

Eastern District of Kentucky
FILED

JUL - 9 2015

AT LEXINGTON
ROBERT R. CARR
CLERK U.S. DISTRICT COURT

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON**

**THE UNITED STATES OF AMERICA AND
THE COMMONWEALTH OF
KENTUCKY,**

Plaintiffs,

v.

**LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,**

Defendant.

Civil Action No. 5:06-CV-386-KSF

FIRST MATERIAL MODIFICATION TO CONSENT DECREE

WHEREAS, in November of 2006, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), and the Commonwealth of Kentucky ("Commonwealth"), on behalf of the Commonwealth's Environmental and Public Protection Cabinet ("EPPC"), filed a complaint against Lexington-Fayette Urban County Government ("LFUCG") under Section 309(b) of the Clean Water Act ("CWA"), alleging that LFUCG violated and continued to violate Section 301 of the CWA; and

WHEREAS, on March 14, 2008, the United States and the Commonwealth lodged a Consent Decree resolving the claims alleged in the complaint; and

WHEREAS, the Commonwealth's Energy and Environment Cabinet ("EEC") was established pursuant to Executive Order in June of 2008 as the successor agency to the EPPC

with responsibility for the environmental enforcement functions of the former EPPC;

WHEREAS, on July 25, 2008, the Plaintiffs, following a period of public comment, filed a Motion to Enter the Consent Decree; and

WHEREAS, on August 7, 2008, the Court issued an Order denying Plaintiffs' Motion to Enter the Consent Decree; and

WHEREAS, following an appeal of this Court's August 7, 2008 Order denying Plaintiffs' Motion to Enter the Consent Decree, the Plaintiffs filed a second Motion to Enter the Consent Decree on March 16, 2010; and

WHEREAS, on January 3, 2011, the Court entered the Consent Decree, and Section XVIII of the Consent Decree establishes the Effective Date of the Consent Decree as the date it was entered by the Court; and

WHEREAS, Paragraph 15.G.(vii) of the Consent Decree provides that the Sanitary Sewer System and WWTP Remedial Measures Plan submitted by LFUCG pursuant to the Consent Decree shall provide an expeditious schedule for design, construction, and placement in service of all proposed measures that is in no event "later than eleven (11) years from the Effective Date of the Consent Decree, or in the event that remedial measures include a WWTP upgrade, thirteen (13) years from the Effective Date of Consent Decree only for such WWTP upgrade and other remedial measures associated with the WWTP upgrade"; and

WHEREAS, Section 15.G.(vii) of the Consent Decree further provides that these deadlines "may only be extended with approval of EPA and EPPC, for good cause, in accordance with Section XX (Modification)"; and

WHEREAS, Paragraph 34 of the Consent Decree provides in part that, "[i]f EPA/EPPC

fails to approve, or otherwise act on a submittal within sixty (60) days of receipt of the submittal, then any subsequent milestone or completion date that is dependent upon such action by EPA/EPPC shall be extended by the equivalent number of days beyond the sixty (60) day review period for the submittal that is used by EPA/EPPC for the approval or other action"; and

WHEREAS, LFUCG submitted its Sanitary Sewer System and WWTP Remedial Measures Plan (RMP) in three parts, Group 1 RMP, Group 2 RMP, and Group 3 RMP, with the Group 1 RMP submitted on October 12, 2011, the Group 2 RMP submitted on April 13, 2012, and the Group 3 RMP submitted on October 11, 2012, but EPA/EEC did not approve or otherwise act upon the originally submitted RMPs or the revised RMPs submitted in response to EPA/EEC comments, within the sixty (60) day review period specified in Paragraph 34, so that LFUCG is entitled to extensions of the Paragraph 15.G.(vii) deadlines pursuant to Paragraph 34; and

WHEREAS, EPA/EEC, on November 18, 2014, approved the RMPs in all respects except for the schedules contained in the RMPs, which were disapproved because they did not comply with the deadlines established under Section 15.G.(vii) of the Consent Decree; and

WHEREAS, after applying Paragraph 34 to adjust the Consent Decree deadlines for designing, constructing and placing into service all remedial measures, the deadlines for LFUCG to place remedial measures into service are as follows:

Remedial Measures Not Associated With WWTP Upgrade

RMP	Deadline
Group 1	September 9, 2024
Group 2	March 9, 2024
Group 3	September 10, 2023

Remedial Measures Associated With WWTP Upgrade

RMP	Deadline
Group 1	September 9, 2026
Group 2	March 9, 2026
Group 3	September 9, 2025

WHEREAS, at or around the lodging of the Consent Decree, the costs of the injunctive relief were estimated to be \$250-\$300 million. *See* United States' Memorandum in Support of Motion to Reconsider Court's Order Denying Motion to Enter Consent Decree, filed 8/21/08, ECF 49-2, at p.10.

WHEREAS, at the time the Consent Decree was signed by the Parties, LFUCG did not anticipate the number and cost of projects that it would ultimately determine to be necessary after conducting the comprehensive Sewer System Assessment that it has now completed pursuant to Paragraph 15.B. of the Consent Decree; and

WHEREAS, the RMPs describe remedial measures for the Sanitary Sewer System and WWTPs that consist of 82 discrete projects that LFUCG estimates will cost approximately \$590 million to design, construct and place into service; and

WHEREAS, the Parties agree that, in light of the unanticipated increased scope and cost of projects that will be implemented pursuant to the RMPs, an extension of the deadline for completion of design, construction and placement into service of all remedial measures described in the RMPs is reasonable and equitable, and in the circumstances of this case would be for "good cause"; and

WHEREAS, the Parties have agreed that a reasonable deadline for completion of design,

construction, and placement into service of all remedial measures described in the RMPs is December 31, 2026; and

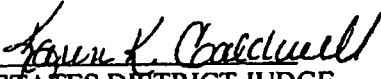
WHEREAS, the Parties have further agreed that this December 31, 2026 deadline will apply to all remedial measures, including measures associated with WWTP upgrades, and that this deadline will not be further adjusted to reflect delays in EPA/EEC review, approval or other action relating to the RMPs;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Paragraph 15.G.(vii) of the Consent Decree shall be removed and replaced with the following language:

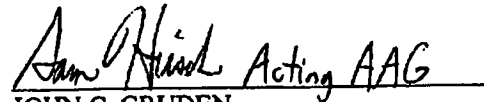
“The Sanitary Sewer System and WWTP Remedial Measures Plan shall provide estimated capital, O & M, and present value costs for each identified remedial measure. Such costs shall be provided in consistent, year-specific dollars. The Sanitary Sewer System and WWTP Remedial Measures Plan shall provide an expeditious schedule for design, construction, and placement in service of all proposed measures. Such schedule shall provide for completion of construction and placement in service of all proposed measures no later than December 31, 2026. The final deadline for completion of construction and placement in service of all proposed measures by December 31, 2026, shall not be subject to extension by operation of Paragraph 34 of this Consent Decree and may only be extended with approval of EPA and EEC, for good cause, in accordance with Section XX (Modification). LFUCG shall identify the dates for preliminary design, complete design, complete permitting, award contract, begin construction, and complete construction dates for each measure proposed in the Sanitary Sewer System and WWTP Remedial Measures Plan.”

Dated and entered this 6 day of July 2015.

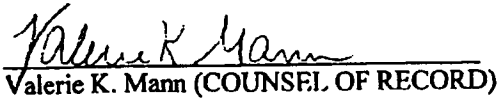

UNITED STATES DISTRICT JUDGE
Eastern District of Kentucky

WE HEREBY CONSENT to the entry of this First Material Modification to Consent Decree in United States, et al. v. Lexington-Fayette Urban County Government, Civil Action No. 5:06-cv-386, subject to the public notice and comment requirements of 28 C.F.R. §50.7.

FOR THE UNITED STATES OF AMERICA:

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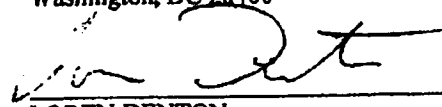


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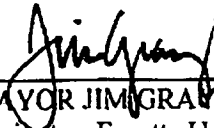
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