

Governance of the Metropolitan Sewer District of Greater Cincinnati by Hamilton County and the City of Cincinnati

February 2016

Executive Summary

The shared governance of MSDGC lacks shared purposes and goals. Disputes lead to litigation, only to be followed by more disputes. Consent decree work has been delayed threatening missed deadlines, fines and penalties.

We recommend that the MSDGC shared governance be ended as soon as possible and one public entity put in charge. This includes termination of the 1968 agreement and addressing worker transitions and pension issues.

Past oversight of the MSDGC did not insure compliance with the law or proper maintenance of assets. Public input was limited and most citizens had little idea of the extent of sewer problems. This has contributed to making the sewer district more costly, particularly by delaying needed work.

Full governance – management, operation, prioritization, budgeting, ownership of assets and property, compliance, etc. – should be transparent, and accountable to the public, thereby avoiding inappropriate contracting and delays in compliance with laws and the consent decree.

Some have suggested splitting the district up into 2 or more districts. An equitable distribution of assets that have had varying levels of improvements, replacements, or new builds – or none of these - over the past 50 years would be difficult. Furthermore sewer sheds may include two or three political jurisdictions. Previously Judge Spiegel would not permit the city of Loveland to leave the District; it should remain whole.

We recommend that the sewers district remain one sewer district.

The success of either a county sewer district, governed by the Board of Commissioners or a regional sewer district, governed by a Board of Trustees depends on the intent and ability of either Board to provide oversight to the sewer district, and comply with legal requirements.

An independent citizen oversight “watchdog” committee, with the resources and authority to monitor, audit, insure transparency, accountability, and public participation, is key to moving forward.

Governance of the Metropolitan Sewer District of Greater Cincinnati Governance

The Metropolitan Sewer District of Greater Cincinnati (MSDGC) was formed under an agreement in 1968 by Hamilton County and the City of Cincinnati. The agreement runs for 50 years and has been amended 4 times. Hamilton County owns the Sewer District, sets sewer rates, approves the capital and operating budgets, approves legislation authorizing items such as construction, adopts rules and regulations for the operation of the system. The County also holds permits for the sewer system. The City of Cincinnati operates and manages the Sewer District. The Director of MSDGC is hired by Cincinnati and the employees are Cincinnati employees (except for consultants and contractors).

The city and county are co-defendants in a federal consent decree signed in 2004 (incorporating a prior Interim Partial Consent Decree of 2002). The decree is the result of legal action brought by USEPA and Ohio EPA.

There are fundamental challenges in this governance structure.

A. Shared responsibility means a lack of accountability - no one is responsible

The functions of management and budgeting overlap in many ways. One might think the shared responsibility would force cooperation but there have been continuing arguments about roles and responsibility, direction, policy, prioritization and performance expectations. Ongoing disagreements over ownership and what constitutes management and management related to fiscal oversight, impact effective and timely correction of sewer overflows by the co-defendants

This shared responsibility impairs public transparency. Citizen pressure has brought about some reporting but it remains minimal and sometimes obscures more than it reveals. A discussion on a project with the city and a separate discussion with the county reveals a quagmire of differing intents, goals and expectations.

There is a fundamental lack of accountability. If a project is over budget, the County can do little but approve the budget increase. They cannot hold the staff or city accountable. The County cannot object to a project and propose its own. The County cannot intervene except in the budget, or at the point of legislating a project.

While the county holds permits they cannot assure MSDGC's performance in meeting those permit limits. In fact, the City has appealed permits without the County's knowledge.

The city on the other hand cannot change or stop a capital project the County has approved or require the County fund a project.

There are no performance standards in the agreement. Performance issues begin with the historic failure to follow the federal Clean Water Act and the numerous violations that have gone on for years, ultimately resulting in the 2004 “global” consent decree. Performance issues also show in the historic lack of funding for asset management (maintenance and keeping the system in good repair). Cost-effective operation of the Sewer District has been impaired by such ventures as the partial merger of internal operations of the City’s Water Works (CWW) and the MSDGC, which was undone – due to the lack of performance measurements. “The partial sharing of select MSD and GCWW administrative functions, which began three years ago, was well intentioned but has not proven to be in the best interests of either entity long-term or their respective customers,” Black wrote in a memo to Cincinnati City Council. “This experiment has likely resulted in some savings; however, mechanisms were not put in place to capture savings in a quantifiable manner.”

As co-defendants in the consent decree, both are responsible for its successful implementation and subject to stipulated penalties for failures to meet the consent decree performance and design criteria as well as meeting deadlines. The co-defendants have had numerous disagreements about consent decree projects.

B. Resolving disputes

There is no mechanism for dispute resolution in the agreement. In the past few years, the city and county have been at odds over local procurement rules, local hire rules and responsible bidder rules. Several projects were stopped or delayed because these issues went unresolved for months. These include projects that are federally mandated and stipulated penalties will apply if they are late. The County declined to fund sewer repairs as part of the streetcar implementation. At times the city and county have referred matters to high level administration officials and at other times to elected officials of the two co-defendants. The county has called for mediation. The city has said that while they are willing to negotiate the termination of the 1968 agreement, but do not wish to hire a mediator. The city proposes to have the court address the ownership issue.

C. Delay and added cost

The shared responsibility between two governments that don’t always agree on what should be done makes it very difficult for citizens to understand and engage in civic action and oversight of government. And importantly, there have been many delays, and money wasted throughout numerous disputes.

These include the high cost Werk and Westbourne EHRT, Glenview Pump Station, Eastern and Delta and several projects delayed by litigation over responsible bidder and local procurement rules.

D. The need for reform in the operations of the MSDGC

The need for improvements in MSDGC operations, the joint liability that the city and the county have for implementing the Consent Decree are complicated by the governance issues and lack of clarity and agreements between the parties. We list a few of the many examples below.

One of the outstanding problem areas is the SSO 700 Final Remedy required by the Consent Decree. The co-defendants received an extension until December 31, 2012 for completing the SSO 700 Final Remedy. The County knew little of what MSDGC planned for SSO 700 in the final months leading up to its submission to the USEPA. While the County approved the submission of MSD's Final Remedy, the County took the unusual step of passing a resolution of opposition to the Remedy and directed the County to initiate efforts to study alternatives. Sierra Club's review of the Final Remedy showed that the Remedy did not meet the requirements of the Consent Decree. Conversations with the USEPA indicate this remains an outstanding issue, subject to possible fines.

In October 2012, MSDGC was found by Ohio EPA to have illegally stored hazardous waste, caused an illegal release to the environment of approximately 50 pounds of mercury at the Little Miami facility and along roads, and illegally disposed of the waste at a facility that was not authorized to accept hazardous waste. MSDGC was fined for these violations and the cleanup cost ratepayers over \$1,000,000. The Ohio EPA identified a lack of training, and lack of proper procedures for handling hazardous waste.

In June 2012, Ohio EPA sent MSDGC a notice of violation for a fish kill at the Mill Creek plant. The fish kill was caused by bypassing untreated sewage through an unpermitted gate. The spill was not reported to Ohio EPA as required, nor was the bypass of sewage reported. MSDGC had two subsequent fish kills. All three were the result of failing to prepare for a lack of capacity at the plant while planned upgrades were being made.

Flaws in MSD's modeling for the development of the Wet Weather Improvement Plan were found, in 2012, to be misstating the overflow volume in Mill Creek by about 3 billion gallons. Further analysis and validation and calibration showed even the revised numbers were still off by 59% for the Lick Run Sewershed. This increased the cost of the remediation from \$.31/per gallon (2012 cost) to \$.52/per gallon. Mistaking the amount of overflows means projects are not being properly sized to meet consent decree requirements. (Any set of improvements might then result in greater reductions in overflows or may add unneeded capacity in some locations.)

In 2014, MSDGC discovered that their plans for Eastern and Delta would not meet the performance criteria in the consent decree, despite being given prior time extensions dating back to the deadlines set in the consent decree in 2002. Again, a

modeling was not synchronized with the projects and the projects were not designed to meet the consent decree criteria.

For years, consultants have been hired to study odors at the Mill Creek plant, without effective remediation. In 2009 improvements at the Septage Receiving facility were made at a cost of about \$6,000,000. In 2015, the Community Advisory Panel (CAP) addressing odor complaints learned from another consultant that the facility was not designed properly to handle the problem. Over the course of 2 years of meetings between the CAP and MSDGC, MSDGC produced 4 Business Case Proposals for correcting odors. Two of these had to be withdrawn because MSDGC could not show that the proposed solution would actually address the problem. The Headworks Chemical Feed was deteriorated, past its useful life and the containment area for the chemicals had failed. Furthermore, the chemical dosing had never been optimized to address the production of highly toxic hydrogen sulfide. Since the proper chemical dosing has ramifications throughout the treatment process, this process needs to be corrected before the effectiveness of other possible controls can be determined. MSDGC knew of problems for years without acting to correct them.

Werk and Westbourne's EHRT was selected based on a benefit cost analysis that showed the EHRT to be the most cost effective solution. The cost, however, proved to be more than double. Project costs went from about \$30 million in 2009 to over \$70 million by September of 2012. Yet no efforts were made to reconsider whether the solution was still the most cost-effective. Additionally, the modeling for the Werk & Westbourne sewershed cannot be calibrated and validated due to Ohio River intrusion, another problem which MSDGC has known about but not corrected for years.

Mt Airy Forest, one of the city parks, has undocumented, unpermitted overflows since the 1960's, but MSDGC failed to put these overflows into the Wet Weather Improvement Plan and address them under the consent decree.

It is very difficult for citizens to assess these and other projects because of the lack of transparency and timely responses to information requests from MSDGC. Hamilton County has, where they have had information, been very prompt in responding to citizen requests.

Barriers to resolving current and future governance issues

A. Pension fund and employee issues

Currently all MSD staff are city employees, participants in the city pension and also have city established pay scales, titles, and benefits. The city has expressed concern about the impact of removing current or future employees from the pension system. The city has said this removal of employees would have the effect of "bankrupting

the pension”. The county on the other hand has stated that the County “fully expects that MSD employees will be protected under any outcome.”

B. Control over development

Sewer districts can affect development plans by providing sewer services to undeveloped areas. Development is also affected by the lack of sewer capacity in parts of MSDGC – generally areas with uncorrected overflows.

In the past, new development has benefited from sewers built and paid for by all ratepayers, sometimes at a cost well above what will be recovered by sewer fees during the life of the infrastructure. And at the same time, there has been an underinvestment in sewer infrastructure in developed areas.

C. Compliance with laws

Expedient compliance with laws and correction of the violations that resulted in the Consent Decree are threatened by continued disputes and delay and the waste of funds means less money for correcting the violations.

D. Legal liability & Consent Decree

The 2004 consent decree is binding on both the Defendants and any successors. A change in successors requires agreement by the USEPA, OEPA, ORSANCO and the federal Court.

E. Upcoming implications

The 1968 agreement runs for 50 years, expiring in 2018. Decisions have already been made, such as issuing bonds beyond 2018 and selecting projects that may preclude other actions, or make them more expensive, after 2018.

Plans for the second phase of projects is due in June of 2017. This means the work that whatever entity will own and operate MSDGC after 2018 has to be agreed to by mid-2017. Unfortunately the City and County are not working jointly to develop the Phase II Plan. Additionally, the public has no information about the planning or say in what is being planned.

F. Ratepayer burden

The \$3.2 billion consent decree will cause considerable ratepayer stress. Project delay, disputes and rework make the consent decree more costly.

Alternative forms of governance

Under Ohio state law, there are three ways to organize Sewer Districts:

1. Municipal Sewer Departments

Sewer Districts can be run by cities, generally in their own jurisdictions, by a county or by a regional district. These districts operate using city ordinance authority.

2. County Sewer Districts

MSDGC was organized by Hamilton County under ORC 6117. County sewer districts created under 6117 may contract with public agencies or persons to manage the district. Ohio law authorizes the County Commission Boards to set up sewer districts. ORC 6117 states “The board may provide for the protection of the sanitary and drainage facilities and may negotiate and enter into a contract with any public agency or person for the management, maintenance, operation, and repair of any of the facilities on behalf of the county upon the terms and conditions that may be agreed upon with the agency or person and that may be determined by the board to be in the best interests of the county.”

3. Regional Sewer Districts

ORC 6119 states, “any unincorporated part of one or more contiguous regional water and sewer district in the manner and subject to the conditions provided in Chapter 6119. of the Revised Code, for either or both of the following purposes:

(A) To supply water to users within and without the district;

(B) To provide for the collection, treatment, and disposal of waste water within and without the district. “

Regional Sewer Districts can be set up through a process outlined in ORC 6119, by petition to the court of common pleas by one or more political jurisdictions within the proposed district. ORC 6119 also prescribes the manner in which a Board of Trustees is to be established for running the Regional Sewer District.

Recommendations

The shared governance of MSDGC lacks shared purposes and goals that are essential to effective leadership. Disputes between the city and county have led to litigation, only to be followed by more disputes. Consent decree project work has been delayed by disputes and sometimes only resolved by the threat of missed consent decree deadlines that invoke fines and penalties.

We recommend that the MSDGC shared governance be ended as soon as possible and one public entity put in charge. This includes termination of the 1968 agreement, plan for addressing any worker transitions including addressing pension issues.

Past oversight of the MSDGC did not insure compliance with the law or proper maintenance of assets. Transparency and accountability were poor. Public input was limited in part because most citizens had little idea of the extent of problems at the sewer district. This has contributed to making the sewer district more costly, particularly by delaying needed work.

Full governance – management, operation, prioritization, budgeting, ownership of assets and property, compliance, etc. – needs to be transparent, accountable to the public and include public participation. Any Board needs to be both responsive to the public and avoid the politicization that has occurred with MSDGC. The Board needs to ensure compliance with laws and the consent decree.

Some have suggested splitting the district up into 2 or more districts. An equitable distribution of assets that have had varying levels of improvements, replacements, or new builds – or none of these - over the past 50 years is virtually impossible to do. Furthermore even small sub-sewer sheds may include two or three political jurisdictions, further complicating any division of the district. Larger sewershed and their treatment plant serve multiple jurisdictions. Even if some jurisdictions wished to run their own treatment plant they may lack any reasonable discharge point for their effluent. Furthermore, hundreds of millions of dollars in bonds have been issued for past improvements and it would be virtually impossible to ascertain which assets are paid off and which aren't. Previously Judge Spiegel would not permit the city of Loveland to leave the District; it should remain whole.

We recommend that the sewers district remain one sewer district.

Reestablishing MSDGC as a county sewer district, governed by the Board of Commissioners or establishing a regional sewer district, governed by a Board of Trustees both have pluses and minuses. A great deal depends on the intent and ability of either Board to provide oversight to the sewer district, and comply with legal requirements.

An independent citizen oversight “watchdog” committee, with the resources and authority to monitor, audit, insure transparency, accountability, and public participation, is key to moving forward.