



Giving Georgia's Environment Its Day In Court

January 19, 2011

Sent via email and U.S. Mail

Assistant District Attorney Ignacia S. Moreno
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Email: pubcomment-ees.enrd@usdoj.gov

RE: Comments on United States and the State of Georgia v. DeKalb County, Georgia, Civil Action No. 1:10-cv-4039-WSD, D.J. Ref. 90-5-1-1-09497.

Dear Ms. Moreno:

Please accept these comments on the proposed Consent Decree (“Decree”) in United States and the State of Georgia v. DeKalb County, Georgia, Civil Action No. 1:10-cv-4039-WSD. These comments are submitted on behalf of the following organizations:

DeKalb Soil and Water Conservation District
Miners Creek Circle Civic Association
The Metropolitan Atlanta Urban Watershed Institute
Newly Organized Citizens Requesting Aquifer Protection
The South DeKalb Neighborhood Coalition
The South River Watershed Alliance

GreenLaw greatly appreciates the opportunity to comment on the Decree. The listed objectives of the Decree include full compliance with the Clean Water Act (“CWA”), the Georgia Water Quality Control Act (“GWQCA”) and the elimination of all sanitary sewer overflows (“SSOs”). (Decree at p. 11) Certainly, the Decree represents a much needed move by EPA toward improving water quality and the health of communities in DeKalb County (the “County”) through improvements to the wastewater collection and transmission system (“WCTS”). Nonetheless, it fails to provide adequate protections to meet the objectives declared in the Decree. The Decree is duplicative of existing requirements, fails to require specific performance goals for completion of remedial actions, mandates a Supplemental Environmental Project (“SEP”) that is not designed as a pollution prevention technique, relies heavily on contentions from the County and does not require adequate supervision by the United States Environmental Protection Agency (“EPA”) and the Georgia Department of Natural Resources, Environmental Protection Division (“EPD”).

For the reasons stated below, the United States should withdraw or withhold its consent in accordance with 28 C.F.R. § 50.7 in order to correct the inappropriate, improper, or inadequate portions of the Decree.

I. The Decree's Objectives Should Include NPDES Compliance and Elimination of Bypasses.

As noted in the Decree, the County is the holder of National Pollutant Discharge Elimination System ("NPDES") permits authorizing the discharge of pollutants to waters of the United States and the State from its Snapfinger Creek and Pole Bridge Creek Wastewater Treatment Facilities. (Decree at p. 4). The County has failed to comply with the provisions of its NPDES permits. As such, the Decree should specifically include the objective of achieving full compliance with the County's current NPDES permits as they relate to the capacity at the wastewater treatment plants ("WWTPs") and capacity, management, operation, and maintenance of the collection systems. The Decree should also include an objective to eliminate all bypasses prohibited by 40 C.F.R. § 122.41(m) as the term is defined in Section IV of the Decree.

II. The Decree is Duplicative and Does not Contain Adequate Performance Goals, Schedule Requirements or Penalties.

With this Decree in place, the County will be determining the schedule for the performance of existing programs with little incentive to complete the necessary projects in a timely manner. After fourteen months of negotiation between EPA, EPD and the County, the resulting Decree largely amounts to a duplication of the requirements currently mandated by the Metropolitan North Georgia Water Planning District Plan ("Metro Water Plan" or "Plan"). The Metro Water Plan mandates are contained in its May 2009 Wastewater Management Plan Update ("Plan").¹ A review of the Plan reveals that the Decree goes little further than to require the County's submission of remedial program plans and subsequent progress reports to EPA/EPD to complete many of the same objectives that are currently required by the Metro Water Plan.

The Plan's mandates are certainly necessary to achieve the Decree's goals, but in order to be effective the Decree should go further. For instance, the Decree's mandates to submit proposals for remedial actions should require a clear schedule for completion of major tasks, such as capital improvement projects. Instead, it requires the County to submit proposals for scheduling and procedures that are currently mandated by the Plan. Further, the Decree does not contain adequate penalties for spills or late submittal of materials required by the Decree.

An example is the Decree's requirements for the existing Fats, Oil and Grease ("FOG") program. (Decree at p. 25-28). There, the Decree requires that "notwithstanding any improvements already achieved through the FOG Management Program, the County shall reevaluate its FOG Management Program to determine if its effectiveness can be improved." (Decree at p. 25-26). The Decree does not mandate any specific performance goal or schedule. These vague requirements for integration into current programs and lack of mandatory penalties are inadequate to ensure full compliance with the CWA and elimination of all SSOs.

¹ Metropolitan North Georgia Water Planning District, *Watershed Management Plan Update – May 2009*, available online at <http://www.northgeorgiawater.com/html/87.htm>.

a. EPA/EPD Should Require the County to Meet Clear Performance Goals Beyond Those Currently Mandated by the Metro Water Plan.

The Metro Water Plan was created by the Georgia General Assembly in 2001 (O.C.G.A. §12-5-572) to serve as the water planning organization for the greater metropolitan Atlanta area.² The Plan lays out the requirements and framework to meet future demands for wastewater treatment while maintaining water quality standards for waterbodies within metro Atlanta.³ The Plan includes specific tasks and milestones for local governments as well as regional and state agencies for implementing those tasks.

In order for a local government to receive a permit from EPD for an increased water withdrawal, a new or increased discharge, or for a MS4 permit, that jurisdiction must be in compliance with the Plan.⁴ EPD is responsible for auditing local governments, including the County, to determine compliance with the plans.⁵ Therefore, the County will be unable to renew these permits if it fails to meet the requirements of the Plan. This compliance mandate leaves little need for a duplicative consent decree between EPA/EPD and the County.

There are ten programs within the Decree’s Capacity, Management Operation and Maintenance Program (“CMOM”), which dictates the required action that the County must take in order to comply with the Decree’s objectives. (Decree at p. 19-56.) All of these programs are currently being implemented by the County and eight of them are addressed in the Plan. The two that are not addressed in the Plan concern financial analysis and infrastructure acquisitions only.⁶ The chart below illustrates the redundancy of the Decree’s mandates by comparing the programs in the Decree’s Remedial Action Program with the Plan’s required “Action Items”:

Metro Water Plan (Implemented May 2009)	The Decree
<u>Sewer System Overflow Emergency Response Program</u> - requires the County to maintain a local standard operating procedure for responding to and reporting sanitary sewer overflows that complies with EPD and EPA requirements. (Plan at 7-17).	<u>Contingency and Emergency Response</u> – requires the County to submit to EPA/EPD a written plan to expediently notify and protect the health and welfare of the potentially affected public and the environment. (Decree at p. 21-25).
<u>Grease Management Program</u> – requires the County to develop a “FOG” management program including mandates for written methods for preventing/controlling discharges of grease and development of legal authority to regulate discharges of grease and. (Plan at 7-15).	<u>Fats, Oils, and Grease Management Program</u> – requires County to re-evaluate its FOG program to include a written description of the program, any amendment necessary for legal authority to regulate the discharge of FOG and an implementation schedule for any possible changes to the program. (Decree at 25-28).

² *Id.* at ES-1.

³ *Id.* at I-1.

⁴ *Id.* at ES-5.

⁵ *Id.* at 13-4.

⁶ The Financial Analysis Program requires the County to re-evaluate its program to ensure that it established and tracks the sufficiency of funds for operations and maintenance, capital projects financing, and debt service coverage associated with WCTS. (Decree at p. 42-44). The Infrastructure Acquisitions Program requires the County to re-evaluate its program to ensure that it is consistent with the County’s design and construction criteria. (Decree at p. 44-45).

<p><u>Sewer System Inventory and Mapping</u> – requires the County to maintain a comprehensive sewer system map, with recommendations to use a GIS-based collection system map. (Plan at 7-2).</p>	<p><u>Sewer Mapping Program</u> – requires the County to submit a sewer mapping program for producing a GIS sewer system mapping system. (Decree at p. 28-30).</p>
<p><u>Sewer System Asset Management</u> – requires the County to maintain a computerized maintenance management program with the goal “to facilitate effective operation and maintenance of the system to ensure its proper functioning and to minimize the occurrence of overflows that threaten public health and water quality. (Plan at 7-4).</p>	<p><u>Maintenance Management System Program</u> – requires the County to re-evaluate its program with the goal to “facilitate effective operation and maintenance activities associated with the WCTS.” (Decree at p. 30-34).</p>
<p><u>Collection and Transmission Systems Training Program</u> – requires the County to maintain a staff training program for sewer system inspection and maintenance to “ensure the sewer system maintenance program is effective”. (Plan at 7-19).</p>	<p><u>Collection and Transmission Systems Training Program</u> – requires the County to re-evaluate its program to “facilitate effective operation and maintenance of the WCTS.” (Decree at p. 34-37).</p>
<p><u>Capacity Certification Program</u> – requires a program and process for certifying wastewater collection system capacity for new development and redevelopment projects, including maintaining a hydraulic model or manual calculation approach. (Plan at 7-12).</p>	<p><u>System-Wide Hydraulic Model</u> – requires the County to submit a WCTS-wide hydraulic modeling program. (Decree at p. 38-42).</p>
<p><u>Capacity Certification Program</u> – requires the County to maintain flow and rainfall monitoring to support the hydraulic modeling and capacity certification program and to determine system capacity. (Plan at 7-13).</p>	<p><u>System-Wide Flow and Rainfall Monitoring Program</u> – requires County to re-evaluate its program to indicate WCTS performance, assess capacity and to prioritize sewers for rehabilitation, repair and/or replacement. (Decree at p. 37-38).</p>
<p><u>Sewer System Inspection Program</u> – requires the County to maintain a sewer inspection program that determines the condition of the sanitary sewer system and identifies any needed maintenance and rehabilitation activities. (Plan at 7-5).</p>	<p><u>Continuing Sewer Assessment and Rehabilitation Program</u> – requires County to submit a priority sewer assessment and rehabilitation program to evaluate those segments of the system most in need of repair and to submit an ongoing sewer assessment and rehabilitation program that will ensure continuous assessment and rehabilitation of the County’s WCTS. (Decree at p. 45-56).</p>

It is acknowledged in the Decree that the County has previously begun work on these programs, but it is not mentioned that the programs are mandated by the Metro Water Plan. (Decree at p. 6.). The Decree does not include an assessment of the County’s efforts to complete these remedial actions. It is simply noted that “the County *contends* that it has made significant progress in implementing and improving capacity, management, operations and maintenance

(“CMOM”) programs, assessing its WCTS for effectiveness, and reducing the number of reported spills.” (Decree at p. 6; emphasis added).

EPD is currently responsible for auditing the County’s progress toward reaching the Plan’s goals.⁷ As shown above, the effect of the Decree is to essentially duplicate the County’s requirements under the Plan with the adjustment of placing both EPA and EPD in positions to supervise and approve the County’s progress. If EPA/EPD are in fact seeking to improve the state of DeKalb County’s waters, this Decree must do more than duplicate existing mandates.

b. EPA/EPD Should Mandate Completion of the Projects in the County’s Capital Improvement Plan.

In order to ensure that the Decree’s objectives are reached, EPA/EPD must mandate that specific performance goals are met on a detailed schedule. The County has approved a 5 year capital improvement projects plan (“CIP”) budget with descriptions, costs and schedules, in which it has identified \$1.4 billion in wastewater capital improvement projects for the next five years.⁸ It is noted in the draft CIP that the County’s treatment plants, as well as thousands of miles of water and sewer pipes, need significant repairs and upgrades.⁹ For example, the Snapfinger Wastewater Treatment Plant was built in 1963, and has not had substantial upgrades since 1983; the Pole Bridge Wastewater Treatment Plant was built in 1973, and was last substantially updated in 1990.¹⁰

The draft CIP includes upgrades to the Snapfinger and Pole Bridge WWTPs, a sewer mapping and manhole inspection study, lift station upgrade/rehabilitation and water and wastewater hydraulic model implementation.¹¹ According to the County, approximately one-third of the \$1.4 billion five-year plan is “related to the types of wastewater collection system rehabilitation, repair and spill prevention projects called for in the Consent Decree.”¹² Beyond requiring compliance with the Plan, the Decree should require that each of these projects be completed on a detailed schedule with penalties for noncompliance. This will ensure that projects deemed necessary by the County in the draft CIP will be completed on a schedule determined by EPA/EPD.

c. EPA/EPD Should Establish a Detailed Schedule for Completion of Required Remediation Actions.

As stated above, the Decree directs the County to submit program plans for completion of remedial actions. Rather than allowing the County to determine the schedule for the Decree’s CMOM Program objectives, the Decree should include a detailed schedule, determined by EPA/EPD, for completion of each program. For instance, the sewer mapping program, in its current form, requires the County to submit within six months a sewer mapping program, but

⁷ Metropolitan North Georgia Water Planning District, *Watershed Management Plan Update* at 13-4..

⁸ The CIP was approved by the County based on a draft CIP document. A finalized CIP has not been made available to the public as of the date of these comments.

⁹ DeKalb County, Department of Watershed Management, *Capital Improvement Projects – Draft* (Oct. 29, 2009), available online at <http://dekalbwatershed.com/PDF/2010-2014-Capital-Improv-Projects.pdf>.

¹⁰ *Id.* at Items 51-54.

¹¹ *Id.*

¹² Press Release, DeKalb County, *DeKalb County Reaches Agreement with EPA, EPD* (Dec. 13, 2010), available online at http://dekalbwatershed.com/PDF/2010_12_13_PressRelease2.pdf.

allows the County to set a schedule for completion. (Decree at p. 28-30). The Decree should require that WCTS-wide mapping be completed on a detailed schedule determined by EPA/EPD.

As stipulated in Metro Water Plan, in order to ensure compliance, the Decree should specify that the County be unable to receive a permit for an increased water withdrawal, a new or increased discharge, or for a MS4 permit, if it fails to meet the schedule set by EPA/EPD for completion of CMOM program objectives. In addition, or in the alternative, EPA/EPD should stipulate that no new sewage hookups be made while the County is in noncompliance.

In addition, the Decree should include a detailed schedule for completion of each of the projects included in the County's draft CIP related to the types of wastewater collection system rehabilitation, repair and spill prevention projects called for in the consent decree. As noted above, the County has estimated the time needed for completion of each project. For instance, it is estimated that the construction phase for the expansion and upgrade of the Snapfinger Wastewater Treatment Plant could be completed in 30 months.¹³

The schedule for completion of these capital improvement projects should be incorporated in and be enforceable under the decree. In the alternative, a detailed schedule for completion of these projects should be determined by EPA/EPD and made enforceable in the Decree. In order to ensure compliance, the Decree should specify that the County be unable to receive a permit for an increased water withdrawal, a new or increased discharge, or for a MS4 permit, if it fails to meet the mandated schedule.

d. EPD has Failed to Require Compliance with the Metro Water Plan.

EPD's most recent audit of the County's progress to determine compliance with the Metro Water Plan revealed a failure to meet targets regarding a number of programs.¹⁴ These include the Wastewater Collection System Inspection and Maintenance Program, Hydraulic Modeling Program and Capacity Certification Program.¹⁵ However, EPD allowed the County to go forward with permit applications because it was deemed to be making a good faith effort to comply with the Plan.

The Decree, in its current form, places supervision in the hands of both EPA and EPD. EPD's inaction in enforcement of the Plan hardly provides confidence in its ability to enforce the Decree. EPA should take sole responsibility for supervision of the County's progress in meeting the Decree's objectives.

e. EPA/EPD Should Require Adoption of NPDES Compliant Sampling Procedures.

The Decree should require that the County evaluate its current procedures to ensure that representative sampling is conducted at the wastewater treatment facilities ("WWTFs") in accordance with the requirements of their NPDES permits and 40 C.F.R. Part 136. This should

¹³ DeKalb County, Department of Watershed Management, *Capital Improvement Projects – Draft* (Oct. 29, 2009) at Items 51 and 52.

¹⁴ Letter from Carol A. Couch to Francis T. Kung'u (May 8, 2009), on file with EPD and included in Contents of *EPD/MNGWPD Audit Checklist for DeKalb County, Section A – Wastewater Management Plan*.

¹⁵ *EPD/MNGWPD Audit Checklist for DeKalb County, Section A – Wastewater Management Plan*.

include a description of all sampling locations, schematics showing the sampling locations and procedures for collecting samples from the designated locations.

f. EPA/EPD Should Require Greater Penalties for Noncompliance.

As it stands, the Decree's stipulated penalties are too low to ensure the County's compliance with the Decree. Only \$500 is due for each spill of 10,000 gallons or less or spills of 10,000 gallons or more within two years of the date of entry of the decree. (Decree at p. 70). The same penalty is due for failure to submit required materials within 1-30 days of the submittal date. (Decree at p. 69). The Decree should require increased fines for spills and for failure to submit required submissions in a timely manner.

These fine amounts are paltry when compared with the maximum penalty per violation per day of \$32,500 authorized by the Clean Water Act. 33 U.S.C. § 1319(d). *See* 69 Fed. Reg. 7121 (adjusting the fines authorized under the Act for inflation to \$32,500). The Decree's penalty amounts are significantly less than the cost of fixing the County's wastewater problems, thus the County is left with little incentive to comply with the Decree in a timely manner.

Currently, numerous reaches within DeKalb County are listed as impaired under EPD's 2010 303(d) list of waters.¹⁶ All reaches of the South River within DeKalb County are listed as impaired due to fecal coliform and polychlorinated biphenyls ("PCBs").¹⁷ The Decree should require at least a fine of up to \$2500 per day for any spill into an impaired stream as identified in EPD's 2010 303(d) list of waters, provided that the pollutant contributes to the water quality criteria violated.

In addition, the language in the Decree allows EPA/EPD full discretion to determine whether to assess penalties for noncompliance. For instance, the Decree states that "[f]or each Spill of 10,000 gallons or less, a stipulated penalty of \$500 *may* be assessed. (Decree at p. 70; emphasis added). The Decree's language should be modified to require that EPA/EPD penalize the County for all violations of the Decree.

III. EPA Should Mandate a SEP which Utilizes a Pollution Prevention Technique

The public comment period in lodged consent decrees serves as the opportunity for community input on SEP proposals. 63 FR 24796, at 24803 (May 5, 1998). According to EPA's SEP Policy, "[s]oliciting community input into the SEP development process can result in SEPs that better address the needs of the impacted community; promote environmental justice; produce better community understanding of the EPA enforcement; and improve relations between the community and the violating facility." *Id.* These comments regarding the SEP have largely been drafted on behalf of residents of southern DeKalb County who have been impacted by frequent releases of raw sewage. The Decree, in its current form, requires the County to complete "one-time cleanup[s]" of trash and debris, such as household appliances, tires, and shopping carts in streams along the South River, South Fork Peachtree Creek and Snapfinger Creek. (Decree, Appendix C at p. 1-3). These "one-time cleanups" mandated by the Decree do not satisfy

¹⁶ GA Environmental Protection Division, 2010 Integrated 305(b)/303(d) List, Streams, available online at http://www.gaepd.org/Files_PDF/305b/Y2010_303d/Y2010_Streams.pdf.

¹⁷ *Id.* at p. A 230.

EPA's SEP Policy nor will they have a lasting impact to prevent further pollution in the County's waters.

a. The SEP Project Does Not Have an Adequate Nexus to the Harm Caused.

According to EPA's Final Supplemental Environmental Projects Policy ("SEP Policy"), a SEP project must include an adequate nexus between the violation and the proposed project. 64 FR 24796, at 24798 (May 5, 1998). The nexus is the relationship between the violation and the proposed project. *Id.* This relationship exists only if one of the following conditions is met:

- a. the project is designed to reduce the likelihood that similar violations will occur in the future; or
- b. the project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
- c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

Id.

The SEP mandated by the Decree does not have an adequate nexus because it does not meet any of the criteria above. Here, the violations are SSOs, which are defined by the Decree as "spills, overflows or building backups."¹⁸ (Decree at p. 16). The proposed project, as stated above, is a series of trash cleanups along County streams "affected by Spills". (Decree, Appendix C at p. 1). The description of the SEP in the Decree makes no mention of limiting future SSOs or remedying the impacts of past SSO events.

First, the clean-up of trash and debris will certainly have no impact on the likelihood of future SSOs occurring.

Second, the clean-up of trash will, in no way, reduce the adverse impact to public health or the environment caused by the repeated discharge of raw sewage into the waters of the County. According to EPA, SSOs contain raw sewage that can "carry bacteria, viruses, protozoa (parasitic organisms), helminthes (intestinal worms), and borroughs (inhaled mold and fungi)."¹⁹ The diseases these organisms carry include cholera, dysentery, hepatitis and gastroenteritis.²⁰ A short-term reduction in trash will have no impact on these harms to public health or the environment.

Third, the project will not reduce the overall risk to public health or environment potentially affected by the County's violations. As the Decree indicates, the County has experienced large numbers of SSOs, releasing raw sewage into its streams and rivers. A limited stream cleanup project, such as the one mandated in the Decree, will not reduce the risk to the public or to the majority of the waters impacted by the SSOs.

¹⁸ The definitions of Spill, Overflow, and Building Backups in the Decree refer only to discharges of wastewater, not to the release of trash or debris. (Decree at p. 12, 15, 17).

¹⁹ U.S. EPA, Sanitary Sewer Overflows and Peak Flows, Frequently Asked Questions, available online at http://cfpub.epa.gov/npdes/faqs.cfm?program_id=4#75

²⁰ *Id.*

b. The SEP Should be Designed as a Pollution Prevention Technique.

Even if a nexus is found, the current SEP project is extremely limited in its breadth and impact. The Pollution Prevention Act of 1990, 42 U.S.C. § 13101, identifies pollution prevention as the height of the environmental management hierarchy. 42 U.S.C. § 13101(b). EPA's SEP policy advises that "selection and evaluation of proposed SEPs should be conducted generally in accordance with this hierarchy of environmental management, i.e., SEPs involving pollution prevention techniques are preferred over other types of reduction or control strategies..." 63 FR 24796, at 24797 (May 5, 1998).

Rather than mandating a "one-time cleanup," which could be completed by detainees and/or a public clean-up effort at a relatively low cost, a SEP which promotes pollution prevention should be selected. According to the Decree, the County has "recognized that the leading cause of Spills from WCTS is fats, oils and grease." (Decree at p. 5). Therefore, a SEP aimed at reducing the introduction of these pollutants should be chosen. The selected SEP should incorporate a public education component regarding grease problems caused by residents and promote grease collection by home and business owners. An example would be a campaign to promote central collection and refunds for residents who drop collected grease at specified County locations.

In the alternative, EPA's "Project Ideas for Potential Supplemental Environmental Projects" lists a number of SEP projects which would have a nexus to the violations and have lasting impacts.²¹ These include the purchase or donation of green buffers and/or conservation easements, restoration/creation of fish or other aquatic habitat, watershed monitoring projects and stormwater control projects.

c. The SEP Should be Conducted in an Environmental Justice Community.

It is important that the SEP included in the final draft of the Decree be conducted in an area of the County that has been disproportionately burdened by pollutant exposure. EPA's SEP Policy states that "emphasizing SEPs in communities where environmental justice concerns are present helps ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near, where the violations occur would be protected." 63 FR 24796, at 24797 (May 5, 1998). The SEP Policy goes on to state that "EPA encourages SEPs in communities where environmental justice may be an issue." *Id.*

In this case, the SEP should be conducted in southern DeKalb County, where residents living along the South River and its tributaries are predominantly African American and have historically been disproportionately burdened by pollutant exposure. Combined sewer overflows from Atlanta's municipal facilities, sanitary sewer overflows, a proliferation of landfills and unbridled development have sullied the environment for its residents.

As stated above, the South River is listed by EPA as a 303(d) impaired water due to fecal coliform and PCB pollution.²² The headwaters to the South River are also impaired due to fecal

²¹ U.S. EPA, *Project Ideas for Potential Supplemental Environmental Projects*, available online at <http://www.epa.gov/compliance/resources/policies/civil/seps/projectsideas42004.pdf>.

²² GA EPD, 2010 Integrated 305(b)/303(d) List, Streams at A 230.

coliform pollution²³ In addition, the South River Watershed has, and is currently, receiving a large number of SSOs from DeKalb County's facilities. For example, between January 1, 2006 and August 29, 2008, there were 311 SSOs in the South River Watershed.²⁴ A SEP conducted in southern DeKalb County that is focused on pollution prevention, rather than a short-term remedial measure, could have a tremendous impact.

IV. EPA/EPD Should Require an Explanation of How the County Identified, Delineated and Prioritized Initial Priority Areas.

According to the Decree, the County has provided EPA/EPD with a list of Initial Priority Areas, within the WCTS for further assessment and rehabilitation. (Decree, at p. 47). The County has concluded, based on a study with vague parameters,²⁵ that this area, constituting 18% of the WCTS experienced approximately 34% of all non-FOG related spills between January 1, 2007 and December 31, 2009. *Id.* The Decree does not provide any further information on how the County came to this result, nor does EPA/EPD make any assessment of the County's techniques in identifying the Initial Priority Areas.

The Initial Priority Areas selected by the County are predominantly located in northern DeKalb County. (Decree, Appendix B). However, the South River Watershed receives roughly the same amount of SSOs as does the Chattahoochee Watershed in northern DeKalb County. As stated above, between January 1, 2006 and August 29, 2008, there were 311 SSOs in the South River Watershed.²⁶ During this same period, the Chattahoochee Watershed experienced 315 SSOs.²⁷

Although the Decree requires the County to provide an "explanation of how the County identified, delineated, and prioritized" Additional Priority Areas with the County's WCTS, it does not require the County to submit this information regarding the Initial Priority Areas. The Decree should require that the County, within 30 days of the date of entry of the Decree, submit this information for approval by EPA/EPD. Further, EPA/EPD should require, based on the number of SSOs, that southern DeKalb County be incorporated into the Initial Priority Areas in a manner equivalent to that of northern DeKalb County.

V. The Public Should Have Expedient Access to All Documents Submitted by the County and Responses by EPA/EPD.

The Decree does not allow for sufficient public access to submissions made by the County to EPA/EPD. Since the Decree relies entirely upon submission by the County to track compliance, it is crucial that the public have access to these submissions to ensure that the County is taking the mandated actions to meet the objectives of the Decree.

²³ *Id.* at A 219-20, 222, 220. The impaired headwaters are Conley Creek, Doolittle Creek, Honey Creek, Intrenchment Creek, Shoal Creek.

²⁴ These numbers are based on information contained in EPD consent orders dated November 20, 2006, October 17, 2007 and December 30, 2008.

²⁵ It is stated in the Decree that "[t]he Initial Priority Areas consists of areas determined by the County as having sewers that are estimated to be older than fifty (50) years; areas with calculated "R" Values greater than three (3); and areas determined by the County, through its ongoing sewer system maintenance program, as needing additional assessment and/or prioritized rehabilitation. (Decree at p. 47).

²⁶ *Id.*

²⁷ *Id.*

The Decree requires only that the County place all final EPA/EPD approved plans, reports or submissions into a public document repository, which are “intended to be made available for public review and copying printing.” (Decree at p. 16, 59). The County is given sole responsibility for depositing documents into the public document repository. (Decree at p. 16).

The Decree should require that all documents submitted by the County to EPA/EPD be placed into the repository. This should include documents that are pending approval and those conditionally approved, approved in part or disapproved entirely. All responses by EPA/EPD to the County’s submission should also be placed into the repository. Further, these submissions should be made available, in a conspicuous manner, to the public through the County’s website within 24 hours of submission. These documents should be maintained in an orderly and/or chronological manner. There should be no fee required for accessing these documents from the County’s website. Additionally, any notices for formal public notice and comment, such as an amendment to the Decree, should be submitted and posted to the repository.

VI. EPA Should Require that the County obtain a Permit for the Use of Shafts to Emplace Fluid into Wastewater Storage Tunnels.

The County is required to submit a number of programs to EPA/EPD elucidating how it will meet the Decree’s objectives. It is not clear from the Decree what projects will be chosen by the County for inclusion in these programs. However, several of these projects may require implementation of a deep-rock wastewater storage tunnel; a process which requires the use of shafts to emplace fluids to fill the tunnels. In fact, the County included a tunnel storage and conveyance system connecting the Snapfinger and Pole Bridge Wastewater Treatment Plants in its draft CIP.²⁸ This tunnel, if created, would go through Rockdale County and would be a danger to the local aquifer that supplies water wells to many residents.

The County has since announced that it has put any wastewater tunnel plans on hold for at least five years. Despite this assurance, it is possible that a tunnel, such as the one described in the draft CIP, will be included in the program(s) submitted to EPA/EPD as required by the Decree.

The Safe Drinking Water Act’s Underground Injection Control (UIC) regulations should be applied to the shafts that emplace wastewater into sewage tunnels, but EPA has refused to require regulation of this activity because it is not considered by the agency to be “underground injection.”

The Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300(f) et seq., empowers EPA to regulate the underground injection of wastewater. The SDWA establishes a regulatory program for underground injections to be administered by EPA or a state approved underground injection control program (“UIC”), such as Georgia’s UIC program. The minimum requirements for state UIC programs are, among other things, prohibition of any “underground injections unless authorized by permit or rule.” 40 C.F.R. § 145.11(a)(5). The statutory definition of “underground injection” is “the subsurface emplacement of fluids by well injection.” 42 U.S.C. § 145.11(a)(2).

²⁸ DeKalb County, Department of Watershed Management, *Capital Improvement Projects – Draft* (Oct. 29, 2009) at Items 55-57.

In *Legal Envtl. Assistance Found, Inc. v. U.S. Envtl. Prot. Agency*, 118 F.3d 1467 (11th Cir. 1997), the Court held that “underground injection” means the subsurface emplacement of fluids by forcing them into cavities and passages in the ground through a well.” *Id.* at 1474. The Court further stated that even the temporary subsurface emplacement of fluids through a well can amount to “underground injection.” *Id.* at 1474 n. 10. Finally, the Court added that “*it is clear that Congress dictated that all underground injection be regulated under the UIC programs.*” *Id.* (emphasis added).

The use of shafts to emplace wastewater into sewage tunnels certainly falls within this broad definition, but EPA has repeatedly refused to require permitting of this activity.²⁹ This inaction is inappropriate and unlawful in light of the Court’s opinion in *Legal Envtl. Assistance Found*. In light of the likelihood that the County will renew plans for a tunnel as a result of the Decree’s mandates, EPA should submit a legal opinion regarding their erroneous determination the SDWA regulations do not apply to shafts used to fill tunnel systems.

VII. Conclusion

We ask that the United States withdraw or withhold its consent until such time as the Decree is modified to correct the errors noted above. If you have any questions about these comments, would like any of the source material referenced in these comments, or require any additional information, please do not hesitate to contact me at (706) 542-5270.

Thank you for your consideration of this important matter.

Sincerely,



David Deganian, Esq.

²⁹ An EPA official has opined in a letter to a concerned citizen that “[t]unnels that convey sewage to a Publicly Owned Treatment Works (POTW) for treatment do not fall within the scope of the definitions set forth in the regulations promulgated under Part C of the SDWA. This is because the tunnels are not intended to emplace fluids below the surface of the ground through a well; rather, they are distribution systems intended to convey wastewater to POTWs from intake sites that collect both sewer flow and flow from a treatment plant during high usage times. Therefore, wastewater conveyance tunnels are not required to be permitted under the UIC program. Letter from James D. Giatinna, Director, Water Management Division, U.S. EPA Region IV, to Robert Schreiber (Oct. 18, 2008) (A copy of said letter is attached to these comments).