

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
and)	
)	
THE STATE OF OHIO,)	
)	Civil Action No. 3:91:CV7646
Plaintiffs,)	Judge James G. Carr
)	
v.)	
)	
THE CITY OF TOLEDO, OHIO,)	
A Municipal Corporation,)	
)	
Defendant.)	

SECOND AMENDMENT TO CONSENT DECREE

A. As set forth herein, the Parties request that the Court approve this Second Amendment to the Consent Decree (“Second CD Amendment”) in this matter. Plaintiff the United States, on behalf of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter on October 29, 1991 (Doc No. 1)¹, and amended its complaint on December 17, 1992 (Doc No. 74), seeking injunctive relief and civil penalties for violations of Section 301(a) of the Clean Water Act (the “Act”), 33 U.S.C. § 1311(a), against the Defendant, the City of Toledo (“Toledo” or “the City”).

¹ Documents filed with the Court in this case prior to December 17, 2004, are not available online, but are listed in the online index. References to those documents will refer to Doc. No, corresponding to the online index.

B. Plaintiff the State of Ohio (the “State”) was originally named as a defendant pursuant to Section 309(e) of the Act, 33 U.S.C. § 1319(e). On behalf of the Ohio Environmental Protection Agency (“Ohio EPA”), the State moved, and this Court granted, Ohio’s motion to be realigned as a plaintiff in this matter (Doc. Nos. 14, 24) (December 23, 1991 and March 3, 1992, respectively). The State’s complaint was originally filed as a cross-claim against Toledo (Doc. No. 13) (December 23, 1991). The State subsequently filed an amended complaint against Toledo seeking injunctive relief and civil penalties pursuant to Section 505(a) of the Act, 33 U.S.C. § 1365(a), for violations of Section 301(a) of the Act, 33 U.S.C. § 1311(a), and Chapter 6111 of the Ohio Revised Code. (Doc. No. 78) (January 4, 1993).

C. To resolve the Plaintiffs’ claims, the parties in this matter (the “Parties”) executed a Consent Decree (the “Consent Decree”), which was entered by the Court on December 16, 2002. The Consent Decree required Toledo: (1) to construct a number of improvements at its wastewater treatment plant, known as the Bay View Plant; (2) implement measures to eliminate the known sources of discharges of untreated overflows from sanitary sewers in Toledo’s sewer system and investigate and evaluate its sanitary sewer system to locate other sources of sanitary sewer discharges; and (3) prepare and implement a Long Term Control Plan (“LTCP”) subject to EPA and Ohio EPA’s approval that specifies additional measures Toledo will undertake to reduce the discharges of combined stormwater and sanitary sewage from the portion of Toledo’s sewer system known as Toledo’s combined sewer system. Such combined discharges are known as combined sewer overflows or “CSOs.”

D. On June 5, 2009, EPA conditionally approved a LTCP, subject to the Court’s entry of the First Amendment to Consent Decree (“First CD Amendment”). The approved LTCP became fully effective when the Court entered the First CD Amendment on February 9, 2011. ECF No. 301; ECF No. 302 (containing the fully executed First CD Amendment). Pursuant to Paragraph 33 of the Consent Decree, the approved LTCP is incorporated into the CD. The approved LTCP is set forth herein as Appendix A, which consists of Section 15.6.1 of the City’s Final LTCP Report, and Table 13.32 of that Report.

E. Among other matters, the approved LTCP requires Toledo to expand and/or optimize certain underground tunnels that intercept and store combined sewage so that the stored sewage can be pumped to the Bay View Plant for treatment after a precipitation event. The performance criteria required by the LTCP (the “Performance Criteria”) are set forth in Table 13.32 of the LTCP. As set forth below, a portion of Table 13.32 requires Toledo to construct an extension to the north side of the Swan Creek Tunnel in accordance with the Design Criteria and the schedule.

Project #	Description	CSO Outfalls Controlled	Design Criteria	Performance Criteria	Critical Milestones
S-1B	Swan Creek North Storage Tunnel Extension	42, 43, 45, 47	Provide storage capacity of 1.6 mg	Achieve 3.8 overflow events	Permit Submittal: 5/1/2017 Initiate Construction: 9/1/2017 Construction Complete: 5/31/2020 Project Operational: 5/31/2020 Project Fully Operational: 8/31/2020

F. The Parties have agreed, subject to the public comment process and this Court's approval through entry of this Second CD Amendment, to replace the requirement to build an extension to the northern part of the Swan Creek Tunnel with a requirement that Toledo separate the combined sewers servicing 190 acres of land to the north of the tunnel into separate stormwater and sanitary sewers.

G. Toledo has demonstrated to EPA and Ohio EPA that the sewer separation project would likely achieve a higher level of CSO control than the Swan Creek North Storage Tunnel Extension, at a lower cost. In 2019, without the approval of a CD modification by EPA or the Court, Toledo completed the combined sewer separation instead of the Swan Creek Project Tunnel extension within the existing deadlines for the tunnel extension project (construction complete, project operational, May 31, 2020, and project fully operational, August 31, 2020). As predicted by Toledo, the sewer separation project, including the new set of stormwater-only sewers has dramatically reduced the volume of stormwater entering into the City's existing combined sewers. These steps have freed up capacity in Toledo's existing combined sewers so that far more sanitary sewage can be conveyed to the Bay View Plant for treatment than was previously possible, even had the Swan Creek Tunnel extension been built. This has in turn reduced discharges from CSO outfalls 42, 43, 45, and 47, the outfalls to be addressed by the tunnel extension.

H. Another portion of the LTCP requires Toledo to construct 0.4 mg of storage capacity at the Jamie Farr Park Storage Pipeline in accordance with the Performance Criteria and the schedule set forth below, which are specified in Table 13.32 of the LTCP, as follows:

Project #	Description	CSO Outfalls Controlled	Design Criteria	Performance Criteria	Critical Milestones
W-1	Jamie Farr Park Storage Pipeline	23, 24, 25	Provide storage capacity of 0.4 mg	Achieve 0.4 overflow events from CSO outfall 24. Abandon CSO outfalls 23 and 25 and achieve 0 overflow events for those outfalls	Permit Submittal: 6/30/2010 Initiate Construction: 11/1/2010 Construction Complete: 6/30/2012 Project Operational: 6/30/2012 Project Fully Operational: 12/31/2012

I. Under the original approved LTCP, the City intended to achieve the Performance Criteria of 0.4 overflow events associated with the Jamie Farr Park Storage Pipeline by consolidating CSO outfalls 23, 24 and 25 into a single outfall, CSO outfall 24, that would discharge an average of 0.4 events per year; and abandon and not discharge from CSO outfalls 23 and 25. The City determined it will be more cost-effective to consolidate the three outfalls into CSO outfall 23 (and discharge from there an average of 0.4 events per year) rather than CSO outfall 24, and abandon and not discharge from CSO outfalls 24 and 25 (rather than abandon and not discharge from CSO outfalls 23 and 25). The City did not inform EPA that it had consolidated the three outfalls into CSO outfall 23 rather than outfall 24, until long after the project was completed. Nonetheless, Toledo has demonstrated that (a) it constructed the project in accordance with the design criteria; (b) the modified project will have the same volume and frequency of CSO discharges, and the same number of remaining active CSO outfalls (one) from which discharges might occur as the original project would have had; and (c) CSO outfall 23 discharges into the same stretch of the Maumee River as CSO outfall 24 would have (they were

located approximately 2700 feet apart from each other). Consequently, Toledo has demonstrated that the modified project will perform the same as the original project and have the same impact on water quality but at a lower cost. The Parties, therefore, have agreed that the Performance Criteria portion of this requirement should be modified so that Toledo is required to achieve 0.4 overflow events from CSO outfall 23 rather than CSO outfall 24, and is required to abandon CSO outfalls 24 and 25 and achieve 0 overflow events for outfalls 24 and 25. This modification, recognizing that CSO outfall 24 will be abandoned instead of CSO 23, is a non-material modification.

J. At the time that the parties were negotiating the First CD Amendment, the ballasted flocculation high-rate clarification technology that Toledo would be constructing under the First CD Amendment to treat wet weather bypass flows at the Bay View Plant was relatively new, and the Parties were interested in obtaining information comparing the effectiveness of that treatment technology at removing pathogens with the effectiveness of conventional, activated sludge secondary treatment technology. Consequently, Paragraphs 9-11 of the Consent Decree, as Amended by the First CD Amendment, required Toledo to perform a Ballasted Flocculation Pathogen Study to obtain that information. The requirements of the Pathogen Study are set forth in Appendix A to the First CD Amendment. ECF No. 302 at Page ID Nos.: 195-200.

Specifically, Appendix A to the First CD Amendment requires Toledo to simultaneously sample discharges from the Bay View Plant's conventional secondary treatment plant and from the ballasted flocculation facilities over ten storm events, and to analyze those samples for ten different pathogens to compare rates of removal of enumerated pathogens from influent

wastewater using its ballasted flocculation facilities with removal rates of the same pathogens from Toledo's main primary and secondary treatment facilities simultaneously.

K. Toledo performed this study for eight years, beginning in 2011. In those eight years, Toledo was only able to collect and analyze pathogen data for six different storm events because Toledo has dramatically reduced the number of times that it discharges bypass flows and therefore the number of times that Toledo has utilized the ballasted flocculation facilities. Given how infrequently Toledo discharges from the ballasted flocculation facility, it would likely take Toledo six to nine more years to collect samples for four additional storm events, and would cost Toledo approximately \$200,000. Toledo analyzed the statistical significance of the pathogen data collected so far and demonstrated that collecting data for four additional wet weather events as required by Appendix A to the First CD Amendment would not yield information that would change the conclusions reached to date. Given the limited value of the information that would be obtained from additional sampling, and the amount of time that it would take for Toledo to collect samples for four additional wet weather events, the Parties agree that Appendix A to the First CD Amendment should be modified to change the number of wet weather events that must be sampled and analyzed from ten events down to six events.

L. The Parties agree that the above-described changes to the LTCP in this Second CD Amendment, with the exception of the changes identified in Paragraphs H and I, above, constitute a material modification of the Consent Decree that must be in writing and approved by the Court in accordance with Paragraph 143 of the Consent Decree before they can become effective. The Parties also agree that the changes to Appendix A to the First CD Amendment are

a material modification of the Consent Decree.

M. The Parties recognize, and the Court by entering this Second CD Amendment finds, that it has been negotiated at arms-length and in good faith, and that it is fair, reasonable, and in the public interest.

N. This Second CD Amendment shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7.

Notwithstanding that the City has already implemented some of the changes reflected in this Second CD Amendment, the United States and the State reserve the right to withdraw or withhold their consent if the comments regarding this Second CD Amendment disclose facts or considerations indicating that this Amendment is inappropriate, improper or inadequate. The City also consents to entry of this Amendment without further notice and agrees not to withdraw from or oppose entry of this Amendment by the Court or to challenge any provision of this Second CD Amendment, unless the United States or the State has notified the other two parties to this Amendment in writing that it no longer supports its entry.

NOW THEREFORE, before the taking of any further testimony, without further adjudication of any issue of fact or law, and upon the consent and agreement of the Parties, it is hereby ORDERED, JUDGED, and DECREED as follows:

1. The Consent Decree, as amended by the First CD Amendment shall remain in full force and effect in accordance with its terms except as provided in Paragraph 2, below.

2. The Rows in Table 13.32 of the LTCP, Appendix A to this Second CD Amendment pertaining to Project ## S-1B and W-1 shall be deleted and replaced by the

following rows, which shall become effective upon entry of this Second CD Amendment by the Court:

Project #	Description	CSO Outfalls Controlled	Design Criteria	Performance Criteria	Critical Milestones
S-1B	Swan Creek North Sewer Separation	42, 43, 45, 47	Separate 190 acres of Combined Sewer Area in accordance with the March 2016 “Swan Creek North (CSO 3, 4 & 5) Sewer Separation Project: Preliminary Design Report”	Achieve 3.8 overflow events	Project Fully Operational: 8/31/2020
W-1	Jamie Farr Park Storage Pipeline	23, 24, 25	Provide storage capacity of 0.4 mg	Achieve 0.4 overflow events from CSO outfall 23. Block off and abandon CSO outfalls 24 and 25, making further overflows impossible.	Permit Submittal: 6/30/2010 Initiate Construction: 11/1/2010 Construction Complete: 6/30/2012 Project Operational: 6/30/2012 Project Fully Operational: 12/31/2012

3. The third paragraph in Appendix A to the First CD Amendment under “2. Sampling” shall be deleted and replaced by the following paragraph, which shall become effective upon

entry of this Second CD Amendment by the Court:

The QAPP will provide for sampling to be carried out for a total of six wet weather events. Because disinfection is practiced seasonally, consistent with permit requirements, the sampling took place between April 1 and October 31 and is now complete.

This Second Amendment to the Consent Decree is entered and approved this _____ day
of _____, 2022.

JAMES G. CARR, JUDGE
United States District Court
Northern District of Ohio

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States of America and State of Ohio v. City of Toledo, Ohio*

FOR THE UNITED STATES OF AMERICA

TODD KIM
Assistant Attorney General
Environmental and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530



STEVEN D. ELLIS
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3163

DATED: April 19, 2022

MICHELLE M. BAEPLER
First Assistant United States Attorney
Northern District of Ohio

By: _____
STEVEN PAFFILAS
Assistant United States Attorney
Northern District of Ohio
801 W. Superior Ave., Suite 400
Cleveland, Ohio 44113

DATED: _____

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FOR THE UNITED STATES OF AMERICA

TODD KIM
Assistant Attorney General
Environmental and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

DATED: _____

STEVEN D. ELLIS
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-3163

MICHELLE M. BAEPLER
First Assistant United States Attorney
Northern District of Ohio

By: 
STEVEN PAPPALAS
Assistant United States Attorney
Northern District of Ohio
801 W. Superior Ave., Suite 400
Cleveland, Ohio 44113

DATED: 4/19/2022

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JOSEPH
THEIS

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JOSEPH THEIS
Date: 2022.04.19
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DATED: _____

JOSEPH G. THEIS
Acting Director, Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

DATED: _____

ROBERT A. KAPLAN
Acting Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JOSEPH G. THEIS
Acting Director, Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

DATED: _____

JANE
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LUPTON
Date: 2022.04.19
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ROBERT A. KAPLAN
Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

DATED: _____

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States of America and State of Ohio v. City of Toledo, Ohio*

FOR THE STATE OF OHIO

Ohio Attorney General
DAVE YOST

By: 
LAWRENCE HELKOWSKI (0068622)
Assistant Attorney General
Environmental Enforcement Section
Office of the Attorney General
30 East Broad Street/25th Floor
Columbus, Ohio 43215-3824

DATED: April 6, 2022

FOR THE CITY OF TOLEDO

By: _____
DALE R. EMCH
Director of Law
City of Toledo
One Government Center, Suite 2250
Toledo, Ohio 43604

DATED: _____

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of *United States of America and State of Ohio v. City of Toledo, Ohio*

FOR THE STATE OF OHIO

Ohio Attorney General
DAVE YOST

By: _____
LAWRENCE HELKOWSKI
Assistant Attorney General
Environmental Enforcement Section
Office of the Attorney General
30 East Broad Street/25th Floor
Columbus, Ohio 43215-3824

DATED: _____

FOR THE CITY OF TOLEDO

By:  _____
DALE R. EMCH
Director of Law
City of Toledo
One Government Center, Suite 2250
Toledo, Ohio 43604

DATED: 3/29/2022