the City is notified of these events, the incidents should be identified as Building Backups, and cleanup service expenses should be covered by the City unless Baltimore can overcome this presumption.

### iii. Building Backup Education Program

The final Modified Consent Decree should obligate Baltimore to develop and carry out a comprehensive Building Backup Education Program. Commenters have spoken to residents who have come into contact with the sewage from backups, usually in an effort to save personal property or to rescue family pets trapped in basements being flooded with overflowing sewage. The current draft of the Modified Consent Decree only calls for education and outreach efforts on “the need to minimize introduction of debris, grease and other items into the Collection System,” and does not require public education and outreach concerning public health.<sup>39</sup> Not only is this offensive to victims who helplessly suffered—through no fault of their own—from sewage backups caused by deficiencies in the collection system, it also ignores the need to inform and protect occupants from the health risks of contact with sewage. Through this program, the City should be required to conduct outreach to Baltimore residents about the health risks of contact with sewage, and to inform residents about programs offered by Baltimore to alleviate the burden of Building Backups.<sup>40</sup>

---

<sup>38</sup> Cincinnati Consent Decree; Ex. 8, at 2 (Appendix L).

<sup>39</sup> Draft Modified Consent Decree, para. 13.a, at 32.

<sup>40</sup> For example, both the Akron Consent Decree and WSSC Consent Decree require the obligated parties to include in emergency response plans, descriptions of methods for communicating with customers about how to report Building Backups and how to obtain cleanup. *See* Akron Consent Decree (Appendix D), section VII, para. 22, Att. C, at 8; *see also* WSSC Consent Decree, Art.12, para. B.2.c, at 57-58 (Appendix H).

The Modified Consent Decree should also require the City to provide a cleanup guide through the mail to all private property owners in Baltimore, and make the guide publicly available on the City's website, within 30 days of the Education Program's approval by EPA. First and foremost, this should explain the City's obligations to clean up property and reimburse occupants for backups as defined in Sections II.B.i and ii above.<sup>41</sup> The guide should explicitly address situations in which cleanup should not be attempted and how to minimize health risks if cleanup is attempted, using the cleanup guide required under St. Louis Consent Decree as a model.

In addition to providing the cleanup guide above, the City should also disseminate educational materials that include the telephone number of the building backup hotline, how to protect oneself and others from contact with sewage, how to inspect for real property damage (e.g., checking for gas leaks or electrical system damage), how to clean up the damaged area and get rid of odors, and information on available cleanup services and monetary reimbursement. Like the provisions in the St. Louis Consent Decree, the Modified Consent Decree should require Baltimore to maintain and disseminate this information through appropriate methods, including a website, brochures, billing inserts, and door hangers.<sup>42</sup> Operators should also be trained to provide this information through the telephone hotline mentioned in Section II.B.i, above.

#### iv. Building Backup Prevention Plan

Baltimore should be required to establish a Building Backup Prevention Plan to implement measures to help prevent Building Backups. At a minimum, the Modified Consent Decree should require the City to provide residents with the option of having technologies designed to prevent future backups, such as backflow preventers or grinder pumps, installed in properties affected by these backups, as required in the St. Louis and Cincinnati consent decrees.<sup>43</sup> However, Commenters recognize that this is a temporary solution, as occupants must be physically present on the property in order to manually switch on and off the backflow converter to prevent backups. This is why it is critical that the final Modified Consent Decree also include the other Building Backup plans and programs (response, financial claims, and education) discussed in these comments.

#### C. The Final Modified Consent Decree Should Prioritize Assistance to Neighborhoods Experiencing the Largest Number of Building Backups and Provide Explicit Deadlines for Projects Aimed to Prevent Backups There

Neighborhoods that are experiencing the largest number of Building Backups should receive immediate attention for accelerated infrastructure improvements. The final Modified Consent Decree should also specifically identify these neighborhoods, should prioritize assistance to them, and should provide deadlines for infrastructure projects that will prevent backups in these communities.

---

<sup>41</sup> In no way should the cleanup guide or other educational services be considered a substitute for city assistance with cleanup and reimbursement for citizen costs, which are critical components of any Building Backup Plan that is fair to Baltimore City residents.

<sup>42</sup> St. Louis Consent Decree, para. 47.b., at 44 (Appendix I).

<sup>43</sup> See Cincinnati Consent Decree, sec. XIII, para. A, at 46 (Appendix L); Ex. 6; see also St. Louis Consent Decree, para. 47.d, at 44 (Appendix I).

It does not appear that anything approximating these requirements currently exists in the Draft Modified Consent Decree. The Draft Modified Consent Decree includes only one provision that even references the neighborhoods most affected by building backups. And this reference simply relates to the requirement that remaining collection system deficiencies that contribute to building backups serve as one factor for the City to consider in prioritizing projects for Baltimore's Phase II Sewershed Plan.<sup>44</sup> This is not sufficient as neighborhoods affected by building backups should be given priority under Phase I of the work and the final Modified Consent Decree should include definite timetables by which these neighborhoods will receive assistance. If EPA and MDE believe that infrastructure repairs for the most affected neighborhoods is already addressed under the Draft Modified Consent Decree, they must explain in the response to comments which required projects will alleviate Building Backups and the deadline for these projects.

Further, the Draft Modified Consent Decree excludes fixes that would help to address Building Backups. In evaluating the hydraulic capacity of the City's collection system components, the Draft Consent Decree requires Baltimore to use flow data collected pursuant to Paragraph 9 of the 2002 Consent Decree.<sup>45</sup> However, the 2002 Consent Decree excluded gravity lines smaller than eight inches in diameter, including gravity lines of this size that cause or contribute to backups, in the City's evaluation of the collection system and development of sewershed plans.<sup>46</sup> The final Modified Consent Decree should require the City to monitor and incorporate these gravity lines that could cause or contribute to backups into the City's evaluation of the long-term capacity and peak flow management in its proposed Phase II projects.<sup>47</sup>

### **III. EPA and MDE Should Schedule a Public Meeting to Explain Their Response to Comments to the Public Before Finalizing the Modified Consent Decree**

The Draft Modified Consent Decree allows for a 60-day written public comment period on the proposed modification.<sup>48</sup> 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 Consent Decree. However, federal regulations set a "floor" for public participation, and agencies are fully authorized to go above and beyond minimum requirements. 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 modification process.

Residents experiencing basement backups have asked that EPA and MDE hold a public meeting before the Modified Consent Decree is finalized and that the agencies explain their response to comments to the public at this meeting. While EPA and MDE are not compelled to

---

<sup>44</sup> Draft Modified Consent Decree, para. 9.c.v.c, at 17.

<sup>45</sup> Draft Modified Consent Decree, para. 9.e.ii., at 20-21.

<sup>46</sup> 2002 Consent Decree, para. 9.D.i., at 15.

<sup>47</sup> Draft Modified Consent Decree, para. 9.e.ii., at 21.

<sup>48</sup> Draft Modified Consent Decree, para. 79, at 73.

allow this,<sup>49</sup> they are fully authorized to schedule and hold such a meeting and ought to agree to do so. EPA has recently recognized the importance of providing this kind of opportunity in its environmental justice plan, in which it states that it “will enhance importance communication and transparency with affected communities and the public regarding compliance and enforcement actions, so that community input can inform [EPA’s] work, and communities can be empowered with information about environmental and human health stressors that affect them.”<sup>50</sup> EPA should follow through on this commitment with action and should schedule a public meeting during which it will explain its response to comments to residents of Baltimore communities affected by repeated sewage backups.

### Conclusion

For all of the reasons above, Commenters respectfully request that EPA and MDE immediately invoke their clear and unequivocal legal authority to revise the Draft Modified Consent Decree in order to address the serious health risks posed by Building Backups. EPA and MDE should also schedule a public informational meeting before finalizing the Modified Consent Decree at which they will explain their response to written comments to the public.

Sincerely,



Leah Kelly  
Sylvia Lam  
Attorneys  
Environmental Integrity Project  
1000 Vermont Ave. NW, Suite 1100  
Washington, D.C. 20005  
Phone: 202-263-4448 (Kelly)  
202-888-2701 (Lam)  
Email: [lkelly@environmentalintegrity.org](mailto:lkelly@environmentalintegrity.org)  
[slam@environmentalintegrity.org](mailto:slam@environmentalintegrity.org)

Halle Van der Gaag  
Executive Director  
Blue Water Baltimore  
3545 Belair Road  
Baltimore, MD 21213

---

<sup>49</sup> See Fern Shen, *Sewage-Plagued Homeowners Seek Deadlines and Dollars*, BALT.. BREW (June 21, 2016, 1:51 PM), <https://www.baltimorebrew.com/2016/06/21/sewage-plagued-homeowners-seek-dollars-and-deadlines/> (“Flores, Hicks, and activist Kim Trueheart told Grumbles that they want to meet with the state and city and discuss their response to the comments before the court deadline to approve the decree is reached. ‘You’re going to sit down with us again and tell us what modifications you’re going to put on the table,’ Trueheart said”).

<sup>50</sup> EPA, DRAFT EJ 2020 ACTION AGENDA, ENVIRONMENTAL JUSTICE STRATEGIC PLAN (2016), at 14, [https://www.epa.gov/sites/production/files/2016-05/documents/052216\\_ej\\_2020\\_strategic\\_plan\\_final\\_1.pdf](https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_1.pdf).

Cc: *Via e-mail and certified mail return receipt requested*

Benjamin H. Grumbles  
Secretary of the Environment  
Maryland Department of the Environment  
1800 Washington Blvd.  
Baltimore, Maryland 21230  
ben.grumbles@maryland.gov

Cara M. Mroczek  
Trial Attorney  
Environmental Enforcement Section  
Environmental and Natural Resources Division  
P.O. Box 7611  
Washington, DC 20044-7611  
cara.mroczek@usdoj.gov