

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF OHIO EASTERN DIVISION

| | | |
|---------------------------|---|------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | CASE NO. 5:09-cv-00272 |
| |) | |
| v. |) | |
| |) | JUDGE JOHN R. ADAMS |
| CITY OF AKRON, OHIO |) | |
| |) | |
| and |) | |
| |) | |
| THE STATE OF OHIO, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

**NOTICE OF LODGING OF
THIRD AMENDMENT TO CONSENT DECREE**

Plaintiff, the United States of America, by and through the undersigned attorneys, respectfully lodges the accompanying proposed Third Amendment to the Consent Decree, attached hereto as Exhibit 1, which, if approved, will amend the entered Consent Decree in the above-titled action. The United States is not requesting any action by the Court at this time on the proposed amendment.

Consistent with Department of Justice regulations (28 C.F.R. § 50.7), the United States is inviting the public to comment on the proposed Third Amendment to the Consent Decree for a period of thirty (30) days before seeking judicial approval. The public comment period will begin upon publication of a notice in the Federal Register, which we anticipate will occur shortly. Upon expiration of that comment period, the United States will advise the Court of any comments received and of the United States' position as to whether the proposed amendment

should be approved by this Court. The United States may withhold its consent to the proposed Third Amendment to the Consent Decree if the comments disclose facts or considerations which indicate that the proposed Third Amendment to the Consent Decree is improper, inappropriate, inadequate, or not in the public interest.

The United States respectfully requests that the Court await, before considering whether to approve the proposed Third Amendment to the Consent Decree as an order of this Court, a subsequent submission by the United States regarding any comments received during the public comment period and the United States' position regarding approval of the proposed Third Amendment to the Consent Decree.

Respectfully Submitted,

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division

/s/ Bonnie Cosgrove
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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---------------------------|---|------------------------|
| UNITED STATES OF AMERICA, |) | |
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| Plaintiff, |) | |
| |) | CASE NO. 5:09-cv-00272 |
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| v. |) | |
| |) | JUDGE JOHN R. ADAMS |
| CITY OF AKRON, OHIO |) | |
| |) | |
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| |) | |
| THE STATE OF OHIO, |) | |
| |) | |
| Defendants. |) | |
| |) | |

**THIRD AMENDMENT TO CONSENT
DECREE**

WHEREAS, this Third Amendment to Consent Decree (“Third Amendment”) provides for the following modification, described in detail below: a change to the size of the Northside Interceptor Tunnel (“NSIT”) that is described in Row 12 of the City of Akron’s (“City” or “Akron”) approved Long Term Control Plan Update (the “LTCP Update”) and the addition of the Rack 34 combined sewer separation project.

WHEREAS, The United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter on February 5, 2009. The complaint was amended on March 20, 2009. The amended complaint sought injunctive relief and civil

penalties for, among other things, unauthorized discharges of sewage by the City from its combined and sanitary sewer system in violation of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311, 1319(b) and 1365(a). The State of Ohio (“State”) was named as a defendant pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e). On May 11, 2009, the State filed a crossclaim against the City alleging violations of the CWA and related Ohio law, O.R.C. § 6111.

WHEREAS, the parties in this matter (the “Parties”) entered into a Consent Decree (the “Consent Decree”) resolving the claims of the United States and State.

WHEREAS, the City entered into the Consent Decree, without admitting the violations alleged by the United States and the State, in order to settle this case and avoid complicated, protracted and expensive litigation.

WHEREAS, the Consent Decree, lodged on November 13, 2009, was entered on January 17, 2014.

WHEREAS, Paragraph 120 of the Consent Decree incorporates by reference the injunctive relief required pursuant to all “approved deliverables,” including the LTCP Update. The City requested approval of the current LTCP Update as a deliverable required by Paragraph 12 of the Consent Decree. The LTCP Update was approved by EPA in November 2011 and by Ohio EPA in April 2012.

WHEREAS, Paragraph 112 of the Consent Decree provides that material changes to the terms of the Consent Decree, including any attached appendices, must be approved in writing by all of the Parties and the Court. Non-material changes are effective upon written agreement of the Parties. *Id.*

WHEREAS, at the request of the Parties, the Court entered the First Amendment to Consent Decree (the “First Amendment”) on September 20, 2016. The First Amendment provided for the following two modifications to the Consent Decree and the LTCP Update: (1) a change to the sequencing of two elements of injunctive relief at the City’s WPCS; and (2) a change to the method the City is required to use to address potential weaknesses in the Main Outfall Sewer. The First Amendment also described non-material changes to the Consent Decree that were previously agreed to by the Parties, including the substitution of green infrastructure for two storage basins and the resizing of control measures at the WPCS.

WHEREAS, at the request of the Parties, the Court entered the Second Amendment to Consent Decree (the “Second Amendment”) on December 17, 2019. The Second Amendment provided for the following two modifications to the Consent Decree and the LTCP Update: (1) a change to the technology used to treat secondary bypasses at the WPCS, along with the requirement to implement a demonstration study; and (2) replacing the requirement to install certain storage basins with the requirement to install new control measures, including green infrastructure and increased conveyance, to control combined sewer overflows (“CSOs”).

WHEREAS, the Parties have now agreed to an additional proposed modification to the LTCP Update and the Consent Decree, as set forth herein. This proposed modification addresses a change to the size of the NSIT that is described in Row 12 of the LTCP Update and adds the requirement to separate the Rack 34 combined sewers. The resized NSIT is expected to result in achievement of the Consent Decree performance criterion of zero untreated CSOs in typical year conditions. Sewer separation will result in an even higher level of control than the zero untreated CSOs performance criterion because it will eliminate overflows in greater than typical year conditions at that CSO discharge point. The Rack 34 CSO discharge point is

located on a segment of the Cuyahoga River that is immediately downstream of the Gorge Dam and is upstream of the confluence with the Little Cuyahoga River. EPA's Great Lakes National Program Office believes that the anticipated benefits of the planned removal of the Gorge Dam include improving habitat and recreational opportunities within the Cuyahoga River Area of Concern. *See* <https://www.epa.gov/great-lakes-aocs/cuyahoga-river-aoc>.

WHEREAS, this Third Amendment will be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw from or withhold its consent if the comments regarding this Third Amendment disclose facts or considerations indicating that the Third Amendment is inappropriate, improper, or inadequate. Akron and the State consent to entry of this Third Amendment without further notice and agree not to withdraw from or oppose entry of this Third Amendment by the Court, or to challenge any provision of the Third Amendment, unless the United States has notified Akron and the State in writing that the United States no longer supports entry of the Third Amendment.

WHEREAS, the Parties recognize, and the Court by entering this Third Amendment finds, that this Third Amendment has been negotiated at arms-length and in good faith, and that this Third Amendment is fair, reasonable, and in the public interest.

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

The Consent Decree shall remain in full force and effect in accordance with its terms, except that LTCP Update Row 12 is replaced with new Row 12 and Row 12a., as identified

herein, effective upon the entry of this Third Amendment by the Court. Row 12 of the LTCP Update, which currently requires installation of the NSIT that has 23 million gallons of storage volume, is replaced with new Row 12 and Row 12.a. as set forth in Attachment A of this Third Amendment. New Row 12 requires the installation of the NSIT that has a storage volume of 10.3 million gallons and new Row 12a. requires the separation of the Rack 34 combined sewers.

JUDGMENT IS HEREBY ENTERED in accordance with this Third Amendment to Consent Decree, on this _____ day of _____, 20_____.

JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT JUDGE

Signature Page for United States of America for Third Amendment to the Consent Decree in the matter of *United States v. City of Akron, et al.*, No. 5:09-cv-272 (N.D. Ohio).

FOR THE UNITED STATES OF AMERICA:

Date: February 13, 2023

TODD KIM
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Environment and Natural Resources Division
United States Department of Justice

/s/ Bonnie A. Cosgrove

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Signature Page for United States Attorney for Third Amendment to the Consent Decree in the matter of United States v. City of Akron, et al., No. 5:09-cv-272 (N.D. Ohio).

FOR THE UNITED STATES OF AMERICA:

MICHELLE M. BAEPLER
First Assistant United States Attorney for the
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Dated: February 13, 2023

/s/ J. Jackson Froliklong

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Signature Page for U.S. EPA for Third Amendment to the Consent Decree in the matter of *United States v. City of Akron, et al.*, No. 5:09-cv-272 (N.D. Ohio).

FOR THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

DIANA SAENZ  Digitally signed by DIANA SAENZ
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Signature Page for U.S. EPA for Third Amendment to the Consent Decree in the matter of United States v. City of Akron, et al., No. 5:09-cv-272 (N.D. Ohio).

FOR THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Dated: December 20, 2022

Robert Kaplan

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THE UNDERSIGNED PARTY hereby consents to this Third Amendment to the Consent Decree in the matter of *United States v. City of Akron, et al.*, No. 5:09-cv-272 (N.D. Ohio).

FOR THE STATE OF OHIO:

DAVE YOST
Ohio Attorney General



Dated: December 8, 2022

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THE UNDERSIGNED PARTY hereby consents to this Third Amendment to the Consent Decree in the matter of *United States v. City of Akron, et al.*, No. 5:09-cv-272 (N.D. Ohio).

FOR THE CITY OF AKRON



Dated: _____, 2022

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ATTACHMENT A

Revised Row 12 and 12.a

| ROW # | CONTROL MEASURE LOCATION | DESCRIPTION | DESIGN CRITERIA | PERFORMANCE CRITERIA (TYPICAL YEAR) | CRITICAL MILESTONES |
|-------|--------------------------|---|---|-------------------------------------|--|
| 12 | Racks 32, 33, 34, 35 | Northside Interceptor Tunnel – Construct a 16-foot internal diameter tunnel, 6850 feet in length or any other combination of diameter and length that achieves the design criteria. | Minimum storage volume of 10,300,000 gallons. This volume excludes conveyance tunnels, dewatering tunnels/sewers, adits, and drop shafts. | 0 CSOs | Bidding of Control Measure – April 30, 2023 Achievement of Full Operation – Dec. 31, 2026 |
| 12a. | Rack 34 | Separation of Rack 34 combined sewer | Separate the combined sewer tributary to Rack 34 and eliminate the Rack 34 overflow structure | 0 CSOs | Bidding of Control Measure – Dec. 31, 2022 Sewer separation substantially complete and in service – Dec. 31, 2024 Rack 34 overflow structure eliminated – Dec 31, 2026 |