UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
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ATLANTA, GEORGIA 30303-8960

JAN [illegible] 2000

CERTIFIED MAIL Z 369 707 345
RETURN RECEIPT REQUESTED

Mr. Bud Hixson
1936 Hepburn Avenue #4
Louisville, KY 40204

Dear Mr. Hixson:

Thank you for your recent comments to the United States Environmental Protection Agency (EPA), Region 4 regarding the Louisville and Jefferson County Metropolitan Sewer District (MSD) draft Pretreatment Project XL Phase 1 Agreement. Your comments were received in response to the notice of availability for this proposed Phase 1 Agreement published in the *Federal Register* on December 14, 1999. Your comments were well thought-out, and EPA appreciates the time you have taken to provide input into the XL process. EPA would like to take this opportunity to reiterate the purpose and process of Project XL, as we believe this discussion will alleviate some concerns you have with MSD's proposed Phase 1 Agreement.

Project XL is a national pilot program that allows state and local governments, businesses and federal facilities to develop with EPA innovative strategies to test better or more cost-effective ways of achieving environmental and public health protection. In exchange, EPA (and the state as necessary), will issue regulatory, program, policy, or procedural flexibilities to conduct the experiment. Such pilot programs are to be described in an agreement known as a Final Project Agreement. On June 23, 1998, EPA solicited pretreatment program reinvention pilot project proposals under Project XL "interested in exploring alternative environmental performance-based pretreatment programs on a pilot basis ..."

MSD submitted a proposal for such a project in the Chenoweth Run watershed-Jeffersontown Wastewater Treatment Plant (WWTP) sewershed. At the core of MSD's proposal is the intent to develop a new way to implement the Pretreatment Program. MSD feels the current regulations do not allow for easy integration of diverse wastewater management programs (pretreatment, wastewater treatment, sludge treatment and disposal, storm water, collection system management, operation and maintenance, etc.). MSD believes that through improved utilization of limited resources, they can address and control more diverse sources of pollutants, integrate the management of the different wastewater programs, and in turn, reduce the amount of pollutants being introduced into the environment. The focus of MSD's project is optimizing the utilization of limited resources. Your comments themselves recognize that "the Chenoweth Run watershed appears well suited for a regulatory reinvention project because the sewershed is contained almost completely in the watershed. The pretreatment program is small with few, if any, problem companies. The entire watershed is of manageable size to monitor and model." MSD's proposal to reinvent the pretreatment program performance measures in the Chenoweth Run

watershed/Jeffersontown WWTP sewershed includes extensive data collection and assessment, before development of new pretreatment program performance measures and pretreatment program redesign. Thus, MSD will not know, what if any, specific regulatory flexibility will be necessary for them to complete the pilot project until data collection and assessment and development of new pretreatment performance measures have been completed.

Therefore, EPA, along with the Commonwealth of Kentucky Department for Environmental Protection (KDEP) and MSD, determined that this project would benefit from being completed in a phased-agreement approach. The phased-agreement approach to this project consists of a Phase 1 Agreement and a Final Project Agreement. The Phase 1 Agreement, which was the subject of the notice of availability published in the *Federal Register* on December 14, 1999, simply relates the intentions of MSD, EPA and the State to begin implementation of the first phase of this project. MSD is not requesting, nor is EPA or the State granting, at this time, any regulatory flexibility. The Phase 1 Agreement was developed to allow MSD time to collect and assess data from the watershed before proposing new pretreatment program performance measures and determining what, if any, regulatory flexibility may be needed to accomplish these performance measures. Once MSD has proposed new pretreatment program performance measures, MSD, EPA and the State will negotiate a Final Project Agreement with stakeholder input which may include regulatory flexibility from pretreatment program requirements. At that time, the superior environmental performance to be gained will be specifically described along with any regulatory flexibility proposed by MSD.

Any agreement between parties regarding Project XL is simply a statement of intentions to carry out an XL project, indicating the seriousness of each party in implementing the activities in the document. The agreements are not legally enforceable or legally binding on any party, do not create any rights or obligations, and thus are not considered to be final Agency "actions." Any regulatory flexibility granted by EPA and/or the state to MSD would require a separate legal implementing mechanism, such as a rule or permit/permit modification, which would be reviewable and legally enforceable. Any intention on the part of EPA and/or the state to propose such an action is clearly stated in any XL Final Project Agreement.

Prior to its Project XL proposal and formal agency selection, MSD received a CWA Section 104(b)(3) grant (Grant No. CX 826669-01-0) from EPA to develop and evaluate pretreatment performance measures in a watershed based management system. MSD is interested in using the information and performance measures developed through the grant to redesign its pretreatment program through Project XL. Thus, the schedule for the XL project will proceed in phases to accommodate the data collection and analysis and performance measures development of the grant. The three phases of the XL project are (1) Data Collection and Development of Pretreatment Performance Measures; (2) Program Redevelopment; and (3) Program Implementation. The overlap of grant and Project XL activities and schedule dates/phases is depicted in the following table:

Relationship of Grant and Project XL Schedules		
Grant Schedule Dates	*Activity*	*Project XL Phases*
present - March 2000	Collect Data and Develop Proposed Performance Measures for Jeffersontown Pretreatment Program	Phase 1
N/A	Develop Plan for Program Redevelopment, Develop Enforcement Screening Criteria & Develop Superior Environmental Performance Baseline	Phase 2
N/A	Sign EPA and modify NPDES permit	End of Phase 2
March 2000 - March 2001	Implement and Assess Proposed Performance Measures	Phase 2
March 2001	Finalize Performance Measures	Phase 3
N/A	Begin Reallocation of Resources	Phase 3

Your comments raised several major issues which EPA would like to specifically address.

Compensation for Stakeholder Participation under 40 C.F.R. Part 25 Pursuant to 40 C.F.R. 25.7, a State, interstate or substate agency must provide financial assistance to an advisory group only under certain circumstances. First the State, interstate or substate agency must be involved in an activity supported by EPA financial assistance under the Clean Water Act, the Resource Conservation and Recovery Act or the Safe Drinking Water Act. 40 CFR 25.7(a). Further, EPA must deem the continued attention of an advisory group, consisting of a core group of citizens to be appointed by the State interstate or substate agency, is necessary in relation to activities conducted with EPA financial assistance. 40 CFR 25.7(b).

In this instance, neither of these requirements has been met. The Section 104(b)(3) grant for data collection was entered into prior to the XL project and with no linkage to the XL project. They have similar goals, but are separate projects. EPA has not provided financial assistance under the Clean Water Act for the proposed XL Project. EPA has not determined it necessary for MSD to appoint an advisory group to assist MSD. As set out in the November 1, 1995, Federal Register Notice (60 FR 55569) that established the XL Program, MSD is only required to identify the parties that have a stake in the environmental impact of the XL project and attempt to achieve the support of those parties.

Compliance Screening. You stated in your comments that, "Since MSD has operated the (J-town) WWTP, very infrequent process upsets have occurred. This is a tribute to the success of the pretreatment program. Prior to MSD operating the system, a number of process upsets had occurred, likely the result of a less rigorous pretreatment program." EPA is also aware of the success MSD has had with the pretreatment program in Jeffersontown and compliance at the Jeffersontown WWTP.

Compliance screening is required prior to acceptance into an XL Project where EPA provides participants some form of regulatory relief or flexibility. The eligibility compliance screen is a pre-decisional survey of the current compliance status and compliance history of federal and/or state enforcement actions taken against a company or facility due to violation(s) of environmental statutes and regulations. EPA evaluates the information on the compliance status and history of a potential project participant to determine whether a facility has an existing enforcement problem that must be addressed, and whether there is a pattern of behavior or compliance trend that foreshadows the participant's capabilities or corporate attitude towards environmental performance. The Agency then makes an informed judgment regarding the likelihood of the participant's ability to achieve promised superior environmental performance, as well as the appropriateness of providing the participant any of the requested regulatory flexibility.

More detailed information regarding the scope, criteria and process for conducting enforcement screens to determine the eligibility of Project XL applicants may be found on the EPA's Project XL website at http://www.epa.gov/oeaegeag/projectxl/guide8.htm. This guidance is consistent with, and is the XL-program-specific application of the Agency's comprehensive screening framework, "Compliance Screening for EPA Partnership Programs."

Regarding your comments about the National Pollutant Discharge Elimination System (NPDES) municipal separate storm water system (MS4) permit, KDEP is the primary permitting and enforcement authority for the NPDES MS4 permit. MSD is currently the sole permittee on the MS4 permit which expired in January 1999. MSD's permit has been administratively extended pending reissuance. In the reissuance, MSD will be joined by eight other co-permittees, including the City of Jeffersontown, for responsibility of permit compliance. However, the City of Jeffersontown is not a party to this Project XL agreement, so your comments regarding the City's compliance status has no bearing on this agreement. MSD has made progress on implementing the MS4 permit requirements as evident in the annual MS4 storm water report submitted by MSD to KDEP. At this time, EPA is unaware of any noncompliance by MSD with the MS4 permit.

Stakeholder Process. Your comments raise some interesting questions in regard to the stakeholder participation process for this project. As you have read, EPA strives to make all XL projects transparent and open to public participation. EPA encourages project sponsors to make public announcements of project meetings, present information at meetings, distribute helpful informational materials, and engage interested parties in good faith who are affected by their project. EPA believes MSD has done an admirable job in this respect. In addition, EPA assists in ensuring projects remain transparent by posting public meeting minutes, all official project-related documents, Federal Register Notices, and project contact information on its national web site.

The XL stakeholder process is one in which EPA and project sponsors welcome your comments. EPA agrees with your statements that proposed aspects of regulatory flexibility and superior environmental performance should be available for public comment before specific regulatory changes are made to implement XL projects. EPA will ensure that this occurs before any final Agency actions are taken in this regard. EPA and other stakeholders have been reviewing and will continue to review the progress of MSD's XL project on both its process and its merit.

Several other issues were raised by your comments, such as customer rate structuring, construction plan approvals, land use practices, industrial employment growth, permits at other facilities, and library repositories. In regard to these issues, EPA has concluded that they are not within the scope of the document that was published for public review and comment on December 14, 1999, and are not within the scope of MSD's XL Project. Public perspectives on these and other environmental issues are important to the Agency and your enthusiastic comments are appreciated. However, Project XL and the MSD Phase 1 Project Agreement is not the appropriate forum for raising or discussing these issues with EPA.

As stated previously, Project XL is a national pilot program that allows state and local governments, businesses and federal facilities to develop with EPA innovative strategies to test better or more cost-effective ways of achieving environmental and public health protection. In exchange, EPA will issue regulatory, program, policy, or procedural flexibilities to conduct the experiment. In order for this to be accomplished, EPA and a project sponsor must realistically limit the number and scope of issues to be worked on in each individual pilot. The scope of each project is defined in a project sponsor's proposal and refined in a final project agreement. Limiting the scope of pilot projects is necessary because of continuously constricting time and resource constraints. Due to these facts, any comments outside the scope of MSD's XL Project will not be responded to if raised in the Project XL forum. EPA, MSD, and KDEP encourage you to raise any issues and concerns you have in the appropriate forum.

EPA is confident, as you are, that "the staff of MSD has the technical expertise to design, engineer and administer a futuristic program." We appreciate your having invested the time and effort into providing comments on the draft Phase 1 Agreement for MSD. Please call me at 404-562-8674 if you have any questions.

Sincerely,

Michelle M. Glenn

Michelle M. Glenn
Region 4 Project XL Coordinator

cc: Robert Logan, Commissioner, Kentucky Department for Environmental Protection
Gordon Garner, Director, Louisville and Jefferson County MSD
Allan Bryant, Division of Water, Kentucky Department for Environmental Protection
Sharon Worley, Louisville and Jefferson County MSD