

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 and)
)
 THE STATE OF WASHINGTON,)
)
 Plaintiffs,)
 v.)
)
 KING COUNTY,)
 WASHINGTON,)
)
 Defendant.)

No. 2:13-cv-677-JCC

**AGREED NON-MATERIAL
CONSENT DECREE MODIFICATION**

Background

1
2 A. On July 3, 2013, the United States District Court for the Western District of Washington
3 approved and entered a Consent Decree between the United States, the State of Washington
4 (“State”), and King County, Washington (“King County” or “County”) (collectively “Parties”),
5 in a case captioned *United States and the State of Washington v. King County*, Washington, Civil
6 Action No. 2:13-cv-677 (W.D. Wash.) (Docket No. 6).

7 B. The express objective of the Consent Decree is that all plans, measures, reports,
8 construction, maintenance, operational requirements, and other obligations in this Consent
9 Decree, or resulting from the activities required by this Consent Decree, shall cause King County
10 to obtain construction completion of all Combined Sewer Overflow (“CSO”) outfalls, no later
11 than December 31, 2030, full compliance with the Clean Water Act (“CWA”) and the
12 regulations promulgated thereunder, applicable state law and regulations, and the terms and
13 conditions of the County’s National Pollutant Discharge Elimination System (“NPDES”) permit,
14 and to meet the requirements of the EPA’s CSO Control Policy and EPA’s Combined Sewer
15 Overflows Guidance for Long Term Control Plan (September 1995). Consent Decree, ¶ 8.

16 C. Paragraph 15 of the Consent Decree requires that King County construct and implement
17 the CSO control measures in accordance with the descriptions, design criteria, performance
18 criteria, and the dates for submission of facility plans, completion of bidding, and construction
19 completion for each CSO control measure as set forth in Appendix B.

20 D. Appendix B, at page 65, requires that King County construct and implement either (i) a
21 Joint City-County Storage Tank on the north side of the Ship Canal to provide 7.23 million
22 gallons of peak CSO storage capacity to capture flows from the 3rd Avenue West (DSN 008)

1 CSO outfall and multiple City of Seattle (“City”) CSO outfalls or (ii) an independent King
2 County storage tank located near Seattle Pacific University to provide 4.18 million gallons of
3 peak CSO storage capacity to capture flows from the 3rd Avenue West (DSN 008) CSO outfall.

4 E. Appendix B, at page 66, also requires that King County construct and implement
5 increased conveyance consisting of 3,200 feet of 84-inch diameter pipe to capture flows from the
6 11th Avenue Northwest (DSN 004) CSO outfall. This storage pipe along with conveyance
7 measures will manage the peak CSO storage volume of 1.85 million gallons to meet the
8 performance criteria in Appendix B.

9 F. The Parties have always understood and the Consent Decree contemplates that King
10 County and the City of Seattle will work together closely to develop and implement, where
11 appropriate, joint CSO projects to control CSOs in the City and County that are more cost-
12 effective, optimize operations of each entity, produce better environmental outcomes, and
13 minimize disruption to communities. *See* Section V.D. and Appendices B and D of the Decree.

14 G. After a lengthy and robust public participation process, including public meetings and
15 briefings of community organizations, environmental groups, and stakeholder groups, public
16 hearings, and public comment period, on May 29, 2015, the City of Seattle submitted its Long
17 Term Control Plan (“LTCP”) specifying, among other things, all CSO control measures that the
18 City must implement to ensure compliance with the CWA and state regulations, in accordance
19 with Paragraphs 12 and 14 of the Consent Decree between the United States, the State, and the
20 City of Seattle, Washington (“City’s Consent Decree”), in a case captioned *United States and the*
21 *State of Washington v. the City of Seattle, Washington*, Civil Action No. 2:13-cv-678-RSM
22 (W.D. Wash.) (Docket No. 6). One of the CSO control measures selected in the City’s LTCP
23

1 was the construction and operation of a joint City-County at least 15.24-million gallon
2 underground storage tunnel, called the Shared West Ship Canal Tunnel, to store flow from four
3 of the largest CSO areas. The Shared West Ship Canal Tunnel was selected as a joint project
4 because the four CSO areas (two from the City and two from the County) with the largest CSO
5 volumes are relatively close to one another. The joint tunnel would extend from
6 Fremont/Wallingford to Ballard, and would provide the storage necessary to address sewage
7 flows from six CSO outfalls -- two of which are King County's CSO outfalls: 3rd Avenue West
8 (DSN 008) and 11th Avenue Northwest (DSN 004) and four of which are the City's CSO outfalls
9 in the Ballard and Fremont/Wallingford basins (NPDES 150/151, NPDES 152, NPDES 147, and
10 NPDES 174).¹ Thus, this joint tunnel would eliminate the need for separate King County CSO
11 control measures at outfalls near 3rd Avenue West (DSN 008) and 11th Avenue Northwest (DSN
12 004). On August 26, 2015, EPA and the Washington Department of Ecology approved the
13 City's LTCP. The City is required to construct and implement the CSO control measures,
14 including the Shared West Ship Canal Tunnel, in accordance with the schedule and terms set
15 forth in the approved LTCP, pursuant to Paragraph 15 of the City's Consent Decree.

16 H. Paragraph 21 of the County's Consent Decree provides that King County may request
17 that the design criteria for the CSO control measures listed in Appendix B be revised if it can
18

19 _____
20 ¹The tunnel will have a total storage capacity of at least 15.24 million gallons ("mg") to capture
21 the flows from each of the six outfalls: 1.85 mg for County's 11th Avenue Northwest, 4.18 mg
22 for County's 3rd Avenue West, 1.06 mg for City's NPDES 174, 2.15 mg for City's NPDES 147,
23 5.38 mg for City's NPDES 152, and 0.62 mg for City's NPDES 150/151 (all of which total 15.24
24 mg).

1 demonstrate that the requested revision (1) reflects good engineering practice and (2) will
2 continue to achieve the performance criteria specified in Appendix B.

3 I. Paragraph 21(e) also provides that if EPA approves a greater than 20 percent revision of
4 design criteria, the modification shall not be effective until a modification of the Decree is
5 approved by the Court in accordance with Paragraph 104 of the Decree.

6 J. Paragraph 104 of the Consent Decree provides that the Consent Decree, including any
7 attached appendices, may be modified only by a subsequent written agreement signed by all
8 Parties. Where the modification constitutes a material change to the Consent Decree, the
9 modification shall be effective only upon approval by the Court.

10 K. The Parties have agreed, pursuant to Paragraphs 21 and 104 of the Consent Decree, to
11 allow King County an option to eliminate its individual County projects of a storage tank at 3rd
12 Avenue West and increased conveyance piping at 11th Avenue Northwest and to connect these
13 two County CSO outfalls to the joint City-County storage tunnel that will be sized to account for
14 the same storage volume of 4.18 million gallons² from 3rd Avenue West and 1.85 million gallons
15 from the 11th Avenue Northwest that was to be captured by King County's individual storage
16 projects (as well as to store the flows from the City's four CSO outfalls). As a result, the design
17

18
19 _____
20 ²Appendix B of the Decree, as shown below on page 9, is revised to show that the joint City-
21 County tunnel will store a total of at least 15.24 million gallons of which 4.18 million gallons
22 represent peak CSO volume attributable solely to County's 3rd Avenue West. Thus, Appendix B
23 deletes the former 7.23 million gallons representing the combined storage volumes of the
24 County's 3rd Avenue West and City's sites that were to be stored in the former joint City-County
storage tank option.

1 criteria – storage capacity – necessary to capture flows from these two County CSO outfalls is
2 not changing, and thus represents a less than 20 percent revision of the design criteria.

3 L. The critical milestone for construction completion of the joint City-County tunnel will be
4 December 31, 2025. As a result, this tunnel project will achieve the performance criteria and
5 better water quality five years earlier at King County’s 11th Avenue Northwest CSO outfall than
6 provided for under the County’ Consent Decree (i.e., December 31, 2030). The critical
7 milestone for King County’s 3rd Avenue Northwest CSO outfall will be extended by two years
8 from December 31, 2023 until December 31, 2025. However, King County’s overall
9 construction completion deadline for all CSO outfalls of December 31, 2030 remains unchanged,
10 as required by Paragraph 8 of the Decree.

11 M. The performance criteria for the joint City-County storage tunnel will remain the same –
12 no more than one overflow event per outfall per year on a 20-year moving average as defined in
13 Paragraph 9(dd) of the Consent Decree.

14 N. This proposed modification reflects good engineering practice and will continue to meet
15 the required performance criteria, in accordance with Paragraph 21. This joint project involves
16 the use of standard and proven tunneling technology. Overall, this engineering approach is more
17 cost-effective, minimizes impacts to neighborhoods during construction, and provides greater
18 flexibility in management of flows during operations than four independent dispersed storage
19 projects for six outfalls. The joint tunnel would eliminate the need for a large number of storage
20 facilities and storage pipes to be installed throughout the City, including the storage tank at 3rd
21 Avenue West and increased conveyance piping at 11th Avenue NW. The joint tunnel benefits the
22 community by reducing property and easement acquisitions that would have been needed for
23

1 four separate CSO projects, because the tunnel will be dug predominantly in the right of way on
2 the north side of the Ship Canal, thereby keeping property available for community use and
3 causing minimal land use or visual impacts. The joint tunnel project will also reduce the
4 following impacts to the neighborhoods surrounding King County's 3rd Avenue West and 11th
5 Avenue NW CSO outfalls that would be associated with construction of individual storage tanks
6 and pipes: traffic impacts, such as fewer truck trips on local roadways and less road closures and
7 detours; noise, dust, and odor issues; and utility disruptions because the tunnel is bored well
8 below the location of utilities at 100-120 feet depth (whereas storage tanks and conveyance
9 piping are located at shallower depths where utilities are also located). Instead, construction-
10 related impacts will be concentrated at the tunnel boring machine entrance portal, which is likely
11 to be located along Lake Washington Ship Canal in Ballard, and the tunnel boring machine exit
12 portal, which is likely to be located in the Fremont/Wallingford neighborhood. However, these
13 impacts will happen regardless because the City plans to build on these same sites to control its
14 respective CSO outfalls whether the County joins its two CSO outfalls to the tunnel or not. The
15 joint tunnel also provides flexibility because operation can be adapted to local storms

16 O. On July 27, 2016, the City and County signed and entered into the "City of Seattle and
17 King County Ship Canal Water Quality Joint Project Agreement" (Joint Project Agreement) that
18 will guide implementation, operation, and cost-sharing of the joint City-County storage tunnel
19 project. The City will be the lead for construction and implementation of the tunnel, and will
20 own, operate, and maintain the tunnel and its related structures. King County will remain
21 responsible for ensuring that 3rd Avenue West and 11th Avenue Northwest CSO outfalls achieve
22 the required performance criteria of one overflow event per outfall per year on a 20-year moving
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1 average. Pursuant to Paragraph 20 of the Decree, if the joint tunnel fails to achieve the
2 performance criteria for these two County CSO outfalls, then King County must submit to EPA
3 and the State a plan and schedule for performing supplemental remedial measures to achieve
4 compliance. Upon approval by EPA and the State, King County must implement such
5 supplemental measures in accordance with the approved schedule. King County will also retain
6 its ability to construct and implement its original individual storage and increased conveyance
7 piping projects at 3rd Avenue West and 11th Avenue Northwest, respectively, in case the City and
8 County mutually agree in writing to terminate the joint tunnel project, pursuant to the Joint
9 Project Agreement. The description, design and performance criteria, and critical milestones for
10 these individual projects would remain the same as set forth in Appendix B, if the City and
11 County mutually agree in writing to terminate the joint tunnel project, pursuant to the Joint
12 Project Agreement.

13 P. Because the proposed modification is less than 20 percent revision of the design criteria,
14 the changes made herein constitute non-material Consent Decree modifications that do not
15 require Court approval under Paragraphs 21 and 104 of the Consent Decree. The undersigned
16 Parties anticipate that the United States will file this Agreed Non-Material Consent Decree
17 Modification (“Agreement”) with the Court as a non-material modification and an agreed
18 supplement to the Consent Decree. The Parties hereby agree that this Agreement shall be
19 effective on the date that it has been signed by all Parties.

20 Q. No action by the Court is required at this time. The Parties file this non-material
21 modification to the Consent Decree with the Court in order to maintain a complete record of the
22 Consent Decree and this modification thereto.

Agreement

1. The Parties hereby agree to the following non-material modification to Appendix B of the Consent Decree:

a. On page 65 of Appendix B, replace the row for 3rd Avenue West (DSN 008) with the following:

CSO Control Project and Discharge Serial Number (DSN)	CSO Control Measure(s)	Description	Design Criteria	Performance Criteria in a Typical Year	Critical Milestones	Estimated Project Cost in 2010 Million Dollars³
3 rd Avenue West (DSN 008)	Joint City-County Storage Tunnel	Storage tunnel on north side of Ship Canal	At least 15.24 MG tunnel, of which at least 4.18 MG of peak CSO storage attributable to County's 3 rd Avenue West site	Reduce to one overflow event per year on a 20-Year Moving Average	<ul style="list-style-type: none"> • Construction Completion by December 31, 2025 	\$133.7 ⁴
	OR Independent County Storage Tank	OR Storage tank near Seattle Pacific University (\$56.4 million)	OR 4.18 MG of peak CSO storage		<ul style="list-style-type: none"> OR • Submission of Facilities Plan by December 31, 2018 • Completion of Bidding by December 31, 2020 • Construction Completion by December 31, 2023 	OR \$56.4

b. On page 66 of Appendix B, replace the row for 11th Avenue NW (DSN 004) with the following:

CSO Control Project and Discharge Serial Number (DSN)	CSO Control Measure(s)	Description	Design Criteria	Performance Criteria in a Typical Year	Critical Milestones	Estimated Project Cost in 2010 Million Dollars ³
11 th Ave. NW (DSN 004)	Joint City-County Storage Tunnel	Storage tunnel on north side of Ship Canal	At least 15.24 MG tunnel, of which at least 1.85 MG of peak CSO storage attributable to County's 11th Avenue NW site.	Reduce to one overflow event per year on a 20-Year Moving Average	<ul style="list-style-type: none"> • Construction Completion by December 31, 2025 	\$133.7 ⁴
	OR Increased conveyance ¹	OR Increased conveyance	OR 3,200 feet of 84-inch-diameter pipe conveyance.		OR <ul style="list-style-type: none"> • Submission of Facilities Plan by December 31, 2026 • Completion of Bidding by December 31, 2028 • Construction Completion by December 31, 2030 	OR \$23.7

¹ The County may propose, subject to EPA and the State's approval, to use Green Stormwater Infrastructure control measures to partially substitute for Gray Infrastructure control measures in accordance with Paragraph 22 and Appendix E of this Consent Decree.

³ 2010 basis year for costs as per original Consent Decree, except for two projects updated as described in footnote 4 below.

⁴ As of 2016, the estimated cost at completion of \$133.7 million shown for both 3rd Avenue West and 11th Avenue NW is the County's total combined financial share of the Joint City-County Storage Tunnel project.

1 2. Except as specified herein, no additional provisions of the Consent Decree or Appendices
2 are modified, superseded, or altered in any way by this Agreement.

3 3. This Agreement may be executed in counterparts.

4 The undersigned party hereby consents and certifies that it is authorized to consent to the terms
5 and conditions of this Agreed Non-Material Consent Decree Modification in the matter of *United*
6 *States and the State of Washington v. King County, Washington*, Civil Action No. 2:13-cv-677-
7 JCC (W.D. Wash.).

8 FOR THE UNITED STATES OF AMERICA:

9
10 THOMAS A. MARIANI, JR.
11 Section Chief
12 United States Department of Justice
13 Environment and Natural Resources Division
14 Environmental Enforcement Section


13 Date: 10-25-2016

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JCC (W.D. Wash.).

4 FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
5 REGION 10:

6
7 Date: 9/19/2016


EDWARD J. KOWALSKI

Director, Office of Compliance and Enforcement
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11 Date: 9/26/16


ALLYN L. STERN *Acting for*

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16 Date: 9/20/2016



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FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE:

Date: 9/7/16



MARK POLLINS, Director
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Date: 9/6/16



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3 *States and the State of Washington v. King County, Washington*, Civil Action No. 2:13-cv-677-
4 JCC (W.D. Wash.).

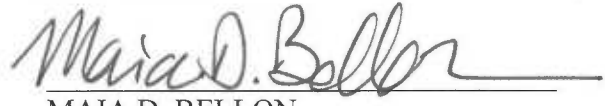
5 FOR THE STATE OF WASHINGTON:

6 Date: 9/29/16



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11 Date: 9/23/16



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1 The undersigned party hereby consents and certifies that it is authorized to consent to the terms
2 and conditions of this Agreed Non-Material Consent Decree Modification in the matter of *United*
3 *States and the State of Washington v. King County, Washington*, Civil Action No. 2:13-cv-677-
4 JCC (W.D. Wash.).

5 FOR KING COUNTY, WASHINGTON:

6
7 Date: 9/14/2016

8 
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