

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,	)	
	)	
and	)	
	)	
THE STATE OF OHIO,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil Action No. 18-cv-90
THE CITY OF MIDDLETOWN, OHIO,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	
	)	

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CONSENT DECREE

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## **CONSENT DECREE**

WHEREAS, Plaintiff United States of America (“United States”), on behalf of the United States Environmental Protection Agency (“U.S. EPA”), and Plaintiff the State of Ohio (“State”), on behalf of the Ohio Environmental Protection Agency (“Ohio EPA”), have filed a complaint in this action (“Complaint”) concurrently with this Consent Decree alleging that the Defendant, the City of Middletown, Ohio, (“Middletown”) violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, and regulations promulgated thereunder; Chapter 6111 of the Ohio Revised Code and rules promulgated thereunder; and certain terms and conditions of the National Pollutant Discharge Elimination System (“NPDES”) permits issued to Middletown pursuant to the CWA relating to the municipal wastewater treatment plant (“WWTP”) and Sewer System owned and operated by Middletown;

WHEREAS, in their Complaint, the United States and the State allege that: (1) various discharges from Middletown’s wastewater treatment plant have violated the CWA by exceeding the effluent limitations in Middletown’s NPDES permits for chlorine, ammonia as nitrogen, fecal coliform, total suspended solids, and pH; (2) Middletown’s wet weather combined sewer overflow (“CSO”) discharges violate the CWA and conditions in Middletown’s NPDES permits because the discharges impair downstream uses; (3) Middletown has discharged untreated sewage from its CSO outfalls during dry weather in violation of the CWA; and (4) Middletown has violated the CWA and conditions of its NPDES permits by failing to monitor and/or report the results for its CSO outfalls in the manner required by the permits;

WHEREAS, Middletown does not admit these allegations nor any liability to the United States or the State arising out of the transactions or occurrences alleged in the Complaint;

WHEREAS, the United States and the State have not alleged violations related to sanitary sewer overflows, however, this Consent Decree, nonetheless, includes requirements that Middletown replace or rehabilitate substantial portions of its Sewer System pipes during the life of this Consent Decree;

WHEREAS, the pipe rehabilitation and replacement measures are being implemented by Middletown in a proactive effort to prevent problems from arising in the future;

WHEREAS, Middletown represents that the Middletown Sewer System currently serves an area of approximately 19,325 acres and approximately 18,000 households;

WHEREAS, Middletown represents that it has undertaken numerous Sewer System and WWTP replacement and rehabilitation projects intended to reduce CSO discharges; and

WHEREAS, the United States, the State, and Middletown (the “Parties”) recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid protracted and expensive litigation among the Parties and that this Consent Decree is fair, reasonable, and in the public interest;

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I (Jurisdiction and Venue), and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

## **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and over the Parties. Venue lies in this District pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b), because Middletown is located in this judicial district and the alleged violations occurred in this District. Authority for Ohio to bring its action is vested in the Ohio Attorney General pursuant to Ohio Revised Code (“O.R.C.”) § 6111.07. This Court has supplemental jurisdiction over the state law claims asserted by Ohio pursuant to 28 U.S.C. § 1367.

2. For purposes of this Consent Decree or any action to enforce this Consent Decree, the Parties consent to the Court’s jurisdiction over this Consent Decree, over any action to enforce this Consent Decree, and over the Parties. The Parties also consent to venue in this judicial district.

## **II. APPLICABILITY**

3. The obligations of this Consent Decree apply to and are binding upon the United States, the State of Ohio, and upon Middletown, its successors and assigns, its officers, directors, employees, and agents in their capacities as such, and all other persons and entities as provided for in Fed. R. Civ. P. 65(d).

4. No transfer of ownership or operation of the WWTP, the Sewer System, or any portion of the WWTP or Sewer System shall relieve Middletown of its obligation to ensure that the terms of the Decree are implemented, unless (1) the transferee agrees to undertake the obligations required by Section IV (Compliance Requirements) of this Decree and to be substituted for Middletown as a Party under the Decree and thus be bound by the terms thereof, (2) the United States consents to relieve Middletown of its obligations, and (3) the Court agrees to the substitution. The United States’ discretion to refuse to approve the substitution of the transferee for Middletown is not subject to judicial review. At least 30 days prior to such transfer, Middletown shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to U.S. EPA, the United States Attorney for the Southern District of Ohio, and the United States Department of Justice, in accordance with Section XV (Notices). Any attempt to transfer ownership or operation of the WWTP, the Sewer System, or any portion of the WWTP or Sewer System without complying with this Paragraph constitutes a violation of this Decree.

5. Middletown shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any contractor retained to perform work required under this Consent Decree. Such copy may be provided in paper form, electronic form, or by on-line access. Middletown shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, Middletown will not raise as a defense to liability the failure of its officers, directors, agents, servants, contractors, or employees to take any actions necessary to comply with the provisions hereof.

### **III. DEFINITIONS**

7. Terms used in this Consent Decree that are defined in the CWA, 33 U.S.C. § 1251, *et seq.*, or in federal regulations promulgated pursuant to the CWA at 40 C.F.R. Part 122 shall have the meanings assigned to them in the CWA or such regulations, unless otherwise provided in this Consent Decree. Terms used in this Consent Decree that are not defined in the CWA or in federal regulations promulgated pursuant to the CWA at 40 C.F.R. Part 122 but that are defined in Chapter 6111 of the Ohio Revised Code or in state regulations promulgated pursuant to Chapter 6111 of the Ohio Revised Code shall have the meanings assigned to them in Chapter 6111 of the Ohio Revised Code or such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. “Combined Sewer Overflow” or “CSO” shall mean any discharge from Middletown’s Combined Sewer System at a CSO Outfall designated in the NPDES Permit.

b. “Combined Sewer Overflow Policy” or “CSO Policy” shall mean the policy issued by U.S. EPA regarding combined sewer overflows, entitled “Combined Sewer Overflow Control (CSO) Policy,” 59 Fed. Reg. 18,688 (April 19, 1994).

c. “Combined Sewer System” shall mean the portion of Middletown’s Sewer System designed to convey municipal sewage (domestic, commercial, and industrial wastewaters) and stormwater to Middletown’s WWTP or to a CSO Outfall.

d. “Complaint” shall mean the complaint filed by the United States and the State in this action.

e. “Consent Decree” or “Decree” shall mean this Consent Decree and all appendices hereto.

f. “Construction Schedule” shall mean the schedule agreed to by the Parties, which is attached to this Consent Decree as Appendix C.

g. “CSO Event” shall mean one or more CSOs from the City’s collection system as the result of a precipitation event following a period of at least 24 hours during which no CSO has discharged. A single precipitation event that causes multiple CSO discharges shall constitute one CSO Event.

h. “CSO Outfall” shall mean an outfall in the Combined Sewer System from which CSOs are permitted to be discharged. Middletown’s CSO Outfalls in its NPDES Permit are labeled as follows:

- i. Lafayette CSO (Outfall 003)
- ii. 15th Avenue CSO (Outfall 004)
- iii. 14th Avenue CSO (Outfall 005)
- iv. Verity Parkway CSO (Outfall 006)
- v. 9th Avenue CSO (Outfall 007)
- vi. 2nd Avenue CSO (Outfall 008)
- vii. Lakeside CSO (Outfall 009)
- viii. Bulls Run CSO (Outfall 010)

i. “Date of Lodging of this Consent Decree” or “Date of Lodging” shall mean the date that this Consent Decree, in proposed form, is filed for lodging, pending solicitation of public comment and entry by the Court, with the Clerk of the Court for the United States District Court for the Southern District of Ohio.

j. “Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, federal holiday, or legal holiday for Middletown, the period shall run until the close of business of the next business day.

k. “Descriptions and Design Criteria” shall mean numeric and/or narrative specifications included in the Long Term Control Plan that must be met in designing and constructing CSO control measures required by this Consent Decree.

l. “Dry Weather Flow” means the combination of domestic sewage, groundwater infiltration, commercial and industrial wastewaters, and any other non-precipitation related flows.

m. “Dry Weather Overflow” shall mean any CSO that consists only of Dry Weather Flow.

- n. “Effective Date” shall have the definition provided in Section XVI (Effective Date).
- o. “Long Term Control Plan” or “LTCP” shall mean the plan attached to this Consent Decree as Appendix A.
- p. “MGD” or “mgd” shall mean million gallons per day.
- q. “Middletown” shall mean the Defendant City of Middletown, Ohio.
- r. “NPDES Permit” shall mean NPDES Permit No. 1PE00003\*OD (OH0026522) issued to Middletown by Ohio EPA, effective on May 1, 2016, and all revisions, modifications, renewals, and successors to this NPDES Permit.
- s. “Ohio EPA” shall mean the Ohio Environmental Protection Agency and any successor departments or agencies of the State of Ohio.
- t. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral.
- u. “Parties” shall mean the United States, the State, and Middletown.
- v. “Performance Criteria” shall mean no more than six CSO Events Systemwide during the Typical Year of 1970, based on rainfall data from the Covington (Northern Kentucky) Airport Station.
- w. “Plaintiffs” shall mean the United States and the State of Ohio.
- x. “Section” shall mean a portion of this Consent Decree that has a heading identified by an upper case Roman numeral.
- y. “SEP” shall mean the Supplemental Environmental Project described in Appendix D of this Consent Decree.
- z. “Sewer System” shall mean the wastewater collection and transmission system owned or operated by Middletown designed to collect and convey municipal sewage (domestic, commercial, and industrial) to Middletown’s WWTP or to a CSO Outfall.
- aa. “State” shall mean the State of Ohio, acting on the referral of Ohio EPA. State and Ohio are interchangeable for the purposes of this Consent Decree.
- bb. “Unauthorized Release” shall mean any overflow, spill, diversion, or release of wastewater from the Sewer System at a location other than a CSO Outfall. This term shall include any release of wastewater from the Sewer System to public or private property, including basement backups.

cc. “United States” shall mean the United States of America, acting on behalf of U.S. EPA.

dd. “Unpermitted Discharge” shall mean any discharge from any portion of the Sewer System that is not a permitted discharge under the CWA or Middletown’s NPDES Permit.

ee. “U.S. EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

ff. “Wastewater Treatment Plant” or “WWTP” shall mean the wastewater treatment plant owned and operated by Middletown and located at 300 Oxford State Road, Middletown, Ohio, 45044, and any future wastewater treatment facilities connected to the Sewer System.

#### IV. COMPLIANCE REQUIREMENTS

8. Injunction. Middletown shall comply with the effluent limitations in its NPDES Permit pertaining to discharges from the outfall identified as “Outfall 001” in the NPDES Permit issued to Middletown by Ohio EPA, effective on May 1, 2016, and with the compliance measures and the schedules set forth below. This includes complying with effluent limitations for that outfall (or for any outfall from the WWTP) in any subsequent NPDES permit.

9. No Dry Weather Overflows. Middletown is prohibited from any and all Dry Weather Overflows.

10. No Unpermitted Discharges. Middletown is prohibited from any and all Unpermitted Discharges.

11. Compliance with Operation and Maintenance Requirements. Middletown shall comply with all operation and maintenance requirements of the NPDES Permit in Parts II.G, II.I and III.3 of the NPDES Permit issued to Middletown by Ohio EPA, effective on May 1, 2016, as well as all comparable operation and maintenance requirements in any revisions, modifications, renewals and successors to that NPDES Permit.

12. CSO Control Measures Implementation. Middletown shall perform the activities and construct the CSO control measures in accordance with the Descriptions and Design Criteria specified in the LTCP attached as Appendix A and the Construction Schedule attached as Appendix C. The State concurs that the CSO control measures in Appendix A are adequate and appropriate.

13. Achievement of Performance Criteria. By January 1, 2043, Middletown shall:

a. achieve full operation of all CSO control measures, as set forth in the LTCP;

- b. achieve the Performance Criteria; and
- c. comply with any numeric and/or narrative effluent limitations of Middletown's NPDES Permit applicable to Middletown's CSOs.

14. Post-Construction Monitoring Program. By January 1, 2041, Middletown shall submit a Post-Construction Monitoring Program to U.S. EPA for review and approval in accordance with Paragraph 18. The Post-Construction Monitoring Program shall be developed in accordance with the terms and schedule specified in Appendix B. Upon approval by U.S. EPA, Middletown shall implement the Post-Construction Monitoring Program in accordance with the terms and schedule specified in the approved Program.

15. No Unpermitted Discharges from Outfall 002. Beginning January 1, 2018, all discharges from the outfall identified as "Outfall 002" in the NPDES Permit issued to Middletown by Ohio EPA, effective on May 1, 2016, are prohibited, except as permitted by the Clean Water Act or the NPDES Permit.

16. Monitoring of CSOs. Middletown shall comply with all CSO monitoring requirements of the NPDES Permit, including the requirements in Part I.A.

17. Sewer Pipe Rehabilitation and Replacement.

a. Middletown shall replace (including complete pipe removal and replacement, pipe bursting, or similar replacement activities) and/or rehabilitate (using slip lining, cured-in-place repairs, or similar rehabilitation activities) 40 miles of sewer pipe in the Sewer System in accordance with the following schedule:

Dates for Achievement of Cumulative Length in Miles Replaced/Rehabilitated	Cumulative Length in Miles of Sewers Replaced/Rehabilitated
January 1, 2023	Completion of Sewer System Condition Assessment
January 1, 2028	8 miles
July 1, 2034	16 miles
January 1, 2043	40 miles

b. At least 12 miles of the total sewer pipe replaced and/or rehabilitated pursuant to Paragraph 17.a shall be 36 inch diameter or larger. At least 4 miles of the total sewer pipe replaced and/or rehabilitated pursuant to Paragraph 17.a shall be 72 inch diameter or larger.

c. Middletown shall prioritize replacement and rehabilitation of sewer pipe based upon the severity of defects identified, likelihood of pipe failure and consequence of pipe

failure, contribution of inflow and infiltration, maintenance history, and any history of discharges or releases from the sanitary portion of Middletown's Sewer System.

d. Pipe Rehabilitation and Replacement Report. By no later than five years following the Date of Entry of the Consent Decree, and every five years thereafter, Middletown shall submit a Pipe Rehabilitation and Replacement Report to U.S. EPA for U.S. EPA review. Each Report shall include:

- i. Identification of the pipes that Middletown plans to replace and/or rehabilitate within the five years following the date of the Report;
- ii. The basis for Middletown's selection of the specific pipes that Middletown plans to replace and/or rehabilitate over the next five years, including an explanation as to how Middletown prioritized replacement and rehabilitation of sewer pipe based upon the severity of defects identified, likelihood of pipe failure and consequence of pipe failure, contribution of inflow and infiltration, maintenance history, and/or any history of discharges or releases from the sanitary portion of Middletown's Sewer System; and
- iii. For all subsequent Reports following the initial Report:
  1. The locations and number of miles of sewer pipes that were replaced or rehabilitated each year during the prior five years;
  2. An estimate of the amount of money spent by Middletown on replacing and rehabilitating sewer pipes (including costs related to planning, design, and any necessary utility relocation) during the prior five years;
  3. The cumulative amount of sewer pipes that have been replaced or rehabilitated since the Date of Entry of the Consent Decree and whether Middletown achieved the cumulative mileage of sewer pipe replacement/rehabilitation by the dates specified in Paragraph 17.a; and
  4. If Middletown has not achieved the required cumulative mileage of sewer pipe replacement/rehabilitation by the dates specified in Paragraph 17.a, a discussion of the reasons why the mileage requirement was not achieved.

18. U.S. EPA Review and Approval.

a. After review of any plan, report, schedule, or other item that is required to be submitted for U.S. EPA review and approval, U.S. EPA, after consultation with the State,

shall in writing: (i) approve the submission; (ii) approve part of the submission and disapprove the remainder; or (iii) disapprove the submission.

b. If the submission is approved pursuant to Paragraph 18.a, Middletown shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is approved only in part pursuant to Paragraph 18.a.ii, Middletown shall, upon written direction from U.S. EPA, after consultation with the State, take all actions required by the approved plan, report, or other item that U.S. EPA, after consultation with the State, determines are technically severable from any disapproved portions, subject to Middletown's right to dispute only the specified conditions or the disapproved portions, under Section XI(Dispute Resolution).

c. If the submission is disapproved in whole or in part pursuant to Paragraph 18.a.ii or 18.a.iii, Middletown shall, within 60 days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with this Paragraph. If the resubmission is approved in whole or in part, Middletown shall proceed in accordance with Paragraph 18.b.

d. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, U.S. EPA, after consultation with the State, may again require Middletown to correct any deficiencies, subject to Middletown's right to invoke Dispute Resolution and the right of U.S. EPA to seek stipulated penalties.

19. Middletown shall provide Ohio EPA with a copy of each plan, report, schedule, or other document submitted by Middletown for U.S. EPA approval.

20. Permits. Where any compliance obligation under this Section requires Middletown to obtain a federal, state, or local permit or approval, Middletown shall submit timely and complete applications to obtain all such permits or approvals. The inability of Middletown to obtain a permit in adequate time to allow compliance with the deadlines stated in this Consent Decree shall be considered a Force Majeure event if Middletown demonstrates that it exercised best efforts to timely fulfill its permitting obligations.

## **V. CIVIL PENALTY**

21. By no later than 30 days after the Effective Date of this Consent Decree, Middletown shall pay to the United States a civil penalty in the amount of \$27,500, together with interest accruing from the Effective Date, at the rate specified in 28 U.S.C. § 1961 as of the Effective Date. Middletown shall pay the civil penalty by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with written instructions to be provided to Middletown, following the entry of the Decree, by the Financial Litigation Unit ("FLU") of the U.S. Attorney's Office for the Southern District of Ohio. The costs of such EFT shall be Middletown's responsibility. The payment instructions provided by the FLU will include a Consolidated Debt Collection System ("CDCS") number, which Middletown shall use to identify

all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Vincent Atriano  
Squire Patton Boggs LLP  
2000 Huntington Center  
41 South High Street  
Columbus, Ohio 43215

on behalf of Middletown. Middletown may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States and U.S. EPA in accordance with Section XV (Notices). At the time of payment, Middletown shall send a copy of the EFT authorization form, the EFT transaction record, and a transmittal letter: (i) to U.S. EPA via email at [cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov) or via regular mail at EPA Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268 and (ii) to the United States via email or regular mail in accordance with Section XV (Notices). The transmittal letter shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in United States, et al. v. City of Middletown, Ohio, and shall reference the civil action number, CDCS number, and DOJ case number 90-5-1-1-08978.

22. By no later than 30 days after the Effective Date of this Consent Decree, Middletown shall pay a civil penalty to the State in the amount of \$27,500. Payment to the State of Ohio shall be made by certified check or checks payable to "Treasurer, State of Ohio," and shall be delivered to Martha Sexton, Paralegal, or her successor, at the Ohio Attorney General's Office, Environmental Enforcement Section, Public Protection Division, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215. Payment may also be made by electronic funds transfer to the designated accounts pursuant to instructions sent by Ohio upon request by Middletown. At the time of payment, Middletown shall simultaneously send written notice of payment and a copy of any transmittal documentation (which should reference the above-captioned case name and civil action number) to Plaintiffs in accordance with Section XV (Notices) of this Consent Decree.

## **VI. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

23. Middletown shall implement a Supplemental Environmental Project ("SEP") providing for capping of a specified area of sediments within the Hydraulic Canal.

24. The SEP shall be completed in accordance with the schedule and requirements set forth in Appendix D.

25. Middletown is responsible for the satisfactory completion of the SEP in accordance with the requirements of this Decree. Middletown may use contractors or consultants in planning and implementing the SEP.

26. With regard to the SEP, Middletown certifies the truth and accuracy of each of the following:

a. that all cost information provided to U.S. EPA in connection with U.S. EPA's approval of the SEP is complete and accurate and that Middletown in good faith estimates that the cost to implement the SEP is \$200,000.00;

b. that, as of the date of executing this Decree, Middletown is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

c. that the SEP is not a project that Middletown was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;

d. that Middletown has not received and will not receive credit for the SEP in any other enforcement action;

e. that Middletown will not receive any reimbursement for any portion of the SEP from any other person; and

f. that Middletown is not a party to any open federal financial assistance transaction that is funding or could fund the same activity as the SEP described in this Section.

27. SEP Completion Report

a. Within 30 days after the date set for completion of the SEP as specified in Appendix D, Middletown shall submit a SEP Completion Report to the United States and Ohio, in accordance with Section XV of this Consent Decree (Notices). The SEP Completion Report shall contain the following information:

- (1) a detailed description of the SEP as implemented;
- (2) a description of any problems encountered in completing the SEP and the solutions thereto;
- (3) an itemized list of all SEP costs expended; and
- (4) certification that the SEP has been fully implemented pursuant to the provisions of this Decree.

28. Within 30 days after receiving the SEP Completion Report, U.S. EPA shall notify Middletown whether or not Middletown has satisfactorily completed the SEP. If Middletown fails to satisfactorily complete the SEP in accordance with Appendix D, Middletown shall pay stipulated penalties as provided in Paragraph 45 below.

29. Disputes concerning the satisfactory performance of the SEP shall be resolved under Section XI (Dispute Resolution) of this Decree.

30. Each submission by Middletown required under this Section shall be signed by an official and shall bear the certification language set forth in Paragraph 36 below.

## **VII. REPORTING REQUIREMENTS**

31. Progress Reports. On July 31 after the Effective Date and continuing on July 31 of each year until termination of this Consent Decree, Middletown shall submit to U.S. EPA and the State a progress report regarding the implementation of the requirements of this Decree in the preceding 12 months ("Progress Report"). The Progress Report shall include:

a. A statement setting forth the deadlines and other terms that Middletown is or was required to meet by the Consent Decree since the date of the last Progress Report, whether and to what extent Middletown has met these requirements, and the reasons for any failure to meet such requirements;

b. A general description of the projects and activities conducted during the reporting period pursuant to this Consent Decree, and a projection of work to be performed pursuant to this Consent Decree during the next reporting period. Notification to U.S. EPA and Ohio EPA of any anticipated delay shall not, by itself, excuse the delay;

c. A summary of all material problems or potential problems encountered during the reporting period, and the actions taken to rectify the problems;

d. A statement of any exceedance of NPDES Permit limitations within the reporting period;

e. A summary of all known CSOs, Dry Weather Overflows, Discharges from Outfall 002, and Unpermitted Discharges occurring within the reporting period, including the actual or estimated frequency, location, duration, and volume of each known CSO, Dry Weather Discharge, Discharge from Outfall 002 and Unpermitted Discharge; and

f. A summary of all known Unauthorized Releases occurring within the reporting period and any corrective action taken to address such Unauthorized Releases.

### **32. Public Notification.**

a. Middletown shall have a discoverable website dedicated to posting Progress Reports submitted pursuant to Section VII (Reporting Requirements) of this Consent Decree upon submission of the Progress Reports to EPA. The posted Progress Reports shall be readily accessible, searchable, clearly labeled, and clearly presented to the public. Each submission of the Progress Reports shall remain available on the online website for two years. The website shall describe the purpose of the Progress Reports and shall include the following language: "The Progress Reports have been posted in accordance with the Consent Decree in

United States v. City of Middletown. The Progress Reports have not been reviewed or verified by EPA prior to posting. If you have any questions about the information in the Progress Reports, how it was collected, or what it means, please contact **[MIDDLETOWN'S POINT OF CONTACT]** at **[email address and/or telephone number]**."

b. Middletown shall also post on the website an electronic copy of the entered Consent Decree, which shall be readily accessible, searchable, clearly labeled, and clearly presented to the public.

c. Middletown shall also implement a program designed to provide electronic notification to members of the general public who wish to receive notice of known CSOs, Dry Weather Overflows, and Unauthorized Releases that expose the general public to contact with raw sewage. Electronic notification shall be provided by either text messaging, email, or by posting a notice on Middletown's public access website. Middletown shall announce the availability of such electronic notification service by a press release and shall maintain availability of the electronic notification service on Middletown's public access website: <http://www.cityofmiddletown.org/>.

33. In addition to the reports required pursuant to this Section, if Middletown fails to comply with any provision of this Consent Decree or its NPDES Permit, Middletown shall notify U.S. EPA and the State of such failure in writing within 10 working days after Middletown knew of the failure. Middletown shall explain the likely cause of the failure and the remedial steps taken, and/or to be taken, to prevent or minimize such failure. If the cause of a failure cannot be fully explained at the time the report is due, Middletown shall so state in the report. Middletown shall investigate the cause of the failure and shall then submit an amendment to the report, including a full explanation of the cause of the failure, within 30 days of the day Middletown becomes aware of the cause of the failure. Nothing in this Paragraph or the following Paragraph relieves Middletown of its obligation to provide the notice required by Section IX (Force Majeure). Such notification shall not relieve Plaintiffs of any applicable burden of proof or waive any defenses available to Middletown under this Consent Decree or applicable law.

34. Whenever any failure to comply with this Consent Decree or any other event affecting Middletown's performance under this Decree may pose an immediate threat to the public health or welfare or the environment, Middletown shall notify U.S. EPA by email sent to [r5weca@epa.gov](mailto:r5weca@epa.gov) and the State orally or by electronic or facsimile transmission as soon as possible following its knowledge of such potential threat, but no later than 24 hours after Middletown first knew of the potential threat. This procedure is in addition to the requirements set forth in the preceding Paragraph. Such notification shall not relieve Plaintiffs of any applicable burden of proof or waive any defenses available to Middletown under this Consent Decree or applicable law.

35. All reports shall be submitted to the persons designated in Section XV (Notices) with a courtesy copy to each email addressee.

36. Each report submitted by Middletown under this Section shall be signed by a Middletown official and include the following certification:

*I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.*

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

37. The reporting requirements of this Consent Decree do not relieve Middletown of any reporting obligations required by its NPDES Permit, the CWA and the rules promulgated thereunder, Ohio Revised Code Chapter 6111 and the rules promulgated thereunder, and any other federal, state, or local law, regulation, permit, or other requirement.

38. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

### **VIII. STIPULATED PENALTIES**

39. Middletown shall be liable for stipulated penalties to the United States and the State for violations of this Consent Decree as specified below, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

40. Late Payment of Civil Penalty. If Middletown fails to pay the civil penalty required to be paid under Section V of this Decree (Civil Penalty) when due, Middletown shall pay a stipulated penalty of \$2,000 per Day for each Day that the payment is late.

41. Reporting Requirements. For each failure to submit a timely and adequate plan, report, schedule, written notice, or other deliverable required by this Decree, Middletown shall pay the following stipulated penalties to Plaintiffs:

<u>Period of Noncompliance</u>	<u>Penalty per Day per Violation</u>

Days 1-30	\$750
Days 31-60	\$1000
Days 61 and over	\$1,500

42. Compliance Milestones. For each failure to comply with a requirement or meet a deadline specified in Paragraphs 12, 13, 14, or 17, Middletown shall pay the following stipulated penalties to Plaintiffs:

<u>Period of Noncompliance</u>	<u>Penalty per Day per Violation</u>
Days 1-30	\$750
Days 31-60	\$1,250
Days 61 and over	\$2,500

43. General Compliance.

a. For each discharge in violation of Paragraph 9 (Dry Weather Overflows) and for each discharge from Outfall 002 in violation of Paragraph 15 (Unpermitted Discharges from Outfall 002), Middletown shall pay the following stipulated penalties to Plaintiffs:

<u>Period of Noncompliance</u>	<u>Penalty per Day per Violation</u>
1st to 3rd day of discharge	\$750 per day per discharge
4th to 10th day of discharge	\$1,250 per day per discharge
After 10 days of discharge	\$2,500 per day per discharge

b. For each failure to comply with the effluent limitations in Paragraph 8, Middletown shall pay the following stipulated penalties to Plaintiffs:

<u>Period of Noncompliance</u>	<u>Penalty</u>
Violation of daily effluent limitation	\$750 per daily effluent limit violation
Violation of 7-day or weekly effluent limitation	\$1000 per 7-day or weekly effluent limit violation
Violation of 30-day or monthly effluent limitation	\$1,500 per monthly or 30-day average violation

c. For each failure to comply with Middletown's NPDES permit that is not otherwise addressed by any other stipulated penalty provision in this Consent Decree, including the requirements of Paragraph 11 (Compliance with Operation and Maintenance Requirements) and Paragraph 16 (Monitoring of CSOs), Middletown shall pay stipulated penalties of \$250 per day per violation.

44. Access Requirements. For each failure to allow access to the WWTP and Sewer System in accordance with Section XII (Right of Entry), below, Middletown shall pay stipulated penalties of \$1,000 to Plaintiffs per day.

45. SEP Compliance. If Middletown fails to satisfactorily complete the SEP by the deadline set forth in Appendix D, Middletown shall pay stipulated penalties for each day for which it fails to satisfactorily complete the SEP, as follows:

<u>Period of Noncompliance</u>	<u>Penalty per Day per Violation</u>
Days 1-30	\$750
Days 31-60	\$1,250
Days 61 and over	\$2,500

46. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

47. Middletown shall pay stipulated penalties to the United States and the State within 60 Days after receipt of a written demand by either Plaintiff. Middletown shall pay 50 percent of the total stipulated penalty amount due to the United States and 50 percent to the State. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff.

48. Either Plaintiff may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

49. Stipulated penalties shall continue to accrue as provided in Paragraph 46, during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of U.S. EPA or the State that is not appealed to the Court, Middletown shall pay accrued penalties determined to be owing, together with interest, to the United States or the State within 60 Days of the effective date of the agreement or the receipt of EPA's or the State's decision or order.

b. If the dispute is appealed to the Court and the United States or the State prevails in whole or in part, Middletown shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days of receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, Middletown shall pay all accrued penalties determined to be owing, together with interest, within 30 Days of receiving the final appellate court decision.

50. Middletown shall pay stipulated penalties owing to the United States and/or the State in the manner set forth and with the confirmation notices required by Paragraphs 21 and 22, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

51. If Middletown fails to pay stipulated penalties when due according to the terms of this Consent Decree, Middletown shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States or the State from seeking any remedy otherwise provided by law for Middletown's failure to pay any stipulated penalties.

52. Subject to the provisions of Section XIII (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States (including, but not limited to, statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt) for Middletown's violation of this Consent Decree or applicable law; provided, however, that with respect to monetary relief, the United States and Ohio must elect between filing a new action for such monetary relief or seeking stipulated penalties under this Consent Decree, if stipulated penalties are also available for the alleged violation(s).

#### **IX. FORCE MAJEURE**

53. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Middletown, of any entity controlled by Middletown, or of Middletown's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Middletown's best efforts to fulfill the obligation. The requirement that Middletown exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. "Force Majeure" does not include Middletown's financial inability to perform any obligation under this Consent Decree, although Middletown's financial capability may be grounds for a modification under Section XVIII.

54. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Middletown shall notify U.S. EPA in writing within 7 days after Middletown first knew, or in the exercise of reasonable diligence under the circumstances should have known, of such event. Middletown shall include in such notice: (a) an explanation and description of the reasons for the delay; (b) the anticipated duration of the delay; (c) all actions taken or to be taken to prevent or minimize the delay; (d) a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; (e) Middletown's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and (f) a statement as to whether, in the opinion of Middletown, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Middletown shall include with any notice all available

documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall be grounds for denial of any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure.

55. If U.S. EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by U.S. EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. U.S. EPA will notify Middletown in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

56. If U.S. EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, U.S. EPA will notify Middletown in writing of its decision.

57. If Middletown elects to invoke the dispute resolution procedures set forth in Section XI (Dispute Resolution), it shall do so no later than 15 days after receipt of U.S. EPA's notice. In any such proceeding, Middletown shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Middletown complied with the requirements of Paragraphs 53 and 54. If Middletown carries this burden, the delay at issue shall be deemed not to be a violation by Middletown of the affected obligation of this Consent Decree identified to U.S. EPA and the Court.

#### **X. POTENTIAL FORCE MAJEURE BETWEEN OHIO AND MIDDLETOWN**

58. If any event occurs that causes or may cause Middletown to violate any requirement of this Consent Decree, whether or not due to a force majeure event, Middletown will so notify Ohio EPA, in writing, within 14 days after Middletown knew, or in the exercise of due diligence should have known of the event. The notice will describe in detail the bases for Middletown's contention that it experienced a force majeure event, the precise cause or causes of the event, the measures taken or to be taken to prevent or minimize the noncompliance or event, and the timetable by which those measures will be implemented. Middletown shall adopt all reasonable measures to avoid or minimize any such violation.

59. In any action by Ohio to enforce any of the provisions of this Consent Decree, Middletown may raise at that time the question of whether it is entitled to a defense that its conduct was caused by circumstances beyond its control such as, by way of example and not limitation, acts of God, strikes, acts of war, or civil disturbances. While Ohio does not agree that such a defense exists, it is, however, hereby agreed by Middletown and the State that it is

premature at this time to raise and adjudicate the existence of such a defense and that the appropriate point at which to adjudicate the existence of such a defense is at the time, if ever, that a proceeding to enforce this Consent Decree or collect stipulated penalties is commenced by the State. At that time, Middletown will bear the burden of proving that any delay was or will be caused by circumstances beyond the control of Middletown. Failure by Middletown to timely comply with the notice requirements of the preceding Paragraph may constitute, at Ohio EPA's discretion, a waiver by Middletown of any right it may have to raise such a defense. Changed financial circumstances or increased costs associated with the implementation of any action required by this Consent Decree will not in any event constitute circumstances beyond the control of Middletown. An extension of one date based on a particular incident does not mean that Defendant qualifies for an extension of a subsequent date or dates. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought.

## **XI. DISPUTE RESOLUTION**

60. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree.

61. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Middletown sends the United States and the State a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 days from the date the dispute arises, unless the Parties otherwise agree in writing. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, Middletown invokes formal dispute resolution procedures as set forth below.

### 62. Formal Dispute Resolution.

a. Middletown shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States and the State a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Middletown's position and any supporting documentation relied upon by Middletown.

b. The United States shall serve its Statement of Position within 45 days of receipt of Middletown's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any then-available factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Middletown, unless Middletown files a motion for judicial review of the dispute in accordance with the following Paragraph.

63. Middletown may seek judicial review of the dispute by filing with the Court and serving on the United States and the State, in accordance with Section XV (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Middletown's position on the matter in dispute, including any then-available supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

64. The United States shall respond to Middletown's motion within the time period allowed by the Local Rules of this Court. Middletown may file a reply memorandum, to the extent permitted by the Local Rules or the Court.

65. The issuance, renewal, modification, denial, or revocation of a permit, certification, or other authorization, and the issuance of orders or other action of the Director of Environmental Protection (Ohio EPA) are not subject to dispute resolution under this Decree but, rather, shall be subject to challenge under Ohio Revised Code Chapter 3745. The term "actions of the Director of Environmental Protection" shall consist of those actions by the Director or Ohio EPA over which the Environmental Review Appeals Commission determines it has jurisdiction.

66. Standard of Review. Except as otherwise provided in this Consent Decree, in any dispute brought under this Section, Middletown shall bear the burden of demonstrating that its position complies with this Consent Decree and the CWA, and that Middletown is entitled to relief under applicable principles of law.

67. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Middletown under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall not be due until resolution of the dispute as provided in this Section XI. If Middletown does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

## **XII. RIGHT OF ENTRY AND INFORMATION COLLECTION AND RETENTION**

68. The United States, the State, and their representatives, including attorneys, contractors, and consultants, shall have the right of entry into and upon Middletown's WWTP and Sewer System, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States or the State in accordance with the terms of this Consent Decree;

- c. obtain samples and, upon request, splits of any samples taken by Middletown or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Middletown's compliance with this Consent Decree.

69. Upon request, Middletown shall provide U.S. EPA and the State or their authorized representatives splits of any samples taken by Middletown. Upon request, U.S. EPA and the State shall provide Middletown splits of any samples taken by U.S. EPA or the State.

70. Until five years after the termination of this Consent Decree, Middletown shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Middletown's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States or the State, and except for any documents, records, or other information subject to the attorney-client privilege, the work-product doctrine or any other privilege recognized by federal or state law, Middletown shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

71. If Middletown asserts the attorney-client privilege or any other privilege recognized by federal law, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Middletown. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

72. Middletown may also assert that information required to be provided under this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that Middletown seeks to protect as CBI, Middletown shall follow the procedures set forth in 40 C.F.R. Part 2.

73. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States or the State pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Middletown to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

**XIII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

74. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged in the Complaint filed in this action through the Date of Lodging.

75. The United States and the State reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States or the State to obtain penalties or injunctive relief under the CWA and the rules promulgated thereunder, Ohio Revised Code Chapter 6111 and the rules promulgated thereunder, or under other federal or state laws, regulations, or permit conditions, except as expressly stated in Paragraph 74. The United States and the State further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Middletown's WWTP and Sewer System, whether related to the violations addressed in this Consent Decree or otherwise.

76. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, civil penalties, other appropriate relief relating to Middletown's WWTP or Sewer System, Middletown shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 74.

77. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Middletown is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits. Middletown's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States and the State do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that Middletown's compliance with any aspect of this Consent Decree will result in compliance with provisions of Middletown's NPDES Permit, the CWA and the rules promulgated thereunder, Ohio Revised Code Chapter 6111 and the rules promulgated thereunder, or any other federal, state, or local law, regulation, permit, or other requirement.

78. Ohio will have no financial liability under this Consent Decree, except as required by Section 309(e) of the CWA in the event that the laws of Ohio prevent Middletown from raising revenues needed to comply with this Consent Decree. The Attorney General of the State of Ohio hereby certifies that the present laws of Ohio do not prevent Middletown from raising revenues needed to comply with this Consent Decree.

79. This Consent Decree does not limit or affect the rights of Middletown or of the United States or the State against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Middletown, except as otherwise provided by law.

80. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

**XIV. COSTS**

81. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the State shall be entitled to collect the costs (including attorneys' fees) against Middletown incurred in any action necessary to enforce this Consent Decree or to collect any portion of the civil penalty or any stipulated penalties due but not paid by Middletown.

**XV. NOTICES**

82. Unless otherwise specified in this Consent Decree, whenever notifications, submissions, or communications are required by this Decree, they shall be made in writing in both hard copy (for mailing to those that are to receive mail copies as specified below) and in text searchable electronic format (for those who are to receive email copies as specified below) and addressed as follows. Any notification, submission, or communication required to be made to the United States shall be made to both the United States Department of Justice and the U.S. EPA. Any notification, submission, or communication required to be made to U.S. EPA shall be made to U.S. EPA.

As to the United States  
Department of Justice by email: [eescdcopy.enrd@usdoj.gov](mailto:eescdcopy.enrd@usdoj.gov)  
Re: DJ # 90-5-1-1-08978

As to the United States  
Department of Justice by mail: EES Case Management Unit  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DJ # 90-5-1-1-08978

As to U.S. EPA by email only: r5weca@epa.gov

As to the State of Ohio: L. Scott Helkowski  
Environmental Enforcement Section  
30 E. Broad Street, 25th Floor  
Columbus, OH 43215-3400  
lawrence.helkowski@ohioattorneygeneral.gov

As to Ohio EPA: Erin Sherer  
Manager, NPDES and Pretreatment  
Ohio EPA - DSW  
Lazarus Government Center  
50 W. Town St., Suite 700  
P.O. Box 1049  
Columbus, Ohio 43216-1049

As to Middletown: Law Director  
City of Middletown  
1 Donham Plaza  
Middletown, OH 45042-1932

with a copy to:

Vincent Atriano  
Squire Patton Boggs LLP  
2000 Huntington Center  
41 S. High Street  
Columbus, OH 43215

83. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

84. Notices submitted pursuant to this Section shall be deemed submitted on the date that they are submitted electronically or upon mailing, as applicable, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

#### **XVI. EFFECTIVE DATE**

85. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

**XVII. RETENTION OF JURISDICTION**

86. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree, entering orders modifying this Decree, or effectuating or enforcing compliance with the terms of this Decree.

**XVIII. MODIFICATION**

87. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties or by an order of the Court. Defendant's request for modification may be based, among other things, on: (a) integrated planning elements developed in accordance with U.S. EPA's Integrated Municipal Stormwater and Wastewater Planning Approach Framework, issued on June 5, 2012; or (b) a current Financial Capability Assessment, which may include additional financial information (per U.S. EPA's Financial Capability Assessment Framework, issued on November 24, 2014). If either the Integrated Municipal Stormwater and Wastewater Planning Approach Framework or the Financial Capability Assessment Framework is modified after the Effective Date, the Defendant's request for modification shall be based on the version of the Framework(s) that is in effect on the day that the request for modification is submitted to the Plaintiffs.

88. Any modification of this Consent Decree or any documents that are developed pursuant to the requirements of this Decree and that become a part of the Decree, that effect a material change to the terms of the Decree or materially affects the ability to meet the objectives of the Decree shall become effective upon a subsequent written agreement signed by all parties and approved by the Court as a modification to this Decree. Any schedule that is included in this Decree or in any document developed pursuant to the Decree may be extended, modified, or revised upon written agreement of the Parties, without Court approval, unless any such modification effects a material change to the terms of this Decree or materially affects the ability to meet the objectives of this Decree.

89. Any disputes concerning modification of this Decree shall be resolved pursuant to Section XI (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 66, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

**XIX. TERMINATION**

90. One year after Middletown has completed all construction and post-construction monitoring required by its LTCP and the requirements of Section IV (Compliance Requirements), Middletown may submit to the United States for review and approval in accordance with Paragraph 18 a Request for Termination of this Consent Decree. Such Request for Termination shall be approved if: (a) Middletown is and has been in compliance with the requirements of Section IV (Compliance Requirements) for at least the prior 12 months; (b) all

civil penalties due and all stipulated penalties due under this Decree (and any interest thereon) have been paid; and (c) Middletown has complied with all other requirements of this Decree.

91. Following receipt by the United States of Middletown's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Middletown satisfactorily has complied with the requirements for termination. If the United States, after consultation with the State, agrees that the Decree may be terminated and approves the Request, the Parties shall submit, for the Court's approval, a joint motion seeking termination of the Decree. If the United States fails to respond in writing to the Request in accordance with Paragraph 18 within 90 days after receipt of Middletown's Request for Termination, Middletown may deem the Request to have been denied, and Middletown may proceed to invoke the dispute resolution procedures set forth in Section XI (Dispute Resolution).

92. If the United States, after consultation with the State, does not agree that the Decree may be terminated, Middletown may invoke dispute resolution under Section XI of this Decree (Dispute Resolution). However, Middletown shall not invoke dispute resolution of any dispute regarding termination until 90 days after service of its Request for Termination.

## **XX. PUBLIC PARTICIPATION**

93. This Consent Decree shall 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 or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Middletown consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of this Decree, unless the United States has notified Middletown in writing that it no longer supports entry of this Decree.

## **XXI. SIGNATORIES/SERVICE**

94. Each undersigned representative of the State, the United States Department of Justice, and Middletown certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

95. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Middletown agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

**XXII. INTEGRATION**

96. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersede all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, the Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree and its appendices.

**XXIII. FINAL JUDGMENT**

97. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the State, and Middletown. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

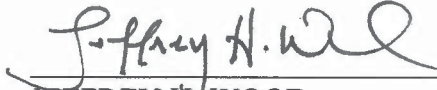
SO ORDERED this 11th day of April, 2018.

S/Susan J. Dlott  
United States District Judge


Signature Page for *United States and State of Ohio v. City of Middletown* Consent Decree

FOR PLAINTIFF UNITED STATES OF AMERICA:

Date: 2/8/18

  
\_\_\_\_\_  
JEFFREY H. WOOD  
Acting Assistant Attorney General  
Environment & Natural Resources Division  
United States Department of Justice

Date: 2/9/18

  
\_\_\_\_\_  
NICHOLAS A. MCDANIEL  
ROBERT DARNELL  
Trial Attorneys  
Environmental Enforcement Section  
Environment & Natural Resources Division  
United States Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044-7611  
Telephone: 202-514-0096

Signature Page for *United States and State of Ohio v. City of Middletown* Consent Decree

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 5:

Date: 2/9/2018



T. LEVERETT NELSON  
Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Blvd.  
Chicago IL 60604

Date: 2/8/2018



GARY PRICHARD  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 W. Jackson Blvd.  
Chicago IL 60604

Signature Page for *United States and State of Ohio v. City of Middletown* Consent Decree

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE:

Date: 1/23/2018

  
\_\_\_\_\_  
MARK POLLINS  
Director, Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

Date: 1/2/2018

  
\_\_\_\_\_  
SARAH GONZALEZ  
Attorney-Adviser, Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

Signature Page for *United States and State of Ohio v. City of Middletown* Consent Decree

FOR PLAINTIFF STATE OF OHIO:

Date: 1/26/18

MIKE DeWINE  
Ohio Attorney General

By: L. Scott Helkowski

L. SCOTT HELKOWSKI (0068622)  
Assistant Attorney General  
Environmental Enforcement Section  
30 E. Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215-3400

Signature Page for *United States and State of Ohio v. City of Middletown* Consent Decree

FOR DEFENDANT CITY OF MIDDLETOWN:

Date: 12/29/17

Name: 

Title: Law Director

## **Appendix A**

### **LTCP**

## APPENDIX A: Long Term Control Plan

## City of Middletown

## Control Measures, Design Criteria, Performance Criterion and Critical Milestones

ROW #	CONTROL MEASURE LOCATION	DESCRIPTION	DESIGN CRITERIA <sup>1</sup>	PERFORMANCE CRITERION <sup>2</sup> (TYPICAL YEAR)	CRITICAL MILESTONES
CSO Control Measures					
<i>Storage Basins</i>					
1	Downtown Storage Facility	Storage Basin	Minimum storage volume of 5,100,000 gallons	6 CSO Events Systemwide	See Appendix C
2	Barnitz Field Storage Facility	Storage Basin	Minimum storage volume of 6,600,000 gallons	6 CSO Events Systemwide	See Appendix C

<sup>1</sup> The criteria for storage volumes are effective storage volumes and as such shall account for hydraulic and/or operational limitations and any other factors of consideration that are necessary to ensure that the basin(s) will be able to store the specified volume identified in this column during the largest typical year storm event

<sup>2</sup> The Performance Criterion of "6 CSOs Events Systemwide" is a systemwide criterion, with the number of overflows based on a 24-hour inter-event period. Achievement of Performance Criterion shall be assessed in accordance with Section 1.4 of Appendix B to the Consent Decree, based on rainfall data from the Covington (Northern Kentucky) Airport Station for 1970, which is the "Typical Year" that Middletown used in developing its LTCP. The Performance Criterion shall be achieved if, using the rainfall data from the Covington (Northern Kentucky) Airport Station for 1970, the model projects that there would have been no more than 6 occasions (using a 24-hour inter-event period to differentiate between occasions) that a discharge would have occurred from any CSO outfall in Middletown's sewer system.

<i>Collection System Measures and Green Infrastructure</i>					
3	Lakeside Redirection	Redirection of approximately 291 acres of sewershed to the Hydraulic Canal	At least 15 CFS storm water pump station, 3,900 feet of 18" force main, and 3,000 feet of 36" gravity sewer	6 CSO Events Systemwide	See Appendix C
4	Bulls Run to Sunset Park Green Infrastructure Project	Storage Basin(s)	At least 1,860 feet of 18" sewer and 1-acre green infrastructure basin	6 CSO Events Systemwide	See Appendix C

ROW #	CONTROL MEASURE LOCATION	DESCRIPTION	EQUIPMENT <sup>3</sup>	PERFORMANCE CRITERIA	CRITICAL MILESTONES
<i>WWTP Major Rehabilitation and Replacement</i>					
5	WWTP, Headworks	Headworks (Pump Station, Screens, and Grit)	New influent structure, screen channel, wet well, influent pumps and grit system.	N/A	See Appendix C
6	WWTP, Secondary	Secondary Settling, Sludge Pumping, Disinfection, and Effluent Pumping	New secondary clarifier center well mechanisms, New RAS pumps, New WAS pumps, New Sodium Hypochlorite Tanks, New Effluent Pumps, New Instrumentation Equipment. Secondary building renovation and structural repair.	N/A	See Appendix C

<sup>3</sup> A Design Criterion for all of the WWTP Rehabilitation and Replacement Measures is that they shall be designed so that the WWTP has equipment reliability and firm capacity to treat a peak flow of 45 MGD.

7	WWTP	Plant Main Electrical Feed and Generator	Replacement of 4.16 kV plant switchgear, 69 kV switchyard and primary service transformer, replacement of 4 480V motor control centers and addition of a standby generator.	N/A	See Appendix C
8	WWTP	Plant SCADA	Installation of a Plant-Wide SCADA	N/A	See Appendix C
9	WWTP, Secondary	Aeration Improvement	New Blowers, New Diffusers, New automatic control valves. Renovation and structural repairs to the Blower Building.	N/A	See Appendix C
10	WWTP, Primary	Primary Clarification System	New settling tank mechanisms, troughs and weirs. Structural rehabilitation, New sludge pumps, new scum pump. Renovation and structural repairs to the Primary Sludge Pump Building.	N/A	See Appendix C
11	WWTP, Solids	Residual Dewatering and Disposal	New Gravity Belt Thickeners, New Centrifuges, New ATAD Equipment	N/A	See Appendix C

## **Appendix B**

### **Post-Construction Monitoring Program Parameters and Schedule**

## **1.0 POST-CONSTRUCTION MONITORING PROGRAM**

### **1.1 Purpose and Deadline for Completion**

The purpose of the Middletown Post-Construction Monitoring Program (PCMP) is to determine whether the projects constructed as part of Middletown's Long Term Control Plan (LTCP) meet the "6 CSO Events Systemwide" Performance Criteria as defined in the Consent Decree and assess the effect of discharges from Middletown's sewer system on River water quality. The PCMP shall include provisions consistent with this Appendix B, including the requirement in Section 1.6 to submit to the United States and Ohio a Final Post-Construction Monitoring Report on or before December 31, 2047.

### **1.2 Post Construction Monitoring**

After fully constructing and implementing the CSO Control Measures described in Appendix A, the City of Middletown shall carry out post-construction rainfall, flow, and CSO activation monitoring for a 12-month post-construction monitoring period. If, following at least six months of monitoring, Middletown has collected sufficient rainfall, flow, and CSO activation data to allow the successful completion of the model validation and recalibration activities described below, Middletown may cease additional monitoring if Middletown submits and EPA approves a written request from Middletown to cease additional monitoring. Middletown shall use such data to validate or if necessary recalibrate its model of the combined sewer system. The rainfall and CSO activation monitoring plan is described below:

The City will monitor rainfall at the four locations utilized in its 2005 model calibration monitoring program, using automatic rain gauges, consistent with then-current industry practice.

The City shall monitor water surface elevation and flow using area/velocity flowmeters at sufficient locations to allow validation and if necessary recalibration of its collection system model, consistent with the guidelines described in Paragraph 1.3, below. At a minimum, the City shall monitor at 12 of the 25 monitoring locations used in Middletown's 2005 model calibration monitoring program. The City shall monitor the time, duration, and volume of discharge from each permitted CSO point that remains active following implementation of the LTCP. Flow meters utilized for this monitoring shall be consistent with then-current industry practices.

Middletown shall carry out the above monitoring in accordance with then-current industry practices, including industry practice meter maintenance and data review/QA procedures.

### 1.3 CSO Collection System Model Calibration and Validation

The City's collection system model will be used, together with best engineering judgment, to determine whether the City has achieved the Performance Criteria as defined in the Consent Decree that Middletown reduce CSO discharges down to no more than 6 CSO Events Systemwide during the Typical Year of 1970, based on rainfall data from the Covington (Northern Kentucky) Airport Station. A "CSO Event" is one or more overflows from the City's collection system that are the result of a precipitation event following a period of at least 24 hours during which no CSO has discharged. A single precipitation event that causes multiple CSO discharges shall constitute one CSO Event. In order to ensure that the model is an appropriate tool for making this determination, a validation and, if necessary, recalibration will be undertaken. Upon completion of the CSO control measures listed in Appendix A, the following steps will be taken to validate and, if necessary, recalibrate the collection system model:

- Flow, rainfall, and CSO discharge data will be collected for a Post-Construction Monitoring Period as described in Section 1.2 above.
- The data collected shall initially be used to validate the then-current version of the model that includes representations of all the CSO control measures. The model shall be considered validated based upon application of the Chartered Institution of Water and Environmental Management (CIWEM) Urban Drainage Group's Wastewater Planning User Group Code of Practice for the Hydraulic Modelling of Sewer Systems, as amended December 2002. In addition to application of the criteria in Section 6.5 of the Code of Practice, Middletown shall specifically consider as a primary validation criterion the degree to which the number of CSO events and number of individual discharges by each CSO simulated for the monitoring period match those detected during that same period by Middletown's monitoring methods. If the number of CSO events and number of individual discharges by each CSO simulated for the monitoring period fail to adequately correlate with those detected during that same period by Middletown's monitoring methods, the model shall be deemed to not be validated.
- A report shall be provided to EPA describing in detail this initial validation effort and its results before Middletown undertakes recalibration as described below.
- If the model is not successfully validated as described above, the City shall select two or more appropriate wet weather events to recalibrate the model, such that the model can be determined to be validated as described above.
- Upon achieving an acceptable model validation, a report will be submitted to EPA documenting the recalibration effort.

#### **1.4 COMBINED SEWER SYSTEM PERFORMANCE CRITERIA ANALYSIS**

A measure of successful completion of all CSO Control Measures will be controlling the number of annual CSO Events in a Typical Year to meet the Performance Criteria as defined in the Consent Decree. Once the model recalibration effort and corresponding report have been accepted by EPA, the validated or recalibrated hydraulic model's results from a continuous simulation of the Typical Year of 1970, using rainfall data for that year from the Covington (Northern Kentucky) Airport Station, will be used to assess whether the Performance Criterion of 6 or fewer CSO Events system-wide for the Typical Year is met. The Performance Criteria of "6 CSO Events Systemwide" is a systemwide criterion, with the number of CSO Events based on a 24-hour inter-event period. The "6 CSO Events Systemwide" Performance Criteria shall be achieved if, using the rainfall data from the Covington (Northern Kentucky) Airport Station for 1970, the model projects that there would have been no more than 6 CSO Events (using a 24-hour inter-event period to differentiate between Events) that a discharge would have occurred from any CSO outfall in Middletown's Sewer System.

If the validated/recalibrated model simulates more than 6 CSO Events for the Typical Year of 1970, using rainfall data for that year from the Covington (Northern Kentucky) Airport Station, the City will first evaluate operating practices before considering further infrastructure improvements. Alternate operating procedures and any additional facilities needed to achieve the "6 CSO Events Systemwide" Performance Criteria will be documented in the Final Post Construction Compliance Monitoring Report. This report will include details on any needed additional operational improvements as well as a proposed implementation schedule.

#### **1.5 WATER QUALITY MONITORING**

An additional component of the PCMP will be a Water Quality Monitoring Plan (WQMP) that will be consistent with the following:

Two years before the final operation of all CSO control measures listed in Appendix A, is expected to be achieved (June 1, 2042), Middletown will submit a draft WQMP that Middletown believes would meet the requirements and schedule set forth below. EPA will provide comment on the draft WQMP within sixty days of receiving the draft plan.

Middletown shall include in the PCMP that it submits to EPA for formal review in accordance with Paragraph 18 of the Consent Decree a WQMP that will be consistent with the following:

The WQMP will include quality assurance project plans (QAPPs), field sampling plans, and standard operating procedures (SOPs). The WQMP shall be designed

to provide information on decreases in the density of E. coli (or other appropriate parameter that is in effect for the State of Ohio's recreational water quality standards and criteria that replaces E. coli) in the Great Miami River resulting from the CSO controls and to provide data to compare to Table 7-13 of OAC 3745-1-07 (or other portions of the State of Ohio's water quality standards that replace this Table).

The WQMP will include collection of samples at three locations in the Great Miami River under different conditions during the recreation season (currently defined as May 1 to October 31):

- a) SR 122 Bridge, at a mid-stream point.
- b) SR 73 Bridge, at a mid-stream point.
- c) Boat Sampling: Middletown shall collect one sample at a center point in the Great Miami River that is downstream of all CSO discharges and upstream of Elk Creek.

The WQMP will incorporate the safety protocols and procedures for River sampling established in U.S. EPA's May 7, 2015 Amended Section 308(a) Request to the City, Docket No. V-W-15-308-18.

Middletown shall take sufficient samples from the above locations under varying conditions to provide sufficient data to allow an assessment of decreases in the counts of E. coli in the Great Miami River resulting from the CSO controls and to provide data to compare to Table 7-13 of OAC 3745-1-07. At a minimum, Middletown's sampling at the above locations will include samples taken: (1) during dry weather, when E. coli levels in the Great Miami River likely have been minimally impacted, if at all, by E. coli from CSOs and other wet weather sources (to enable an assessment of E. coli levels that are not the result of wet weather events); (2) during wet weather events that occur on days when Middletown's CSOs are not discharging; and (3) during wet weather events that occur on days when Middletown's CSOs are discharging, in which case samples from the SR 73 Bridge and Boat Sampling will be taken at a time when discharge from any of Middletown's CSOs upstream of the sampling location would be expected to have reached the downstream sample location, and sampling from the SR 122 Bridge will be done at a correspondingly appropriate time relative to the other sampling events to enable for an assessment of how E. coli levels in the Great Miami River are impacted by Middletown's CSOs. If the State of Ohio's water quality standards have been revised to replace E. coli with another parameter as a recreational use criterion, then Middletown shall sample for such additional parameter, in lieu of sampling for E. coli.

## **1.6 FINAL POST CONSTRUCTION MONITORING REPORT**

On or before December 31, 2047, Middletown shall submit to the United States and Ohio a final Post-Construction Monitoring Report, which shall:

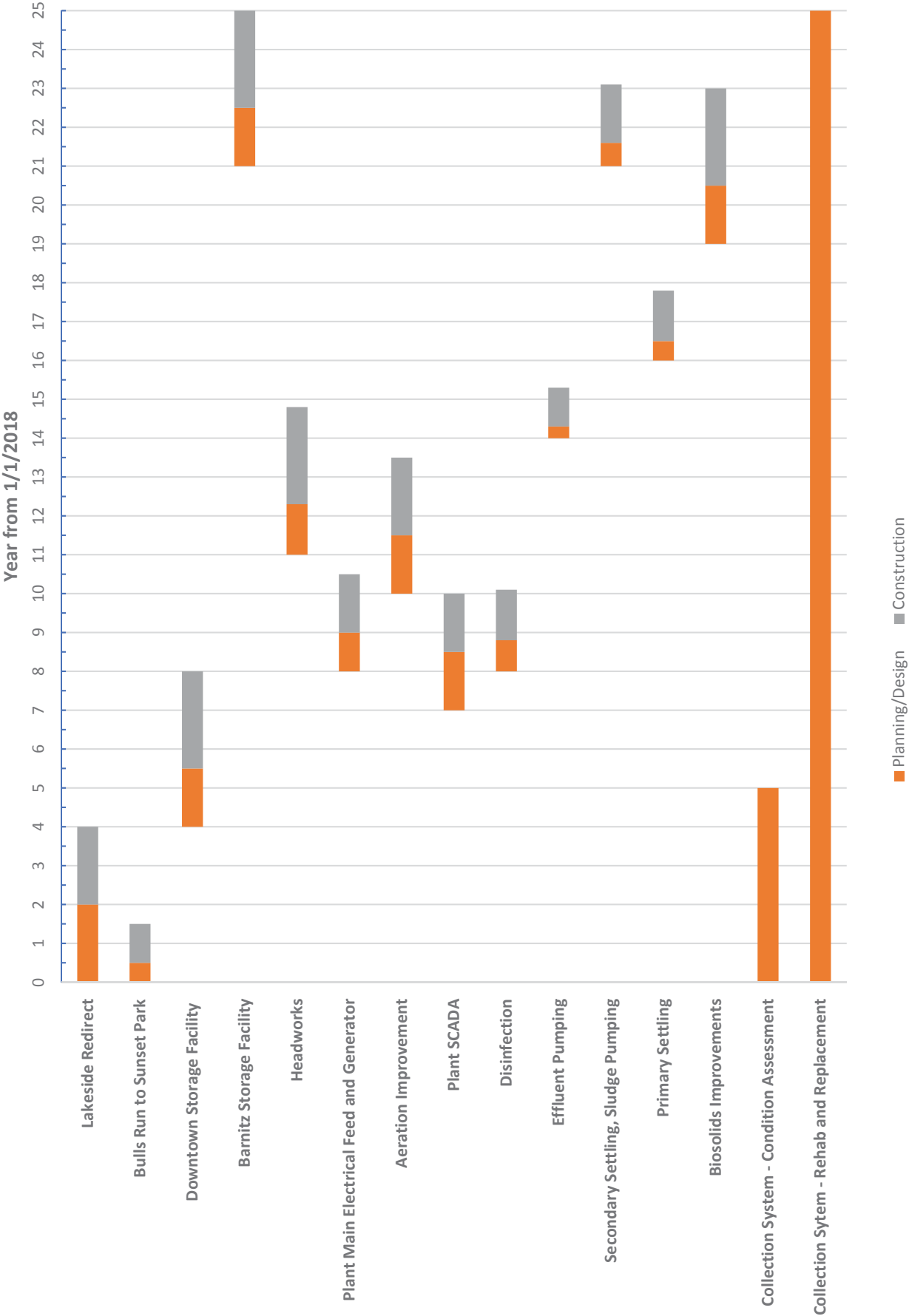
- a) demonstrate that Middletown completed all of the requirements of the PCMP;
- b) evaluate whether the CSO Control Measures implemented pursuant to Appendix A collectively meet the Performance Criteria of no more than 6 CSO Events Systemwide as defined in the Consent Decree;
- c) evaluate how well Middletown's system is performing as a whole, following completion of all CSO Control Measures, and shall include an assessment of whether the CSO Control Measures implemented pursuant to Appendix A, as constructed, operated, or otherwise implemented, have achieved the "6 CSO Events Systemwide" Performance Criteria;
- d) summarize the data collected during the entirety of the post-construction monitoring period and include any new data relevant to the evaluation that Middletown did not previously submit to EPA or OEPA;
- e) if model or monitoring results show that Middletown's CSO Control Measures did not meet the "6 CSO Events Systemwide" Performance Criteria, Middletown shall identify and describe in detail deficiencies or performance-limiting factors in system design, process, operations, and maintenance that may have limited the ability of the CSO Control Measures to achieve their intended performance. Thereafter, Middletown shall identify and describe in detail all necessary and feasible corrective measures, alternative operating strategies and additional facilities and processes necessary to meet the "6 CSO Events Systemwide" Performance Criteria.

# **Appendix C**

## **Construction Schedule**

**Appendix C - LTCP Implementation Schedule**

Project	Duration	Start	End
<b>Lakeside Redirect</b>	<b>48 months</b>	<b>1/1/18</b>	<b>1/1/22</b>
Planning/Design	24 months	1/1/18	1/1/20
Construction	24 months	1/1/20	1/1/22
<b>Bulls Run to Sunset Park</b>	<b>18 months</b>	<b>1/1/18</b>	<b>7/1/19</b>
Planning/Design	6 months	1/1/18	7/1/18
Construction	12 months	7/1/18	7/1/19
<b>Downtown Storage Facility</b>	<b>48 months</b>	<b>1/1/22</b>	<b>1/1/26</b>
Planning/Design	18 months	1/1/22	7/1/23
Construction	30 months	7/1/23	1/1/26
<b>Barnitz Storage Facility</b>	<b>48 months</b>	<b>1/1/39</b>	<b>1/1/43</b>
Planning/Design	18 months	1/1/39	7/1/40
Construction	30 months	7/1/40	1/1/43
<b>Headworks</b>	<b>45 months</b>	<b>1/1/29</b>	<b>10/1/32</b>
Planning/Design	15 months	1/1/29	4/1/30
Construction	30 months	4/1/30	10/1/32
<b>Plant Main Electrical Feed and Generator</b>	<b>30 months</b>	<b>1/1/26</b>	<b>7/1/28</b>
Planning/Design	12 months	1/1/26	1/1/27
Construction	18 months	1/1/27	7/1/28
<b>Aeration Improvement</b>	<b>42 months</b>	<b>1/1/28</b>	<b>7/1/31</b>
Planning/Design	18 months	1/1/28	7/1/29
Construction	24 months	7/1/29	7/1/31
<b>Plant SCADA</b>	<b>36 months</b>	<b>1/1/25</b>	<b>1/1/28</b>
Planning/Design	18 months	1/1/25	7/1/26
Construction	18 months	7/1/26	1/1/28
<b>Disinfection</b>	<b>24 months</b>	<b>1/1/26</b>	<b>1/1/28</b>
Planning/Design	9 months	1/1/26	10/1/26
Construction	15 months	10/1/26	1/1/28
<b>Effluent Pumping</b>	<b>16 months</b>	<b>1/1/32</b>	<b>5/1/33</b>
Planing/Design	4 months	1/1/32	5/1/32
Construction	12 months	5/1/32	5/1/33
<b>Secondary Settling, Sludge Pumping</b>	<b>25 months</b>	<b>1/1/39</b>	<b>2/1/41</b>
Planning/Design	7 months	1/1/39	8/1/39
Construction	18 months	8/1/39	2/1/41
<b>Primary Settling</b>	<b>21 months</b>	<b>1/1/34</b>	<b>10/1/35</b>
Planning/Design	6 months	1/1/34	7/1/34
Construction	15 months	7/1/34	10/1/35
<b>Biosolids Improvements</b>	<b>48 months</b>	<b>1/1/37</b>	<b>1/1/41</b>
Planning/Design	18 months	1/1/37	7/1/38
Construction	30 months	7/1/38	1/1/41
<b>Collection System</b>	<b>300 months</b>	<b>1/1/18</b>	<b>1/1/43</b>
Condition Assessment	60 months	1/1/18	1/1/23
Rehab and Replacement	300 months	1/1/23	1/1/43



## **Appendix D**

### **Supplemental Environmental Project**

## **APPENDIX D**

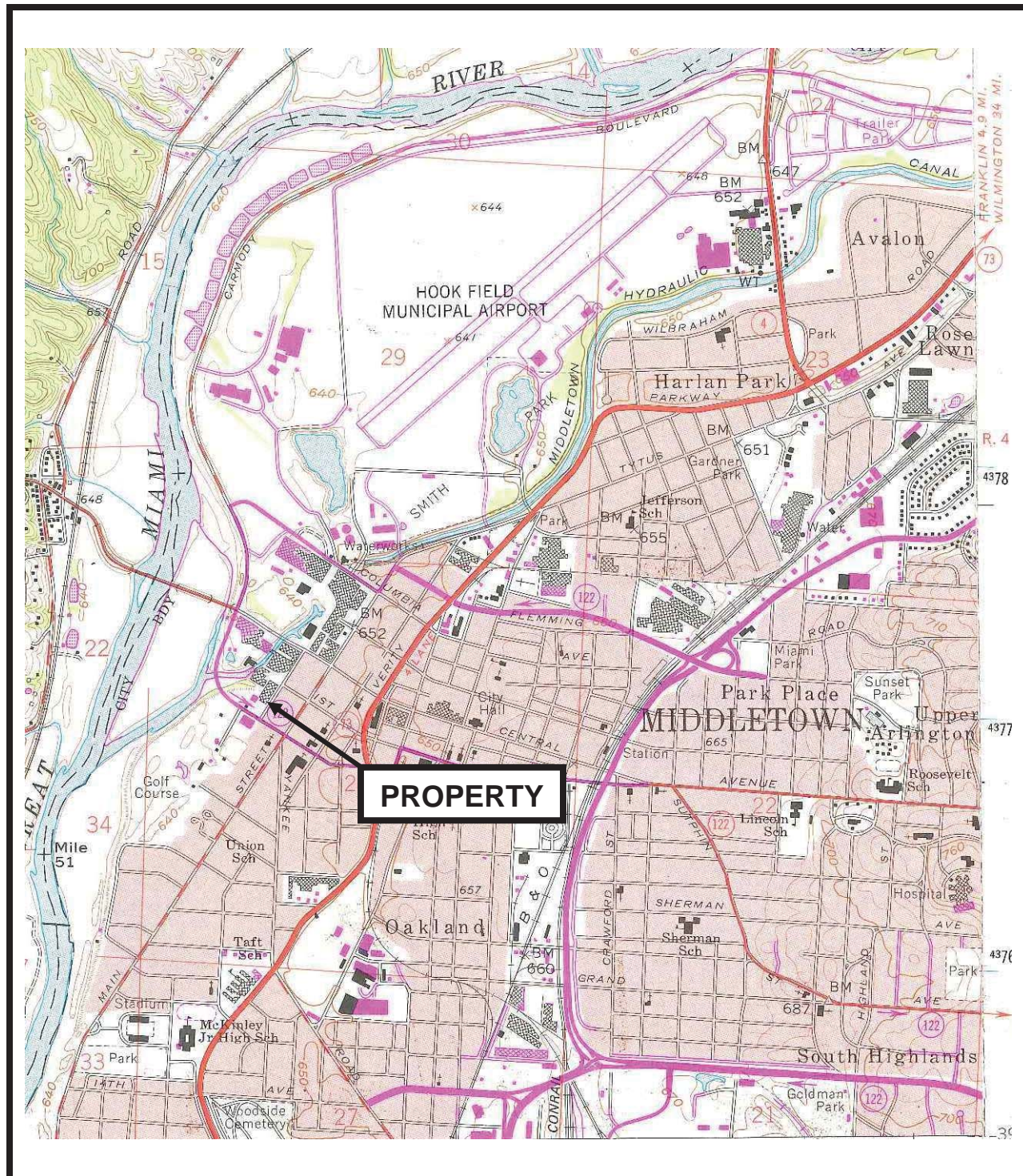
### **SUPPLEMENTAL ENVIRONMENTAL PROJECT**

1. Middletown shall perform a Supplemental Environmental Project (SEP) consisting of capping of a designated portion of the sediment bed in the Hydraulic Canal adjacent to the former STM Property (the “Property”) located at 810 Front Street, Middletown, Ohio.
2. The Hydraulic Canal is a man-made structure created in the 1800’s to serve the paper mill industry in Middletown. The Great Miami River was dammed at the head of the Hydraulic Canal (approximately two miles upstream from the Property) in order to divert water into the canal, but the dam failed approximately 20 years ago. Although some water is present in the Hydraulic Canal year-round, flow in the canal is minimal.
3. Middletown elected to performed a “voluntary action” remediation of the Property under Ohio’s Voluntary Action Program (VAP) statute, O.R.C. Ch. 3746, financed by a Clean Ohio Revitalization Fund grant. The on-site voluntary action remedial work was completed and a “No Further Action” letter was submitted to the Ohio Environmental Protection Agency (Ohio EPA) by the City’s VAP Certified Professional in January, 2016.
4. In connection with this voluntary action, Middletown conducted sampling of sediments in the Hydraulic Canal adjacent to the Property. Based upon this sampling, Ohio EPA determined that sediments in a designated section of the sediment bed exhibit impacts from historic industrial use of the Hydraulic Canal. This impacted area of sediment is approximately 250 feet long by 50 feet wide (see attached figures), comprising an area of approximately 12,500 square feet.

5. Middletown will engage a contractor to cap this designated area with a material known as AquaBlok®. AquaBlok is a patented, composite-aggregate technology resembling small stones comprised of a dense aggregate core, clay or clay-sized materials and polymers. For typical freshwater product formulations, AquaBlok's clay (sealant) component consists largely of bentonite. The particles congeal upon hydration to form a low permeability barrier. AquaBlok hardens and sets immediately upon application.
6. The AquaBlok will be placed over the designated area to a thickness of approximately 6 inches using a trackhoe, and will be dispersed over the designated area sequentially using a telebelt and/or slinger unit. The total volume of AquaBlok to be applied will be approximately 250 cubic yards.
7. Before placing the material, Middletown's contractor will perform limited clearing of the adjacent bank of the Hydraulic Canal in order to allow access to the sediment bed. The thickness and proper placement of AquaBlok will be field-verified upon initial placement. The initial field work is expected to require 14 days to complete.
8. Within 30-60 days after initial placement, the AquaBlok cap will be re-inspected to verify that it has properly set and remains intact.
9. Prior to the start of the project, Middletown must obtain authorization from the U.S. Army Corps of Engineers. Middletown will seek authorization of the Project under Nationwide Permit (NWP) 38. In addition, Middletown understands that a Qualitative Habitat Evaluation Index (QHEI) will need to be prepared and submitted to Ohio EPA. The project schedule below assumes that the Corps will concur that the project may be authorized under NWP 38, and that all required permits and approvals will be obtained by the date set forth in the project schedule below.
10. The general tasks and schedule are summarized below:

<b>Task</b>	<b>Description</b>	<b>Anticipated Completion Date</b>
1. Submittal of Pre-Construction Notification to Corps	Required to obtain authorization under NWP 38	February 1, 2018
2. Preparation and submittal of QHEI to Ohio EPA	Required for project approval	February 1, 2018
3. Confirmation of NWP 38 authorization by Corps and receipt of all other necessary approvals from Ohio EPA	Required for project start	June 1, 2018
4. Finalization of all necessary contract and purchase orders with contractors and suppliers	Required for project authorization	July 1, 2018
5. Initial Field Work (on-site mobilization and bank clearing through completion of initial field work)	Conduct of capping and associated initial field work	September 1, 2018
6. Re-inspection of AquaBlok cap to verify proper setting and placement	Post-implementation confirmation	November 1, 2018
7. Middletown submittal of SEP Completion Report	Required under Consent Decree	December 15, 2018

11. Any agreed modification of this Appendix D shall be considered a minor modification of the Consent Decree that does not require Court approval.



SOURCE: USGS 7.5 Minute Series Topographic Map of Middletown, Ohio Quadrangle, 1959, photorevised 1981.

**PROPERTY VICINITY MAP**  
 VAP No Further Action Letter  
 Former STM, Inc. Property  
 810 First Avenue  
 Middletown, Ohio

**PROJECT NO.**  
 Z072000145

**DATE:**  
 11-23-15

**DRAWN BY:**  
 WAN

**REVIEWED BY:**  
 Wan

**SCALE:**  
 1 in. ~ 2000 ft.

**FIGURE:**  
 1





ENVIRONMENTAL • GEOTECHNICAL  
BUILDING SCIENCES • MATERIALS TESTING

11121 Canal Road  
Cincinnati, Ohio 45241  
(513) 771-2112

**Proposed Hydraulic Canal  
Remedial Area**  
Former STM Property  
810 First Avenue  
Middletown, Ohio

Project No: Z072000145

Date: February 2017

Drawn By: WAN

Reviewed By: ML

Scale: 1" = 100'