IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA, and the STATE OF GEORGIA, Plaintiffs, v. DEKALB COUNTY, GEORGIA, Defendant.	CIVIL ACTION NO. 1:10-cv-04039-SDG

DEKALB COUNTY'S MOTION TO ENTER REVISED CONSENT DECREE MODIFICATION AND BRIEF IN SUPPORT OF MOTIONS TO ENTER SAME

Defendant DeKalb County (the "County") respectfully moves this Court to enter the proposed Consent Decree Modification lodged on October 21, 2020 (Dkt. 61), as revised to fix subparagraph numbering (Dkt. 72-2), by and between the County and the Plaintiffs, the United States of America and the State of Georgia (the "Plaintiffs"). In support of this motion and Plaintiffs' Motion to Enter Revised Modification to Consent Decree, filed August 3, 2021 (Dkt. 72), the County shows the Court as follows:

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

This case arises out of an enforcement action brought by Plaintiffs against the County under the Clean Water Act, 33 U.S.C. § 1251 *et seq*. ("CWA"), and the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20 *et seq*. ("GWQCA") related to alleged sanitary sewer overflows ("SSOs") from the County's wastewater collection and transmission system ("WCTS," sometimes "sanitary sewer system" or "system"), which collects and transmits sewage to one of the County's two wastewater treatment plants ("WWTPs") or to collection and transmission systems operated by other jurisdictions. (Dkt. 1 at ¶¶ 12-17, 25, 28-31.)

I. In December 2011, this Court Entered a Consent Decree.

Plaintiffs, represented by the United States Environmental Protection Agency ("EPA") and the Georgia Environmental Protection Division ("EPD"), commenced an enforcement action in 2009, after which Plaintiffs and the County (collectively, the "Parties") worked for over 22 months to negotiate a settlement.

On December 13, 2010, Plaintiffs initiated this action against the County seeking injunctive relief and civil penalties for alleged violations of the CWA and the GWQCA. (Dkt. 1.) Simultaneously, Plaintiffs lodged the pre-negotiated settlement—the Consent Decree—with this Court to resolve the allegations raised in the Complaint. (Dkt. 3.) After soliciting public comments, the Parties moved for

entry of the Consent Decree. (Dkt. 13; 14.) On December 20, 2011, after considering objections filed by two citizen group intervenors and the public comments, this Court approved and entered the Consent Decree, finding that it was "fair, reasonable, lawful, and in accord with public policy and the public interest." (Dkt. 38 at 37.)

II. DeKalb County Has Worked to Comply with the Consent Decree; However, the Parties Agree that Certain Modifications Are Warranted.

The County has acknowledged that a number of contributing factors limited and delayed its performance in the early years of the Consent Decree. (Dkt. 72-2 at 2.)[1] Nonetheless, the County has made significant strides towards improving its WCTS and complying with the Consent Decree. The Parties agree, however, that certain modifications are now warranted. (*See* Dkt. 72-1 at 7, 20-21.)

First, through implementation of the Consent Decree, the County has learned that its sanitary sewer system has more capacity-related limitations than initially anticipated. As a result, the County has learned that it will need to expend significantly more resources than initially anticipated and undertake more complex

[1] Citations to the Consent Decree Modification are to the revised version filed with Plaintiffs' Motion to Enter on August 3, 2021 (Dkt. 72-2) and not to the version lodged on October 21, 2020 (Dkt. 61-1).

rehabilitation projects that are expected to take several years to plan, fund, and complete.[2]

Second, the context surrounding the implementation of the Consent Decree has changed. The original Consent Decree was negotiated during a period of economic downturn. In recent years, however, the County has experienced significant population and economic growth.[3] This growth has presented new challenges for the County in assessing requests for new connections or increases in flow to its sanitary sewer system associated with development. For example, from 2012 until 2015, the County *annually* received between 14 and 19 requests for

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[2] The County has estimated that it will cost over $1,000,000,000 to implement the requirements of the Consent Decree Modification, including $750,000,000 in capital project costs and several hundred million dollars in Consent-Decree-related operations, maintenance, and management costs. (*See* Declaration of Zachary L. Williams, Chief Operating Officer and Executive Assistant of DeKalb County ("Williams Decl.") at ¶ 14, attached hereto as Exhibit A.)

[3] *See, e.g.,* Atlanta Regional Council ("ARC"), *DeKalb County Profile*, available at https://atlantaregional.org/atlanta-region/county-profiles/dekalb-county/ (last visited Aug. 17, 2021). In 2008, the County's population was 685,646 and had remained relatively steady since 2000 (where it was 668,271). (*Id.*) The ARC predicts that DeKalb County's population will increase to 758,230 by the end of 2020 and to 1,012,000 by the end of 2050. *See* ARC, *Atlanta Region Population Estimates*, available at https://atlantaregional.org/atlantaregion/population-forecasts-estimates/atlanta-region-population-estimates/ (last visited Aug. 17, 2021); ARC, *ARC Series 16 Forecast Dashboard*, available at https://33n.atlantaregional.com/arc-series-16-forecast (last visited on Aug. 17, 2021).

capacity from developers and homeowners. (Williams Decl. at ¶ 15.) In 2017, however, the County began to see a significant and sustained increase in new connection requests, receiving 571 in 2017, 626 in 2018, 674 in 2019, and 441 in 2020. (*Id.*) The extent and location of this growth was unanticipated at the time the Parties initially negotiated the Consent Decree.

III. The Parties Have Negotiated a Consent Decree Modification and Solicited Public Comments.

A. Pursuant to the Terms of the Consent Decree, the Parties Negotiated a Modification for the Court's Approval.

The Consent Decree allows the Parties to modify the Consent Decree by a subsequent written agreement, provided that material modifications (as determined by the Parties) must also be approved by the Court. (Dkt. 39 at ¶ 105.) In 2019, the County requested that the timeframe for assessment and rehabilitation of priority areas[4] established in accordance with the Consent Decree be extended for "good cause."[5] The County also requested a modification to accommodate use of a

[4] The Consent Decree included a Continuing Sewer Assessment and Rehabilitation Program, which included a Priority Areas Sewer Assessment Program ("PASARP"), which required assessment and rehabilitation of priority areas by June 20, 2020. (Dkt. 39 at ¶¶ 34-35.)

[5] *See* Consent Decree and Final Judgment (Dkt. 39) at ¶ 35(i) (Dec. 20, 2011) (expressly stating that this timeline could be extended for "good cause").

dynamic hydraulic model in connection with a Capacity Assurance Program ("CAP"). The Parties met in April 2019 and continued to negotiate through July 2020, when an agreement in principle was reached.

The Modification requires the County to pay a civil penalty of $1,047,000 divided equally to the Plaintiffs (Dkt. 72-2 at ¶ 3), and it includes the following key terms:

- **PASARP Timeframe and New Interim Milestones.** Extends the timeframe for completing rehabilitation of priority areas to December 20, 2027, and imposes enforceable annual interim milestones to ensure consistent progress towards priority area rehabilitation.

- **Dynamic Model and Capacity Certifications.** Requires the use of a dynamic model (which has already been peer-reviewed and submitted to Plaintiffs for review) in place of a static model. The dynamic model would be used to certify adequate collection and transmission capacity prior to authorizing new connections (and increased flows) to the WCTS in accordance with the CAP.

- **Capacity Assurance Program (or "CAP").** Enables the County to ensure the WCTS has sufficient capacity to collect, convey, and treat all wastewater generated by the system's customers. It will also help the County better anticipate and provide for prospective new sewer connections and track growth to support short-term and long-term planning. Importantly, it allows the County to authorize new connections using capacity "credits," under certain circumstances. Credits are generated by conducting certain capacity improvement projects and can be banked and applied to offset additional capacity needed for new developments/connections.

- **Priority Fix List ("PFL").** Requires implementation of a PFL Program, which requires the County to prioritize fixing locations in the system that experience repeat SSOs.

- **Reporting and Stipulated Penalty.** Requires enhanced and more onerous documentation and reporting to better inform the public and EPA/EPD of the County's progress. It also increases the stipulated penalties the County will face for Spills,[6] missing various timelines, reporting and documentation issues, and for authorizing new connections in violation of the Modification.

(Dkt. 72-2.)

On October 21, 2020, Plaintiffs filed a Notice of Lodging of Modification to 2011 Consent Decree Subject to Public Comment (Dkt. 61) with this Court.

B. The Parties Have Received and Considered Public Comments.

As required, Plaintiffs sought, received, and considered public comments filed in connection with the Modification. *See* 28 C.F.R. § 50.7; *see also* Notice of Lodging of Proposed Modification to Consent Decree Under the Clean Water Act, 85 Fed. Reg. 68,094, 68094 (Oct. 27, 2020). Plaintiffs now move this Court to enter the Modification, finding that the comments did not disclose facts or considerations indicating that the Modification is inappropriate, improper or inadequate. (Dkt. 72-1 at 24-25.)

While it is not obligated to do so, the County has also considered the comments and is pleased to file its detailed responses to the public comments and questions as Exhibit B to this Motion. The County welcomes and appreciates

[6] "Spills" are SSOs that reach State waters.

comments and engagement from citizens. From the County's perspective, it is critical for its citizens to understand the scope and complexity of the work committed to under the Modification and for them to have confidence in their local government and its leadership. Having considered the public comments, the County is confident that the Modification exceeds the legal requirements for judicial entry of settlements of civil enforcement actions under the CWA and is in the public interest of the citizens of DeKalb County.

ARGUMENT AND CITATION OF AUTHORITY

I. The Standard of Review Requires that the Consent Decree Modification Be Approved if It Is Fair, Reasonable, and Resolves the Matter Consistent with the Public Interest.

A consent decree should be approved if it is "fair and reasonable, and resolves the controversy in a manner consistent with the public interest." *United States v. Georgia-Pacific Corp.*, 960 F. Supp. 298, 299 (N.D. Ga. 1996) (citing *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984)); *see also United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) (explaining that the district court must be satisfied the consent decree is fundamentally fair, adequate and reasonable, and in conformity with applicable laws); *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991) (holding that review of consent decree is for

"fairness, reasonableness and consistency with the statute"); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (reviewing whether consent decree was "fair, reasonable, and faithful to the objectives of the governing statute"); *United States v. Metro. St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992) (Same); *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 113 (2d Cir. 1992) (reviewing whether consent decree was "fair, reasonable and lawful").

Thus, "[d]istrict courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy." *Stovall v. City of Cocoa*, 117 F.3d 1238, 1240 (11th Cir. 1997); *see also United States v. Hooker Chem. & Plastics Corp.*, 607 F. Supp. 1052, 1057 (W.D.N.Y. 1985), *aff'd*, 776 F.2d 410 (2d Cir. 1985) ("[T]he scope of the court's review of the proposed judgment is not unlimited. The court's function is not to substitute its own judgment for that of the parties to the decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy.") (internal quotation omitted).

There is a presumption of validity for consent decrees that have been negotiated by an agency committed to the furtherance of the public interest:

> Entry of the Decree is supported by a long line of caselaw which requires deference to a federal agency's discretion in effecting a settlement in an area of complex legal and factual issues, and to the

> sophistication of the parties who negotiated in good faith to achieve an expeditious resolution of the United States' claims.

Georgia-Pacific Corp., 960 F. Supp. at 301; *see also United States v. Bay Area Battery*, 895 F. Supp. 1524, 1528 (N.D. Fla. 1995) ("When, as in this case, an agency committed to furthering the public interest has negotiated a decree, there is a presumption of validity."); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 681 (D.N.J. 1989) ("Indeed, where a settlement is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of Justice . . . a presumption of validity attaches to that agreement.").

In this case, both federal and state agencies with the technical expertise and the statutory mandate to enforce the relevant laws negotiated with the County to produce a Modification that is fair and reasonable, and that resolves the controversy in a manner consistent with the public interest.

II. The Consent Decree Modification Is Fair.

A court can determine fairness of a consent decree by examining whether "it is the product of good-faith negotiations, reflects the opinions of experienced counsel, and takes into account the possible risks involved in the litigation if the settlement is not approved." *Georgia-Pacific Corp.*, 960 F. Supp. at 299 (citing

Hooker Chem. & Plastics Corp., 607 F. Supp. at 1057). The decree must "reflect[] the parties' careful and informed assessment of the relative merits of each other's claims while taking into consideration the costs and risks associated with litigating a massive case such as this." *Id.*

A. The Modification Is the Product of Good-Faith Negotiations.

The parties negotiated the Modification for a period of more than 16 months. All parties were represented by experienced and able counsel acting for the benefit of their clients and their clients' constituents. Indeed, EPA and EPD have primary enforcement responsibilities under the CWA and the GWQCA, as well as the National Pollutant Discharge Elimination System ("NPDES") permitting program, *see* 33 U.S.C. § 1342 (establishing the NPDES permitting program for authorizing discharges of pollutants to waters of the U.S.), and they act on behalf of and for the benefit of all citizens. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002) ("Like most states, Georgia administers the NPDES program within its borders subject to EPA oversight of the state's permit-issuing procedures."); *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007) ("The CWA gives primary enforcement authority to the EPA and state enforcement agencies."); *EPA v. City of Green Forest*, 921 F.2d 1394, 1404 (8th Cir. 1990) ("The EPA is charged with enforcing the CWA on behalf of all citizens."); *Franklin Cnty. v. Fieldale Farms*

Corp., 270 Ga. 272, 275 (1998) ("The [GWQCA] gives state government the responsibility for establishing and maintaining water quality."). The County, represented by experienced counsel and technical experts, acted on behalf of all its citizens to negotiate a modification to the Consent Decree that would best address the issues confronting the County.

The 16 months of negotiations were at arm's length, and the Modification is a product of these negotiations and the good faith efforts of the parties to resolve Plaintiffs' allegations in a manner consistent with the CWA and for the benefit of both the citizens of DeKalb County and the State.

B. The Modification Takes Into Account the Possible Litigation Risks.

Plaintiffs' Complaint is based on a complex set of facts in a complex area of the law, and it presents a number of litigation risks for each side. The Consent Decree avoided litigation a decade ago; if the Modification is not entered, the Parties may be forced into disputes and litigation over, among other things, the extent to which the County has complied with the terms of the Consent Decree and/or is entitled to certain relief from it.[7] Not only will that litigation be costly, but it could

[7] The County disputes any liability, and, as noted in the Consent Decree, "does not admit any liability to the United States or the State arising out of the transactions or occurrences alleged in the Complaint." (Dkt. 3-1 at 8.) Accordingly, the County's position in negotiations and its support for entry of the Consent Decree and

further delay rehabilitation of the County's WCTS. The Modification provides the County with an aggressive, yet feasible schedule to complete the necessary projects to improve its WCTS, while avoiding litigation and exposure to heavy financial penalties that may divert critical resources from the County as it attempts to rehabilitate its WCTS.

By way of example, the County and Plaintiffs disagree on the appropriate level of reserved system capacity—established by the definition of "surcharge condition"—when certifying new connections. (*See* Exhibit B at 36-40.) The County believes—based on its technical assessments—that its system can handle higher pressures associated with higher flow levels within the pipes. Thus, the County believes it should be able to use the full capacity of its WCTS infrastructure. Plaintiffs disagree and insist that the County's system may be damaged without a significant margin of safety (*i.e.*, unused pipe and infrastructure capacity) to protect the system from damage. This is a highly technical issue, and its resolution has enormous consequences for the County. Litigating this and other underlying technical issues is daunting.

Modification do not arise from passive acceptance of the Plaintiffs' allegations, but rather from a thorough and calculated analysis of the costs and benefits of settlement versus litigation, as well as a strong desire to act quickly and decisively in the public interest.

Perhaps more significantly, the County vigorously disputes Plaintiffs' authority to regulate "surcharge conditions" in the first place (*i.e.*, where the system is under significant pressure, but no spills occur). Plaintiffs assert that they have broad authority based on "proper operation and maintenance" ("O&M") provisions in the County's NPDES permits, which were a basis for Plaintiffs' Complaint. (Dkt. 1 at ¶¶ 46-53.) The County is confident this Court would agree with its position if these issues were litigated and suspects Plaintiffs may also be confident in their legal positions. Rather than litigating these and other issues, however, the Parties chose to settle all claims and move forward expeditiously with improvements to the County's system—which no one disputes are warranted and in the public interest.

Litigating the facts and statutory and regulatory nuances of Plaintiffs' allegations would significantly detract from the overriding goal of Plaintiffs' enforcement action. And the Court's rejection of this proposed settlement would likely lead to complex disputes and litigation involving extensive discovery, motions practice, and a considerable amount of the various governments' and the Court's attention. At the same time, rejection of the Modification could delay implementation of remedial measures required by it, which the County believes are far broader and more comprehensive than the relief established in the Consent Decree or than Plaintiffs might be able to obtain through litigation. Accordingly,

although it disputes Plaintiffs' technical and legal positions, the County has opted to settle with Plaintiffs and to spend its resources to improve its WCTS and its management and operation of the system, which will benefit the environment.

III. The Consent Decree Modification Is Reasonable.

A court can determine reasonableness of a consent decree by examining whether "it is technically adequate and adequately compensates the public for the alleged violations." *Georgia-Pacific Corp.*, 960 F. Supp at 299. The Modification is technically adequate and adequately compensates the public for the alleged violations. Consequently, it should be approved.

A. The Modification Is Technically Adequate.

Two of the most beneficial technical aspects of the Modification from the County's perspective are the PASARP extension and the CAP. Each, considered in isolation, is technically adequate. More broadly, however, the Modification imposes several new and more onerous requirements, which taken collectively underscore the technical adequacy of the Modification on the whole.

1. The Modification Will Provide a Reasonable Extension of Time to Complete the Most Complex, Major Projects.

The PASARP required the County to assess and rehabilitate all priority areas by June 20, 2020. The Modification would extend this timeframe by 7.5 years to December 20, 2027.

The County has acknowledged an initial slow start to Consent Decree implementation, which, to some extent, impacted its timeline for completing the most onerous WCTS assessment and rehabilitation work under the PASARP. However, the primary justifications for the PASARP extension are two-fold.

First, through implementing the Consent Decree, the County obtained a better understanding of its WCTS and discovered that the extent of capacity limitations—which typically require much more extensive capital projects to address—was more severe than initially understood. Thus, it learned that the scope of the work required under the PASARP was more than initially expected.

Second, the Modification would add a new Priority Fix List ("PFL") program. This is a significant and demanding program, requiring the County to prioritize fixing repeat SSO locations within set timeframes. The County believes this is an unprecedented requirement. Without a doubt, it alone significantly expands the scope of work that the County would be required to accomplish.

In light of these expansions in the scope of the injunctive relief, the PASARP extension is reasonable and technically justified. Further, the Modification adds new annual interim milestones and enhanced reporting to ensure that the PASARP work is on schedule and to provide the public with transparency with respect to the County's progress. These safeguards, combined with the new requirement to timely

fix repeat SSO locations (*i.e.*, the PFL Program), ensure that the Modification exceeds the requisite standard for being technically adequate.

2. The Modification Will Allow the County to Accommodate New Development and Economic Growth.

Because the County believed that its WCTS did not have extensive capacity limitations, the original Consent Decree, unlike most (if not all) similar municipal SSO consent decrees,[8] did not include a capacity assurance program (or "CAP"). The CAP allows the County to incentivize capacity projects and apply those capacity gains to accommodate new connections and economic growth in a balanced way. The CAP includes trade ratios to ensure system capacity increases associated with projects are more than needed to offset increased flows associated new connections. In this way, the CAP provides the County with flexibility to allow economic growth, while providing a margin of safety to protect the WCTS and the environment. It is a common and encouraged program in similar civil enforcements; one that the County initially and mistakenly believed was unwarranted.

[8] Capacity Assurance Programs are routinely included in consent decrees related to sanitary sewer systems to ensure that a WCTS operator is able to adequately measure its capacity and approve requests for new connections or increases in flow. *See, e.g.*, Consent Decree, *United States v. City of Chattanooga*, Case No. 1:10-CV-281 (E.D. Tenn. Apr. 24, 2013); Consent Decree, *United States v. City of Jackson*, Case No. 3-12-cv-790 (S.D. Miss. Mar. 1, 2013).

The County began to realize the WCTS's capacity-limitations at about the same time its static hydraulic model was approved and deployed to approve new connections and conduct sanitary sewer system assessments. This resulted in significant limitations on the County's ability to certify capacity for new development in some parts of the County. These events corresponded with a rapid acceleration in economic growth, where the County saw demands for development in previously unanticipated areas.

The proposed CAP, implemented in connection with the County's dynamic hydraulic model, would alleviate some of the unnecessary constraints on economic development and provide the County with an important tool to balance broader public interests, including the environment, public health, and economic and social wellbeing, while incentivizing capacity relief projects.

3. The Modification Will Impose Significant New Requirements.

The PASARP extension and the implementation of a CAP greatly benefit the County. With the Modification, the County can pursue fixing its system the right way, while having the flexibility to certify certain new connections. These public benefits have not been challenged by public commenters. But the Modification also imposes new more onerous requirements on the County. For example, it requires the County to implement the expansive new PFL Program and more detailed and

expanded reporting and record-keeping obligations. It also establishes more severe stipulated penalties. These targeted safeguards are designed to ensure consistent progress towards achieving the goals of the Consent Decree and the CWA.

B. The Modification Adequately Compensates the Public.

The Modification requires the County to pay a civil penalty in the amount of $1,047,000. (Dkt. 72-2 at ¶ 3.) The penalty was calculated by and is consistent with the United States' long-standing penalty policy. United States Environmental Protection Agency, *Interim Clean Water Act Settlement Penalty Policy,* (March 1995). Under that policy's "National Municipal Litigation Consideration," a municipality's penalty is based on an assessment of four factors: (i) the impact of the alleged violations on human health and the environment; (ii) the economic benefit to the County for allegedly not complying with requirements of the Act; (iii) the municipalities' service population; and (iv) the duration of the alleged violations. *Id.* at 17-20. The Consent Decree Modification's proposed civil penalty is calculated consistent with this policy for each of these factors.

Further, the County estimates that it will cost over $1,000,000,000 to comply with the injunctive relief required by the Modification. Accordingly, the Modification is technically adequate and adequately compensates the public for the alleged violations.

IV. The Modification Resolves the Controversy in a Manner Consistent with the Statutory Schemes and the Public Interest.

A. The Modification Is Consistent with the Objectives of the CWA and GWQCA.

The chief objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. The provisions of the Modification, as outlined above, are completely supportive of the objectives of the CWA. The Modification's provisions are protective of the health and welfare of the County's citizens and establish programs to ensure continuous compliance with the CWA and the GWQCA. Approval and execution of the Modification will serve to ensure prompt and effective compliance with these statutory schemes.

B. The Consent Decree Modification Addresses Public Concern.

In addition to compliance with the relevant statutory scheme, a court may look to the public interest as expressed in comments on proposed consent decrees.

> The final step in the Court's inquiry is the evaluation of public comments on the Consent Decree. In this process, the function of a reviewing Court is not to substitute its judgment for that of the parties to the decree, but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy.

Georgia-Pacific Corp., 960 F. Supp at 299-300. DOJ solicited public comments on the proposed settlement and received 39 comments from various entities and

members of the public. (*See* Dkt. 72-3; 72-4). Twelve of the most substantive comments supported the entry of the Modification, representing a broad range of interests. These included comments from several County Commissioners, the Mayor of Stonecrest, the DeKalb Chamber of Commerce, and the DeKalb County Branch of the NAACP. The County agrees with these commenters that Modification is in the public interest.

More importantly, having carefully considered the more critical comments, the County is confident that the Modification reflects sound public policy. Several commenters suggested that the Modification should require more oversight and transparency. The Modification imposes significantly increased reporting requirements (Dkt. 72-2 at ¶¶ 9-10), as well as interim milestones to ensure longer term projects remain on track (*id.* at ¶ 11). And the Consent Decree gives EPA/EPD broad oversight and audit authority. While some commenters may prefer more oversight and transparency, the Modification provides a fair and reasonable balance with respect to these public concerns and reflects the basic fact that the County is ultimately responsible for fixing, operating, and maintaining the WCTS, under the Modification and beyond.

A few comments express concern that the Modification disadvantages minority and low-income populations. (*See, e.g.,* Dkt. 72-3 at 62-63; 72-4 at 17-18.)

The Modification, however, particularly with the inclusion of the CAP, allows the County the ability to better serve its disadvantaged populations. These populations have suffered the worst from the County's historical SSOs. And, because much of the major, long-term work is located near these populations, they will bear a disproportionate burden in connection with WCTS rehabilitation (*e.g.*, traffic disruptions, construction noise). This work must happen. But with the Modification, specifically the CAP, the County will be able to incentivize capacity projects benefiting these areas and use "credits" from those projects to promote economic and social development much sooner. Without the Modification, because these areas correspond in large part with the capacity limited areas in the County, the County could not authorize new housing, businesses, or even grocery stores in these areas until some of the most significant work is completed. The more affluent portions of the County, with or without the Modification, would not face similar development constraints.

The County is pleased to respond to all of the public comments and questions—including those summarized above—in extensive detail in Exhibit B. In these responses, the County addresses several common criticisms and misunderstandings, as well as the ten pages of technical comments submitted by the South River Watershed Alliance.

C. Enforcement of the Consent Decree Without Modification Would Be Detrimental to the Public Interest.

Implementation of the Consent Decree without the Modification would not serve the public interest. As set forth in Section II(B), *supra*, without the Modification, the Parties may resort to disputes and litigation, rather than focusing on fixing the WCTS in an orderly and feasible manner. But there are also broader and more significant public interest detriments.

First, the public benefits that the Plaintiffs fought to include in the Modification would not apply. The County would not be subject to minimum linear footage interim milestones for its most complex work; would not be required to enhance its documentation, record-keeping, and reporting; would not be subject to broader and more severe stipulated penalties; would not be required to prioritize fixing repeat SSO locations within set timeframes; and would not pay the civil penalty to the Plaintiffs.

Second, the County would be facing daily stipulated penalties for not meeting the PASARP timeframe, which was established in 2010 when the Parties were unaware of the extent of capacity limitations facing the system. This is particularly untenable because all Parties now agree that fixing the system the right way will take another 7.5 (now 6.5) years and have established a more feasible schedule. *See United States v. City of Portsmouth,* 06-CV-282-PB, 2016 WL 5477571, at *5

(D.N.H. Sept. 28, 2016). Under the terms of the Modification, the County will be able to implement more permanent and long-term solutions to address the significant capacity-related issues in its WCTS.

Third, the County would not be able to certify new connections in various parts of the County, including disproportionately low-income and minority areas, thereby unnecessarily denying those areas of economic growth.

CONCLUSION

For the foregoing reasons, the County respectfully requests that this Court approve and enter the Consent Decree Modification lodged with this Court on October 21, 2020 and as revised on August 3, 2021.

Respectfully submitted this 17th day of August, 2021.

{signature on following page}

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LOCAL RULE 7.1D CERTIFICATION

I hereby certify that the within and foregoing DEKALB COUNTY'S MOTION TO MODIFY CONSENT DECREE AND BRIEF IN SUPPORT OF MOTION TO MODIFY CONSENT DECREE was prepared using Times New Roman font (14 point), in compliance with Local Rule 5.1B.

This 17th day of August, 2021.

/s/ Lindsey B. Mann
Lindsey B. Mann

CERTIFICATE OF SERVICE

I hereby certify that the foregoing DEKALB COUNTY'S MOTION TO ENTER REVISED CONSENT DECREE MODIFICATION AND BRIEF IN SUPPORT OF MOTIONS TO ENTER SAME was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This 17th day of August, 2021.

/s/ Lindsey B. Mann
Lindsey B. Mann