Melinda Greene December 19,1999
USEPA REGION 4
61 Forsyth Street, S.W.
Atlanta, GA 30303-8960

Re: Louisville and Jefferson County
Metropolitan Sewer District (MSD)
Pretreatment Project XL Draft Phase I
Project Agreement (PPA)

Comments to Notice FRL-6508-6
The Draft Phase I Project Agreement does not clearly define the site specific Project XL
goals and objectives of Superior Environmental Performance and how regulatory flexibility
(RF) in the pretreatment regulations for Jeffersontown WWTP, will achieve SEP.

MSD should not submit and EPA should not sign a quasi-legal agreement that does not fully meet all criteria for approval of an XL Project. Since MSD is not making a clear presentation of it<s desired Regulatory Flexibility in the PPA and is not disclosing it's detailed plan to attain SEP --no signed agreement is appropriate. EPA is requested to consider these objections.

PPA Page 11, VIII. A. EPA Intentions
The EPA states an intention to propose and issue a site specific rule amending 40CFR403 and proposes to work with KYDOW to alter the Jeffersontown WTP permit under 40CFR402 to allow pretreatment reinvention. Will EPA provide authority to KYDOW for J-town permit modification in an agreement outside the Project XL stakeholder process?

page 13 IX Project Implementation
A. Legal Basis
The Parties announce they will carry out stated intentions. The Parties deny that this Agreement fits the legal definition of *action# for the reason that it does not create legal rights or obligations and is not legally enforceable.

A signed intention to carry out rule changes and site specific permit modifications without specifying what they are, is clearly an *agency decision# made by the parties no matter how lightly phased in. As a result of this agreement both EPA and MSD agency funds and staff time will be

allocated for the project. It is an *agency decision# affecting Clean Water Act programs and rules.

The right of the public, under 40CFR25.4, to understand and fully consider what is being decided would be abridged by signing at this time. I asked for an EPA clarification of the applicability of 40CFR25 rules in the Project XL at the April 22 meeting. This has not been responded to. Based on the phone conference remarks by EPA counsel, it appears 40CFR25 applies prior to signing an agreement but not afterwards. This important transition- surrendering specific rights- is not covered anywhere in the PPA. (See 40CFR 25 Attachment B)

No prior presentation of specific CWA rule changes has been discussed with stakeholders. The proposal to change rules also leaps over the XL requirement for a consensus finding by stakeholders that such a proposal is appropriate or desirable for the environment based on a consideration of SEP versus specific regulatory flexibility. The process is confusing, not transparent, and doesn<t have stakeholder support yet. The decision removes the option of a fully informed stakeholder group rejecting the Project for lack of merit, before MSD and agency funds have been expended or other action taken.

page 12 VIII. B. 2. Voluntary
MSD states it will enter into agreements with indirect dischargers who desire to receive flexibility to reinvest half their resulting cost savings in MSD-approved activities.
When would MSD have authority to enter into these agreements? Without discussion or consultation with the stakeholder group on the environmental benefits, MSD already plans specific regulatory flexibility in the form of agreements with pretreatment clients. Why get ahead of the stakeholder process?

The PPA initializes the project without presenting the assurances of SEP that are most important for environmental protection. Signing an agreement on the present, incomplete submission basis, deprives stakeholders of their consultation role in considering the environmental benefits to be gained from supporting specific regulatory flexibility. Once agencies commit time and resources to the Project they will want to follow through-not turn back.

Therefore, a single FPA in complete form should be negotiated with the stakeholder group, and all aspects given full and appropriate evaluation.

SEP
Page 9, PROJECT XL STAKEHOLDER INVOLVEMENT GUIDE reads--
Seek measurable results.
XL projects are supposed to produce superior environmental performance -- better than what is being achieved now. You can help by pushing for well-defined procedures for measuring whether, in fact, these results occur. Ideally these measures should be something objective, such as reductions in emissions, acres of land cleaned-up, or levels of exposure, that are easy to identify and evaluate.

Among several alternatives considered in the background documents, pretreatment reinvention appears potentially, to offer the least amount of superior environmental performance though it will confer significant economic benefit to regulated industries. The predominant pollution of Chenoweth Run appears to come from stormwater runoff sources. Iron, Copper, Zinc and total Phosphorus from stormwater are the environmental pollutants of concern (Strand 7-2).

Pretreatment Performance Measures in a Watershed -Based Management System --17 pages, Mark Sneve, Strand Assoc., Sharon Worley, MSD, Greg Ratliff
page 7--first paragraph,
Based on the data reviewed, pretreatment program parameters, especially metals, are not impacting the quality of the stream at a downstream sampling location.
page 8--The industrial users contribute a small percentage of the flow and metals loading and a slightly higher percentage of conventional pollutant loading (BOD&TSS) to the J-town WWTP.
page 4-2, 4.03 Industrial Discharges
..The permitted industries contribute only about3% of the total flow to the J-town WWTP. This table(4-4) indicates the permitted industries contribute a low percentage of the WWTP pollutant mass and flow. (Strand Report)

Chenoweth Run is 303(d) listed, not meeting use-designations and WQS. The KYDOW TMDL prioritized measures to attain WQS, were phosphorus removal at the WWTP(done), creation of riparian zones, and effective stormwater management controls.

During the 5 year review of the MS4, KPDES permit, MSD provided program tracking information that reported little or no progress by Jeffersontown for the first five year period of the general stormwater permit.
Jeffersontown is a co-permitee. The watershed health would be most improved by rapid compliance with the responsibilities of MSD and J-town under the stormwater permit.

EPA does not present how it reviewed non-compliance and no progress in the stormwater program in the project screening criteria. Why is MSD not required to meet it<s responsibility under the MS4 permit before being selected for Project XL? Would a commitment to develop a watershed master plan for Chenoweth Run in compliance with the MS4 be part of the future FPA? Will MSD not commit within the PPA, to bringing the MS4 program into compliance? Where is minimum environmental performance, much less superior? Where is excellence in leadership in failing to list and address significant regulatory and watershed problems?

Specifically, where is the watershed Master Plan required since 1994 by-
40CFR122.26(d) Part2
(iv) Proposed management program. A proposed management program covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary inter-governmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. and
(iv)(A) (2), A description of planning procedures including a comprehensive master plan...

Page 10 D. Innovation/Multi-media Pollution Prevention
The more efficient use of resources while providing SEP is not adequately presented to provide a basis for supporting the Project.

The dollar figure of money available from providing pretreatment flexibility and entering into agreements with pretreatment clients as stated in VIII. B. 2. is not given but, by my estimate, would be low based on the number of regulated entities and the requirement for once yearly lab sampling. Stakeholders do not know what amount of money would be available to transfer to other watershed programs. The argument for reinvention would be stronger if estimated cost-savings and the money available for alternative watershed programs was presented. In it<s absence, there is a feeling that there wouldn<t be a significant amount produced from the 29 currently permitted establishments. They purchase only 5% of the water used in the watershed according to the Strand Report (2-1). If MSD could collect $5,000.00 from each of the 29 annually, it would yield $145,000 annually that could support education and stormwater program activities. How much is expected?

It may be that MSD has excellent plans that depend on securing flexibility for pretreatment clients and capitalizing on the political good will thereby produced to pass rate increases on other customers to expand the system and

improve the watershed. The commenter could support such action ¡depending on its details.

Pretreatment Reinvention
MSD appears to understand the sources and causes of pollution loading in the watershed based on the background documents listed below. In the 3-5-99 Draft Proposal, the requested flexibility was specified quite clearly (page 20) and in the paper, Reinvention of Local Pretreatment Program to Achieve Improved Watershed Health, Utilizing Project XL-presented to WEF by Worley and Ratliff, it is restated on page 5. The RF should appear in the PPA correlated to proposed specific rule changes that MSD is seeking, and be available for comment.

MSD/EPA is proposing a serious and profound shift in Clean Water Act protection. It proposes a shift from requiring regulated industries to monitor and report¡ at their own expense¡chemical discharges as concentrations (once annually), to placing the sampling duty on the POTW at selected strategic sewer monitoring points and reporting annual loadings. The project will result in a transferrable program that could be utilized by other POTW systems. There has been no discussion of the capability of the proposed and published sampling schedule to provide an accurate estimate of annual loadings. It would seem companies could reduce discharges to avoid high readings in scheduled months.

Sampling endpoints should not be moved to the watershed and the loadings of industry be responded to only after they appear in the stream. This is a potential consequence of the *results oriented# approach. Under the present regulations, poor results result in SNC status, public notification in the newspaper, and perhaps a fine for individual companies. With watershed endpoints, poor results aren<t detected until they show up in watershed sampling.

Slug discharges from industrial processes are short duration events easily missed by sampling, but contribute huge loadings. Average annual loadings that do not account for intermittent slug discharges will underestimate industrial contributions. Once the detection method is established with environmental endpoints, the finger-pointing will include urban runoff metals and chemicals, and responsibility will be impossible to assign. Will all the industries tributary to the strategic manhole sampling point be inspected when high readings are detected? Why institute a guessing game?

Prior to this XL Project, I have never heard at any water quality gathering or read in any text or reference, the opinion expressed¡ that by reducing

monitoring and reporting requirements on industrial point source dischargers, watershed health or treatment plant performance will be improved. In fact, the opposite is often claimed¡

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.
(Pretreatment Performance Measures in a Watershed-Based Management System, Sneve, Worley, Ratliff-- page 6)

Moving away from Technology-based effluent limits towards Water-Quality based effluent limits for industrial dischargers runs counter to the successful innovations of the Clean Water Act and is an unproven environmental concept, in contradiction to Page 10, F. Feasibility. The American Municipal Sewer Association and its industrial customers appear to have originated this concept, which defies conventional wisdom. The AMSA 18 Pretreatment Performance Measures have not been presented to the Stakeholder Group or considered at any length. How can stakeholders do other than object to MSD implementing complex and extensive proposed program elements they have not yet evaluated? What is the history of this unproven concept?

Alternative Projects
Based on reading several of the requested background documents, requiring innovative stormwater controls for new and existing pervious area is where MSD could really protect the environment and provide detectable SEP. Chenoweth Run is 303(d) listed, not presently meeting use-designations and WQS. The KYDOW TMDL concludes with prioritized measures to attain WQS, they were phosphorus removal at the WWTP(done), creation of riparian zones, and requiring effective stormwater management controls.

The PPA does not contain any discussion of MSDs role and responsibility in construction plan approval in the watershed. Hundreds of plans are approved each year. The Strand Report cites MSDs need to update the land use information that dates before 1992 (2-1). The study reports the industrial park is the largest in the world based on employment! The area experienced 12% growth in three years (Sneve, Worley, Ratliff- page 3)

In review of construction plans and sewer line extension approvals, MSD is able, under it<s current authority, to require of new development, controls on stormwater pollutants, and to disclose and mitigate the impact on the collection system and treatment works of new connections. The Louisville and Jefferson County Planning and Zoning Board routinely requires businesses to

meet the stormwater engineering requirements requested by MSD in construction review.

MSD has a history of requiring minimal or no pollutant removal stormwater controls. With the exception of sediment controls during construction, MSD does not usually require new construction to install pollutant removal from collected stormwater prior to discharge to the stream. A commitment to better performance here, would persuade stakeholders that SEP is possible.

Project XL should not be initiated without describing how pretreatment reinvention will accomplish SEP and how the Stakeholder Group evaluated alternative choices and available resources.

Stakeholder Commitment
The signed agreement will allow MSD to go forward with the Project while taking up to two years to finalize a Final Project Agreement with stakeholder participation.

This will exhaust the resources of non agency and non regulated industry stakeholders who have to support participation out of their own pockets. All the agency and sponsor team members are covered by salary during their participation in stakeholder proceedings. The environmentalists who have demonstrated appropriate understanding of the issues and concern for the affected environment are going to be placed at unjust disadvantage and waited out in an unnecessarily prolonged FPA process. Only funded stakeholders will be able to participate consistently to the conclusion of a Final Project Agreement. The device of adopting a phased approach will prevent participation by a specific class of stakeholders--the economically disadvantaged.

EPA Stakeholder Guidance says--
Further Identification of Stakeholders. The first step in the FPA development process is to notify the general public of the project and more formally invite stakeholders to become direct participants or commentors. The project sponsors should:
- notify the general public via local media of their intent to develop an FPA and invite direct participants to identify themselves within a set time period (e.g., 30 days); (The public notice should include a brief description of the project, including the stakeholder plan, and the name and contact information for a person in the sponsors' organization, at the state environmental agency, and at EPA);
make special efforts to recruit:
- potential direct participants and commentors from among economically

disadvantaged stakeholders and among stakeholders most directly affected by the environmental and health impacts of the project;
- potential direct participants and commentors who have specific interest or expertise in the issues addressed in the project from among the national environmental and environmental justice communities and the industry segment of which the facility is a part;

The pretreatment regulatory issues, watershed and sewershed details, stormwater, TMDL, performance measures, and other relevant matters to this Project present a complex challenge to even the best prepared stakeholders. Making the commitment to review the issues and participate meaningfully as a direct stakeholder participant should be an option for interested citizens and should not entail serious economic penalty. The Chenoweth Run, Audubon, Friends of Beargrass Creek, KWA and Floyd<s Fork participants appear as unpaid representatives of their non-profit organizations. How has EPA planned the process to facilitate direct participation by this important group? It seems to have done the opposite.

EPA and MSD have arrived at and propose to sign on to a process that will expand greatly the demand in time and effort needed by the direct participants to negotiate an FPA. Along the way, any economically disadvantaged stakeholders will fall out. As an illustration consider the list of materials I have requested, read, studied written or responded to in participating in the Project to date. (Attachment A)

The public is very interested in the Compliance and Enforcement Profile and what EPA knows about pretreatment program problems here and how EPA assessed them in selecting MSD for Project XL. The Morris Forman permit is in administrative appeal on issues related to pretreatment performance and the commenter doubts that EPA really understands these site specific systems, programs and problems. What review has been made of the Bioroughing Tower collapse and rubber clogging by dischargers at Morris Forman, by EPA Region 4 Pretreatment?

I have requested the Discharge Monthly Reports for the Jeffersontown WWTP but none have been provided. I have requested preliminary results of baseline stream sampling but not received them. I received eight relevant background documents either following request to MSD, from EPA, or by downloading from various EPA websites. The stakeholders should not have to hunt down the information and primary documents necessary for meaningful participation. But the PPA page 14, E. Reporting/Annual Reports, continues to require stakeholders to make a specific request for basic information. No repository is planned for the J-town library. EPA has deep experience in

stakeholder group function and dynamics and knows how to get timely information to decision makers to make things happen. The agency appears to prefer that some stakeholders be at a disadvantage.

MSD should provide a complete set of all background documents for the direct participants at the earliest possible date. MSD should have been able to clearly define this XL Project and provide adequate information on the environmental and regulatory choices in the past year.

In every publication, the importance of stakeholder participation in Project XL is reiterated. But the selected process makes it virtually impossible for any but the financially supported few, to stay in the game. The participation burden has been, and will continue to be so great, that a significant group¡ the economically disadvantaged¡ will not be able to participate. In this group one could include almost anyone who is not being paid to participate for the required hundreds of hours, or whose paid work does not already include preparation in these issues.

EPA would significantly reduce the burden of voluntary participation by waiting until all the documentation for requesting Regulatory Flexibility and demonstrating reasonable goals in SEP are available and then starting an FPA negotiation. The plan to have two types of meeting, -stakeholder and public- adds to the burden and confuses the process further. Now two sets of minutes and two agendas will be needed as well as tracking two sources of suggestions and policy reccomendations. MSD still is not ready to provide the data to support a decision for flexibility. The process is unnecessarily grueling, duplicative, compartmentalized and extended.

MSD has established several additional groups to the Project, the Work Group, the Resource Group and the Peer Review Group consisting of WEF, AMSA, EPA and others. In this, a tiered system is established in which the Stakeholder Group has been informed last, and given the final product of the previous groups efforts. Thus, considerable document preparation and project momentum has occurred before the public is invited to consider an issue. Will these groups have common meetings?

I request that the basis for successful and meaningful stakeholder involvement be provided before any FPA or PPA is signed. A complete briefing book should be prepared with all the necessary regulatory, programmatic and environmental information that is needed to consider the decision of SEP and RF and the public consultation rules. After thirty days to consider the data, participants should meet and negotiate an FPA or reject the project within another thirty day period. This will allow informed and intensive

direct participation in these complex issues without becoming a marathon where victory is assured for the subsidized.

Conclusion

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. The future of Clean Water Act watershed permitting with benefits to both the community and the environment could be pioneered in this project.

The commenter would support a project that looks for a new balance between controls on non-point source and point source pollution by increased public awareness, pollution prevention and source control programs. Unnecessary sampling and expense should be reduced as possible and resources shifted to address other program needs. The staff of MSD has the technical expertise to design, engineer and administer a futuristic program. But, the process seems driven more by desire for regulatory relief and incentives for business development than for superior environmental performance that would be gained by stormwater controls.

A convincing case has not been made that providing pretreatment regulation flexibility as an element in whole watershed management is cleaner, cheaper or smarter. The PPA is improperly constructed, bypasses important public consultation and should not be signed.

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Attachment A--Burden of Participation

August 26, 1998-- MSD Board approves funds for XL Project-- board minutes
first became aware of the project
October 7, 1998-- My letter to Director Garner inquiring about

stakeholder participation opportunity
for Friends of Beargrass Creek
November 24, 1998-- Garner replies XL Project stakeholder membership restricted to
the group already selected -stating enviros outnumber agency members
December 8, 1998--I received no notification of meeting --I didn't go and neither did
Ky Resources Council<s Fitzgerald or Audubon<s Frank
December 1998--letter of complaint to Michelle Glenn, EPA asking for inclusion
December 21- 1998--response from Glenn supporting my participation
March 15, 1999--letter from M. Mallard Greene-confirming participation
March 30, 1999--Invited to Project XL meeting by Sharon Worley
April 22, 1999--meeting- 5 page handout agenda,
received 3-5-99 Draft Proposal, 40 pages including tables of
pretreatment industrial users, maps
I researched the flexibility target regs-
40CFR403.12--9 pages of rules,
40CFR403.8 --6 pages of rules
--403.8 (f)(2)(vii) reads--
Comply with the public participation requirements of
40CFR25 in the enforcement of national pretreatment standards... and
define measures of SNC--reread 40CFR 25
received KYDOW Water Quality Study of Chenoweth Run-June 1996--65 pages
April 23, 1999--send my minutes of meeting to e-mail list to elicit participation
April 24, 1999--40CFR25 citations first sent

October 26, 1999--meeting phase 1 FPA draft of draft --22 pages
November 1, 1999--my e-mail list letter encouraging participation
November 10, 1999--Director Garner e-mail response clarifying issues
November 10, 1999--Phase 1 FPA meeting at MSD mark up draft
MSD ANNUAL PRETREATMENT PROGRAM REPORT-1998
November 11, 1999--received from Sharon--
Water Environment Federation -Abstract Pretreatment Performance
Measures in a Watershed -Based Management

System --17 pages
Reinvention of Local Pretreatment Program to
Achieve Improved
Watershed Health, Utilizing Project
XL-Worley, Ratliff--11 pages
November EPA 100-F-99-001 March 1999
PROJECT XL STAKEHOLDER INVOLVEMENT:A GUIDE
FOR
PROJECT SPONSORS AND STAKEHOLDERS --30 pages
EPA-833-B-98-002 February 1999 50 pages
with appendices
INTRODUCTION TO THE NATIONAL PRETREATMENT
PROGRAM
December 2, 1999--Stipend proposal letter
December 6, 1999--Conference Call--1-hour, my expense -Stakeholder
Involvement Plan
December 8 1999--received from Sharon the STRAND REPORT, seven chapters,
tables,
appendices, maps
--2nd Conference Call---MSD line
December 17, 1999--Downloaded pdf file of the Phase 1 Agreement--19 pages
December 17, 1999--EPA 100-F-99-003, MANUAL FOR EPA PROJECT XL TEAMS
December 17-19 study PPA and Stakeholder Plan documents and write
comments

Attachment B--Existing KPDES Requirements for public consultation
The consideration of changes to the pretreatment program of Jeffersontown
WTP are covered by 40CFR25 as adopted unchanged, under its KPDES permit.
These requirements currently apply and have not been met, by providing
specific notice of rule changes and describing alternative courses of
action.

Sec. 25.4 Information, notification, and consultation responsibilities.
(b) Information and assistance requirements.
(1) Providing information to the public is a necessary prerequisite to
meaningful, active public involvement.
Ç Agencies shall design informational activities to encourage and facilitate
the public's participation in all significant decisions covered by Sec.
25.2(a), particularly where alternative courses of action are proposed.

Alternative actions could include, improved stormwater program compliance,

more TMDL plans and implementation for other pollutants, expansion of the treatment plant or building an additional plant in the lower watershed, and others, instead of the Project XL flexibility for pretreatment clients. In fact, of all alternatives, pretreatment reinvention appears to offer the least amount of superior environmental performance.

(2) Each agency shall provide the public with continuing policy, program, and technical information and assistance beginning at the earliest practicable time.
Ç Informational materials shall highlight significant issues that will be the subject of decision-making.
ÇWhenever possible, consistent with applicable statutory requirements, the social, economic, and environmental consequences of proposed decisions shall be clearly stated in such material.

(d) Public consultation.
... Public consultation must be preceded by timely distribution of information and must occur
sufficiently in advance of decision-making to allow the agency to assimilate public views into agency action. EPA, State, interstate, and substate agencies shall provide for early and continuing public consultation in any significant action covered by this part. Merely conferring with the public after an agency decision does not meet this requirement.