

**IN THE 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-KKC**

**SECOND 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), 33 U.S.C. § 1319(b), of the Clean Water Act (“CWA”), alleging that LFUCG violated and continued to violate the CWA by violating conditions and limitations established in its National Pollutant Discharge Elimination System permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, and by discharging pollutants to navigable waters without authorization by a permit in violation of Section 301 of the CWA, 33 U.S.C. § 1311;

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

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;

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

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

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;

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;

WHEREAS, Paragraph 15.G.(vii) of the Consent Decree required Defendant to submit a Sanitary Sewer System and WWTP Remedial Measures Plan ("RMP"), including an expeditious schedule for design, construction, and placement in service of all proposed measures. Paragraph 15.G.(vii) further required the Defendant to identify dates for preliminary design, complete design, complete permitting, award contract, begin construction, and complete construction dates for each measure proposed, and the RMP established staggered deadlines for the completion of construction and placement into service of various remedial measures deadlines based on EPA/EEC approvals of various submittals;

WHEREAS, on June 23, 2015, Plaintiffs filed a Motion to Enter First Material Modification to Consent Decree, the purpose of which was to consolidate the staggered remedial measures deadlines in the RMP to one final completion date of December 31, 2026 in Paragraph 15.G(vii) of the Consent Decree, for completion of construction and placement into service of all measures associated with the Sanitary Sewer System and WWTP RMP;

WHEREAS, on July 9, 2015, this Court entered the First Material Modification to the Consent Decree;

WHEREAS, on January 25, 2021, the Parties filed a Joint Stipulation and Agreed Order Partially Terminating Consent Decree, requesting this Court terminate Section VI of the Consent Decree (Compliance Measures Relating to Storm Sewer System) pursuant to Paragraphs 83 and 84 of the Consent Decree, which provide for terminating Section VI after all requirements of that Section had been met for a period of five (5) years following the Effective Date of the Consent Decree;

WHEREAS, on January 26, 2021, this Court entered the Joint Stipulation and Agreed Order Partially Terminating Consent Decree, terminating Section VI of the Consent Decree, associated reporting requirements, and the submittal of the MS4 Annual Report to the recipients specified in Section XVII;

WHEREAS, since the Consent Decree was entered in 2011, LFUCG has worked diligently to meet all other Consent Decree compliance schedules and requirements;

WHEREAS, from 2013 through the second quarter of 2023, LFUCG completed seventy-five (75) RMP projects at an average of approximately seven (7) projects per year, as well as abated eighty-five (85) recurring sanitary sewer overflows (“SSOs”);

WHEREAS, LFUCG has expanded the scope of some existing RMP projects to improve the operation and performance of the Sanitary Sewer System and WWTPs and provide greater human health and environmental benefits by minimizing the occurrence of sewage releases or effluent violations during large storm events. These project size increases resulted in a greater cost to LFUCG than it anticipated while developing the original RMP. Examples include: a 50% increase in the capacity of the East Hickman Force Main, a 2 million gallons per day upgrade to the East Hickman Pump Station, a nearly 50% increase to the East Hickman wet weather storage facility, and numerous WWTP upgrades to increase reliability;

WHEREAS, LFUCG has alleged and provided certain information to the United States detailing widespread supply chain shortages and disruptions (e.g., cement supply, certain PVC piping), workforce and labor shortages, and difficult economic conditions;

WHEREAS, LFUCG has demonstrated that the impacts on the workforce, supply chains, and economic conditions have resulted in unanticipated delays in easement acquisitions and construction project delays due to material and labor shortages, and have compromised LFUCG's ability to meet the December 31, 2026, deadline contained in Paragraph 15.G.(vii) of the Consent Decree, as amended;

WHEREAS, approximately forty-one (41) RMP projects remain to be completed, which would require LFUCG to complete an average of approximately twelve (12) projects per year in order to meet the current deadline of December 31, 2026, which the Parties agree is not realistic in today's environment;

WHEREAS, extending the deadline in Paragraph 15.G.(vii) of the Consent Decree by four (4) years to December 31, 2030, would provide LFUCG the time necessary to acquire easements and sequence the construction of the remaining projects required by the RMP;

WHEREAS, the Parties agree that a reasonable and realistic deadline for completion of construction, and placement into service of all remedial measures described in the RMP schedule is December 31, 2030;

WHEREAS, LFUCG has already implemented a majority of its total RMP projects;

WHEREAS, the Parties agree that it is no longer necessary for LFUCG to provide, in the RMP schedule, the interim deadlines associated with design, permitting, and contracting, as required by Paragraph 15.G.(vii) of the Consent Decree, and that LFUCG need only provide dates for completion of construction and placement into service for each remedial measure described in future iterations of the RMP schedule;

WHEREAS, the Parties further agree, in light of the amount of progress made and current status of Consent Decree implementation, and the diminished need for frequent reporting, that it is reasonable to change the Quarterly Report requirement in Paragraph 29.A. of the Consent Decree to a Semi-Annual Report requirement; and

WHEREAS, the Parties also agree to make edits to Paragraph 29.A. by deleting superfluous noticing procedures set forth in Paragraph 29.A. that are inconsistent with the Consent Decree's generally applicable noticing procedures set forth in Paragraph 30.

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

1. Paragraph 15.G.(vii) of the Consent Decree, as amended by the First Material Modification to 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 construction and

placement into 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, 2030. The final deadline for completion of construction and placement in service of all proposed measures by December 31, 2030, 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 date for completion of construction and placement into service for each measure proposed.”

2. Paragraph 29.A. of the Consent Decree shall be removed and replaced with:

“Semi-Annual Reports. After the Effective Date of the Second Material Modification To Consent Decree and until termination of this Decree pursuant to Section XXI (Termination), LFUCG shall submit to EPA and EEC Semi-Annual Reports on July 30th of each year (for the six-month period from January 1st to June 30th) and on January 30th (for the six-month period from July 1st to December 31st). The Semi-Annual Report shall include, at a minimum:

(i) A description of all projects and activities conducted during the most recently completed six (6) month period to comply with the requirements of this Consent Decree, as amended, in Gantt chart or similar format;

(ii) The date, locations, estimated volume, and cause (if known) of all SSOs for the most recently completed six (6) month period; a cumulative accounting of the estimated reduction in volume and in number of occurrences of SSOs and Unpermitted Bypasses;

(iii) The anticipated projects and activities that will be performed in the next six (6) month period to comply with the requirements of this Consent Decree (as amended), in Gantt chart or similar format;

(iv) If LFUCG violates any requirement of this Consent Decree or has reason to believe that it is likely to violate any requirement of this Consent Decree in the future, LFUCG shall notify the United States and EEC of such violation and its likely duration, with an explanation of the violation's likely cause and of the remedial steps taken, and/or to be taken, to prevent or minimize such violation. If the cause of the violation cannot be fully explained at the time the report is due, LFUCG shall include a statement to that effect in the report. LFUCG shall investigate to determine the cause of the violation and then shall submit an amendment to the report, including a full explanation of the cause of the violation, within thirty (30) days after the semi-annual report; and

(v) Any additional information that demonstrates that LFUCG is implementing the remedial measures required in this Consent Decree.

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Dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

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UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this Second 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 provisions of 28 C.F.R. § 50.7:

FOR UNITED STATES OF AMERICA:

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FOR U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4 (Continued):

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FOR U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF ENFORCEMENT AND COMPLIANCE (Continued):

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FOR THE COMMONWEALTH OF KENTUCKY, ENERGY AND ENVIRONMENT  
CABINET (formerly the ENVIRONMENTAL & PUBLIC PROTECTION CABINET);

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FOR THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT:

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