

**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 ____ day of _____ 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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Of Counsel:
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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.

MARK POLLINS
Chief, Water Enforcement Division
Office of Enforcement & Compliance Assurance
U.S. Environmental Protection Agency
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Washington, DC 20460

LOREN DENTON
Chief, Municipal Enforcement Branch
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ROBERT FENTRESS
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FOR THE COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET (formerly the
ENVIRONMENTAL & PUBLIC PROTECTION
CABINET):

JOHN WEST (COUNSEL OF RECORD)
Office of General Counsel
Kentucky Energy and Environment Cabinet
2 Hudson Hollow
Frankfort, KY 40601
Telephone: (502) 564-2356, ext. 707
Facsimile: (502) 564-9212

FOR THE LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT:

MAYOR JIM GRAY

Lexington-Fayette Urban County Government
12th Floor, Government Center
200 East Main Street
Lexington, KY 40507

JOHN C. BENDER

Attorney of Record for LFUCG
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300 West Vine Street, Suite 1100
Lexington, KY 40507-1665
Telephone (859) 288-4607
Facsimile (859) 367-3806

Revised 6/2014

Revised 6/2014

³ Well Headman WWTP WWS Tank is expected to be constructed in phases (i.e. multiple storage bins) over the 6-year construction period.

WWTP Reliability Upgrades - Project Detail

Project Name	2014 Year 1	2015 Year 2	2016 Year 3	2017 Year 4	2018 Year 5	2019 Year 6	2020 Year 7	2021 Year 8	2022 Year 9	2023 Year 10	2024 Year 11	2025 Year 12	2026 Year 13	Total
Town Branch WWTP														
Headworks		\$1,480,500	\$919,500											\$2,400,000
Primary Clarifier Equipment														\$3,575,000
Aeration Basins				\$1,159,990	\$2,415,010									\$4,480,000
Final Clarifier Equipment	\$2,500,000						\$2,090,000	\$2,400,000						\$4,870,000
RAS Pump Station									\$550,000			\$1,185,000		\$560,000
WAS Pump Station													\$40,000	\$40,000
Gravily Thickeners					\$300,000	\$350,000								\$650,000
Disinfection											\$100,000			\$100,000
Non-Potable Water PS											\$35,000			\$35,000
Primary Digesters			\$1,526,400	\$1,470,000	\$528,800	\$500,000								\$3,525,000
Secondary Digesters / Sludge Holding					\$1,140,000	\$1,660,000	\$500,000							\$2,800,000
Dewatering								\$400,000						\$400,000
Scum Facility										\$200,000				\$200,000
Site										\$241,165	\$253,040	\$112,134	\$200,000	\$800,000
Design			\$407,500	\$510,545	\$282,026	\$305,000	\$128,050	\$100,000	\$35,540	\$241,165	\$253,040	\$112,134	\$200,000	\$2,350,000
Town Branch Totals														
West Hickman WWTP	\$2,500,000	\$1,480,500	\$2,853,400	\$3,140,535	\$4,645,636	\$2,615,000	\$2,678,050	\$2,900,000	\$685,540	\$441,165	\$1,673,040	\$1,497,134	\$240,000	\$27,350,000
Influent Pump Station ¹														
Raw Sewage Pump Station ¹			\$1,080,000	\$1,080,000										\$2,160,000
Leaping Weir ¹			\$1,630,000	\$260,000										\$3,260,000
BPR Improvements														\$260,000
Zone 1 Aeration	\$1,196,000													\$3,480,000
Zone 2 Aeration	\$1,200,000													\$1,195,000
Clarifier Flow Distribution		\$240,000		\$585,000										\$1,789,000
Disinfection														\$240,000
Dewatering										\$140,000				\$140,000
Final Effluent PS									\$120,000					\$120,000
Return Activated Sludge Pumping							\$1,400,000	\$1,400,000		\$280,000				\$2,800,000
Waste Activated Sludge Pumping											\$120,000			\$280,000
Waste Sludge Holding				\$179,500										\$179,500
Waste Sludge Thickening														
Ball Press Replacement								\$1,250,000						\$1,250,000
Dewatering														\$380,000
Scum Facility				\$576,000										\$576,000
Non-potable Water System				\$320,000										\$320,000
Emergency Electrical Power										\$780,000				\$780,000
Odor Control Facilities ¹			\$570,000	\$570,000										\$1,140,000
Road Repair														
Design		\$75,000			\$748,800	\$823,425	\$621,475	\$299,425	\$374,595	\$353,595	\$224,595	\$224,595	\$400,000	\$3,970,000
West Hickman Totals	\$3,415,400	\$315,000	\$3,280,000	\$5,204,500	\$748,800	\$2,663,425	\$3,761,475	\$2,949,425	\$634,595	\$1,413,595	\$724,595	\$1,114,595	\$524,595	\$26,750,000
Town Branch Totals	\$2,500,000	\$1,480,500	\$2,853,400	\$3,140,535	\$4,645,636	\$2,615,000	\$2,678,050	\$2,900,000	\$685,540	\$441,165	\$1,673,040	\$1,497,134	\$240,000	\$27,350,000
Total WWTP RMP Expense	\$5,915,400	\$1,795,500	\$5,133,400	\$8,345,035	\$5,394,436	\$5,378,425	\$6,439,525	\$6,849,425	\$1,220,136	\$1,854,760	\$2,297,635	\$2,611,729	\$864,595	\$54,100,000
WWTP RMP Projects per FY (not design)	4	2	5	10	4	4	4	4	3	3	5	3	3	

Notes
1. These projects will be included with the construction of the Phase 1 WWWS at the WWTP

STEVEN L. BESHEAR
GOVERNOR



Rec'd
11/20/14
LEONARD K. PETERS
SECRETARY

ENERGY AND ENVIRONMENT CABINET

DEPARTMENT FOR ENVIRONMENTAL PROTECTION

DIVISION OF ENFORCEMENT

300 FAIR OAKS LANE

FRANKFORT KENTUCKY 40601

www.kentucky.gov

November 18, 2014

CERTIFIED MAIL 7012 1010 0002 0759 6533
RETURN RECEIPT REQUESTED

Lexington-Fayette Urban County Government
Division of Water Quality
c/o Mr. Charles H. Martin, P.E., Director
125 Lisle Industrial Ave., Suite 180
Lexington, Kentucky 40511

Re: Consent Decree # 5:06-cv-386
U.S. Environmental Protection Agency and the Kentucky Department for Environmental
Protection Joint Approval of Remedial Measures Plans

Dear Mr. Martin:

The United States Environmental Protection Agency and the Kentucky Department for Environmental Protection (KDEP) have reviewed the Remedial Measures Plans for Group 1, 2, and 3 Sewersheds (RMPs) initially submitted by the Lexington-Fayette Urban County Government (LFUCG) on October 12, 2011, April 13, 2012, and October 11, 2012, respectively, with revisions submitted on March 14, 2014. The RMPs are required submittals pursuant to Section VII, Paragraph 15.G.(i) of the LFUCG Consent Decree (CD).

The RMPs are approved with the exception of the proposed implementation schedule. The 12 year project implementation schedule exceeds the compliance deadlines in Section VII, Paragraph 15.G.(vii) of the CD, which allows for 11 years from the CD effective date (January 3, 2011) for non-wastewater treatment plant (WWTP) projects and 13 years from the CD effective date for WWTP upgrade projects.

LFUCG is entitled to an extension of those deadlines based on operation of Paragraph 34 of the CD, which provides that if EPA/KDEP 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/KDEP shall be extended by the equivalent number of days beyond the sixty (60) day review period for the submittal. RMPs for Group 1, 2 and 3 Sewersheds were submitted on October 12, 2011, April 13, 2012, and October 11, 2012, respectively. Accordingly, the adjusted deadlines for completion of RMP projects are extended for Group 1 RMP projects by 980 days, with resulting deadlines of September 9, 2024 (for projects not associated with WWTP upgrades) and September 9, 2026 (for projects associated with WWTP upgrades); the completion deadlines for Group 2 RMP projects are extended by 794 days, with resulting deadlines of March 9, 2024 and March 9, 2026; and the completion deadlines for Group 3 RMP projects are extended by 615 days, with resulting deadlines of September 10, 2023 and September 9, 2025.

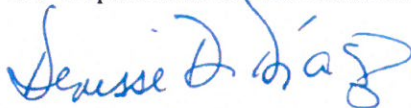
On January 16, 2014, LFUCG submitted a formal request to modify the deadlines in Section VII, Paragraph 15.G.(vii) of the CD. In response to EPA/KDEP requests for additional information regarding the proposed modification, LFUCG submitted additional information by letters of June 23, 2014, and September 12, 2014, including a revised 12 year project implementation schedule. The EPA and KDEP are considering the modification request. In the event that the modification is approved and entered by the Court after public comment, the EPA and KDEP will review the 12-year project implementation schedule submitted in connection with LFUCG's formal modification request for compliance with the modified CD. Alternatively, if the request to modify the deadlines is withdrawn by LFUCG, denied by the EPA and KDEP, or denied by order of the Court, the proposed implementation schedule will be deficient and, pursuant to Paragraph 36 of the CD, LFUCG shall submit a revised implementation schedule which meets the CD deadlines as adjusted through operation of Paragraph 34, as described above, within 60 days of withdrawal or denial of the modification request.

If you have questions regarding this letter, please contact Ms. Lynne Brosius of KDEP at (502) 564-3410, ext. 4892, or Ms. Laurie Jones of the EPA Region 4 at (404) 562-9201.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeffrey Cummins".

Jeffrey Cummins, Director
Division of Enforcement
KY Department for Environmental Protection

A handwritten signature in blue ink, appearing to read "Denisse D. Diaz".

Denisse D. Diaz, Chief
Clean Water Enforcement Branch
Water Protection Division