

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 4:10-cv-0497-GAF
)	
)	
v.)	<u>UNOPPOSED MOTION TO ENTER</u>
)	<u>PROPOSED SECOND AMENDMENT</u>
)	<u>TO CONSENT DECREE</u>
CITY OF KANSAS CITY,)	
MISSOURI,)	
)	
Defendant.)	
_____)	

I. INTRODUCTION

Plaintiff, United States of America, on behalf of the U.S. Environmental Protection Agency (“EPA”), moves to enter the proposed Second Amendment to Consent Decree (“Proposed Amendment”) that was lodged in this case on November 9, 2017 (Docket No. 18). As required by 28 C.F.R. § 50.7, the United States published notice of the Proposed Amendment in the Federal Register on November 16, 2017, providing the public with an opportunity to submit comments to the Department of Justice during a thirty (30) day period. See 82 Fed. Reg. 53528 -53529 (November 16, 2017). The public comment period has expired and the United States received no comments during the public comment period.

As discussed below, the proposed Second Amendment to Consent Decree is fair, reasonable, and consistent with the Clean Water Act (“CWA”). By signing the proposed Second Amendment, Defendant City of Kansas City, Missouri (“City” or “KC”) agreed to its entry without further notice. See proposed Second Amendment to Consent Decree ¶ 6, Docket No. 18.

Accordingly, the United States respectfully requests that the Court sign the attached order and enter the proposed Second Amendment to Consent Decree as a final order of the Court.

A. Brief Factual History

On September 27, 2010, the District Court for the Western District of Missouri entered a Consent Decree between the United States, on behalf of the Environmental Protection Agency, and the City of Kansas City, Missouri (“KC” or “City”); the State of Missouri, at its request, participated as a “Non-aligned Party joined pursuant to 33 U.S.C. § 1319(e).”¹ The Consent Decree is intended to resolve KC’s unpermitted discharges of raw sewage from its sanitary sewer overflow system (“SSO”) and its combined storm water and sanitary sewer overflow system (“CSO”) by requiring the City to perform extensive modification and/or expansion of equipment and facilities to rehabilitate those systems, thereby reducing or eliminating the unpermitted discharges to area rivers and streams, manholes, basements, and other discharge points in the City. The Consent Decree also required KC to pay the United States a civil penalty and to fund a Supplemental Environmental Project (“SEP”) helping low-income residents connect their homes to the City’s sewer system.

The Consent Decree provides that “there shall be no material modification of this Consent Decree without written approval by all Parties and the Court.” Consent Decree, Section XXV (“Modification”). Previously, the Parties agreed to amend the Consent Decree to materially modify certain substantive requirements and implementation schedules in light of the recognition that intervening events might render certain Consent Decree requirements

¹ Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), states “[w]henver a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined

unnecessary. This Court entered the Parties' agreed-upon Amendment to the Consent Decree on January 9, 2015 (the "Amended Consent Decree")(Dkt. No. 17).

Since entry of the Amended Consent Decree, KC has continued to refine the design and implementation of the agreed-upon CSO and SSO control measures and the integration of those measures with other planned KC infrastructure improvements. As part of this process KC has determined, and the United States concurs, that additional modifications to the Amended Consent Decree will enhance the cost-effectiveness and environmental benefits of the contemplated control measures and other planned infrastructure improvements.

B. The Proposed Second Amendment to the Consent Decree

The proposed Second Amendment to the Consent Decree incorporates the specific changes KC has proposed to the scope and timing of six of the projects required by the Amended Consent Decree. These changes, which are detailed in the Second Amendment to the Consent Decree and the Declaration of Special Assistant City Manager Andy Shively filed in support thereof (Ex. 1 to Second Amended CD, "Shively Declaration"), are anticipated to provide the same or better performance as that contemplated by the Amended Consent Decree at lower cost than originally estimated. As discussed in the Shively Declaration, the proposed changes are prompted by facts and circumstances that became apparent to KC as it began to implement the CD and realized that the scope of certain tasks would have to be expanded to efficiently achieve the CD's objectives (see, e.g., Shively Decl. at ¶¶ 7.a., 7.b., 8.c.). Proposed scheduling changes are intended to accommodate the expanded scope of the project and efficiencies associated with the refined sequencing of tasks in light of the changed scope and the relationship of CD tasks to

as a party." Missouri often chooses to participate as a "Non-aligned Party" in Clean Water Act suits brought against

other KC infrastructure projects (id., at ¶ 7.b, c.). More specifically, the following modifications to the Amended Consent Decree are proposed:

1. Diversion Structure 068 to Blue River Relief Sewer (Appendix A at p.9). The original control measure included construction of 9,400 linear feet of 30 to 36-inch relief sewer from DS 068 (upstream of CSO Outfall 058) within the Middle Blue River Basin. The project start date was 2017, with a deadline for achievement of full operation by December 31, 2018. The control measure was intended to reduce the discharge from CSO Outfall 058 to one or less in a typical year, and overflow volume to 0.32 million gallons or less in a typical year. KCMO, after further engineering analysis during conceptual design, recognized that the original Control Measure would not meet the Outfall Control Plan (“OCP”) guidelines because the control measure would not provide enough capacity to sufficiently reduce discharges from CSO Outfall 058, and might also cause discharges at additional outfalls. The proposed Amendment instead provides for construction of an earthen storage basin, which will achieve the same or better performance level at a reduced cost (saving somewhere between \$2 and \$3 million). Because of the additional time necessary to obtain approvals for the site, and to complete design and construction of the basin, the proposed Amendment extends the deadline from December 31, 2018 to December 31, 2020.
2. Sewer Separation Diversion Structure 099 (Appendix A at p. 9). KCMO will separate the sewer in approximately 50 acres in the upstream drainage area to Diversion Structure 099 to eliminate typical year overflows. The project start date was 2016, with a deadline for achievement of full operation of December 31, 2017. The original project included the use of green infrastructure best management practices (BMPs) and/or new storm sewers for disconnection of a group of isolated storm inlets, and is not modified by the proposed Amendment. Design of the project is complete, however, KCMO has determined that it would be cost prohibitive to protect aging water mains in the project area from disruption and damage during construction, therefore, the proposed Amendment requires KCMO to replace approximately 3,500 linear feet of existing water mains in the areas where new storm sewers are being installed. In addition, Diversion Structure 099 is located within the project area for Outfall 063, and cannot be removed until the work within the Outfall 063 project area has been completed on December 31, 2018 (see below). Therefore, the proposed Amendment extends the deadline to December 31, 2018. The anticipated increase in scope to the 099 and 063 projects is \$13.8 million.
3. Outfall 063 Sewer Consolidation Project (Appendix A at p. 10). The original control measure included the construction of 12,000 linear feet of consolidation piping within the Middle Blue River Basin to reduce CSOs from Outfalls 063 (to zero) and 064 (two or less annually). The project start date is 2016, with a date of achievement of full

Missouri municipalities.

operation by December 31, 2017. Engineering analysis by KCMO revealed the scope of the project was underestimated (i.e. the OCP indicated that there were less than ten storm inlets to disconnect, but detailed field investigations identified approximately 120 inlets requiring disconnection). The increase in scope of the project will result in construction of over 21,000 linear feet of storm sewer to complete the disconnections from approximately 120 storm inlets required to meet the overflow reduction requirements required by the Consent Decree. Additionally, the project will construct approximately 34,000 linear feet of new water mains. While construction on this program began on time in November 2016, due to the significantly expanded scope and complexity, the proposed Amendment extends the deadline to December 31, 2018.

4. Gooseneck Creek Arch Gate and 4 MG Pump Station (Appendix A at p. 11). The original control measure included the construction of a 4 million gallons per day (“MGD”) pump station and installation of an automated gate in existing Gooseneck Arch Sewer to dewater the Gooseneck Creek Arch to the Blue River Interceptor Sewer following installation of the automated gate. This will provide 4 million gallons of storage in the existing Gooseneck Creek Arch and will reduce overflow events to twelve or less in a typical year. The project start date is 2017 and deadline for achievement of full operation is December 31, 2018. The original proposed locations of the gate structure and pump station were both situated on private property, and the property owner has denied KCMO access. Therefore, KCMO must relocate the control measures to another location. Therefore, the proposed Amendment provides an additional year to achieve full operation, extending the deadline to December 31, 2019.
5. NEID Diversion Structure 006 Sewer Separation (Appendix A at p. 10). The original control measure included sewer separation in approximately 260 acres and construction of 13,500 linear feet of new sanitary sewer, which would eliminate typical year overflows at DS 006. The project start date is 2016, with a deadline for achievement of full operation of December 31, 2017. The proposed Amendment expands the project to the installation of approximately 12,700 linear feet of new sanitary sewer ranging in sizes from 8-inch to 12-inch, a new 2 MGD pump station and approximately 1,150 linear feet of new force main, and separation on 20 private industrial properties. The pump station will handle sanitary flows during wet weather events when the interceptor is surcharged and gravity discharge from the new sewers is not possible. This alternative removes Diversion Structure 006 and eliminates all typical year overflows to the diversion structure. The proposed Amendment extends the deadline one year to December 31, 2018.
6. Round Grove Pump Station Project (Appendix A at p. 21). The original SSO control measure, included an increase to pumping capacity of the Round Grove Pump Station by 12 MGD. The project start date was 2016, and the deadline for achievement of full operation was December 31, 2018. The analyses conducted by KCMO indicate that the capacity expansion may not be required if sufficient inflow and infiltration (“I/I”) is removed from the Blue River Central and Round Grove Basins. Post construction flow

monitoring is planned for spring 2018 and then KCMO can determine the level of I/I reduction achieved in the Blue River Central Basin and the required increase in pump station capacity, if needed, by late 2018. If the results show that a capacity increase is required, pump station design work could commence in 2019, with construction completion by the end of 2021. Alternatively, KCMO could perform additional I/I reduction in the Round Grove and Blue River Central Basins in an effort to eliminate the need for a pump station capacity expansion. If the spring of 2018 is dry and insufficient flow data is collected to determine I/I reduction, monitoring may be required again in spring 2019. Therefore, the proposed Amendment extends the deadline to December 31, 2022 is requested.

II. LEGAL STANDARD FOR ENTRY OF A CONSENT DECREE

The standard of review for entering a settlement agreement is whether the proposed agreement is fair, reasonable, and consistent with applicable law. See United States v. Union Elec. Co., 132 F.3d 422, 430 (8th Cir. 1997). This limited standard of review reflects that “[t]he law strongly favors settlements. Courts should hospitably receive them As a practical matter, a remedy that everyone agrees to is a lot more likely to succeed than one to which the defendants must be dragged kicking and screaming.” Little Rock Sch. Dist. v. Pulaski, 921 F.2d 1371, 1383 (8th Cir. 1990). This is particularly true in disputes involving environmental violations “where voluntary compliance by the parties . . . will contribute significantly toward ultimate achievement of statutory goals.” Patterson v. Newspaper & Mail Deliverers’ Union of New York, 514 F. 2d 767, 771 (2d Cir. 1975).

“A consent decree is not reviewed as a judgment on the merits.” United States v. Metro. St. Louis Sewer Dist., 952 F.2d 1040, 1044 (8th Cir. 1992). Approval of a settlement is committed to the informed discretion of the trial court. United States v. BP Amoco Oil PLC, 277 F.3d 1012, 1019 (8th Cir. 2002); Union Elec. Co., 132 F.3d at 430. Courts, however, usually exercise this discretion in a limited and deferential manner. See United States v. Bliss, 133 F.R.D. 559, 567 (E.D. Mo. 1990) (“[A] court’s approval of a consent decree is discretionary, but

the Court's role is limited.”). For example, “[n]either the district court nor [the circuit] court is empowered to rewrite the settlement agreed upon by the parties. We may not delete, modify, or substitute certain provisions of the consent decree.” Officers for Justice v. Civil Serv. Comm’n and County of San Francisco, 688 F.2d 615, 630 (9th Cir. 1982). Further, a court determines “not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.” United States v. Cannons Eng’g Corp., 899 F.2d 79, 84 (1st Cir. 1990).

Finally, the balancing of competing interests affected by a proposed consent decree to which the United States is a party “must be left, in the first instance, to the discretion of the Attorney General.” United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981). Judicial deference to a settlement “is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field.” United States v. Akzo Coatings, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991). The Eighth Circuit has emphasized that “[w]e therefore exercise restraint on review - because we are deferring both to the EPA’s inherent experience and expertise in handling such matters and to the district court’s carefully-exercised informed discretion.” BP Amoco, 277 F.3d at 1019; see also Union Elec. Co. 132 F.3d at 430 (When considering a district court’s approval of a consent decree the reviewing court “must consider the EPA’s expertise in these issues.”). Thus, where an agency committed to the furtherance of the public interest has negotiated an agreement, there is a presumption of validity.

III. THE COURT SHOULD ENTER THE PROPOSED AMENDMENT TO THE CONSENT DECREE

The proposed Second Amendment satisfies the three-part test for district court approval of a settlement: it is fair, reasonable, and consistent with the Clean Water Act. Accordingly, the Court should enter the proposed Amendment.

A. The Proposed Second Amendment to the Consent Decree is Fair

To determine whether a proposed settlement is fair, courts look to factors indicating both procedural and substantive fairness. Cannons, 899 F.2d at 86. When analyzing the procedural fairness of a settlement, courts examine the “candor, openness, and bargaining balance” of the negotiation process. Id. The court must determine if “the settlement was the result of good faith arms length negotiations.” United States v. Hercules, Inc., 961 F.2d 796, 800 (8th Cir. 1992). Substantive fairness is indicated in the terms of the Consent Decree, namely that “a party should bear the cost of the harm for which it is legally responsible.” Cannons, 899 F.2d at 87.

In this case, the proposed Second Amendment to the Consent Decree is the result of good faith arms-length bargaining between the plaintiff and the defendant. Kansas City approached EPA seeking the change embodied in the proposed Second Amendment, and for nearly one year, attorneys and technical representatives from EPA and the Department of Justice engaged in negotiations with Kansas City. The City was represented by experienced counsel throughout this negotiation process. The negotiations involved sharing of technical information and exchanges of draft amendments, resulting in the mutually acceptable proposed Second Amendment to the Consent Decree currently before the Court. Those robust negotiations provide ample support for the good faith efforts of the parties.

As described above, the proposed Second Amendment is also substantively fair, as Kansas City is agreeing to install significantly more new sewer line and pumping capacity, providing substantially more protection against sewage overflows than previously agreed to. While the schedules for implementation of the modified tasks are being extended, the existing schedule for ultimate achievement of all Performance Criteria mandated by the Consent Decree is not altered by the proposed Second Amendment.

B. The Proposed Second Amendment to the Consent Decree is Reasonable.

The “reasonableness” of a settlement can be determined in light of the considered risks of litigation and whether it is technically adequate and compensates the public for the alleged violations. See Cannons, 899 F.2d at 90. In assessing reasonableness, the Court looks to “the decree’s likely efficaciousness as a vehicle for cleansing the environment.” Id. at 89. Applying this standard here, this Court should find that this proposed Second Amendment represents a reasonable adjustment to the injunctive requirements of the Consent Decree in light of the changed facts and circumstances surrounding those requirements.

The proposed Second Amendment reasonably allows the extension of some performance schedules in order to accommodate the implementation of control measures beyond those required by the Amended CD, and, in the case of the Round Grove Pump Station, deferring potentially unnecessary increased pumping capacity while awaiting the results of efforts to reduce inflow. Thus, the Second Amended CD embodies a reasoned attempt to maximize environmental benefit in an efficient and cost-effective manner.

C. The Proposed Second Amendment is Consistent With the Clean Water Act

A primary purpose of the Clean Water Act is “is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. By providing KC ample time to expand elements of the project as warranted to ensure sufficient capacity to manage sanitary and storm water flows and to evaluate the effectiveness of its other water management efforts, the proposed Second Amendment is consistent with the Clean Water Act’s objectives to restore and maintain the integrity of the Nation’s waters.

IV. CONCLUSION

For the reasons explained above, the United States respectfully requests that the Court grant this Unopposed Motion and enter the proposed Second Amendment to the Consent Decree as a final order of the Court. Kansas City consents to entry of this proposed Second Amendment. Proposed Second Amendment ¶ 6. A proposed order granting this Motion is being electronically forwarded to chambers this date for the Court’s signature.

Dated: January 5, 2018

RESPECTFULLY SUBMITTED,

JEFFREY WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ FREDERICK PHILLIPS
FREDERICK PHILLIPS, D.C. Bar 433729
Senior Trial Attorney
United States Department of Justice
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0439
Email: frederick.phillips@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5TH day of January, 2018, I filed and served the foregoing UNOPPOSED MOTION TO ENTER PROPOSED SECOND AMENDMENT TO CONSENT DECREE electronically through the CM/ECF system.

/s/ Frederick Phillips
FREDERICK PHILLIPS
Senior Trial Attorney
United States Department of Justice
Environmental Enforcement Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
Telephone: (202) 305-0439
Email: frederick.phillips@usdoj.gov