

# **BURNT**

IMPROVING THE ENVIRONMENT THROUGH  
CITIZEN INVOLVEMENT WITH GOVERNMENT,  
BUSINESS, AND ACADEMIA

Please Reply also to  
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Nashville, Tennessee 37210

21 September 2007

Karl, J. Fingerhood, Trail Attorney  
Environment and Natural Resources Division  
United States Department of Justice  
Post Office Box 7611  
Washington, D.C. 20044

RE: DOJ Case No. 90-5-1-1-0900 --Consent Decree Between the United States and State of  
Tennessee with The Metropolitan Government of Nashville

Dear Mr. Fingerhood:

BURNT works to improve the environment through involvement with government, business, and academia. We support progress made by Nashville in controlling sewer overflow. We believe the Consent Decree [DOJ Case No. 90-5-1-1-0900] violates basic Tennessee law governing Open Records, environmental injustice, failure of the State to enforce, and pollution of citizens and waters of the state.

The proposed 2007 Consent Decree violates Tennessee laws governing public access to government records and decision making. The Consent Decree allows Nashville to delay until year 2018 the installation of all CSO controls and elimination of all overflow or by-passing almost twenty years from the initial 1 July 2000 deadline accepted by Nashville in the 1999 Order. We believe a public hearing would demonstrate the State has granted Metro one or more waivers for mandated work on sewers on specific rehabilitation projects. Even though Nashville determined that newly discovered and unknown SSO's/bypasses prevented compliance with the 1999 Commissioner's Order, there is no apparent consideration of leakage, measurement problems, or unknown overflows. Nashville slowed the rate of increase in Water and Sewer fees which has directly limited compliance. The Supplemental Environment Project (SEP) violates US EPA standards, does not compensate impacted poor and minorities for years of overflow and sewer treatment operations, projects credited for a SEP have long been part of Nashville Water and Sewer Capitol Budget, and scheduled SEP projects violate state laws

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## **I. The Consent Decree Violated State Open Records Act**

*T.C.A. 8-44-101* is very explicit that these matters may not be secret

"The general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret." *T.C.A. 8-44-101*

BURNT stands behind the Tennessee Open Records Act which this process flaunts. A State Notice of Violation or enforcement would be proceeded by letters, memos, and alleged violations which would be part of the public file. However, the federal government has pre-empted open records with no apparent notices, accounts of meetings, basis of decision, and all participants are sworn to secrecy. It is a radical decision to extend a 1 July 2000 compliance deadline in the 1999 Order, which Nashville accepted, until year 2018 without a public hearing on the environmental practices of parties to the Order and serious fines. BURNT requests a public hearing with testimony and examination of enforcement and particularly any waivers on rehabilitation projects which were apparently granted to Nashville by the State. The Consent Decree, arrived at in private, does not appear to consider leakage and unknown overflow points which have been a past problem causing Metro to violate 1988 and 1999 State Orders.

## **II. The Consent Decree Allows Nashville Eleven More Years to Comply With The 1999 Order**

With no public hearing, notice or participation, this Consent Decree ["VII. Performance Of The Work—B. Remedial Measures for Sanitary Sewer Overflows"] allows Nashville to continue for eleven (11) more years (to year 2018) Combined Sewer Overflows as well as overflows and bypassing from sanitary sewers. The 1999 Commissioner's Order signed by Nashville required both to be stopped entirely by 1 July 2000

1. Item 3 of Commissioner's Order 99-0390 stated that all CSO controls including floatable materials be in place by 1 July 2000

2. Item 4 of the 1999 Order requires elimination of all overflows or bypassing from sanitary sewers by 1 July 2000

On 17 February 2000, Nashville requested, and was then granted, an extension to FY 2007 to install all CSO controls and on 12 April 2000 requested the same extension to FY 2007 for elimination of all sanitary sewer overflows or bypassing.

BURNT is concerned the Consent Decree does not consider leakage, unknown sewer overflows, or measurement problems which plagued Nashville Compliance with the 1999 Order. Poor and minority neighborhoods bear the brunt of sewer treatment operations as well as consuming water polluted by sewer overflow and fish from the river. BURNT believes that Nashville is not reducing toxicity of effluent produced by households and business to reduce toxicity of sewage that overflows. The sale of sewer sludge for use as fertilizer, soil amendment, or agriculture use is simply another, riskier, and under regulated version of sewer overflow. We ask for a public hearing and that this Consent Decree be vacated.

### **III. The Supplemental Environmental Project (SEP) Violates the Purpose Under Law**

The SEP credits \$2.6 million in new sewers in Brandywine Subdivision, Old Hickory, and \$200,000 on Sanitarium Drive [Northeast Davidson County] where leaking septic tanks severely pollute Old Hickory Lake, streams, and ground water. Nashville made a grievous but politically and economically expedient decision to allow 350 septic tanks in Brandywine Subdivision. There should be no reward for fixing this illegal pollution of the waters of the state. These projects are already part of the Nashville Water and Sewer Capitol Budget. The SEP violates the definition under USEPA guidelines that SEP

“...projects or activities that go beyond what is required of a violator to return to compliance with environmental requirements and *which the defendant/respondent is not otherwise legally required to perform...*[to] encourage the regulated community to *propose environmentally beneficial projects that would otherwise not be implemented due to the long term speculative nature of the returns.*” [*emphasis added*] USEPA “New Guidance on Supplemental Environment Projects Issued by Office of Enforcement and Compliance Assurance”

The SEP to provide sewers for 350 leaking septic tanks is NOT an “...*environmentally beneficial projects that would otherwise not be implemented due to the long term speculative nature of the returns.*” (*Id.*, USEPA “New Guidance on Supplemental Environment Projects...”)

The State allocates money for a SEP to *The Cumberland River Compact* for tasks which are unrelated to problems caused by or created by sewer overflow. Minority and poor citizens are primarily hurt. Citizen groups may evaluate and educate on State enforcement actions against long running Metro water pollution by sewer overflow, if

1. citizen groups, minority or women owned firms, consultants, or universities with histories positive government change submit competitive proposals not inside deals
2. SEP funding for citizen groups should educate decision makers, generators of industrial waste, and operators of pump stations on reducing toxicity, impact, and amount of overflow.

No aspect of this SEP meets the standards delineated by the US EPA. We request a public hearing.

#### **IV. This Is Environmental Injustice**

Neither the SEP or the Consent Decree acknowledges the environmental injustice in Nashville Water and Sewer treatment. Federally imposed secrecy in violation of *T.C.A. 8-44-101* makes it impossible to understand the decision making process. We do not know why enforcement of previous ORDERS was suspended. The Consent Decree does not acknowledge the disproportionate impact of sewage overflow on poor, minority, and disenfranchised. This should be addressed directly by any SEP which funds a citizen group to educate decision makers and citizens about delinquent Nashville CSO and SSO. Minority and poor are injured as consumers of fish from the river and tap water. Treatment plants and sewage outlets are apparently located in largely minority areas with severe degradation of air, quality of life, and home value. Government must protect the real estate interests of poor and minority even as sewer treatment plant operations improve.

BURNT advocates reducing the impact of overflows by reducing pollution businesses dispose into the sewer and education of residential users to reduce use of kitchen disposals and disposal of fats and oils is needed. We believe use of sewer sludge as a soil amendment for agriculture is a serious threat because we will eat, drink, or breathe the sewage that does not overflow. However, due to federally imposed secrecy we still do not know what was considered in this Consent Decree.

#### **V. Despite Written and Verbal Requests, The Metro Council Did Not Allow a Public Hearing, Comment Or Copy of the Consent Decree**

The Consent Decree was submitted to the Nashville Metro Council as a one vote 'Resolution' at the last meeting of the four year term of the Metro Council in August 2007. No delay was allowed. No Committee or the Council itself heard any public comments. There was no copy of the Consent Decree posted electronically or at libraries. The State tolerance of Nashville's failure to not meet the 1999 Commissioner's Order and also Nashville's failure to meet the Nashville requested extension of deadlines to 2007 has never been publicly considered. In violation of US EPA guidelines, there has been little public information of CSO's or SSO's.

#### **VIII. Requested Action**

We ask for a public hearing before this is presented to a Court. We ask for this Consent Decree to be vacated. There has been no opportunity for public participation at any point. We believe the federal government has violated *Tennessee Open Records Act T.C.A. 8-44-101*. Gutting of State Open Records Act by this secret deal is important because of the failure to enforce historically agreed fines, acknowledge and remediate environmental injustice, and apparent waiver by the state of sewer re-construction in rehabilitation projects. There has been no consideration of years of environmental degradation or environmental injustice by Nashville or the State. The proposed SEP projects are political agreements for Nashville to repair septic tank failures which should never have been allowed.

The SEP also funds a citizen group to do work which does not contribute to identifying and resolving root causes and root impacts of sewer overflows on poor and minority. BURNT is highly concerned that this Consent Decree does not address a core aspect of sewer overflow--reduce the toxicity of the effluent entering the system to reduce toxicity of sewage and sewer sludge. We do not think the 1999 State Order should be vacated or made null and void by this Consent Decree because history has shown the citizens of Nashville cannot count on regulators to enforce. We believe the 1999 State Order should be reserved as a safety net.

Thank you

Bruce Wood  
president

cc: Metropolitan Nashville and Davidson County  
Metropolitan Council  
Scott Potter, Director, Metropolitan Nashville Water Services  
Metropolitan Nashville Department of Law

State of Tennessee  
Water Pollution Control Director  
Barry Turner, Deputy Attorney General  
Patrick Parker, TDEC, Assistant General Counsel

Federal Government  
Chief Environmental Enforcement Section, U.S. Department of Justice  
Doug Mundrick, Chief Water Programs Environment Branch Region 4 EPA  
United States Attorney, Middle District Tennessee  
Chief, Water Programs Enforcement Branch, US EPA--Region 4  
Granta Nakayama Office of Enforcement and Compliance--US EPA

Mrs. Sweet-Love, president  
Tennessee State Convention NAACP

Ms. Marilyn Robinson, president  
Nashville Branch of the NAACP

BURNT Board

