

July 17, 2023

**VIA EMAIL & EXPRESS MAIL DELIVERY**

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**Re: City of Akron's Statement of Position in Support of Formal Dispute Resolution  
*United States v. City of Akron, Ohio, et al.*, S.D. Ohio No. 5:09-cv-00272**

Dear Sir or Madam:

In accordance with Section XIV, Paragraph 72.A, of the January 17, 2014 Consent Decree entered into between the United States of America ("United States"), the State of Ohio ("Ohio")

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and the City of Akron (“Akron”), Akron hereby serves the following Statement of Position to invoke formal dispute resolution procedures. The Statement of Position concerns the Parties’ dispute regarding Akron’s proposed modification of Row 11.a in Akron’s Long Term Control Plan Update (“LTCP Update”) to eliminate the requirement to install the ACTIFLO Ballasted Flocculation Unit, also referenced as Enhanced High Rate Treatment (the “EHRT”) and substitute certain alternative projects in lieu of the EHRT.

Pursuant to Paragraph 72.A and without waiving any rights, privileges or objections, this Statement is being served along with a production of factual data and supporting documentation that is contained on the thumb drive that is enclosed with this letter. An index of the documents on the thumb drive is enclosed as Appendix A.

Please be advised that Akron hereby asserts claims of privilege over certain attorney/client privilege documents and/or work product; confidential settlement communications and meeting materials that fall within the settlement privilege recognized by the Sixth Circuit in *Goodyear Tire & Rubber Company v. Chiles Power Supply Inc.*, 332 F.3d 976, 981 (6th Cir. 2003), and similar controlling authority; and Confidential Business Information, pursuant to 40 C.F.R. Part 2, Subpart B and/or O.R.C. § 149.433 for certain documents exempt as public records that contain sensitive financial information and/or information relating to infrastructure matters. Accordingly, Akron requests that the following documents be maintained as confidential as indicated below:

<b>Bates Nos.</b>	<b>Basis for Claim of Privilege or Confidentiality</b>
EHRT_000001-1038, 6055-6143	Privileged and Confidential Settlement Communications
EHRT_001039-1623	Privileged and Confidential Settlement Meeting Materials
EHRT 006171-6174	Attorney/Client and/or Work Product Documents
EHRT 003244-3271	Confidential Sensitive Financial Information
EHRT 003272-3278	Confidential Sensitive Infrastructure Documents

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In accordance with Paragraph 95 of the Consent Decree, Appendix C contains a detailed listing of materials that are claimed as privileged and confidential.

Sincerely,

ROETZEL & ANDRESS, LPA

A handwritten signature in black ink, appearing to read "Terrence S. Finn". The signature is fluid and cursive, with a prominent initial "T" and "F".

Terrence S. Finn

cc: E. Belfance  
B. Bremer  
P. Gsellman  
C. Ludle  
B. Cosgrove  
S. Ricci  
B. Fischbein  
M. Navarre  
A. Wooton-Hertlein  
(all via email)

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**THE CITY OF AKRON'S STATEMENT OF POSITION  
IN SUPPORT OF FORMAL DISPUTE RESOLUTION**

**I. INTRODUCTION**

Akron has incurred close to **one billion dollars** and devoted significant resources towards implementing the numerous combined sewer overflow (“CSO”) projects and upgrades to Akron’s treatment plant and sewer system as required under the January 17, 2014 Consent Decree and corresponding LTCP Update. Only two projects remain to be completed: The Northside Interceptor Tunnel (“NSIT”) and the EHRT. Akron is currently implementing the NSIT project in accordance with the proposed Third Amendment to the Consent Decree, which is pending before the Court. Once the NSIT project has been completed, Akron will be controlling more than 99.0% of all wet weather flow that enters Akron’s combined sewer system. As such, the debate over the EHRT involves a relatively minute amount of overflow discharges, 1.0%, in comparison to the total volume of wet weather flow that enters Akron’s system. However, at a cost of more than \$209 million, the project cannot be reasonably justified as cost-effective. Since at least 2016, Akron, the United States and Ohio have engaged in extensive discussions regarding Akron’s request to modify Row 11.a of the LTCP Update to eliminate the requirement to install the EHRT. The State of Ohio acknowledges the excessive burden that implementing the EHRT would involve and also sees the actual, substantial water quality benefits of implementing Akron’s proposed alternatives projects in lieu of the EHRT. However, the United States has failed to provide a substantive written response to Akron’s concerns and Akron’s proposal to address the issue. Even worse, the United States recently informed Akron that no matter the cost or lack of water quality benefits Akron must obtain 100% capture of wet weather flows, despite the fact that Akron will obtain a 99.0% capture without the EHRT. This position is unreasonable and unjustifiable,

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especially given the information now available which was not available in 2011 when the requirement was negotiated.

As discussed herein, the underlying rationale for imposing the EHRT requirement is flawed. A combination of updated modeling, results obtained through the completion of required projects, improved operational efficiencies, and more accurate and reliable data shows that the projected environmental benefits to be realized by the EHRT are overstated and proves that the project costs have been greatly underestimated. If constructed, the EHRT will treat the remaining typical year overflows from the Ohio Canal Interceptor Tunnel (the "OCIT"). As of this submission, there has not been an overflow from the OCIT since March 7, 2022, 497 days ago, which is a testament to the above-mentioned improvements that Akron has already implemented. Accordingly, any justifications for imposing the EHRT that appeared to exist in 2011 are now revealed as illusory. In lieu of the highly wasteful and unproductive EHRT requirement, Akron has proposed alternative projects that will produce demonstrable water quality benefits within the target watershed.

Akron engaged the United States and Ohio in lengthy discussions in accordance with the Informal Dispute Resolution procedures set forth in Paragraph 71 of the Consent Decree. The State of Ohio has embraced elimination of the EHRT and the proposed alternatives to the EHRT. However, the United States continues to oppose Akron's request to modify the Row 11.a requirement essentially because the requirement was agreed to in 2011. Although Akron has worked diligently to resolve the issue during informal dispute resolution, in light of the inflexible position of the United States, it must now pursue Formal Dispute Resolution in accordance with Paragraph 72.A of the Consent Decree.

**A. The Consent Decree and LTCP Update**

The Parties lodged the Consent Decree with the Court in 2009, and the Court entered the Consent Decree on January 17, 2014. In accordance with Section VI and Attachment A of the Consent Decree, Akron agreed to implement the Long-Term Control Plan (“LTCP”) Update, which was previously approved by the United States in 2011 and Ohio in 2012. The stated objective of the Consent Decree is to bring Akron into full compliance with Akron’s current NPDES Permit and “to meet the objectives of the Combined Sewer Overflow Control Policy, with the goal of eliminating sanitary sewer discharges ...” 1/17/2014 Consent Decree, ¶ 1. Together, the Consent Decree and LTCP Update require the implementation of a variety of control measures and individual projects towards achieving the stated goals, which Akron has worked to diligently and timely implement, as discussed below.

**1. Applicable Requirements**

Sections V through VIII of the Consent Decree require implementation of several combined sewer overflow (“CSO”) separation projects, a pump station improvement project, initial upgrades to the treatment plant, and an ongoing, extensive sewer inspection and cleaning program. The additional control measures required by the LTCP Update are set forth in a summary table containing twenty-two “rows,” with each row constituting a separate and unique project. Separate projects were specified as Rows 11 and 11.a. Additionally, Rows 15-20 are described as “alternatives” of which Akron was only required to complete two projects based upon US EPA’s approval of either Alternative Plan A or B to Upgrading Conventional Secondary Treatment to 170 million gallons per day. Moreover, additional projects, such as the separation of Racks 8, 13,



21, 25 and 30 have been performed in accordance with requirements contained within the Consent Decree itself.

The First Amendment to the Consent Decree reordered the WPCS upgrade projects required in LTCP Rows 17 and 18 and replaced the Main Outfall Interceptor project required under Rows 21 and 22 with a new project required under new Rows 21, 22, and 23. The Second Amendment to the Consent Decree replaced the WPCS control technology required under LTCP Row 18 with a new control technology and a full scale pilot study. The Second Amendment also replaced the four storage basins required in Rows 1, 3, 8 and 9 with a larger basin in amended Row 3 and a combination of green infrastructure and increased conveyance in amended Rows 1, 8 and 9 and new Rows 1.a, 8.a. and 9.a.

Enclosed as Appendix B is a detailed chart that lists all of the Consent Decree and LTCP Update projects along with the corresponding implementation dates and associated costs. In total, Akron has completed 24 of 26 major projects required under the Consent Decree. The two outstanding projects are the EHRT required under Row 11.a and the NSIT required under Row 12. Based upon the proposed Third Amendment, the NSIT Project now includes the separation of Rack 34 under new Row 12.a.<sup>1</sup> Once Akron completes the NSIT and separation of Rack 34, it will be

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<sup>1</sup> Row 12 describes the Northside Interceptor Tunnel (“NSIT”) project, which involves the construction of “a 20-foot internal diameter tunnel, 10,000 feet in length or any other combination of diameter and length that achieves the design criteria,” with such criteria establishing a minimum storage volume of 23,000,000 gallons. *See* LTCP Update at p. 6. The NSIT project is the subject of the Parties’ proposed Third Amendment to the Consent Decree, lodged by the United States on February 13, 2023 (Doc. 345). The Third Amendment seeks to modify the tunnel diameter required under Row 12, as well as add the Rack 34 separation project in new Row 12.a. The modified NSIT and the Rack 34 separation have each met the respective bid date and are on schedule to meet the respective AFO date.

capturing 99.0% of all wet weather flows that enter the sewer system. Accordingly, the EHRT will only address 1.0% of wet weather flows.

In complying with the Consent Decree and the LTCP Update, Akron has already expended in excess of \$740 million, not including the cost of the extensive sewer cleaning and inspection program. This work includes, but is not limited to, construction of five storage basins, five green/conveyance/sewer separations projects, five sewer separations, pump station improvements, the 25.6 million gallon OCIT, multiple upgrades at the WPCS (including the 60 million gallon per day BioCEPT facility) and the rehabilitation of the Main Outfall sewer. Akron's work includes the completion of the projects associated with the first two Consent Decree amendments and the benefits associated with those projects are being realized today. The added cost of the ongoing NSIT and Rack 34 separation projects will result in over \$1 billion being incurred by Akron to implement the Consent Decree. Since the lodging of the Consent Decree in 2009, Akron has spent in excess of \$55.3 million on the ongoing inspection and cleaning program. It has also incurred over \$95.7 million on numerous sewer and pump station rehabilitation projects, and \$58 million on the Headworks replacement projects at the plant.

## **2. Modification Requirements**

Pursuant to Sec. XXIV of the Consent Decree, the terms of the Consent Decree and attachments (including the LTCP Update) may be modified by written agreement of the Parties, and where modification constitutes a material change, upon approval by the Court. Consent Decree at ¶ 112. However, any disputes concerning modification are to be resolved under Sec. XIV (Dispute Resolution), but the burden of proof is under Fed. R. Civ. P. 60(b) instead of the standards set forth in Paragraph 73.A or B. *Id.*, ¶ 113.

Accordingly, as detailed below, Akron initiated Informal Dispute Resolution proceedings pursuant to Paragraph 71 of the Consent Decree for its proposed modification of the EHRT requirement and having been unable to obtain agreement from the United States, is now commencing Formal Dispute Resolution procedures under Paragraph 72 of the Consent Decree.

**B. Proposed Modification to Eliminate the Row 11.a EHRT Requirements**

Akron's specific request is to modify Row 11.a of the LTCP Update to eliminate the requirement to install the EHRT. As part of the modification request, Akron has also proposed to implement several alternative projects that will reduce the volume of untreated overflows from the OCIT and realize substantial water quality benefits within the watershed.

The EHRT was intended to treat the wet weather overflows from the OCIT. The OCIT itself has since been implemented under Row 11 of the LTCP Update. Importantly, when the Parties entered into the LTCP Update in 2011, the City's original planning level hydraulic model estimated there would be seven overflow events from the OCIT, with a total volume of approximately 191.1 million gallons, in the typical year. Therefore, the LTCP Update imposed the EHRT requirement based upon the specific understanding that it would need to treat seven typical year overflow events with a total volume of over 191 million gallons at a cost of \$75 million.

However, there has been a significant change in circumstances since the development and approval of the LTCP Update. The annual overflow assumptions consistent with the original planning level hydraulic model have been superseded by the predictions from Akron's new and recalibrated model. Since 2014, Akron conducted additional evaluations of its combined sewer system, including the installation of flow meters and level sensors. Akron also made extensive

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updates to the model by including additional details on the sizing and configuration of numerous pipes within the system. Moreover, the details of the numerous CSO control measures, implemented as a result of the Consent Decree, have also been factored into the model, including model calibration based on the actual performance of the completed OCIT. Finally, Akron acquired more sophisticated computer software to run the model. All of this work resulted in a new, more technologically advanced model that is significantly more accurate in predicting the hydraulic flows within the sewer system compared to the original model that was available in 2011. U.S. EPA has accepted the results of the new, more accurate model as part of its approval of the Second Amendment to Consent Decree and the Third Amendment to Consent Decree. The more advanced and accurate model predicts that there will only be three overflow events from the OCIT in the typical year, with a total volume of approximately 100 million gallons. The OCIT has not overflowed since March 7, 2022.

Furthermore, while the data establishes that the number of overflow activations have significantly decreased at the OCIT, the anticipated construction costs for the EHRT have dramatically increased. Akron retained the engineering firm DLZ to further evaluate and update the estimated costs to construct the EHRT. On January 5, 2023, Akron submitted to the United States a detailed report prepared by DLZ that provides that the estimated cost for the EHRT at over \$209 million, an amount massively higher than the original estimate of \$73 million at the time of the LTCP Update in February 2011. *See 1/5/2023 Letter to B. Cosgrove from T. Finn.* To place these costs into perspective, it is useful to compare the substantial costs and marginal benefit of the EHRT with the high return on investment realized from the OCIT Row 11 project. In that case, the OCIT project ultimately reduced typical year overflow volumes by 466.7 million gallons, at a

cost of approximately \$315.3 million. *See* 6/14/2021 Letter to B. Cosgrove, Ex. D. The decrease in typical year events and overflow volumes as a result of the OCIT and other factors, combined with substantially increased implementation costs of the EHRT, undermine any reasonable cost-benefit rationale supporting imposing the EHRT.

Importantly, no one should lose sight of the fact that the significant costs for the EHRT would be shouldered by Akron's rate payers. Even without the EHRT, these same rate payers have already had to incur the approximately \$1 billion cost to implement the substantial requirements of the Consent Decree. These staggering costs represent true hardships for Akron's most vulnerable populations. With this crucial factor in mind, any \$209 million construction project would demand thoughtful consideration and meaningful public benefit. But where, as here, a \$209 million project will obtain no discernible environmental benefit and will substantially burden Akron's economically disadvantaged and historically oppressed populations, the project runs counter to the principles of environmental justice as it makes no sense economically or as a matter of public policy. While very few people, if any, will benefit from the capture and treatment of three overflows in a typical year during recreationally dangerous rainfall events, many Akron ratepayers and especially our most disadvantaged residents will be burdened by the investment in an EHRT that may not be activated at all.

### **C. Procedural History**

In light of the new data and cost considerations noted above, Akron prepared a thorough analysis of these details and other relevant considerations supporting Akron's rationale for its proposed modification to eliminate the EHRT requirement, as set forth in a June 14, 2021 letter to counsel for the United States and State of Ohio. The letter included several attachments of

supporting information, data and analysis, including cost model updates (Ex. A), water quality evaluations (Ex. B), EHRT design diagrams (Ex. C), compliance matrix for the various Consent Decree and LTCP Update requirements (Ex. D), a summary of Akron's various environmental initiatives and achievement (Ex. E), and historical sewer rate analysis showing Akron's sewer rates at the top of Ohio's major municipalities (Ex. F).

The United States did not formally respond to Akron's detailed analysis for over a year and then summarily dismissed Akron's proposal on August 3, 2022, in a cursory page-and-a-half response. Notably absent from the United States' response was any technical analysis of its own, any consideration of costs or impact upon Akron's ratepayers, or any recognition that the core objective of the Consent Decree—to “meet the objectives of the Combined Sewer Overflow Control Policy”—has been met without the EHRT. For example, the United States did not address the fact that the “presumption approach” under the Combined Sewer Overflow Control Policy allows for “no more than an average of four overflow events per year.” 75 Fed. Reg. 18688, 18692 (Apr. 19, 1994) (“CSO Policy” hereafter; emphasis added). Thus, notwithstanding that Akron's three projected overflow events falls squarely within U.S. EPA's CSO Policy (and that Ohio's other major metropolitan areas are allowed up to four overflow events), the United States persists in demanding a \$209 million project.

### **1. Informal Dispute Resolution**

Informal discussion related to the proposal began in earnest in 2016 when Akron expressed its intention to remove the Row 11.a EHRT requirement during discussions with the United States. As noted above, Akron had been reevaluating its combined sewer system since 2014 and performing a number of key upgrades. Revised and recalibrated modeling pertaining to the OCIT

and EHRT were presented to the United States and Ohio on July 11 and July 20, 2016, which predicted that there would be only three overflow activations from the OCIT in a typical year with a total volume of approximately 100 million gallons. However, Akron determined that it was necessary to perform additional evaluations regarding the impact of the various projects on the OCIT, as well as consider whether the updated and recalibrated model altered the predictions related to overflow activations and volumes. On July 10, 2017, counsel for Akron issued a letter to inform the United States of its intention to defer formally proposing elimination of the EHRT until such assessments were completed.

Between 2017 and 2021, Akron worked to implement a number of projects under the Consent Decree and evaluated the impacts upon the predicted overflow activations and volumes. During this time, Akron, the United States and Ohio conducted numerous technical discussions.

In 2020, Akron reengaged the United States and Ohio in discussions regarding elimination of the EHRT. On June 14, 2021, after several meetings and presentations, Akron presented a letter to the United States and Ohio formally outlining its rationale and summarizing the technical justification for eliminating the EHRT as a result of the past several years of investigation and project implementation.

On August 3, 2022, the United States responded by letter, taking the position that the proposed modification would not meet the LTCP Update's performance criterion and summarily rejected the proposal. As noted above, the brief letter offered no technical or cost-effectiveness analysis whatsoever. However, the letter did acknowledge the State of Ohio's position that it "would require additional water quality projects to offset the loss of environmental benefits conferred by this control measure before it could support the proposed modification."

Consequently, the letter acknowledged a fundamentally different position taken by the State of Ohio, that the proposal of appropriate alternative projects could justify elimination of the EHRT.

On September 12, 2022, Akron submitted a Notice of Dispute to the U.S. EPA and Ohio EPA regarding Akron's proposed modification to the EHRT. Pursuant to the Dispute Resolution provisions set forth in Paragraph 71 in Section XIV of the Consent Decree, the Parties engaged in informal dispute resolution discussions regarding the proposed modification. During the course of these discussions, Akron updated its EHRT cost estimate, which confirmed costs in excess of \$209 million. Akron also analyzed other technologies and confirmed that there is no cheaper alternative technology to the EHRT. Accordingly, Akron's position is that these factors, as well as the lack of meaningful water quality benefit as confirmed in the updated modeling, satisfy the requirements for modification to eliminate the EHRT requirement.

During informal dispute resolution discussions on November 10, 2022, Akron offered to amend its original modification request by proposing alternative projects that would realize meaningful water quality benefits. Consistent with the position described in the September 12, 2022 letter, Ohio was receptive to the proposal. Even more notably, the United States also embraced the possibility of alternative projects and invited Akron to present specifics and technical details on such proposed projects. Accordingly, the Parties engaged in several months of discussion, identifying several key projects that essentially involved extending sewer connections to disadvantaged Akron-area communities and the corresponding elimination of private septic and wastewater facilities that are directly discharging into the Cuyahoga River and Springfield Lake.

On May 26, 2023, Akron presented the United States and the State of Ohio with a letter that included the results of recent updates to the model. Specifically, the hydraulic model was



updated to include details from the 75% design of the NSIT, the separation of Rack 34 and the improved hydraulics that resulted from the recently completed WPCS Headworks project. The results from the updated modeling demonstrate that an increased dewatering rate from the OCIT can reduce the typical year overflow volume to 62.1 million gallons. While the increased OCIT dewatering rate will increase overflows at the downstream Cuyahoga Street Storage Facility (“CSSF”), Akron’s letter proposed to convert the CSSF to a disinfection facility so that the CSSF typical year overflows would be treated overflows under the CSO Policy.<sup>2</sup> Akron previously submitted a feasibility study for providing disinfection at the CSSF. *See Hazen Report, July 9, 2021.*

On May 30, 2023, the Parties held a Zoom-based conference that was attended by key representatives of all parties, including U.S. EPA Region 5 Regional Administrator Debra Shore, Regional Counsel Robert Kaplan, Ohio EPA Director Anne Vogel, and Akron Mayor Dan Horrigan. Akron presented a detailed review of the subject matter set forth herein underlying Akron’s position with regard to elimination of the EHRT requirement and the inclusion of alternative projects, including the increased dewatering from the OCIT with treatment at the CSSF. The meeting resolved with Regional Administrator Shore committing to providing a response shortly thereafter.

On June 23, 2023, the Parties’ respective legal teams participated in a virtual meeting. During that meeting the United States informed Akron that the United States will not support Akron’s proposed modification and that it is unwilling to consider any type of alternative project

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<sup>2</sup> Akron is willing to perform a pilot study to confirm that the CSSF provides primary clarification of the overflows.

that would offset the limited remaining overflows from the OCIT. Notably, the United States did not provide any substantive response to Akron's detailed analysis. Rather, the United States stated that it would not accept anything less than zero untreated overflows from the OCIT, a position that is based upon a purported EPA policy that has not been stated or published in any official manner.

For its part, the State of Ohio stated that it agreed with Akron's analysis that the EHRT is no longer a cost-effective project, and that the water quality benefits to be achieved through Akron's proposed alternative projects are sufficient to justify elimination of the EHRT.

## **2. Initiation of Formal Dispute Resolution**

Under Paragraph 72.A, "Akron shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States and the State, in accordance with Section XVI (Notices and Submissions) of this Decree, a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but not be limited to, any factual data, analysis, or opinion supporting Akron's position and any supporting documentation relied upon by Akron." Consent Decree ¶ 72.A.

Accordingly, the present Statement of Position is intended to comply with the requirements of Paragraph 72.A. The below section of the Statement contains the technical and opinion analysis that supports the proposed modification and details the relevant factual data and supporting documentation. In addition, Appendix A contains an index of all relevant supporting materials with information corresponding to Akron's document production.

## **II. ANALYSIS AND OPINION SUPPORTING THE PROPOSED MODIFICATION**

### **A. The Modeling and Projections Provide a Justification for Eliminating the EHRT.**

#### **1. Original Model**

Akron's original planning level hydraulic model, which was used to develop the LTCP Update, predicted that the OCIT would have seven activations in the typical year with a total annual volume of approximately 191 million gallons. The results from this initial version of the model formed the basis for including EHRT at the downstream end of the OCIT.

#### **2. Updated Model**

Over the years Akron has continually updated and recalibrated its hydraulic model, which is now far more accurate than the original planning level model. Using the more accurate version of the model, which has been calibrated to account for the actual performance of completed control measures, Akron has demonstrated that the number of activations and annual overflows from the OCIT is significantly less than was originally predicted at the time the LTCP was approved. Model results presented by Akron in 2021 predicted that there would only be three annual overflows in the typical year with a total annual overflow volume of approximately 100 million gallons. Over the years, Akron has presented the United States and the State of Ohio with five technical memoranda showing the various updates to the hydraulic model and has responded to numerous technical questions.<sup>3</sup> During the hearing on the Second Amendment to the Consent Decree Akron also presented the expert testimony of Dr. Christopher Miller, which demonstrated that the updated model is far more accurate than the version that was relied upon to develop the LTCP Update.

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<sup>3</sup> The technical memorandums are produced within the thumb drive of electronic files.

**B. Akron is Already in Compliance with and Exceeds the Criteria under the 1994 CSO Control Policy, which is the Objective of the Consent Decree.**

The Consent Decree expressly states that its primary purpose is requiring compliance with EPA's 1994 Combined Sewer Overflow Control Policy ("CSO Policy"):

It is the express purpose of the Parties in entering this Consent Decree to further the objectives of the Act, as enunciated in Section 101 of the Act, 33 U.S.C. § 1251 et seq., and the objectives of Chapter 6111 of the Ohio Revised Code. All plans, reports, construction, remedial maintenance, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree *shall have the objective of causing Akron to come into and remain in full compliance with the terms and conditions of Akron's Current NPDES Permit and to meet the objectives of the Combined Sewer Overflow Control Policy, with the goal of eliminating sanitary sewer discharges, as these terms are defined in Section IV of this Consent Decree.*

1/17/2014 Consent Decree, ¶ 1 (p. 5) (emphasis added).

The CSO Policy requires that LTCPs "give the highest priority to controlling overflows to sensitive areas," which include in relevant part National Resource Waters, waters with primary contact recreation, and public drinking water intakes or their designated protection areas. *Id.* at 18692. For such areas, the LTCP should:

- (1) Prohibit new or significantly increased overflows;
- (2) Eliminate or relocate overflows that discharge to sensitive areas wherever physically possible and economically achievable, except where elimination or relocation would provide less environmental protection than additional treatment; or where elimination or relocation is not physically possible and economically achievable, or would provide less environmental protection than additional treatment, provide the level of treatment for remaining overflows deemed necessary to meet WQS for full protection of existing and designated uses; and
- (3) Where elimination or relocation has been proven not to be physically possible and economically achievable, permitting authorities should require, for each subsequent permit term a reassessment based on new or

improved techniques to eliminate or relocate or on changed circumstances that influence economic achievability.

*See id.*

Akron's plan submitted with the LTCP Update demonstrated that, except for the sewer separation projects provided for in the LTCP Update, elimination of the remaining overflows was not physically possible and/or economically achievable. Importantly, without the EHRT, the remaining overflows from the OCIT do not need additional treatment in order to meet water quality standards for the protection of uses. *See* Ohio EPA's 2003 report on Total Maximum Daily Loads for the Lower Cuyahoga River Lower Cuyahoga River (the "TMDL").

The CSO Policy further requires that LTCPs adopt one of two approaches to addressing CSOs. *Id.* Under the "presumption" approach criteria, it is acceptable that "no more than an average of four overflow events per year, provided that the permitting authority may allow up to two additional overflow events per year" or "the elimination or capture for treatment of no less than 85% by volume of the combined sewage collected in the CSS during precipitation events on a system-wide annual average basis." CSO Policy at 18692. Consequently, a program allowing for less than four CSO untreated overflows or capturing greater than 85% of the wet weather flows is "presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA." *Id.*

If the presumption approach cannot be met, then a permittee may utilize the "demonstration" approach: "A permittee may demonstrate that a selected control program, though not meeting the criteria specified in [the presumption approach] above is adequate to meet the water quality-based requirements of the CWA." *Id.* However, even under this approach, consideration must be given to cost-effectiveness, as well as whether the ability to meet WQS is

impacted by background conditions or pollution sources other than CSOs. *See id.* at 18693. As to the latter, it is undisputed that the pollution impacting water quality within the Cuyahoga and Little Cuyahoga watersheds is the result of upstream nonpoint sources and/or background conditions. In any case, Akron’s modeling predicts only three overflows within a typical year and a percent capture of 99%, which exceeds either criteria under the presumption approach.

Notably, under both the presumption and demonstration approaches, the elimination of the EHRT does not result in the need for the Ohio EPA to review or revise water quality standards due to the adjustment in the long-term controls at the OCIT. Instead, because Akron is capturing and treating 99% of its wet weather flows by volume and virtually meeting the fecal coliform removal contemplated by the TMDL, this is not a modification that would require a revision or “downgrade” of water quality standards under the “reasonably attainable” language of the LTCP Guidance.

**C. The Environmental Benefits from the EHRT will be *De Minimis* under the Lower Cuyahoga River TMDL.**

Further undermining the need for the EHRT is the fact that the project will provide no meaningful benefit to the Cuyahoga River and Little Cuyahoga River through elimination of overflow events. Akron’s updated hydrological model demonstrates that, even if the three predicted overflow activations at the OCIT occur, Akron will be within 0.08% of its allocated wasteload under the TMDL, which is a *de minimis* difference. Indeed, even under this scenario, the remaining overflows will not result in a change in water quality.

In particular, on September 2003, Ohio EPA Division of Surface Water issued the TMDL for the Lower Cuyahoga River, as an identified priority “impaired” water pursuant to Section 303(d) of the Clean Water Act. “A TMDL is a calculation of the maximum amount of a pollutant

that a waterbody can receive and still meet water quality standards, and an allocation of that amount to the pollutant's sources." Lower Cuyahoga River TMDL, p. 1.

Based upon Ohio EPA's TMDL analysis, the major source of impairment is unregulated run-off upstream, which accounts for over 99.75% of the bacteria load in the river. *See* 5/30/2023 Akron Presentation, *US EPA/DOJ/Ohio EPA Amendment No. 4 Discussions*, p. 15; *see also* Lower Cuyahoga River TMDL, App. H (Causes and Sources of Impairment in the Lower Cuyahoga River Basin). The remaining 0.25% of the bacteria load within the river is comprised of multiple sources, including Akron's CSO and Secondary Treatment Bypass. The TMDL allocated Akron's CSOs only 0.03% of the total bacteria load to the river<sup>4</sup>. *Id.* If Akron does not build the EHRT, the CSOs will only be contributing 0.11% of the total bacteria in the river, which represents a miniscule 0.08% difference in the TMDL allocated load. *See id.* Notably, when considering Akron's proposal to include disinfection at the CSSF, the difference in the allocated load becomes even more insignificant at 0.04%. Therefore, in terms of the total bacteria load in the Cuyahoga River, the EHRT will provide no discernible benefit to water quality.

**D. The EHRT is Not Cost-Effective**

While the CSO Policy sets forth a general aspirational goal of eliminating CSO overflows, the measures required to meet the Policy must be "economically achievable" and cost-effective. *See* CSO Policy at 18688 (CSO Policy is a "national strategy ... to achieve cost-effective CSO controls that ultimately meet appropriate health and environmental objectives and requirements");

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<sup>4</sup> Notably, the TMDL allocated a 0.07% load for both the secondary treatment bypassed and the CSOs. In doing so, it was assumed that there would be over 900 million gallons for secondary bypasses treated by Actiflo. However, Akron has eliminated all secondary bypasses by installing and operating a BioCEPT facility, which provides full biological treatment of flows exceeding 220 million gallons per day.

*see also id.* at 18693 (requiring “an analysis to determine where the increment of pollution reduction achieved in the receiving water diminishes compared to the increased costs.”).

The original cost estimate to construct the EHRT was estimated at less than \$73 million, which was developed around the time that Akron’s Long-Term Control Plan (“LTCP”) was approved in 2011. More recently, Akron engaged the firm DLZ to further evaluate and update the estimated cost to construct the EHRT, as well as consider any technological alternatives.

DLZ performed a thorough analysis over time that estimated an updated total project cost of approximately \$209 million for the EHRT. DLZ also evaluated alternative technologies of pile cloth filters, dense sludge settling and compressible media filters, which were at roughly the same cost level or increased to upwards of \$315 million. In addition to these substantial capital costs, DLZ also estimated total annual O&M costs of \$113,800.

While not cost effective at \$73 million, implementing the EHRT to address half as many overflow activations at almost triple the cost fails any objective view of cost-effectiveness and as such, undermines established public policy goals.

**E. The Public Interest Will Not Be Served by the EHRT and Will Be Detrimental.**

**1. The EHRT Will Impose a Heavy Burden on the Community.**

As noted above, the EHRT will have a detrimental impact as Akron will most likely be forced to assume significant debt and/or raise sewer rates to pay for the project. Akron has presented its affordability evaluation to the United States and Ohio. This evaluation was prepared pursuant to EPA’s Financial Capability Assessment Guidance, which determined the following current and projected burdens to the Akron public:



	<b>“High Burden” Standard</b>	<b>Present</b>	<b>2029</b>	<b>2040</b>
Residential Indicator	<b>2.0%</b>	2.1%	3.0%	3.3%
Lower 20% RI	<b>2.0%</b>	4.2%	5.8%	6.6%

The evaluation demonstrates that the economic burden of the EHRT will be imposed upon an already burdened public and fall most heavily upon the poorest populations in Akron. In particular, the Residential Indicator (“RI”) is currently at 2.1% of the medium household income, and the lower 20% (“LQRI”), is currently at 4.2%. 2.0% represents a High Burden under U.S. EPA’s Guidance. Notably, the burden on the Akron ratepayers increases over time. By 2029, when the controls would be fully implemented, the RI increases to 3.0% and the LQRI increases to 5.8%. By 2040, it increases to 3.3% and 6.6%, respectively. In reaching a LQRI of 6.6%, the extremely high burden will likely force ratepayers in the lower 20% to choose between paying for water and sewer services and other necessities.

Akron already has the highest sewer rates of all major cities in Ohio. *See* 6/14/2021 Letter to B. Cosgrove, Ex. F. Akron anticipates increasing sewer rates even if Akron does not build the EHRT. However, it currently estimates that if Akron is forced to build the EHRT it will need to increase sewer rates by more than an additional 20%, compared to not building the EHRT.

Furthermore, the siting of the EHRT is problematic based on the White House Council on Environmental Quality’s own Climate and Economic Justice Screening Tool. Located in the Hickory Street neighborhood, the EHRT would further impact a population that exceeds the burden threshold for asthma, diabetes, heart disease, low life expectancy, low income, historic underinvestment, low median income and high school education indicators. Instead of disproportionately burdening the Hickory Street neighborhood and Akron’s most disadvantaged ratepayers, Akron has identified alternative projects that would alleviate the burden on adjacent

communities that exceed the screening indicator threshold in the areas of low income, unemployment, high school education, heart disease and historic disinvestment.

## **2. How Akron Compares to Other Communities**

Consistent with the CSO Policy, Ohio's other major municipalities in Cleveland (NEORS), Columbus, and Toledo are all allowed up to 4 overflows *from multiple locations in a typical year*. See 6/14/2021 Letter. In other words, Cleveland may experience separate locations overflowing and those separate overflows would be aggregated together as a single overflow. For Akron, by contrast, the three predicted overflows are counted regardless of location; thus, overflows at multiple locations would be tallied separately. As such, Akron is being held to a considerably more stringent standard.

Moreover, the allowed volumes in these other municipalities greatly exceed Akron's less than 100 million gallons estimate (e.g., Cleveland at 500 million gallons, Columbus at 250 million gallons, and Toledo at 140 million gallons). Even with the elimination of the EHRT, Akron's activations and volumes will be much less than those of the other nearby CSO communities. It is also worth noting that in the case of Cleveland, the overflows discharge directly into the area of public beaches that are extensively utilized by the public. In the case of Akron, the waters at issue would be of an extremely high velocity during a CSO event, making the waters extremely hazardous for public use at those times. Thus, direct human exposure during a CSO overflow is highly unlikely.

## **3. The EHRT Will Prevent Akron from Implementing Other Critical Water Projects.**

When Akron started its CSO program, the annual volume of CSOs and secondary treatment bypasses exceeded 2.4 billion gallons. Akron compiled a detailed chart showing all of the CSO

projects and WPCS upgrades that the City has implemented under the CSO Program, which was presented to the United States as part of its June 14, 2021 letter. *See* 6/14/2021 Letter, Ex. D. Akron has updated this chart to include update information since June 14, 2021. Importantly, the list of projects does not include additional projects, such as the ongoing Capacity, Management, Operations and Maintenance work or ongoing infrastructure improvements that are not part of the Consent Decree, such as the project to replace the Headworks at the WPCS. With the implementation of all the CSO control measures, except for the EHRT, the City will have reduced the annual CSO overflow volume down to approximately 100 million gallons.<sup>5</sup>

Accomplishing these impressive reductions in overflows and activations has come at an extremely high and burdensome cost to Akron's ratepayers. At the end of the day, the ratepayers will have incurred over \$1 Billion to implement the CSO program.

Akron's June 14, 2021 letter includes a list of several water quality improvement projects that Akron has voluntarily implemented over the years. The substantial financial outlay to comply with the CSO program significantly limits Akron's ability to implement other water quality improvement projects. In addition, the Consent Decree significantly hampers Akron's ability to raise drinking water rates to pay for needed infrastructure improvements to Akron's drinking water system. *See* Akron's January 5, 2023 letter. The imposition of the EHRT will only further inhibit Akron's ability to perform additional water quality projects and hamper Akron's ability to pay for infrastructure improvements to the City's drinking water system.

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<sup>5</sup> As noted above, this remaining CSO volume is approximately one-fifth of Cleveland's, less than half of Columbus's, and also less than Toledo's, all of which are approved by the EPA.

**F. Akron has Offered to Implement Alternative Projects that Will Achieve Meaningful Water Quality Benefits.**

As a compromise, Akron has offered to amend its original modification request by including alternative projects, as detailed below:

**1. The Village of Peninsula**

An opportunity for an alternative project is the Village of Peninsula area, which is located in the heart of the Cuyahoga Valley National Park. The Peninsula area has a significant number of privately owned wastewater facilities, wells, and cisterns, including 126 residential, 21 commercial and 5 institutional systems. Due to age, poor soil conditions, and small lot sizes, however, many of these systems are failing and discharging directly into the Cuyahoga River as it flows through the park. Sampling performed by Summit County Public Health and Ohio EPA between 2018 and 2020 found exceedances of the 1030 CFU/100mL standard for E. Coli in Peninsula's storm sewers and catch basins. As a result, the Ohio EPA has issued findings and orders.

The proposed project involves installing a gravity collection system with a conventional extended aeration treatment facility to address the patchwork of private facilities, which would treat an estimated peak flow of 65,000 gallons per day, with additional capacity for system expansion. Akron is in detailed discussions with Summit County Department of Sanitary Sewer Services ("DSSS") regarding this project. Over the past three decades, lack of affordability has been a significant barrier to implementing this project. Akron's financial involvement as a funding source will be instrumental in achieving affordability.

## **2. Springfield Lake**

Springfield Lake is a tributary of the Little Cuyahoga River by way of Springfield Lake Outlet in the Cuyahoga River watershed. The lake continually tests high for algae and bacteria. Springfield Township has reported that algae testing for the lake in both Springfield and Lakemore detected algae toxins at unsafe levels. Residents and visitors are advised to avoid all contact with the lake water.

A Springfield Lake Task Force report states that the contamination is from direct and indirect sanitary sewer overflows, septic systems, and storm water runoff. Lake water testing collected by the Ohio Department of Natural Resources from 2006-2019 demonstrates definite increases in the quantity and concentration of nitrogen and phosphorous over that time period. These nutrients are known to cause harmful algal blooms.

Potential sources have been identified including the Village of Lakemore and the Sawyerwood area of Springfield Township. These sources would also include contributions of a bacteria load to the lake and Cuyahoga River watershed.

### **a. The Village of Lakemore**

The Village of Lakemore utilizes an 80-year old sanitary sewer system well past its usable working life, and the entire system needs to be rehabilitated. Issues with the system include the operation of a single pump station with Sanitary Sewer Overflows (“SSOs”) to the lake, and failing sanitary sewers that potentially discharge to storm sewers and subsequently to the lake.

A potential project is the elimination of SSOs in the Village of Lakemore, which have resulted in the release of untreated wastewater from the sanitary sewer system to Springfield Lake.

Elimination of the SSOs will reduce the bacteria load in Springfield Lake and the Cuyahoga River watershed.

The Village of Lakemore is the subject of Director's Final Findings and Orders, which required the Village to replace a sanitary sewer force main, employ a certified professional wastewater collection system operator, conduct a sewer system evaluation study, develop a CMOM (Capacity, Management, Operation, and Maintenance) Program, and develop a SSO Emergency Response Plan. Based upon discussions with Summit County Department of Sanitary Sewer Services (DSSS), additional rehabilitation work has been identified. Lakemore is a small community with extremely limited financial resources.<sup>6</sup> As such its lack of available funding for the community has resulted in an inability to move the entire project forward. As proposed, Akron would provide financial assistance to DSSS to aid the community in rehabilitating their sanitary sewer collection system. Flow from the Village is treated at the Akron Water Pollution Control Station.

**b. Springfield Lake Study in the Sawyerwood Community**

The Sawyerwood community is situated along Springfield Lake in Springfield Township. The community is one of 16 priority unsewered low-to-moderate income areas, as identified by Summit County Public Health. Sawyerwood has approximately 385 septic systems. The neighborhood has a high number of septic system failures and public health nuisance declarations. Many of these non-functioning systems are due to density, poor soil conditions and high

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<sup>6</sup> According to the Village's 2019-2020 Regular Audit, the Village's "Enterprise Funds", which address water, sewer, trash and storm sewer operations collected only \$1,987,481 in actual receipts for 2020 (and similarly \$1,878,528 in 2019). These figures illustrate that the Village is simply not financially positioned to assume the sizeable costs of a major sewer system upgrade.

groundwater. The public health risk is substantial as the area is served by individual private water wells.

In light of recent algal blooms, there is ongoing concern that the sewage from the failing systems is discharging to Springfield Lake as a result of the sandy soils and high groundwater table. The proposed project would involve conducting a groundwater study with Ohio EPA, DSSS and Springfield Township to assess the potential impacts to Springfield Lake and whether elimination of the septic systems by tying in the community to new sewer lines would be effective. Akron has had detailed discussions with DSSS regarding this project. Importantly, without Akron's involvement, this project will not be implemented.

### **3. Treatment at the Cuyahoga Street Storage Facility**

Finally, Akron has proposed to increase the dewater rate from the OCIT, which will reduce the annual overflow volume down to 62.1 million gallons. While the increased dewater rate will increase overflows at the CSSF, Akron is willing to install a disinfection facility at the CSSF, including construction of a new building, chemical storage, feed pumps, and tank modifications and other site improvements, as well as reprogramming the real-time controls to reduce overflows. *See 5/30/2023 Akron Presentation, US EPA/DOJ/Ohio EPA Amendment No. 4 Discussions*, pp. 12, 19, 26. Thus, any additional overflows from the CSSF would be treated overflows under the CSO Policy.

#### **G. Akron Can Meet the *Rufo* Standard for Modification of the Consent Decree.**

Acron believes that the foregoing demonstrates a significant justification for modification of the Consent Decree. Should the United States continue to withhold its approval, Akron shall

proceed with requesting judicial resolution in accordance with Paragraph 72.C of the Consent Decree.

Under the prevailing Fed. R. Civ. P. 60(b) standard (as provided by Paragraph 113), Akron believes that the facts and analysis set forth herein clearly demonstrates a “significant change in circumstances” such to justify modification of the Consent Decree and that the modification is “suitably tailored to the changed circumstances.” *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

Without question, the foundational technical basis for imposing the EHRT has been undermined by improved and updated modeling, demonstrating that the projected number of typical year overflows decreased from seven overflows to three overflows. This decrease further results in a decreased overflow volume from 191 million gallons to approximately 100 million gallons. Moreover, the associated costs with the projects were vastly underestimated, going from the original estimate of \$73 million to over \$209 million today, as a result of significant engineering and manufacturing considerations not contemplated at the time of the original cost estimate, as well as unforeseen circumstances including but not limited to the profound impact of the COVID-19 national emergency on construction costs and supply chains. Neither of these significant changes to material aspects of the project could have been reasonably anticipated in 2011 when the EHRT was negotiated.

### **III. CONCLUSION**

The predictions from the original hydraulic model that formed the basis for the EHRT are no longer valid. Akron’s newer, updated hydraulic model demonstrates there will only be three overflow events in the typical year, with an estimated total of approximately 100 million gallons.



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As Akron demonstrated in its June 14, 2021 letter, the EHRT is not cost-effective. The enormous increase in construction costs (and taking account substantial O&M costs), further demonstrates that the EHRT at a cost of over \$209 million is clearly not cost-effective. Even with the elimination of the EHRT, Akron will still provide a higher level of control than Ohio's other major municipalities, which are allowed up to four overflow events and yet are still "presumed to provide an adequate level of control to meet the water quality-based requirements of the CWA."

Finally, while not required under the CSO policy or the Clean Water Act, Akron is willing to implement the foregoing alternative projects that will actually achieve meaningful environmental benefits and further reduce the overflow volumes down to 62.1 million gallons.

In light of the above, and in an effort to resolve the existing dispute, Akron submits the above modification request to the LTCP Update Row 11.a to eliminate the EHRT requirement.

**CERTIFICATION:** I certify under penalty of law that this document and its attachments were prepared under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my inquiry of those individuals immediately responsible for obtaining the information, that I believe that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.



Chris D. Ludle, Director  
Department of Public Service