

# Update on City of Fort Smith Efforts to Modify Federal Sewer Consent Decree

July 14, 2021

The City was cautiously optimistic following our September 17, 2019 meeting with DOJ management (Jonathan Brightbill et al – on behalf of Jeff Clark). However, nothing came of it thereafter. While the lead DOJ case attorney retired, the replacement attorney has stayed the course and chose to continue the dispute resolution rather than any meaningful compromise.

The DOJ case team has reiterated that they expect Fort Smith to comply with the CD requirements. Barring federal or state grant funding support, that likely means double-digit rate increases for the next 11-12 years of the consent decree (11% increases currently projected – 215.2% over 11 years).

Because it could not afford to comply with the consent decree requirements, after several years of seeking to negotiate a modification, in 2019 the City sought a unilateral modification from Judge Holmes. Judge Holmes finally issued his decision last month and rejected all of the changes proposed by the City. He noted the very high burden for a court to unilaterally change a consent decree and that the City had not met that burden - even if our dire financial projections were accurate.

Also before him was a key consent decree interpretation issue – that he left unresolved initially. He ruled that all category 4/5 sewer line/manhole defects must be included in the City's annual remedial measures plans (which is ok) but he left unclear whether some of the defects can be monitored and maintained (the practice of every other city) as the response approach. For example, there may be defects which allow inflow/infiltration to the sewer system that the City wants to ignore because it built storage to handle those flows. The City filed a short motion seeking clarification on this issue. Unfortunately, despite the express wording of Appendix D which lists ("Monitoring and Maintenance Analysis: performed as part of CMOM") as one of the techniques for addressing defects, EPA asserts that such an approach to 4/5 defects is inappropriate. This is an important issue because like every other City, if this approach were available Fort Smith can defer fixing defects that don't matter. Judge Holmes ruled that all 4/5 sewer line/manhole defects must be repaired. The City will need to raise sewer rates and/or seek a voter approved sales tax to fund the required work.

Judge Holmes did agree that the City should get five more years and that EPA cannot condition those additional five years on doing additional projects.

Finally, Judge Holmes indicated support for the City getting additional time/consideration from EPA for both the 2019 flood (he threw cold water on EPA's argument that the City would be made whole once FEMA reimbursed response costs) and COVID-19. He invited the City to invoke dispute resolution if it is not satisfied with the concessions EPA offers for those events.

Overall, the ruling is disappointing. We had hoped that Judge Holmes would require mediation with a federal magistrate judge and that mediation would put pressure on EPA to compromise. Instead, he denied any mediation as well as any modification of the consent decree. He did signal support for some additional time due to the 2019 flood and CV-19.

The City is left in a very tough place. It is going to have to significantly increase its spending to comply with the Consent Decree requirements while trying to obtain additional time to offset the impacts of the 2019 flood and CV-19. Even assuming that EPA agrees to another 5-6 years added to the now 17-year compliance schedule, the City will need double-digit rate increases every year through the remaining consent decree implementation period.

The City will need to make every effort to secure federal/state grant and grant-equivalent funding, extensions of sales and use taxes, and any CV-19 grant funding that may be available to help mitigate these rate increases.

The relentless sewer rate increases will come on top of significant increases necessary for the drinking water utility.

Our best hope at this time may be for the State of Arkansas to provide grant/grant equivalent funding from their CV-19 grants and/or State Revolving Loan Funds or from any infrastructure bill that may pass. That said, the City received no meaningful assistance or support from the State during the September 2020 meeting at DOJ or during the dispute resolution process. Also, we did not receive support for our request for mediation or any of the relief sought by the City.

Going forward, the City must now comply with the CD requirements. We need to try to achieve agreement or pursue dispute resolution regarding additional time for the 2019 flood and CV-19. Once any additional time is resolved, the City must then develop a financial plan that will allow it to comply with the Consent Decree.

Barring State or federal grant/grant equivalent funding the City will have to impose sewer rate increases necessary to generate the revenue to comply. The sewer rate increases will be compounded by the projected 85.8% increase in water rates over the next five years.