

Clearinghouse REVIEW

November–December 2005
Volume 39, Numbers 7–8

Journal of
Poverty Law
and Policy

INSIDE:

- The Medicare Part D Maze
- The New Bankruptcy Law
- Civil Rights Action on Sewer Overflows
- Ex-Prisoners Reentering the Community
- Using the Media
- Medical Debt

The Rehnquist Court's
FINAL CHAPTER ON
ACCESS TO COURTS

Sargent Shriver
National Center
on Poverty Law
FOUNDED 1967
Taking action to end poverty



John Chavez

Civil Rights Action on Combined Sewer Overflows in Indianapolis

By Thomas G. Neltner

Combined sewer overflow pipe opening into Fall Creek just upstream of Meridian Street in the heart of a densely populated neighborhood.

Thomas G. Neltner
Former Executive Director,
Improving Kids' Environment,
neltner@ikecoalition.org

A sewer system discharging sewage into a neighborhood stream is a health risk to neighborhood residents and undermines the biological diversity of the stream. When sewage overflows regularly, the stream blights the neighborhood and undermines the neighborhood's integrity and diversity. The residents who remain see the stream as their "dirty little secret." The secret gets out on those hot August evenings when the sewage cooks under the summer sun and the odor spreads as the evening cools. The smell defines the neighborhood in the minds of the members of the larger community.

The constant struggle with sewage in their stream creates an environmental injustice to the residents of the neighborhood. The stream is transformed from an asset into a liability. The "floatables" that get flushed down the toilet hang on trees like ornaments. Birds make their nests with condoms. Carp that survive the punishment feast on the feces floating on the surface after a heavy rain. The odor hangs in the air for days as the sewage decomposes. Grandparents warn children to stay away from the stream, but many children cannot resist the temptation. These children may experience stomach illnesses or more serious diseases after the rains, but no one traces the diseases to the secret places children find along the stream.

As a result of these and other socioeconomic factors affecting older, urban neighborhoods, residents with money flee. Property values decline. Older residents rooted to the neighborhood stick it out and make do. Newer residents seeing a great deal on property move in but quickly reconsider.

Such was the case in 1999 with the neighborhoods along Fall Creek and White River in Indianapolis, Indiana, downstream of Indianapolis' combined sewer overflows.



John Chavez

Combined sewer overflow pipe opening into Fall Creek by 30th Street. After these photographs were taken, the City of Indianapolis added screening to the pipe to remove large solids.

The Problem

Combined sewer systems are relics from the early 1900s when sewage, industrial wastewater, and storm water were combined in a single pipe to be conveyed to a wastewater treatment plant.¹ When it rained, the sewers were likely to overflow into a lake, stream, or estuary because the storm water flow was too much for the combined sewer system to handle.²

In 2004, according to the U.S. Environmental Protection Agency (EPA), 746 communities across the United States had combined sewer systems.³ Most of these

communities are in the Great Lakes Region and Northeast.⁴ The EPA estimates that these communities discharge 850 billion gallons of untreated sewage, industrial wastewater, and storm water from combined sewer overflows each year.⁵ The EPA's goal is to reduce this volume by 81 percent to 160 billion gallons each year.⁶ Achieving this goal will cost more than \$40 billion in the EPA's estimate.⁷

Indiana has 107 communities with combined sewer systems—behind only Pennsylvania with 153 and Illinois with 108.⁸ Recognizing the problem, Indiana,

¹Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18687, 18689 (April 19, 1994), www.epa.gov/npdes/pubs/owm0111.pdf; see also U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA 833-R-01-003, REPORT TO CONGRESS: IMPLEMENTATION AND ENFORCEMENT OF THE COMBINED SEWER OVERFLOW CONTROL POLICY, at ES-1 (2001), www.epa.gov/npdes/pubs/csorcexecsum.pdf; Indiana Department of Environmental Management, Wastewater Permit Programs 9 (last updated Oct. 26, 1998), www.in.gov/idem/water/npdes/guide/wastedoc.pdf; DEPARTMENT OF PUBLIC WORKS, CITY OF INDIANAPOLIS, COMBINED SEWER OVERFLOW LONG-TERM CONTROL PLAN AND WATER QUALITY IMPROVEMENT REPORT, at ES-1 (2001), www6.indy.gov/dpw/cso/plan.htm.

²Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18687, 18,689 (April 19, 1994), www.epa.gov/npdes/pubs/owm0111.pdf; REPORT TO CONGRESS, *supra* note 1, at ES-2.

³U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA 833-R-04-001, REPORT TO CONGRESS ON THE IMPACTS AND CONTROL OF COMBINED SEWER OVERFLOWS AND SANITARY SEWER OVERFLOWS, ch. 1, at 1-2 (2004), www.epa.gov/npdes/pubs/csosorRTC2004_chapter01.pdf [hereinafter 2004 REPORT TO CONGRESS].

⁴*Id.*, ch. 4, at 4-13, 4-14 fig.4.1, www.epa.gov/npdes/pubs/csosorRTC2004_chapter04.pdf.

⁵*Id.* at 4-17 tbl.4.7.

⁶*Id.*

⁷*Id.*

⁸See *id.* at 4-14 fig.4.1, 4-15 fig.4.2. In about 1987 the EPA delegated responsibility for permitting combined sewer overflows and other wastewater discharges to the Indiana Department of Environmental Management. As of November 23, 2004, the department reported that it had 104 combined sewer overflow communities; the department gives a status report for these 104 communities on its website, www.in.gov/idem/water/npdes/permits/wetwtr/cso/index.html (click on the link labeled "CSO Tracking" to download the Excel spreadsheet).



John Chavez

Combined sewer overflow pipe opening into Fall Creek at 34th and Sutherland Streets. The pipe is about twelve feet in diameter. Much of the additional overflow due to the housing boom is discharged through this pipe.

like most states, prohibited construction of new combined sewer systems after the 1960s.⁹ It approved only systems that relied on two pipes—one to handle sewage and industrial wastewater, called sanitary sewers, and the other to handle storm water.¹⁰ In 1972 Congress banned the approval of new combined sewer systems after July 1, 1974, and their construction after July 1, 1977.¹¹

Properly designed, constructed, and managed sanitary sewer systems—unlike combined sewer systems—should not discharge sewage into lakes, streams, and estuaries except in extraordinary situations.¹² In 2004 the EPA reported that 15,582 municipal sanitary sewer systems had wastewater treatment plants.¹³ The EPA estimated that these sanitary sewer systems had 10 billion gallons of sewage discharges—far less than the 850 billion gallons from combined sewer systems.¹⁴

Indiana had 300 sanitary sewer systems—including the 107 communities with combined sewers.¹⁵

The communities with combined sewers were left with a legacy that most lacked the resources and political will to resolve. Replacing combined sewers with sanitary sewers is difficult, especially in urban areas where the sewers are located under busy streets.¹⁶

These communities had little incentive to address the problem. Federal construction grants were focused on treatment plants and installing new sanitary sewers into areas without sewers.¹⁷ Nationally the federal “carrot” provided only \$3.4 billion in grants for upgrading combined sewers between 1965 and 1988 and \$3 billion in loans for upgrade between 1988 and 2003 out of more than \$14.1 billion awarded to states and local governments.¹⁸

⁹Indiana Department of Environmental Management, *supra* note 1, at 9.

¹⁰*Id.*

¹¹Federal Water Pollution Control Act of 1972, § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B) (2000).

¹²2004 REPORT TO CONGRESS, *supra* note 3, ch. 1, at 1-3.

¹³*Id.*, ch. 4, at 4-19, 4-20 fig.4.4.

¹⁴*Id.*

¹⁵*Id.*

¹⁶DEPARTMENT OF PUBLIC WORKS, *supra* note 1, at 4-14.

¹⁷2004 REPORT TO CONGRESS, *supra* note 3, ch. 9, at 9-5.

¹⁸*Id.*

The federal “stick” provided little incentive either. In the 1980s the EPA and state permitting programs essentially “grandfathered” combined sewer overflow discharge points.¹⁹ The EPA and many states were not yet willing to enforce the requirements prohibiting discharges such as those that routinely violated water quality standards.²⁰ Not until 1989 did the EPA issue its National Combined Sewer Overflow Strategy to chart an approach to resolve the problem.²¹ The EPA revised the strategy in 1994 when the 1989 strategy ran into implementation difficulties.²²

Without the promise of funds or a tangible threat of enforcement, combined sewers in many communities suffered from neglect. New sewers to accommodate growth were more attractive to political leaders than committing limited resources to repairing aging relics that the combined sewers had become. The problem of combined sewer overflows did not become a priority until the late 1990s.

Even then, the efforts were lacking. The shortcoming was best captured in the Indiana Department of Environmental Management’s “Review of Sanitary Sewer Construction Permit Applications for Communities with Combined Sewer Overflow Outfalls.”²³ In that guidance document, the department concluded

that it could determine whether a combined sewer system had the capacity to handle new sewage flow based only on dry weather conditions.²⁴ However, measuring the capacity of a combined sewer system designed to handle storm water only under dry weather conditions is akin to sizing a road based on traffic in the middle of the night. Thus the department’s actions fell far short of the rhetoric in its 1996 Combined Sewer Overflow Strategy in which it directed municipalities to “require new construction be designed to minimize or delay inflow, if at all possible, to the existing combined sewer.”²⁵

As a result of these forces, in the late 1990s Indianapolis was left with an overloaded combined sewer system in desperate need of repair. In its 2001 long-term control plan, Indianapolis estimated that it averaged almost seven billion gallons and 65 days of combined sewer overflows.²⁶ These overflows caused the water quality standards for bacteria to be exceeded for 180 days each year.²⁷ And, unlike many larger communities, Indianapolis is situated on a relatively small river that is not navigable; thus its sewage discharges are less likely to be diluted in the stream and are more likely to cause serious damage to the river and those using it.

¹⁹See National Combined Sewer Overflow Control Policy, 54 Fed. Reg. 37370, 37373 (Aug. 10, 1989). One of the three objectives of the 1989 strategy was to “bring all wet weather CSO [combined sewer overflow] discharge points into compliance with the technology-based and water quality-based requirements of the CWA [Federal Water Pollution Control Act, also known as the Clean Water Act].” *Id.*

²⁰*Id.* The national combined sewer overflow control policy essentially waived the law’s requirements by setting up prolonged compliance requirements. In 1994 the EPA was still working to achieve the objective of the 1989 strategy of bringing the combined sewer overflows into compliance.

²¹Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18687 (April 19, 1994), www.epa.gov/npdes/pubs/owm0111.pdf (see introduction).

²²U.S. ENVIRONMENTAL PROTECTION AGENCY, PUB. NO. EPA 832-B-95-003, COMBINED SEWER OVERFLOWS: GUIDANCE FOR NINE MINIMUM CONTROLS 1–2 (1995), www.epa.gov/npdes/pubs/owm0030.pdf.

²³Indiana Department of Environmental Management, Review of Sanitary Sewer Construction Permit Applications for Communities with Combined Sewer Overflow Outfalls, 26 In. Reg. 3433 (July 1, 2003), www.in.gov/legislative/register/Vol26/10Jul/14NONRUL.PDF.

²⁴*Id.* at 3433.

²⁵INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, FINAL STATE OF INDIANA COMBINED SEWER OVERFLOW STRATEGY 10 (1996), www.in.gov/ndem/water/npdes/permits/wetwthr/cso/finalcso.pdf.

²⁶DEPARTMENT OF PUBLIC WORKS, *supra* note 1, at 7-10 tbl.7-2.

²⁷*Id.* at 4–14.

Residents' Passivity

Despite the pervasive impact of sewage in their stream, the residents along Fall Creek and White River did not view the problem as an injustice that must end. Five reasons appeared to account for their passivity:²⁸

- Sewage was a familiar pollutant that led residents to feel that overflows were a fact of life, especially in an urban setting.
- Few residents noticed that the sewage overflows were getting worse over the years as sewer flows from new development resulted in more frequent and more severe overflows.
- No one understood that sewage from wealthier neighborhoods “upstream” contributed to the problem.
- Most struggled with the daily grind of poverty and health concerns that left them with little time to understand and address seemingly less immediate environmental issues.
- Residents lacked the resources, opportunity, and knowledge needed to access the legal and regulatory system to act on their behalf.

Their awareness and activity began to change in fall 1999 because of a confluence of events. A new, local nonprofit organization, Improving Kids' Environment, was

formed.²⁹ One of the organization's top priorities was to catalyze advocacy for action on combined sewer overflows in Indianapolis and Indiana.³⁰ The Indiana Department of Environmental Management decided that it was time to revise the wastewater discharge permit for Indianapolis.³¹ The Indiana State Department of Health issued the permit in 1985, and it had expired in 1990; the department had administratively extended the terms and conditions of the 1985 permit since 1990.³² And, because the mayor chose not to seek reelection, the November election was going to be competitive. Combined sewer overflows became a key focus of the election campaign as the mayor's chosen replacement was running against a candidate who helped guide state environmental policy during the early 1990s.³³

Complaint Filed

As part of its effort to catalyze action on combined sewer overflows, Improving Kids' Environment toured the overflowed areas. Minority and low-income communities obviously bore the brunt of the overflows. After researching the affected neighborhoods' demographics, Improving Kids' Environment and the Hoosier Environmental Council filed, on October 19, 1999, an administrative complaint with the EPA's Office of Civil Rights on behalf of minority residents of the Fall Creek and White River neighborhoods in Marion

²⁸Based on my personal experience.

²⁹Improving Kids' Environment (5244 Carrollton Ave., Indianapolis, IN 46220-3181; 317.442.3973) is a nonprofit advocacy coalition that facilitates tangible and significant improvements to children's health through reductions in environmental threats to children. [Editor's Note: Thomas G. Neltner, who was Improving Kids' Environment's executive director until July 2005, founded the coalition in 1999. For more information, visit www.ikecoalition.org.]

³⁰Improving Kids' Environment, IKE's Priority Projects, www.ikecoalition.org/priority_projects.htm (as of May 31, 2005).

³¹Press Release, Indiana Department of Environmental Management, IDEM Issues Indianapolis NPDES [National Pollutant Discharge Elimination System] Permits (Oct. 26, 2001), www.state.in.us/serv/presscal?PF=idem&Clst=16&Elist=41562; see also Indiana Department of Environmental Management, Fact Sheet: Belmont (AWT [advanced wastewater treatment]) Wastewater Treatment Plant 1 (Nov. 5, 1999; rev. Aug. 2001), www.in.gov/idem/water/npdes/public_notice/belmontfs.pdf (stating that the public notices alerting the public to the opportunity to comment on the draft permit began on November 5, 1999 (coincidentally four days before the election)); Fact Sheet 23 Post Public Notice Addendum, *id.* at 23 (Aug. 30, 2001). The Indiana Department of Environmental Management did not issue the permit until 2001, and the permit was not effective until 2003.

³²Fact Sheet, *supra* note 31, at 1. The Indiana Department of Environmental Management was created in 1987, and the permitting responsibilities shifted from the Indiana State Department of Health to the Indiana Department of Environmental Management.

³³See Indianapolis Star, Library Factfiles, Bart Peterson, Mayor of Indianapolis (updated Nov. 9, 2003), www2.indystar.com/library/factfiles/people/p/peterson_bart/peterson.html.

County, Indiana.³⁴ The Concerned Clergy, Sierra Club's Hoosier Chapter, and the Mapleton–Fall Creek Neighborhood Association quickly joined as cocomplainants.³⁵

The complaint alleged that the City of Indianapolis and its mayor violated the residents' civil rights because its sewer system had a disproportionate impact on minority residents of those neighborhoods.³⁶ The complaint alleged that the percentage of minority residents in the affected areas was more than 85 percent African American—3.6 times higher than Marion County's average of 23.5 percent based on the 1990 census.³⁷ The complaint called on the EPA to fulfill its responsibilities under Title VI of the Civil Rights Act and under EPA's Title VI regulations at 40 C.F.R. Part 7 by investigating the allegations and, if it found them to be valid, to force the City to eliminate the disproportionate impact.³⁸

The complainants alleged five methods by which the City of Indianapolis discriminated against the residents:

1. The most severe impact from combined sewer overflows was on Fall Creek and White River. As many as 85 sewage discharges a year totaled almost 1.9 billion gallons a year. For every three gallons the sewer system received during wet weather, one gallon overflowed to the stream. Neighborhoods along the other streams in Marion County fared

much better—and had much lower minority population groups.³⁹

2. The City made the problem worse by encouraging a housing boom that added flow to the existing sewers without significantly increasing the capacity of the existing sewers. The sewage from the new suburban neighborhoods was literally being discharged in the poor, minority neighborhoods.⁴⁰
3. The City preferentially invested in the neighborhoods with low minority population groups. In one egregious situation in the late 1980s, the City installed a new sewer collector that diverted an estimated 200 million gallons of sewage from one of Indianapolis' wealthiest and least diverse communities to the Fall Creek neighborhood. Under most circumstances, this sewage overflowed into Fall Creek.⁴¹
4. The City's goals fell far short of remedying the problem of the combined sewerage overflow. If the City had implemented the mayor's 1999 interim proposals, Fall Creek would have had more gallons overflowing after controls than the other streams had before controls.⁴²
5. The City was opposed to meeting water quality standards for bacteria. It asked the Indiana Department of Environmental Management for a variance from the standards that would have the practical effect of

³⁴Letter from Thomas G. Neltner, Executive Director, Improving Kids' Environment, to Carol Browner, Administrator, EPA (Oct. 19, 1999), available at www.ikecoalition.org/documents/Indy_CSO_Complaint2_10-19-99.pdf (this letter is the complaint). For more information on the Hoosier Environmental Council, a nonprofit environmental advocacy organization based in Indianapolis, Indiana, see www.hecweb.org. For more information on the Indianapolis civil rights action, see www.ikecoalition.org/Sewers_Indy/Indy_CSO_Civil_Rights.htm.

³⁵E-mail from Thomas G. Neltner, Executive Director, Improving Kids' Environment, to Office of Civil Rights, EPA (Nov. 14, 1999), available at www.ikecoalition.org/documents/Indy_CSO_Clergy_Sign-On_11-14-99.pdf.

³⁶Neltner, *supra* note 34, at 1.

³⁷*Id.* at 2 & att.B—Methodology to Develop Demographics.

³⁸*Id.* at 1 & app. A; Title VI Civil Rights Act, 42 U.S.C. § 2000d-1; 40 C.F.R. §§ 7.30, 7.35 (2005).

³⁹Neltner, *supra* note 34, at 3.

⁴⁰*Id.* at 4.

⁴¹*Id.* at 5.

⁴²*Id.* at 6.

institutionalizing the disproportionate impact on minorities.⁴³

National Attention

The complaint drew immediate national attention. “Indiana Environmental Justice Case Provides EPA with ‘Easy Win’” was the headline in the October 29, 1999, issue of *Inside EPA*.⁴⁴ The article cited an unnamed EPA source as saying, “[T]he case may prove to be a particularly good case for OCR [Office of Civil Rights] investigators, noting that it is ‘much closer’ to a traditional civil rights complaint than most of the complaints the agency has received thus far.”⁴⁵ The article went on to say, “But because the Indianapolis complaint hinges on the amount of money spent by officials, and how they prioritized the activities, there could potentially be much more ‘clear cut’ evidence of discrimination.”⁴⁶ According to the article, a second unnamed source familiar with the issue stated that “the Indianapolis complaint could pose an inviting, ‘easy win’ for EPA if it ultimately takes up the case.”⁴⁷

The article prompted Congressional Commerce Committee Chairman Thomas J. Bliley (R-Va.) to send EPA Admin-

istrator Carole M. Browner a scathing letter demanding explanations as to why the EPA had commented on the complaint and prematurely judged the complaint’s merits.⁴⁸ On February 28, 2000, Indianapolis’ Congresswoman Julia Carson (D-Ind.) sent Browner a letter demanding action to address the injustice identified in the complaint.⁴⁹ On March 17, 2000, the EPA responded to Congresswoman Carson’s letter; the EPA cited its concerns that a congressional rider on the EPA’s 1999 and 2000 appropriations prohibited the EPA from using funds to implement or administer its interim guidance that addressed investigation of Title VI complaints challenging permits.⁵⁰

Allegations Accepted by the EPA

On October 12, 2001, the EPA determined that three of complainants’ allegations met the four jurisdictional requirements under 40 C.F.R. § 7.120.⁵¹ The four jurisdictional requirements are that the complaint must

- be in writing;⁵²
- describe the alleged discriminatory act that violated the EPA’s Title VI regulations;⁵³

⁴³*Id.*; see also Indiana Department of Environmental Management, Public Noticing the Receipt of a Variance Application (Sept. 13, 1999), www.in.gov/idem/water/npdes/public_notice/indyvar.pdf.

⁴⁴*Indiana Environmental Justice Case Provides EPA with “Easy Win,”* *INSIDE EPA* (Inside Washington Publishers, Arlington, Va.), Oct. 29, 1999, at 23 (on file with Thomas G. Neltner).

⁴⁵*Id.* Most of the other complaints related to facility siting issues.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸Letter from Cong. Thomas J. Bliley, Chairman, Committee on Commerce, U.S. House of Representatives, to Carol M. Browner, Administrator, EPA (Dec. 1, 1999) (on file with Thomas G. Neltner); see also *Commerce Committee Grills EPA on Indiana Environmental Case*, *INSIDE EPA* (Inside Washington Publishers, Arlington, Va.), Dec. 2, 1999 (on file with Thomas G. Neltner) (article quotes text of Bliley letter).

⁴⁹Letter from Cong. Julia Carson, U.S. House of Representatives, to Carol M. Browner, Administrator, EPA (Feb. 28, 2000), available at www.ikecoalition.org/documents/Indy_CS0_Carson_EPA_2-28-00.pdf.

⁵⁰Letter from Ann E. Goode, Director, Office of Civil Rights, EPA, to Cong. Julia Carson, U.S. House of Representatives (March 17, 2000), available at www.ikecoalition.org/documents/Indy_CS0_EPA_Carson_3-17-00.pdf (in response to Letter from Cong. Carson, to Carol Browner, Administrator, EPA (Feb. 28, 2000)); see EPA, Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits, www.epa.gov/civilrights/docs/interim.pdf (Feb. 25, 1998); for EPA guidance on Title VI complaints, see Office of Civil Rights, EPA, Policies and Guidance, www.epa.gov/civilrights/polguid.htm (last updated July 20, 2005).

⁵¹Letter from Karen D. Higgenbotham, Acting Director, Office of Civil Rights, EPA, to Thomas G. Neltner, Executive Director, Improving Kids’ Environment 4-5 (Oct. 12, 2001), available at www.ikecoalition.org/documents/Indy_CS0_EPA_Accept_10-12-01.pdf.

⁵²40 C.F.R. § 7.120(b)(1) (2004).

⁵³*Id.*

- be filed within 180 days of the alleged discriminatory act;⁵⁴ and
- identify an EPA assistance applicant or recipient that allegedly committed the discriminatory act.⁵⁵

The EPA accepted three of complainants' allegations for investigation and notified the City of Indianapolis and the complainants of its decision. The EPA restated the allegations as follows:

- That the City's June 9, 1999, application, as amended, to the Indiana Department of Environmental Management, for a variance from the water quality standard-based effluent limitations for E. coli made clear that the City did not intend to remedy the disproportionate impact that resulted from the operation of its sewer system. This variance application was directed to effluent limitations for combined sewer overflows to be included in the City's renewed National Pollutant Discharge Elimination System permit.
- That in July and August 1999 the City diverted capital improvement funds away from addressing the disproportionate impact on the Fall Creek neighborhood when it invested a substantial sum in a project to reduce floods and combined sewer overflows on Pogues Run, which has a substantially smaller minority population than the Fall Creek neighborhood.
- That on August 18, 1999, the City issued a capacity certification for one treatment plant, which the complainants claimed would result in increased sewage flowing in the Fall Creek sewer system, thereby "exacerbating the disproportionate impact on the African American residents of [the] Fall Creek neighborhood." The complainants also alleged that the City's issuance of a certification without requiring storage of sewage or offsets for new flow "consti-

tute[d] a discriminatory act that [made] disproportionate impacts of the sewer overflows worse."⁵⁶

Negotiating a Resolution

Immediately after accepting the complaint, the EPA suggested that the complainants request that the EPA suspend the investigation to allow the parties an opportunity to negotiate a resolution. The complainants agreed for the following reasons:

- The EPA lacked the resources to begin the investigation for at least six months and could not assure the timeliness of its investigation when it did begin.
- Because the City had submitted a proposed long-term control plan in April 2001, the EPA and the City already were negotiating to resolve many of the issues raised in the complaint, and complainants were concerned that a resolution would essentially foreclose their participation.
- The citizens of Indianapolis had elected a new mayor who regularly and publicly expressed his disgust and dismay with the sewage overflows and was strongly committed to resolving the problem.
- Under the new mayor's leadership, City staff and complainants had begun to communicate regarding the civil rights issues related to combined sewer overflow problems.
- Communications between the City and the complainants were cordial but not productive, leading the complainants to conclude that the EPA's presence at formal discussions would be a significant benefit.

On December 3, 2001, the EPA sent the civil rights complainants a letter in which it agreed to suspend its Title VI investigation of the complaint at the complainants' request.⁵⁷ The EPA stated:

⁵⁴*Id.* § 7.120(b)(2).

⁵⁵*Id.* § 7.15.

⁵⁶Higgenbotham, *supra* note 51, at 4.

⁵⁷Letter from Gail C. Ginsberg, Chairwoman, Title VI Task Force, EPA, to Thomas G. Neltner, Executive Director, Improving Kids' Environment (Dec. 3, 2001), available at www.ikeycoalition.org/documents/Indy_CS0_EPA_IKE_Suspend_12-3-01.pdf.

We have agreed that EPA, the City and IDEM [Indiana Department of Environmental Management] will continue to hold inter-governmental meetings to discuss issues pertaining to Indianapolis' long-term control plan. Following each such meeting, insofar as is possible, the governmental parties will meet with you and the parties you represent to inform you of their progress on the Long-Term Control Plan and to seek your input on the issues of concern to you.⁵⁸

Meeting

The initial meeting on December 12, 2001, among the complainants, the City, the Indiana Department of Environmental Management, and the EPA was far from cordial or productive. Later on, however, with the EPA in the room, the dynamic changed dramatically. The complainants were on an equal footing with the City. Through the intense back-and-forth discussion among the parties, the EPA saw serious underlying differences. Dueling meeting summaries further exposed different perspectives.⁵⁹

A month later, the director of the City's Department of Public Works—the lead department in the negotiations—transferred to a new agency. The new director took a more open and respectful approach. She immediately agreed to notify the public when combined sewers overflowed—a long-standing demand of the complainants.⁶⁰

During 2002 and 2003, the negotiations became productive, and the City redoubled its efforts to improve its combined sewer overflow long-term control plan significantly. The City responded to complainants' questions with solid analysis to

back up its positions. It reviewed draft documents and proposals with the complainants before making decisions regarding combined sewer overflows and generally incorporated the complainants' comments into its decisions.

Despite this progress, in 2004 the negotiations briefly took a step backward. The complainants' key concern was the City's unwillingness to implement—or even seriously consider—restrictions on new sewer connections that would increase the frequency and duration of sewer overflows. From the complainants' viewpoint, these sewer connections added to the base dry weather flow in the combined sewer systems. When it rained, less capacity was available in the combined sewer, and this reduced capacity caused combined sewer overflows to occur more frequently and last longer. The complainants perceived the City's unwillingness to consider restrictions as particularly egregious because the cumulative effect of the connections on sewer overflows essentially shifted sewage from the wealthier, less diverse, newer neighborhoods to the inner city, minority neighborhoods. The minority neighborhoods believed that they were subsidizing the economic growth of the City and that their health and well-being were being undermined. From the City's perspective, any increase in base dry weather flow from a new connection was extremely small compared to the amount of storm water entering the system during a storm. Further, projects to reduce overflow volumes were already under way or completed in most watersheds, including Fall Creek. The City maintained that these projects more than offset any assumed increase in overflows from new sewer connection permits.

While the EPA participated constructively in the negotiations, communicated

⁵⁸*Id.* at 1.

⁵⁹Thomas G. Neltner, January 31, 2002, Meeting Summary (Feb. 1, 2005) (on file with Thomas G. Neltner); City of Indianapolis, January 31, 2002, Meeting Summary (Feb. 26, 2002) (on file with Thomas G. Neltner).

⁶⁰Neltner, Meeting Summary, *supra* note 59; see also Indiana Department of Environmental Management, City of Indianapolis, "Stream Line" Newsletters, www.indygov.org/eGov/City/DPW/Environment/CleanStream/Help/News/newsletter.htm (last visited May 31, 2005) (describing history of public notification program from combined sewer overflows); Indiana Department of Environmental Management, City of Indianapolis, Sewage Overflow Alerts, www.indygov.org/eGov/City/DPW/Environment/CleanStream/Help/News/sewage_alerts.htm (last visited Oct. 4, 2005).

effectively with the stakeholders, and thoroughly considered the City's proposals to upgrade its combined sewer system, the EPA never got a handle on this sewer connection issue because the EPA was focused on the long-term control plans and not the immediate effects of the City's day-to-day decisions. The EPA allowed the dispute to simmer. The dispute rose to the surface when the City introduced an amendment to the ordinance regarding permits for sewer connections; the amendment would have prohibited the construction of new combined sewer overflows, as required by the City's National Pollutant Discharge Elimination System permit.⁶¹ The complainants objected and claimed that the amendment did not go far enough. Under the direction of the chairman of the City-County Council Committee that oversees the ordinance and the City's director of the Department of Public Works, the complainants and the City worked out a process to resolve the issues involved in the City's approval of sewer connections.⁶² Through this process, the parties partially resolved these issues, and a full resolution is possible as sewer connection regulations are revised.⁶³

Tangible Benefits

The administrative civil rights complaint has yielded tangible benefits to

Indianapolis' minority community. Before the City had a final plan approved by the Indiana Department of Environmental Management and the EPA, the complainants leveraged projects that reduced sewage overflows and odors in their neighborhood.⁶⁴ The streams' overall appearance has improved significantly, thanks to the City's efforts to implement these projects before the overall plan's final approval and to improved sewer maintenance.⁶⁵

The complaint is expected to result in even more benefits for the minority community. In April 2001, six months before the EPA accepted the complaint for investigation, the City proposed a plan costing just over \$1 billion that would result in twelve days and three billion gallons of overflows per year.⁶⁶ When the City finalizes the long-term control plan this fall, the City is expected to propose a plan that is close to \$2 billion with only three to four days and about one billion gallons of overflows per year.⁶⁷ This is double the investment for 66 percent fewer gallons and 66 percent fewer days of overflows. The City's final long-term control plan, by ensuring that the City treats equally all streams affected by combined sewer overflows, should eliminate the discriminatory impact that formed the basis of the complaint.⁶⁸ And the City is working on final revisions of

⁶¹CONSOLIDATED CITY AND COUNTY, INDIANAPOLIS/MARION, IND., REV. CODE § 671.151 (codified through ordinance No. 6, 2005 (supp. No. 15)), available at http://library2.municode.com/mcc/home.htm?infobase=12016&doc_method=cleardoc (select chap. 671, art. VII); see also Indiana Department of Environmental Management, Authorization to Discharge Under the National Pollutant Discharge Elimination 49 (Oct. 26, 2001) (system permit for Belmont Treatment Plant issued to the City of Indianapolis), www.in.gov/idem/water/npdes/public_notice/belmontfinalpermit.pdf.

⁶²See Indianapolis Department of Public Works and Improving Kids' Environment, Indianapolis Sewer Use Ordinance No. 238 Non-NPDES [National Pollution Discharge Elimination System] Permit Related Language, Memorandum of Understanding (May 14, 2005), available at www.ikecoalition.org/documents/Indy_Sewer_Connection_Agreement_5-14-04.pdf.

⁶³See INDIANAPOLIS DEPARTMENT OF PUBLIC WORKS, SEWER CONNECTION STAKEHOLDER GROUP, REPORT TO THE CITY-COUNTY COUNCIL OF INDIANAPOLIS-MARION COUNTY PUBLIC WORKS COMMITTEE ON SEWER CONNECTION ISSUES (Oct. 14, 2004), available at www.ikecoalition.org/documents/Indy_Sewer_Council_Report_10-14-04.pdf.

⁶⁴The City of Indianapolis installed odor control equipment on one building handling the sewage. See Department of Public Works, City of Indianapolis, Completed Projects, www.indygov.org/eGov/City/DPW/Environment/CleanStream/Projects/completed_projects.htm (last updated Sept. 29, 2005).

⁶⁵Based on my regular tours of neighborhood and discussions with residents.

⁶⁶DEPARTMENT OF PUBLIC WORKS, *supra* note 1 (see Section 7 for Recommended Plan).

⁶⁷City of Indianapolis, Presentation at the Meeting of Clean Stream Technical Advisory Committee (Sept. 12, 2005) (on file with Thomas G. Neltner). The schedule originally called for the plan to be adopted in September 2005, but, at writing, the City is behind schedule by approximately two months.

⁶⁸*Id.*

its standards so that the City accounts for the potential impact of sewer connections on combined sewers during wet and dry weather.⁶⁹

The administrative complaint process for civil rights violations has been encouraging to the civil rights complainants. After the EPA accepted the complaint for investigation, the EPA crafted a process that allowed the parties to suspend the investigation and resolve the dispute more constructively. In essence, the EPA ensured that the parties “played fair.”

A critical undercurrent in the process was the stigma associated with a municipality being formally accused of violating its residents’ civil rights. In the heat of an election, a lame-duck mayor “blasted” the complaint.⁷⁰ A candidate focused on the issue to differentiate himself from his opponent. And the implications of the stigma extended to Congress.

Indianapolis’ congresswoman cited the complaint as a civil rights issue that the EPA must resolve. By contrast, a Virginia congressman objected to the complaint out of fear that the EPA would act too aggressively and uncover the extensive discrimination that might hold up permitting in other communities.

The EPA’s Title VI civil rights regulations gave the agency a valuable tool to resolve legitimate disputes between minority residents and organizations such as municipalities benefiting from the EPA funding that may discriminate against minority residents.⁷¹ The EPA’s acceptance of the complaint validated the minority community’s concerns without inflaming the situation. And EPA Region 5’s use of the civil rights complaint in fulfilling its responsibilities under Title VI of the Civil Rights Act demonstrated the EPA’s sensitivity and responsiveness to the situation.

⁶⁹See Indianapolis Department of Public Works, Project Summary: DPW [Department of Public Works] Sanitary Standards Update Project, Project No. SY-00-190 (Aug. 27, 2004) (on file with Thomas G. Neltner).

⁷⁰George McLaren, *Mayor Blasts Environmental Groups*, INDIANAPOLIS STAR, Oct. 16, 1999, at 1 (City-State Section).

⁷¹See 40 C.F.R. § 7.15 (2004).