

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA

and

THE STATE OF INDIANA,

Plaintiffs,

v.

THE CITY OF FORT WAYNE,
INDIANA,

Defendant.

Civil Action No. 2:07-cv-00445-PPS-APR

AGREED CONSENT DECREE MODIFICATION

WHEREAS:

A. On April 1, 2008, the United States District Court for the Northern District of Indiana approved and entered a Consent Decree between the United States and State of Indiana (collectively "Plaintiffs") and the City of Fort Wayne, Indiana ("Fort Wayne" or "Defendant") in a case captioned *United States, et al. v. City of Fort Wayne*, Civil Action No. 2:07-cv-00445-PPS-APR (Doc. No. 4).

B. The objective of the Consent Decree is for Defendant to achieve and maintain full compliance with the Clean Water Act, applicable state law, and Fort Wayne's Current National Pollution Discharge Elimination System Permit issued pursuant to the Clean Water Act for Defendant's Wastewater Treatment Plant and Sewer System.

C. Paragraphs 14 and 16 of the Consent Decree require the Defendant to construct the Combined Sewer Overflow Control Measures set forth in Appendix 3 to the Consent Decree in accordance with the descriptions, Design Criteria, and schedule set forth in Appendix 3, and to achieve the specified Performance Criteria in accordance with the schedule set forth in Appendix 3.

D. In the course of implementing the Consent Decree, Fort Wayne has determined that certain of the Combined Sewer Overflow (“CSO”) Control Measures (requiring satellite storage and disinfection) that it had previously selected and agreed to are not ideal, and that better solutions exist for the affected CSOs. Fort Wayne has proposed, and the U.S. Environmental Protection Agency (“EPA”) and the Indian Department of Environmental Management (“IDEM”) have agreed to, an alternative approach for CSO Control Measures 7 and 8, and Fort Wayne is developing a proposed alternative approach for Control Measure 9 for consideration and, if appropriate, approval by, EPA and IDEM.

E. Paragraph 81 of the Consent Decree provides that any modification of the Consent Decree, including any attached appendices, may be made only by the written approval of all Parties. Where a modification also constitutes a “material change” to the Consent Decree, it shall be effective only upon approval by the Court. At least some of the modifications that the Parties propose herein constitute “material changes” and require judicial approval.

Changes to Appendices 3 and 4 concerning CSO Control Measures 7 and 8

F. EPA and IDEM have agreed to Defendant’s proposal to combine and modify CSO Control Measures 7 and 8. Instead of using remote storage and disinfection to control the overflow from CSO Outfalls 45, 51, 52, 53 and 68, covered by Control Measures 7 and 8, as originally specified by Consent Decree Appendix 3, Fort Wayne shall expand the St. Joseph

Interceptor to accommodate the flow from Outfalls 45, 51, 52, 53 and 68. This “St. Joseph Interceptor” Control Measure is designated as Control Measure 7 in the Revised Appendix 3 (which is attached in redlined format as Attachment 1). CSO Control Measure 8 has been eliminated.

G. This modification extends one interim deadline applicable to Outfall 52 (which had been in the prior Control Measure 8) by one year, from December 2014 to December 2015, but the completion schedule for all of the CSO Control Measures for the St. Joseph River CSO Outfalls (45, 51, 52, 53 and 68) will be considerably accelerated with the revised approach (Revised Control Measure 7 in Revised Appendix 3, Attachment 1 hereto). The deadline for completion will move up from December 2019 to December 2015.

H. The proposed modification to these Control Measures is required and expected to achieve the Performance Criteria originally specified in Appendix 3 for the St. Joseph Combined Sewer Overflows (CSOs) (one overflow per typical year) and is expected to provide water quality benefits that meet or exceed those that would be obtained by the measures that were originally required for these CSOs. Revised CSO Control Measure 7 also costs less.

I. A modification is also proposed for Paragraph 4.6.2 in Appendix 4 to the Consent Decree (attached in redlined form here to as Attachment 2) to reflect the earlier deadline by which the St. Joseph River Interceptor Control Measure will achieve final operation (by December 2015, instead of December 2019).

Changes to Appendices 3 and 4 and Consent Decree Section XXI.G/Paragraph 103
Concerning CSO Control Measure 9

J. The Parties also take this opportunity to build some flexibility into the Consent Decree for Control Measure 9, to allow Fort Wayne to propose for EPA and IDEM approval

a Control Measure other than those that are currently specified in Appendix 3. As entered by the Court, Appendix 3, footnote 8, provides:

The preferred CSO Control Measure for these CSOs is Satellite Disinfection based on the technology screening and selection process conducted by the City. The City will proceed as described in Section 4.6 of Appendix 4 to conduct a Satellite Disinfection Pilot Study if it ultimately elects to construct one or more Satellite Disinfection facilities. Alternatively, the City may elect to construct Satellite Storage facilities that will achieve the same Level of Control. The City will construct Satellite Storage facilities in lieu of Satellite Disinfection facilities if it comes to acquire, by January 1, 2010, the wastewater collection and treatment systems currently owned or operated by Utility Center, Inc. (a/k/a AquaSource or Aqua Indiana, Inc.) and connected to the Main Aboite and Midwest wastewater treatment facilities (for which the State has issued NPDES Permit Nos. IN0035378 and IN0042391).

K. EPA and IDEM have been in discussions with Fort Wayne concerning CSO Control Measure 9, and EPA and IDEM agree that satellite disinfection may not be the optimal remedy for the outfalls on the St. Marys and Maumee Rivers that are to be addressed by this Control Measure. The City may develop an alternative solution for these outfalls and has indicated that it may wish to propose a relief sewer approach (not dissimilar from the improved solution now set forth in proposed CSO Control Measure 7). However, the City's plans for a possible improved solution for CSO Control Measure 9 are not as developed as those for CSO Control Measures 7 and 8. Rather than specifying an alternative approach now, the Parties propose to allow the City the flexibility to propose its solution subject to EPA and IDEM approval, when it has been sufficiently developed. Any such proposed Alternative Control Measure must meet the Level of Control/Performance Criteria and Critical Milestones previously agreed to for Control Measure 9 (but see Paragraph P, below) and as currently set forth in proposed Revised Appendix 3 (Attachment 1 hereto). If the City fails to propose, or EPA does not approve, an Alternative Control Measure, the City remains obligated to

construct the Satellite Disinfection system that was originally required by the Consent Decree and that remains the specified CSO Control Measure for these CSOs in Revised Appendix 3 (Attachment 1).

L. Finally, footnote 8 of Appendix 3, as set forth above, specifies that the City may elect to construct Satellite Storage facilities in lieu of the Satellite Disinfection facilities, and that it would in fact construct them (“The City will construct . . .”) if the City acquired certain necessary property and facilities by January 1, 2010. EPA and IDEM do not currently believe that Satellite Storage is in fact an optimal approach for the St. Marys and Maumee Rivers CSOs, and, in any event, despite its efforts, the City was unable to timely acquire the necessary property and facilities. Thus, this aspect of the footnote is now moot.

M. Accordingly, the Parties propose to revise footnote 8 of Appendix 3 as follows (and as shown in Revised Appendix 3, Attachment 1 hereto):

The preferred CSO Control Measure for these CSOs is Satellite Disinfection based on the technology screening and selection process conducted by the City. The City will proceed as described in Section 4.6 of Appendix 4 to conduct a Satellite Disinfection Pilot Study if it ultimately elects to construct one or more Satellite Disinfection facilities. ~~Alternatively, the City may elect to construct Satellite Storage facilities that will achieve the same Level of Control. The City will construct Satellite Storage facilities in lieu of Satellite Disinfection facilities if it comes to acquire, by January 1, 2010, the wastewater collection and treatment systems currently owned or operated by Utility Center, Inc. (a/k/a AquaSource or Aqua Indiana, Inc.) and connected to the Main Aboite and Midwest wastewater treatment facilities (for which the State has issued NPDES Permit Nos. IN0035378 and IN0042391).~~ Alternatively, the City may pursue construction of an Alternative Control Measure, including one or more satellite storage or other facilities, in lieu of satellite disinfection facilities as the CSO Control Measure for Outfalls 54, 61 and/or 62. Any such proposed Alternative Control Measure must meet the Level of Control/Performance Criteria and Critical Milestones previously agreed to for Control Measure 9 and as currently set forth in this Revised Appendix 3. If Fort Wayne pursues the selection of other facilities in lieu of satellite disinfection it shall submit an Alternative Control Measure Proposal by December 15, 2016 for approval under Paragraph 103 of the Consent Decree. The Proposal shall include a full discussion of the justification for the selection.

N. The Parties also propose minor revisions to the Consent Decree to bring the Alternative Control Measure Proposal within the ambit of the existing EPA/IDEM approval process set forth in Section XXI.G (Paragraphs 103-109, pp. 47-49) the Decree (Doc. 4, pp. 50-52). Specifically, the Parties propose that the Paragraph heading for Section XXI.G and Paragraph 103 be revised as follows:

G. EPA and IDEM Approval of Submissions Pursuant to Sections XXI.A-F and Appendix 3, note 8

103. For all plans, reports, and other documents that Fort Wayne is required to submit to EPA and IDEM for approval in accordance with Sections XXI.A-F and Appendix 3, note 8, EPA and IDEM shall, in writing: (i) approve the submission

O. The Parties also agree to modify Paragraph 4.6.3.4.2 of Appendix 4, the Post Construction Monitoring Plan, to acknowledge that satellite disinfection at Outfalls 54, 61 and 62 may not occur, because Fort Wayne, as discussed above, may propose a Control Measure other than satellite disinfection. *See* Attachment 2, hereto.

Change to Appendix 3 to Correct Typographical Error Concerning Performance Criteria for CSO Control Measure 9

P. The Parties also take this opportunity to correct a longstanding typographical error in Appendix 3 concerning the Performance Criteria for CSO Control Measure 9, which addresses the Maumee River Outfalls (CSOs 54, 61 and 62). As correctly stated in footnote 7 of Appendix 3, “CSO Control Measure [9] will be designed to achieve Performance Criteria of 4 CSO events for the St. Marys and Maumee Rivers . . . in a ‘typical year.’” This was also discussed in the United States’ Motion to Enter Consent Decree and Memorandum in Support, which stated that CSO Control Measure 9 “is expected to reduce the number of CSOs from

roughly 60 per year currently to four per typical year on the Maumee [River]” Doc. 3, p. 8.

However, the Performance Criteria for Control Measure 9 set forth in the text box of Appendix 3 mistakenly calls for Outfalls 54, 61 and 62 to be controlled to one overflow in a typical year.

Therefore, the Parties have agreed that the Performance Criteria in the text box for Control Measure 9 should be corrected from one overflow event per typical year to four overflow events per typical year, as correctly set forth in footnote 7 and as previously explained to the Court.

This correction is shown in the Revised Appendix 3 (Attachment 1).

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The Parties hereto agree, and the Court by entering this Agreed Consent Decree Modification finds, that entry of this Modification is fair, reasonable, and in the public interest;

NOW, THEREFORE, upon consent of the Parties hereto, before the taking of testimony, and without any adjudication of issues of fact or law, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Consent Decree shall remain in full force and effect in accordance with its terms, except as follows:

a. The attached Revised Appendix 3 (Attachment 1) shall be substituted for the Appendix 3 currently filed with the Decree.

b. The attached Revised Appendix 4 (Attachment 2) shall be substituted for the Appendix 4 currently filed with the Decree.

c. Section XXI.G (Paragraphs 103-109, pp. 47-49) the Consent Decree (Doc. 4, pp. 50-52) shall be revised as follows:

G. EPA and IDEM Approval of Submissions Pursuant to Sections XXI.A-F and Appendix 3, note 8

103. For all plans, reports, and other documents that Fort Wayne is required to submit to EPA and IDEM for approval in accordance with Sections XXI.A-F and Appendix 3, note 8, EPA and IDEM shall, in writing: (i) approve the submission

2. This Agreement may be executed in counterparts.

3. This Agreed Consent Decree Modification 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. The United States reserves the right to withdraw or withhold its consent if the comments regarding this First Amendment to the Consent Decree disclose facts or considerations indicating that the Amendment is inappropriate, improper, or inadequate. Defendant hereby agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Consent Decree.

This First Amendment to the Consent Decree is entered and approved this 26th day of Jan., 2014.

s/Philip P. Simon

PHILIP P. SIMON
Chief Judge