

**Statement of Carl E. Geffken
City Administrator
City of Fort Smith, Arkansas**

**Before the Subcommittee on Intergovernmental Affairs
and the Subcommittee on the Interior, Energy, and the
Environment of the Committee on Oversight and
Government Reform**

July 25, 2017

Chairmen Palmer and Farenthold:

I am pleased to join you and your fellow subcommittee members for today's important hearing on public policy considerations behind federal litigation settlements.

Because the other panelists will address sue and settle examples whereby special interest groups sue a friendly federal administration and extract settlements which inappropriately commit the federal government to prioritizing issues and even specifying what subsequent rules and requirements will specify, I will address a related abuse of federal litigation affecting communities nationwide.

On behalf of the City of Fort Smith, Arkansas, I want to thank the committee for allowing me to share with you our experiences regarding the Fort Smith Consent Decree with United States Environmental Protection Agency and the State of Arkansas. I can assure you the City has taken this Consent Decree seriously. In fact not only has the city raised its utility rates 167% in three years but it also has complied with all the provisions contained in the Consent Decree to date. The City's staff has become environmental stewards in Consent Decree compliance. We seek a successful implementation of all the utility improvements within the Consent Decree, however the City has major concerns about future compliance because aspects of the Consent Decree are unattainable for the City. Before we discuss the issues of concern within the Consent Decree, a brief review of the community of Fort Smith should be informative for the Committee.

Fort Smith has a population of 87,351. However its utility provides water and sewer services to a number of adjacent communities for a service area population of

approximately 120,000. Fort Smith is a regional metropolitan center in North Western Arkansas of about 300,000 and it is a transportation hub with multiple Interstate highways, three class one railroads, and barge traffic on the Arkansas River. Even though Fort Smith is the largest manufacturing hub in the State of Arkansas, it has experienced some manufacturing setbacks due to business relocation or closure. For example, Whirlpool employed upwards of 4,500 residents manufacturing appliances but relocated the manufacturing to Mexico about ten years ago. The economic impact of this loss and other business closings have had a negative financial impact on the City.

Like many older cities, Fort Smith has an aged utility infrastructure system. Many of the sewer lines and water lines have exceeded their design life which has undoubtedly contributed to compliance issues with the Clean Water Act. 29% of Fort Smith's population live below the Federal poverty line while the national average is 14.7%. One of more troubling statistics is the fact that the median household income for the City is decreasing. When the Consent Decree was finalized in 2015, the Median Household Income was \$37,600, 32% lower than the national average of \$55,775. Today, Fort Smith's Median Household Income is now projected to be \$33,500, 11% lower than two years ago. While our resident's incomes dropped 11%, the sewer utility bills have increased 167% to pay for the initial work on the Consent Decree. If this were not enough, a recent 24/7 Wall St. survey ranked Fort Smith as the 24th worst place to live in the United States. Many of the Fort Smith community profiles reflect an older, poorer community with aging infrastructure and an unfortunate candidate for a Consent Decree addressing Clean Water compliance.

Leading up to the Consent Decree, the City was under an Administrative Order from United States Environmental Protection Agency. It was also one of the oldest Administrative Orders still active, however the City was actively attempting to improve the compliance issues raised in the Administrative Order by investing \$200 million dollars in the sewer infrastructure, responding to requests from the Environmental Protection Agency, and eliminating 22 Sanitary Sewer overflow points. Unfortunately, having the oldest Administrative Order may have made us a target for enforcement.

Despite our willingness to comply and after a change in the attorney assigned to Fort Smith by the United States Department of Justice, the Department of Justice and the Arkansas State Attorney General brow beat and coerced the Fort Smith into accepting the Consent Decree. Statements were made by the Department of

Justice attorney at disagreements during the negotiations that the complaint was already written and would be filed. The City was presented with the option of spending millions in the legal fees required to contest the Consent Decree provisions or accept it.

The Fort Smith Consent Decree has many features and requirements in it that are typical to many other Consent Decrees. Many of the requirements are aimed at improving management tools and programs. One could argue that this is regulatory overreach but the City is not concerned at this time over these items because it has enacted most of the management improvements already. However there are six items in the Consent Decree the City believes are not realistic and need modifying. The six items are:

- 1) The City has only 12 years to complete the Consent Decree, however there are at least 12 cities who were granted 20 to 25 years to comply. Fort Smith is poorer than most and it is the only one experiencing a Median Household Income decline. The obvious question is whether Fort Smith been treated fairly.
- 2) The Consent Decree contains a detailed and prescribed list of tasks that must be performed over the 12 years. It does not allow for adequate flexibility or an iterative approach to maximize public benefits with the limited dollars available.
- 3) The cost of the Consent Decree exceeds the Federal guideline of 2% of Median Household Income. The sewer portion of the City's utility bill is already at 2.2% of Median Household Income and rates will need to increase further in order to generate the funds needed just to complete the Consent Decree. Funds, over and above the amount needed for the Consent Decree, will be needed for non-Consent Decree expenses.
- 4) Stipulated penalties in Consent Decrees are counterintuitive and for Fort Smith, need to be changed. Assessing penalties is a tool to change behavior, however Fort Smith worked on the sewer issues before the Consent Decree and is currently complying with all requirements contained in the Consent Decree. When a city is complying with its Consent Decree, assessing penalties only reduces the funds available to comply in the future.

- 5) Fort Smith's Consent Decree is flawed in that there is a set, fixed time to complete it but the ultimate scope of the Consent Decree projects and the actual cost of those projects was unknown when the Consent Decree was finalized.
- 6) The Consent Decree requires Fort Smith to repair structural problems instead of focusing on spending those dollars on inflow and infiltration points.

The City shares its experiences and concerns with both Subcommittees of the United States House Committee on Oversight and Government Reform to show that the City of Fort Smith has made every effort to comply with Federal Clean Water Act. The City is spending a great deal of time, money, and effort on the Consent Decree, however we need the Federal Government to be our partner and allow modifications to the Consent Decree. The modifications that the City will request are absolutely needed because as you have heard, Fort Smith does not have money to waste. The current Consent Decree has a price tag of over \$450 million dollars. That makes it the single largest project in the City's history and it is more than two years of Fort Smith's total budget for all government functions. In addition, the cost of this agreement has resulted in utility rate fatigue among our residents. Our water utility needs to invest in a new transmission main and the replacement and upgrade of all household water meters but the cost of Consent Decree is impacting our ability to fund the public drinking water system.

As a City Administrator, I need to share how aggressive and unrealistic Consent Decrees can result in poor public policy. The following issues six highlight this:

- 1) Federal enforcement removes the State from exercising their enforcement role.
- 2) Federal enforcement is not always necessary. States, using the NPDES Permit process, should enforce and address sewer issues not Federal Consent Decrees.
- 3) Federal Enforcement by the Department of Justice and the Environmental Protection Agency pursue "comprehensive relief" to address all possible areas of noncompliance instead of focusing on the matters which require direct federal regulation.

- 4) Cumbersome provisions to modify Consent Decrees inhibit a city's ability to adjust the scope of work and spend limited funds wisely based on actual experience and findings.
- 5) Federal Consent Decrees lack Federal agency appreciation for local affordability and are used to impose Federal policy.
- 6) Federal Consent Decrees inhibit integrated planning.

Fort Smith is an older and somewhat poorer city that is faced with a very large expense as a result of a federal unfunded mandate. As the Fort Smith sewer utility rates rise, our city becomes less competitive for private economic investment. What company would choose a city in which sewer utility rates are three or four times higher than non-Consent Decree cities? This results in older cities becoming poorer, exacerbating decreasing investment in cities and the continuation of urban sprawl. In an unrealistic attempt to coerce compliance, the cities in Consent Decrees become less able to comply financially.

The modification that we will eventually propose to the United States Environmental Protection Agency will be aggressive in compliance, affordable for the community and provide the greatest public benefits for the dollars invested. Once a new EPA Regional Administrator is appointed, the City will request an appointment to discuss the modifications we need to Consent Decree. Hopefully this meeting can take place in October. The City of Fort Smith would be happy to update the committee on our progress with the Regional Administrator and the Consent Decree modification in order to show the successes and difficulties faced by cities like Fort Smith across the United States.

Thank you for the opportunity to share the Fort Smith perspective on federal consent decrees. I will be pleased to answer any questions you may have.

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