

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

UNITED STATES OF AMERICA,	:	CASE NO. 5:09-CV-00272
	:	
Plaintiff,	:	JUDGE JOHN ADAMS
	:	
v.	:	
	:	
CITY OF AKRON, OHIO,	:	
	:	
and	:	<u>DEFENDANT/CROSS-CLAIMANT STATE</u>
	:	<u>OF OHIO'S RESPONSE TO DEFENDANT</u>
	:	<u>CITY OF AKRON'S MOTION FOR</u>
THE STATE OF OHIO,	:	<u>RELIEF FROM THE CONSENT DECREE</u>
	:	
Defendants.	:	

The State of Ohio responds to the Defendant City of Akron's ("Akron" or "City") Motion for Relief from the Consent Decree. Akron's requested relief is completely unnecessary as the Consent Decree is adequately drafted to accommodate any timely request by Akron for Integrated Planning. As such, Akron is not entitled to modification of the Consent Decree and its Motion must be denied.

I. INTRODUCTION

The City of Akron operates a combined sewer system which, during periods of excess wastewater flows, can convey untreated or partially treated wastewater to the Cuyahoga River and its tributaries. The United States, the State of Ohio, and the City of Akron had engaged in lengthy negotiations to resolve this problem, which originally proved unsuccessful. Ultimately, on February 5, 2009, the United States filed its Complaint in this action. [Dkt. No. 1.] The United States then filed its First Amended Complaint on March 20, 2009, naming the City of Akron and the State of Ohio as Defendants. [Dkt. No. 4.] Akron filed its Answer to the First Amended Complaint on April 29, 2009. [Dkt. No. 11.] The State

of Ohio filed an Answer and Cross-Claim against Akron on May 11, 2009. [Dkt. No. 16.] Akron filed its Answer to the State's Cross-Claim on June 1, 2009. [Dkt. No. 24.]

Following this, the Parties engaged in written discovery and continued settlement discussions. Ultimately, the Parties reached an agreement and on October 15, 2009, the Court granted a stay of discovery. [Dkt. No. 43.] On November 13, 2009, the Parties filed a Notice of Proposed Consent Decree. [Dkt. No. 46.] On December 2, 2009, the Court issued a stay of the remainder of the litigation. [Dkt. No. 47.] In response to comments received during the public comment period, the Consent Decree was modified slightly and on May 10, 2010, the United States move for entry of an Amended Consent Decree. [Dkt. No. 53.]

A Fairness Hearing was held on January 4 – 5, 2011 regarding the proposed Amended Consent Decree. Following the Hearing, the Court rejected the Amended Consent Decree. The parties continued to negotiate and ultimately reached agreement on a Long Term Control Plan which sets deadlines for projects to be completed that will result in there being no untreated discharges to the Cuyahoga River by 2027. The U.S. EPA approved the LTCP Update on November 17, 2011 and the Ohio EPA did so on April 11, 2012. In light of this agreement and approval of the LTCP Update, the parties moved in May 2012 for reconsideration of the earlier decision rejecting the Amended Consent Decree. *Id.* The Court granted the motion and entered the Amended Consent Decree on January 17, 2014. [Dkt. Nos. 154, 155.]

Shortly before the Court entered the Amended Consent Decree, Akron indicated that it wished to “withdraw” the previously approved LTCP Update and instead reconsider the injunctive relief based on its interpretation of U.S. EPA’s Integrated Planning Framework. In October 2014, the Akron presented to U.S. EPA and Ohio EPA a “proof of concept” for its

proposed integrated planning methodology. [Dkt. No. 167, Ex 5 to Ex A.] U.S. EPA responded to this proof of concept, explaining as an initial matter that it does not “approve” integrated plans themselves, and also raised specific concerns about Akron’s interpretation and application of certain integrated planning concepts. [Dkt. No. 167, Ex 6 to Ex A.] Akron disagreed with many of the points raised in the response; its response is reprinted in large part at page 7 of its brief in support of the current motion. [Dkt. No. 167, pg 7.]

II. REQUESTED RELIEF

The relief sought by Akron in the instant Motion seeks to amend the Amended Consent Decree by adding the following paragraph:

112-a. Notwithstanding any other provision in this Consent Decree, the City may request a modification of the control measures (including the location, description, design criteria, performance criteria, or critical milestones) specified in the Long Term Control Plan Update based on development of an Integrated Plan, consistent with the June 5, 2012 U.S. EPA Memorandum Integrated Municipal Stormwater and Wastewater Planning Approach Framework, or any later-adopted guidance concerning integrated planning. Such a modification request may be based on factors including but not limited to: a) modifications that may provide equal or better environmental results than those required by the performance criteria of the existing control measures; or b) a demonstration that the existing control measures are no longer affordable. U.S. EPA will evaluate such a modification request in accordance with applicable law and guidance concerning integrated planning and affordability.

Akron’s proposed modification does not relate to a specific project or even a set of projects. Akron’s proposed modification would unnecessarily rewrite the terms of the Amended Consent Decree while bypassing the dispute resolution provisions in the Amended Consent Decree specifically included address this situation.

III. **LAW AND ARGUMENT**

Federal Rule of Civil Procedure 60(b) provides a mechanism for seeking post-judgment relief—reopening of a case—for a limited set of circumstances. Gonzalez v. Crosby, 545 U.S. 524, 528, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Rule 60(b) states:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Fed.R.Civ.P. 60(b).

A. Akron's Motion for Relief from Judgment Is Unnecessary.

In its Motion, Akron specifically asks this Court to modify the Amended Consent Decree by inserting a new provision stating that the City may request a modification of the Decree based upon the development of an Integrated Plan consistent with federal guidelines. There is no need to modify the Amended Consent Decree to include this specific language. The Amended Consent Decree already provides the flexibility for Akron to pursue integrated planning and Akron has already commenced the pursuit this course of action without the modification.

By its own admission, Akron is already pursuing integrated planning. Def. City of Akron's Rule 60(b) Motion, Memorandum in Support, pp. 6-8 [Dkt. No. 167] In its Memorandum in Support of Rule 60(b) Motion filed on January 17, 2015, Akron specifically outlines the course of action they have taken to pursue integrated planning for their sewer system. Akron states that "On October 1, 2014, Akron Submitted a Preliminary IP [integrated planning] Draft Plan." [Dkt. No. 167, pg. 6] Akron then states that "On November 17, 2014, USEPA Region 5 provided a response to the Preliminary IP Plan and rejected the City's methodology." [Id.] Akron then proceeds to outline the major points of disagreement between the City and the U.S. EPA. Clearly Akron has been able to work toward the development of an integrated sewer plan absent any modification of the Consent Decree. The fact that Akron, the U.S. EPA and the State of Ohio have not been able to agree on an appropriate integrated planning framework does not, in itself, warrant a modification to the Amended Consent Decree. Since the parties have already begun discussing integrated planning, there is simply no reason that the Amended Consent Decree requires a modification for parties to discuss or to continue discussing integrated planning.

B. The Amended Consent Decree, By Its Own Terms, Provides a Procedure for Modification.

When the State of Ohio entered into the Amended Consent Decree it was anticipated that the work required by Akron would take years to complete. Given the long term horizon of the Amended Consent Decree, it was anticipated that conflicts would arise. As a result the Amended Consent Decree contains provisions which address the issue of modification. Specifically, the Consent Decree states "... the dispute resolution procedures of the Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. ..." [Dkt No. 155, pg. 42] The Amended Consent Decree

proceeds to outline detailed procedures for invoking both informal and formal dispute resolution. Under the terms of the Amended Consent Decree, the parties must agree in writing to a modification and to present any modification that represents a “material change” to the Amended Consent Decree for Court approval. [Dkt. No. 155, pg 55.] If the parties cannot agree on a proposed modification, there is a mechanism to resolve such dispute through the dispute resolutions process of the Consent Decree. [Dkt. No. 155, pgs 55-56.] If the disagreement is not resolved through dispute resolution, the matter may then be presented to the Court for review “in accordance with the Federal Rule of Civil Procedure 60(b).” *Id.*

Akron is attempting to circumvent this agreed procedure by prematurely going directly to the Court under the guise of a Rule 60(b) motion. Akron must wait to seek this Court’s intervention until 1) Akron has made a formal modification proposal that the U.S. EPA and the State of Ohio have formally rejected, and 2) dispute resolution under the Amended Consent Decree has been unsuccessful in resolving the dispute.

C. Akron Is Not Entitled to Modify the Consent Decree Because It Has Not Met the High Burden Required to Demonstrate Entitlement to the Relief Requested Pursuant to Rule 60(b)(2).

Akron stated reason for filing its Motion on January 17, 2015 is that “in the event that USEPA and the Court might deem this to be a Rule 60(b)(2) rather than a Rule 60(b)(5) motion.” [Dkt. No. 167, pg. 6] Notwithstanding the stated reason that the Court may deem this to be a Rule 60(b)(2) motion, Akron fails to state any facts or law in support relief pursuant to Rule 60(b)(2).

In the Sixth Circuit, a movant seeking to modify a consent decree pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure must show “(1) that it exercised due

diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result before the original judgment.” *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 615 (6th Cir. 2012); see also Fed. R. Civ. P. 60(b)(2). To prevail the newly discovered evidence “must have been previously unavailable.” *GenCorp, Inc. v. Am. Int’l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999).

There is no new information here. U.S. EPA’s Integrated Municipal Stormwater and Wastewater Planning Approach Framework was issued on June 5, 2012, well before the entry of the Amended Consent Decree. Additionally any “new” information asserted by Akron could easily have been discovered in the exercise of due diligence by January 2014. Additionally, the City was aware during the development of the LTCP Update that not all engineering information was known at the time; rather, it would develop as specific measures were being implemented. See Reichlin Decl. ¶ 6. As for the City’s remaining assertions, any population and economic trends tending to increase burdens on Akron ratepayers were, or could have been, known to Defendant prior to January of 2014. Accordingly, the Court should deny the City’s motion to modify the Amended Consent Decree pursuant to Rule 60(b)(2).

D. Akron’s Fails to Meet the Criteria for Relief From Judgment under Federal Rule of Civil Procedure 60(b)(5).

A party seeking to modify a decree under Rule 60(b)(5) bears the burden of “establishing that a significant change in circumstances warrants revision of the decree.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). To meet its initial burden, the moving party must show “a significant change either in factual conditions or in law.” *Id.* at 384. The Supreme Court noted that a modification may be warranted when: (1) changed factual conditions make compliance with the decree “substantially more onerous;”

(2) a decree proves to be unworkable because of “unforeseen obstacles;” or (3) enforcement of the decree without modification would be “detrimental to the public interest.” *Id.* If a party has met its burden of establishing that a change in circumstances may warrant a modification, the district court should focus on “whether the proposed modification is tailored to resolve the problems created by the change in circumstances.” *Id.* at 391. “A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires.” *Id.*

The Supreme Court emphasized in *Rufo* that Rule 60 is not intended to provide relief to a party “when it is no longer convenient to live with the terms of a consent decree.” *Id.* at 383. Thus, ordinarily, a court should not grant a modification “where a party relies upon events that actually were anticipated at the time it entered into a decree.” *Id.* at 385. Under those circumstances, the party would have to satisfy a “heavy burden” to establish that “it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking.” *Id.*

Akron asserts that modeling and treatment information, financial information concerning affordability, and allegations of unfair treatment warrant modification of the Amended Consent Decree. Initially, the City points to updated modeling information in support of its Motion. The fact that the City would prepare such a refined model – and that it might produce different results – would have been easily anticipated as a result of the lengthy process of the negotiation of the Consent Decree, the LTCP, and the Amended Consent Decree. As Mr. Reichlin explains, the City updated its sewershed model in the late-spring of 2014 because, while “the original modeling and technical understanding” of the system were adequate for the planning and development of the LTCP Update, the City

required more detailed and calibrated information for “the detailed engineering decisions” necessary at the implementation stage. *See* Reichlin Decl. at ¶6. According to the City, the updated model indicates that water flows are different than previously understood, and that system performance assumed in the Amended Consent Decree is “inaccurate.” [Dkt. No. 167, pg 5.] This new information may well factor into future discussions between the parties about compliance and the assessment of appropriate control measures. But the fact that Akron revised its model does not make compliance with the Amended Consent Decree any more onerous, unworkable, or inequitable, and it does not justify the requested modification, to the Amended Consent Decree modification review process itself.

Next, the City argues that the modification is warranted due to changes in the anticipated cost of the projects, certain new financial assessment information and the output of an updated Financial Capability Assessment (“FCA”). [Dkt. No. 167, pg 5] As Akron’s Motion explains, in late 2013, the City updated its cost estimates for the LTCP Update and has recently prepared an updated FCA. The parties have had initial discussions regarding the outputs of the updated FCA. If presented with specific modification proposals in the future, the United States and the State of Ohio will consider whether this financial information would justify modifications to the Consent Decree. Again, the requested modification, does not relate to a specific financial proposal, but rather to the Amended Consent Decree modification review process itself.

IV. CONCLUSION

Based on the foregoing, Akron is not entitled to modify the Amended Consent Decree. The State of Ohio respectfully requests that the Akron’s Motion for Relief from Judgment be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **Defendant State of Ohio's to Response to the Motion of Defendant City of Akron's for Relief From the Consent Decree** was served upon the following parties via email and/or this Court's Case Management/Electronic Case Files (CM/ECF) docketing system, this 3rd day of February 2015:

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