

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:)	
)	Chapter 9
)	
CITY OF DETROIT, MICHIGAN,)	Case No. 13-53846
)	
Debtor.)	Hon. Steven W. Rhodes
)	
)	
)	

**AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES MICHIGAN COUNCIL 25’s MOTION TO CLARIFY,
OR IN THE ALTERNATIVE LIFT THE AUTOMATIC STAY**

Under the provisions of title 11 of the United States Code (“Bankruptcy Code”), 11 U.S.C. §§ 362(d) and 922(b), American Federation of State, County and Municipal Employees Michigan Council 25 (“AFSCME”) and its affiliated Locals 207, 2394 and 2920 respectfully request that this Court clarify, or in the alternative lift, the automatic stay for the purpose of allowing the Michigan Employment Relations Commission (“MERC”) to hear AFSCME’s Unfair Labor Practice Charge (“ULP”) and Unit Clarification Petition (“UCP”) against the City of Detroit (“City” or “Debtor”). AFSCME’s ULPs and UCP at MERC address the City’s sweeping reorganization of the Detroit Water and Sewerage Department (“DWSD”), wherein the AFSCME locals are having an estimated 380 of their members placed into other unions and/or deemed “at will” by unilateral action of DWSD management. AFSCME asserts the City’s actions violate state labor law, and seeks relief from this

Honorable Court to permit the ULPs and UCP to go forward at MERC. For its motion, through its counsel, AFSCME states as follows:

INTRODUCTION

1. Michigan AFSCME Council 25 has three locals in the DWSD: Locals 207, 2920 and 2394. The DWSD recently reorganized many of its job classifications, eliminating certain positions and creating new positions. Many DWSD employees were removed from prior classifications, and placed into new classifications. In this process, DWSD unilaterally removed employees from their current union, and placed them into other unions. As a result, AFSCME is losing approximately 380 union members within DWSD.

2. AFSCME has filed ULP charges against the City, contesting the illegal removal of employees from their selected union membership. AFSCME has also filed a UCP, to have the MERC determine the appropriate union representation for these new job classifications. MERC has held these charges in abeyance, due to the pending bankruptcy procedure. AFSCME seeks an order from this Court to assure that those actions can go forward.

3. Further, AFSCME Local 207 is in the process of bargaining a new union contract with the DWSD. The contract talks have not progressed well. Thus, recently DWSD announced a new policy which prevents any employee who was a member of a union without a contract from being placed into a new classification.

Instead, certain employees would be placed into new titles and deemed “at will.” AFSCME contends that this new policy was retaliatory and a violation of state labor law, and hopes to challenge the policy at MERC.

4. AFSCME seeks to clarify that these actions are not stayed by the Court’s order, or in the alternative for a motion to lift the stay in order that the ULPs and UCP can advance at MERC. The relief sought by AFSCME is chiefly injunctive. For any monetary elements of the relief AFSCME seeks, it need not execute on any financial remedy before further order of this Court or until the conclusion of the bankruptcy process. Yet, the risk that this considerable reorganization and institution of “at will” positions becomes the new status quo, as the bankruptcy proceedings are concluded, is significant and compels AFSCME to seek this relief now.

JURISDICTION, VENUE AND BASIS FOR RELIEF REQUESTED

5. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

6. The relief requested in this Motion is predicated upon 11 U.S.C. §§ 362(d), 922 and Local Rules 4001-1 and 9014-1 of the United States Bankruptcy Court, Eastern District of Michigan.

STATEMENT OF FACTS

7. The DWSD has approximately 1700 total employees, and approximately 26 unions represent sections of this workforce. As with any unionized workforce, the employees voted to join their respective unions. AFSCME at the time represents approximately 1050 DWSD employees.

8. AFSCME is the exclusive bargaining representative of certain classifications within DWSD.

9. AFSCME Local 2920 and the DWSD are parties to a collective bargaining agreement (“CBA”), in existence from 2013-2018.

10. AFSCME Local 207 and the DWSD are parties to an expired CBA. On or about October 5, 2012, the Debtor imposed the “City Employment Terms” (“CET”) on all bargaining units without a ratified agreement.

11. AFSCME Local 2394 and the DWSD are parties to an expired CBA. On or about October 5, 2012, the Debtor imposed the “City Employment Terms” (“CET”) on all bargaining units without a ratified agreement. The CET represents employment terms which were unilaterally imposed on most City unions without negotiation.

12. Honorable Sean F. Cox presided over a lawsuit brought against the City and its DWSD by the United States Environmental Protection Agency, initially filed in 1977, filed under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* By order of Judge

Cox (explained more fully below), DWSD was permitted to reorganize its workforce in the interest of operational enhancements.

13. Earlier this year, in March 2014, DWSD announced a substantial reorganization effort of its workforce, referred to as the “optimization plan,” which retitled many existing job classifications with some adjustment in job duties. The plan eliminated a number of job classifications. The vast majority of this reorganization involved the removal of existing DWSD employees from an “old” classification and placement into a “new” classification.

14. Upon removing employees from old to new classifications, the DWSD management unilaterally decided whether these employees would remain in their current union, or be placed into a different union. Importantly, nothing in Judge Cox’s orders permits the City to unilaterally adjust the DWSD employees’ union membership.

15. As a result of this shuffling, DWSD management is removing an estimated 380 employees from the AFSCME locals at DWSD, and placing them into different unions.

16. On May 21, 2014, AFSCME and its Locals 207, 2920 and 2394 filed unfair labor practice charges (ULPs) at MERC, contending that these adjustments in union membership violated state labor laws. (*Exhibit 6.1*)

17. On May 29, 2014, Administrative Law Judge (“ALJ”) Julia C. Stern issued a complaint against the City. Along with the complaint, the ALJ sent a communication to the parties, advising them that “[b]ecause of the pending City of Detroit bankruptcy proceedings, no hearing are being scheduled at this time on unfair labor practice charges filed against the City.” (*Exhibit 6.2*)

18. On June 16, 2014, AFSCME filed a unit clarification petition (UCP), claiming that DWSD “seeks to unilaterally upset decades of established unit structure by re-titling certain positions.” AFSCME requested “clarification on the newly created and re-titled positions as there is no substantial change in duties that justify such drastic measures.” Specifically, AFSCME requested the Commission to “direct a hearing to clarify the unit with regards to the newly created and re-titled positions.” (*Exhibit 6.3*)

19. Neither the MERC nor its ALJ has taken action on this UCP, due to the pending bankruptcy.

20. The three AFSCME locals in DWSD bargain separate union contracts than the locals representing employees in general fund departments. This is per Order of Judge Cox, separating the operations of the DWSD from the City’s general fund. Currently, AFSCME Locals 2920 has a completed union contract, but Locals 207 and 2394 are still bargaining their contracts. Of AFSCME’s approximate 1050 members in the DWSD, about 900 are Local 207 members.

21. DWSD and AFSCME Local 207 negotiations are not progressing well. The DWSD bargaining proposals have contained very unconventional terms without accompanying justification, such as certain bargaining unit members being deemed “at will”.

22. On August 4, 2014, the DWSD announced a new policy, wherein it would expressly punish members of a union within DWSD that did not have a union contract. Under the policy, DWSD employees who were members of a union that did not have a union contract would be denied placement into a newly created position. Instead, within the reorganization effort, the union members would be put into “special projects” job classifications, and be considered “at will.” Typically, union members are not subject to discipline or discharge unless the employer has “just cause” to do so. These new “special projects” employees would lose this just cause protection; indeed, a most basic right accompanying unionization.

23. AFSCME seeks to advance another ULP charge at MERC, alleging that the DWSD is retaliating against the Local 207 union for its protected activity; bargaining a union contract. AFSCME will do so by amending its current ULP.

24. AFSCME seeks to have these ULP charges and UCP advanced at MERC expeditiously, as opposed to waiting until the conclusion of Detroit’s bankruptcy proceedings. Hundreds of AFSCME members have been stripped of their union membership, and many others are being designated as “at will”

employees. AFSCME fears the creation of the new *status quo* if required to wait. Thus, it seeks a clarification of the Court's Stay order, or in the alternative a motion to lift the stay, for its actions at MERC.

25. As AFSCME primarily seeks injunctive relief against DWSD at MERC, there are few (if any) financial implications for the City in permitting the ULPs and UCP to advance. There would be a financial consequence to the City if, for instance, the City discharged an employee after being improperly designated "at will". For any financial consequence that may exist, AFSCME does not need to pursue collection against the City without further order of this Court, or until the resolution of the bankruptcy proceedings.

BACKGROUND ON CLEAN WATER ACT LITIGATION

26. The DWSD operations have been overseen by federal court for thirty-six years. The case was recently closed by the trial court, followed by ruling on appeal which reversed in part and remanded the trial court's denial of union intervention. AFSCME's request here is not at odds with the federal court's orders concerning DWSD.

27. The United States Environmental Protection Agency ("EPA") initiated an action in 1977 against the City and DWSD, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (Case No. 77-71100, United States District Court Eastern District of Michigan). The action was originally assigned to Honorable John

Feikens. After Judge Feikens retired on November 29, 2010, the case was reassigned to Honorable Sean F. Cox. (Docket No. 2323)

28. On September 9, 2011, Judge Cox issued an Opinion and Order Denying Without Prejudice the City of Detroit's Motion to Dismiss. (*Exhibit 6.4*, Docket No. 2397) Judge Cox found that human resources issues have been a chronic problem for DWSD and that the job descriptions and qualifications for various positions within the DWSD were obsolete. (*Id.* at 33) He concluded that "an effective equitable remedy to achieve sustained compliance will require this Court to order structural changes regarding the DWSD that will likely override the City of Detroit's Charter, its local ordinances, and/or some existing contracts." (*Id.* pg. 42) Judge Cox ordered:

[T]he Mayor of the City of Detroit, the City Council President and President Pro Tem, and a current member of the Board of Water Commissioners (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, devise a plan to address the root causes of non-compliance that are discussed in this Opinion & Order. In doing so, they *shall not* be constrained by any local Charter or ordinance provisions, or by the provisions of union or other contracts.

(*Id.* pgs. 3-4) (emphasis in original).

29. After receiving the Plan of Action proposed by the "Root Cause Committee", Judge Cox issued another Order on November 4, 2011. (*Exhibit 6.5*, Docket No. 2410) The court concluded that the plan did not adequately address CBA

issues and it ordered additional relief necessary for the DWSD to achieve short-term and long-term compliance. Specifically, the court ordered the following:

3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees (“DWSD CBAs”). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD.

4. The Court hereby strikes and enjoins any provisions in current CBAs that allow an employee from outside the DWSD to transfer (“bump”) into the DWSD based on seniority. Future DWSD CBAs shall adopt a seniority system for the DWSD that does not provide for transfer rights across City of Detroit Departments (ie., does not provide for “bumping rights” across city departments).

* * *

8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of DWSD employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.

* * *

11. The Court strikes and enjoins any provisions in existing CBAs that prevent DWSD management from assigning overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management. DWSD CBAs shall provide that management has the discretion to assign overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management.

12. Any existing work rules, written or unwritten, or past practices that are contrary to these changes are hereby terminated.

13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also

enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

(*Id.* pgs. 6-7)¹

30. Notably, the November 4, 2011 Order never directed or suggested that DWSD employees would be involuntarily stripped of their union membership, due to the retitling of their job classification.

31. Judge Cox's Orders do not prevent AFSCME's ULPs or UCP from advancing. The November 2011 Order enjoined MERC from hearing "disputes arising from the changes ordered by this Court ...," and enjoined the unions from filing ULPs over "disputes arising from the changes ordered by this Court." Since Judge Cox did not "order" that union membership be adjusted in the reorganization process, the ULPs are not disputes arising from changes ordered by Judge Cox. Also, Judge Cox's November 2011 Order did not preclude MERC's authority to direct a hearing to clarify the unit regarding DWSD's newly created and re-titled positions, as called for in AFSCME's UCP. Finally, Judge Cox's November 2011 Order did

¹ AFSCME had challenged Judge Cox's authority to issue such orders, under U.S. Const. Art 1, § 10, the 5th Amendment and the 10th Amendment of the United States Constitution. (Docket 2412) Judge Cox prevented the AFSCME union from intervening in the lawsuit. (Docket 2413) AFSCME appealed, (Docket 2418 and 2534) and the Court of Appeals reversed in part and remanded the denial of intervention. This ruling only applied to AFSCME Local 207, as AFSCME Council 25 settled with the City and withdrew its appeal.

not sanction punishment of union members for positions taken at the bargaining table.

32. Indeed, on August 23, 2012, Judge Cox clarified paragraph 3 of its November 4, 2011 Order. (*Exhibit 6.6*, Docket No. 2470) The court gave the following clarification:

Paragraph 3 on Page 6 of this Court’s November 4, 2011 Order was intended to, and shall be construed as, ordering the severance of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees.

(*Id.* pg. 3) Judge Cox further clarified “that MERC is not enjoined from ruling on the DWSD’s pending Clarification Petitions, in order to effectuate the above severancing ordered by this Court.” (*Id.*)

33. On October 5, 2012, Judge Cox issued an Opinion and Order, acknowledging that its November 4, 2011 Order did “not provide MERC with sufficient direction as to the scope of its jurisdiction over petitions filed relating to the DWSD” and taking the matter under advisement until supplemental briefing on the MERC jurisdictional question concluded. (*Exhibit 6.7*, Docket No. 2489, pg. 37)

34. On December 14, 2012, Judge Cox issued an Opinion and Order clarifying that the court’s “November 4, 2011 Order does not stand as an obstacle to the DWSD implementing the CETs for DWSD employees – if permitted to do so under otherwise applicable law. As to this issue, the DWSD-unions stand in the same

shoes as other unions with CBAs with the City of Detroit.” (*Exhibit 6.8*, Docket No. 2512, pg. 18)

35. On January 30, 2013 Judge Cox issued an Opinion and Order further ruling on MERC’s jurisdiction. (*Exhibit 6.9*, Docket No. 2520) Judge Cox clarified paragraph 13 of its November 4, 2011 order:

This Court’s injunction as to MERC was intended to be quite limited in scope. This Court only intended to enjoin MERC and the Wayne County Circuit Court from: 1) ruling that the various items of specific relief relating to CBAs that were ordered by this Court constitute unfair labor practices; or 2) exercising jurisdiction over any grievances, unfair labor practice charges, or arbitration demands that are based upon the specific relief ordered by this Court. This Court did not intend to enjoin MERC from exercising jurisdiction over every dispute relating to collective bargaining that involves the DWSD. For example, this Court did not intend to enjoin MERC from exercising jurisdiction over the union requests that are currently pending before it, which relate to negotiations for new union contracts and involve disputes over wages, health insurance, fringe benefits, and other conditions of employment.

(*Id.* pgs. 9-10) Judge Cox went on to clarify DWSD actions that would not constitute an unfair labor practice. Judge Cox also enjoined MERC from exercising jurisdiction over any grievances, unfair labor practice charges or arbitration demands that are based upon certain specific actions – none of them being adjustment in union membership, removal of bargaining unit work from one DWSD union into another DWSD union, or new policies retaliating against a union’s bargaining positions.

36. Importantly, this January 30, 2013 order denied the DWSD’s request that the Court “enjoin[] MERC from exercising jurisdiction over DWSD-related

labor disputes altogether” or that it “issue[] an order creating new DWSD-specific processes and procedures for MERC to follow ...” It rationalized as follows:

“This Court has already ordered the severancing of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees. Those new DWSD-specific units must now negotiate new CBAs. But until they execute such agreements, this Court has expressly enjoined those few provisions of currently existing CBAs that have been shown to impede compliance with the Clean Water Act and the DWSD's NPDES permit. For example, this Court's November 4, 2011 Order “strikes and enjoins any provisions in current CBAs that allow an employee from outside the DWSD to transfer (‘bump’) into the DWSD based on seniority” and “strikes and enjoins any provisions in current CBAs that prohibit the DWSD from subcontracting or outsourcing.” (Docket No. 2410 at 6, ¶¶ 4 & 5). Thus, MERC exercising jurisdiction over disputes relating to negotiations for new union contracts, which involve disputes over issues such as wages and health insurance, will not impede this Court's November 4, 2011 Order as it relates to the specific CBA provisions and work rules that this Court found to be impeding the DWSD from achieving and maintaining compliance with its NPDES permit and the Clean Water Act.”

The Court then narrowed the limit on MERC’s jurisdiction:

“This Court is only enjoining MERC and the Wayne County Circuit Court from: 1) ruling that the various items of specific relief relating to CBAs that were ordered by this Court constitute unfair labor practices; or 2) exercising jurisdiction over any grievances, unfair labor practice charges, or arbitration demands that are based upon the specific relief ordered by this Court.”

(Id)

37. On March 27, 2013, Judge Cox issued an Opinion and Order Terminating Second Amended Consent Judgment and Closing This Case. (*Exhibit 6.10*, Docket No. 2528)

38. While AFSCME does not believe MERC has been divested of jurisdiction over its ULPs or UCP, AFSCME is providing a copy of the ULPs, the UCP and this instant pleading to Judge Cox. It has asked the Court to indicate if the Court feels any of these actions should not be resolved by MERC. If Judge Cox feels these disputes are appropriately before him, AFSCME will of course respond appropriately to that Court.

ARGUMENT

39. AFSCME asserts that the current Automatic Stay and the Extended Stay Order (Docket No. 166) (together “Stay Orders”) should not apply to its ULPs and UCP actions before MERC.² Nonetheless, resolution of that issue is not

² Section 362(b), Title 11 provides exceptions to the automatic stay provision. Section 362(b)(4) excepts from the stay provision “an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit’s . . . police or regulatory power[.]” Applying the above exception, courts have held that the automatic stay provision does not operate to stay state enforcement actions brought under the state’s police and regulatory power. See *N.L.R.B. v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986) (holding that NLRB’s unfair labor practices proceeding was exercise of government’s police and regulatory power and therefore not subject to automatic stay). The MERC itself – the government entity – has statutory powers similar to the NLRB, as in the *Edward Cooper Painting*. While a private party files the charge, the MERC itself initiates the complaint to advance the ULP. MCLA sec 423.216(a). Also, the PERA statute does give the MERC the ability to seek enforcement of the ULP determination, as with the NLRA. MCLA sec 423.216(d). See also, *In re Halo Wireless, Inc.*, 684 F.3d 581 (5th Cir. 2012), where actions before public utility commissions brought by private parties (not the government) against a bankruptcy debtor were exempt from the automatic stay.

necessarily required, because MERC will not proceed with the ULPs and UCP until this Honorable Court issues an order: either clarifying that the Stay Orders do not apply to AFSCME's ULPs and UCP, or that the Stay Orders are lifted so that those actions can proceed.

40. AFSCME's request here is warranted because MERC has been entrusted by statute with special authority to remedy unfair labor practice charges and to determine unit clarifications. The Public Employment Relations Act ("PERA"), MCL 423.201 *et seq.*; MSA 17.455(1) *et seq.*, governs public sector labor law. The court, in *Rockwell v. Crestwood School Dist.*, declared the PERA to be the "dominant" and "governing" law regulating "public employee labor relations":

"This Court has consistently construed the PERA as the dominant law regulating public employee labor relations. . . ."

"The supremacy of the provisions of the PERA is predicated on the Constitution (Const.1963, art. 4, s 48) and the apparent legislative intent that the PERA be the governing law for public employee labor relations."

393 Mich. 616, 629-630, 227 N.W.2d 736 (1975) (emphasis added). The court explained in *Rockwell* that "MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA." 393 Mich. at 630, 227 N.W.2d 736.

41. Relief from the stay is warranted because, in a similar situation, this Court has ordered that the automatic stay does not extend to certain claims against the 36th District Court. Following a motion by the State of Michigan to extend the

Extended Stay to actions brought by AFSCME locals against the 36th District Court, on October 25, 2013 this Court entered an Order extending the Chapter 9 stay “to any attempt to collect from any of the 36th District Court Parties upon any monetary judgment or award.” But the Court explicitly ordered that the Chapter 9 stay did not extend to the following:

- (a) the liquidation of monetary claims against any of the 36th District Court Parties,
- (b) claims seeking nonmonetary injunctive relief to the extent of such nonmonetary relief and
- (c) claims seeking prospective wage relief to the extent of such prospective wage relief.

(Docket No. 1388)

42. Here, AFSCME seeking to litigate claims against the City, short of collection of monetary award.

43. Analyzed as a Motion to Lift the Stay, Congress specifically granted – in the same provision establishing the automatic stay – full discretion to the bankruptcy court to lift the stay and allow litigation to go forward in another forum. 11 U.S.C. § 362(d)(1) states, “On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . for cause [.]” Under 11 U.S.C. § 362(g), the debtor bears the burden of proving that there is not cause for relief from the stay.

44. To determine whether sufficient cause exists to grant relief from the stay in a non-bankruptcy forum, the bankruptcy court must scrutinize the factual circumstances of the case before it. *Trident Assoc. Ltd. P'ship v. Metro. Life Ins. Co. (In re Trident Assoc. Ltd. P'ship)*, 52 F.3d 127, 131 (6th Cir. 1995) (quotation marks omitted) (quoting *In re Laguna Assoc. Ltd. P'ship*, 30 F.3d 734, 737 (6th Cir. 1994)). In *In re City of Detroit, Mich.*, this Court explained that in balancing the competing interests to determine whether there is cause for relief from the stay, the Court will consider both the harm to the City if the motion is granted and the harm to the AFSCME plaintiff if the motion is denied. In addition, the Court concludes that it is appropriate to consider the public interest in this context, just as it was appropriate to consider the public interest when determining whether to extend the stay when the City requested it. 501 B.R. at 709, citing *In re Trans-Serv. Logistics, Inc.*, 304 B.R. 805, 807 (Bankr. S.D. Ohio 2004).

45. In evaluating the hardships, the City will face no tangible prejudice in having the ULPs and UCP move forward (save time and attention paid to the matters by City's counsel). The City will simply be forced to justify its actions, free of an immediate financial consequence. The hardship faced by AFSCME and its members, however, will be severe. The members will lose the membership in the AFSCME union, and be forced to join other unions. If the new union is required to take action on these employees' behalf (i.e., file a grievance), there will be representational

confusion in the event MERC returns them to the AFSCME union. For those employees forced into at-will employment relationships, they will be forced to wait months/years for resolution while unemployed.

46. AFSCME's claims before MERC have merit. A public employer's unilateral decision to transfer exclusive bargaining unit work outside the unit is an unfair labor practice under PERA, § 10(1)(e). *Detroit Police Officers Ass'n v. Detroit*, 428 Mich. 79, 92-93, (1987) ("A long line of MERC opinions holds that an employer's unilateral decision to transfer bargaining unit work outside the unit is an unfair labor practice under the PERA.")

47. As to the UCP, PERA (MCLA § 423.213) provides for MERC, as opposed to the City unilaterally, to decide the issue of an appropriate collective bargaining unit for new or modified classifications:

Sec. 13. The commission shall decide in each case, to insure public employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining.

Unit clarification is appropriate regarding a new position or where there has been a recent and significant change in duties assigned to an existing position. *Macomb Co. Cmty Coll.*, 2000 MERC Lab. Op. 165. AFSCME's UCP simply seeks MERC's opinion of the appropriate union membership of the new/changed titles.

CONCLUSION

WHEREFORE, AFSCME respectfully requests that this Court clarify or lift the automatic stay for the purpose of allowing the MERC to hear AFSCME's ULP and UCP against the City of Detroit, as outlined herein.

Dated: August 12, 2014

/s/ Richard G. Mack, Jr.
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**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:)	
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CITY OF DETROIT, MICHIGAN,)	Case No. 13-53846
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Debtor.)	Hon. Steven W. Rhodes
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_____)	

**ORDER GRANTING THE PETITIONER’S MOTION FOR RELIEF FROM
AUTOMATIC STAY**

This matter coming before the Court on the Petitioner AFSCME’s *Motion for Relief from Automatic Stay* and the Court having determined that the legal and factual bases as set out in the motion establish just cause for relief;

IT IS HEREBY ORDERED THAT:

The Motion is GRANTED.

Dated: _____

Honorable Steven W. Rhodes
United States Bankruptcy Judge

**NOTICE OF MOTION FOR RELIEF FROM THE
AUTOMATIC STAY & OPPORTUNITY TO OBJECT**

American Federation of State, County and Municipal Employees Michigan Council 25 (“AFSCME”) and its affiliated Locals 207, 2394 and 2920 has filed papers with the court to lift the automatic stay for the purpose of allowing the Michigan Employment Relations Commission (“MERC”) to hear AFSCME’s Unfair Labor Practice Charge (“ULP”) and Unit Clarification Petition (“UCP”) against the City of Detroit (“City” or “Debtor”).

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to lift the automatic stay, or if you want the court to consider your views on the motion, within fourteen (14) days, you or your attorney must:

1. File with the court a written response or an answer, explaining your position at:¹

United States Bankruptcy Court
211 West Fort Street
Detroit, MI 48226

If you mail your response to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above. All attorneys are required to file pleadings electronically.

You must also mail a copy to:

Richard G. Mack
Ada A. Verloren
Miller Cohen, P.L.C.
600 West Lafayette Street
Detroit, MI 48226
(313) 964 4454 (Phone)
(313) 964 4490 (Fax)
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Tere M. McKinney
600 West Lafayette Street. Suite 500
Detroit, MI 48226
(313) 964 1711 (Phone)
(313) 964 0230 (Fax)
tmckinney@miascme.org

2. If a response or answer is timely filed and served, the clerk will schedule a hearing on the motion and you will be served with a notice of the date, time and location of the hearing.

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: August 12, 2014

Signatures /s/ Richard G. Mack, Jr.
Name Richard G. Mack, Jr.
Address 600 W. Lafayette, 4th Fl., Detroit, MI 48226

¹ Response or answer must comply with F. R. Civ. P. 8(b), (c) and (e)

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FOR THE EASTERN DISTRICT OF MICHIGAN
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)	
_____)	

CERTIFICATE OF SERVICE

The undersigned certifies that on August 12, 2014, the *American Federation of State, County and Municipal Employees Council 25's Motion to Clarify, or in the Alternative Lift the Automatic Stay*, with the Clerk of the Court for the United States Bankruptcy Court, Eastern District of Michigan, Southern Division using the CM/ECF System, which will send notification of such filing to all attorneys and parties of record registered electronically.

/s/ Richard G. Mack, Jr.
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SUMMARY OF ATTACHED EXHIBITS

The following documents are exhibits to this Motion, labeled in accordance with Local Rule 9014-1(b).

- Exhibit 1** Unfair Labor Practice Charge, dated 5/16/14
- Exhibit 2** ALJ Stern's correspondence dated 5/29/14
- Exhibit 3** Unit Clarification Petition, dated 6/16/14 and correspondence from MERC Director, Ruthanne Okun
- Exhibit 4** Opinion and Order Denying Without Prejudice the City of Detroit's Motion to Dismiss (Case No. 77-71100, Hon. Sean Cox, dated 9/9/11)
- Exhibit 5** Order (Case No. 77-71100, Hon. Sean Cox, dated 11/4/11)
- Exhibit 6** Order (Case No. 77-71100, Hon. Sean Cox, dated 8/23/12)
- Exhibit 7** Opinion and Order Regarding the DWSD's Motion for Interim Order (Case No. 77-71100, Hon. Sean Cox, dated 10/5/12)
- Exhibit 8** Opinion and Order (Case No. 77-71100, Hon. Sean Cox, dated 12/14/12)
- Exhibit 9** Opinion and Order Ruling on remaining Requests in the DWSD's Motion for Interim Order (Case No. 77-71100, Hon. Sean Cox, dated 1/30/13)
- Exhibit 10** Opinion and Order Terminating Second Amended Consent Judgment and Closing this Case (Case No. 77-71100, Hon. Sean Cox, dated 3/27/13)

EXHIBIT 1



CHARGE

Michigan Department of Licensing and Regulatory Affairs
Employment Relations Commission (MERC)
Labor Relations Division
313-456-3510

C14 E-060
14-009883
5/16

Authority: P.A. 380 of 1965, as amended.

INSTRUCTIONS: File an **original** and **4 copies** of this charge (including attachments) with the Employment Relations Commission at: Cadillac Place, 3026 W. Grand Boulevard, Suite 2-750, PO Box 02988, Detroit MI 48202-2988 or 1375 S. Washington St., Lansing MI 48910. **The Charging Party must serve the Charge on the opposing side within the applicable statute of limitations, and must file a statement of service with MERC. (Refer to the "How to File a Charge" document under the "Forms" link at www.michigan.gov/merc.)**

Complete Section 1 if you are filing charges against an employer and/or its agents and representatives. —or—
Complete Section 2 if you are filing charges against a labor organization and/or its agents and representatives.

1. EMPLOYER AGAINST WHICH THE CHARGE IS BROUGHT

Check appropriate box: Private Governmental

Name and Address: City of Detroit
Detroit Water and Sewage Dept
735 Randolph
Detroit, MI 48226

2. LABOR ORGANIZATION AGAINST WHICH THE CHARGE IS BROUGHT

Name and Address:

3. CHARGE

Pursuant to the ~~Labor Mediation Act (LMA)~~ or Public Employment Relations Act (PERA) (*cross out one*), the undersigned charges that the above-named party has engaged in or is engaging in unfair labor practices within the meaning of the Act.

On an attached sheet you must provide a clear and concise statement of the facts which allege a violation of the LMA or PERA, including the date of occurrence of each particular act and the names of the agents of the charged party who engaged in the complained of conduct. The charge should describe who did what and when they did it, and **briefly** explain why such actions constitute a violation of the LMA or PERA.

The Commission may reject a charge for failure to include the required information. However, it is not necessary to present your case in full at this time. Documentary material and exhibits ordinarily **should not** be submitted with this charge form.

4. Name and Address of Party Filing Charge (Charging Party)
(if labor organization, give full name, including local name and number)

Telephone Number:

Michigan AFSCME Council 25, AFL-CIO and Locals 207, 2394 & 2920

(313) 964-1711 x2237

5. List ALL related MERC case(s) (if any):

(Name of parties)

Case No.: _____ Judge: _____

Case No.: _____ Judge: _____

I have read this charge and it is true to the best of my knowledge and belief.

Tere McKinney (BSA)

Signature of Representative/Person Filing Charge

Email:
tmckinney@miafscme.org

Telephone/Cell No.: 313-964-1711

Print Name and Title: Tere M. McKinney, Esq. Staff Attorney

Fax No.: 313-964-0230

Street Address:
600 W. Lafayette Blvd. 5th floor

City:
Detroit

State:
MI

Zip Code:
48226

The Department of Licensing and Regulatory Affairs will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

BER (8/11)

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

City of Detroit, Water & Sewage
Respondent-Public Employer,

-and-

Unfair Labor Practice Charge

AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL EMPLOYEES,
MICHIGAN COUNCIL 25, Locals 207, 2394 & 2920
Petitioner-Labor Organization,

RECEIVED
MAY 16 2014

PROOF OF SERVICE

I HEREBY CERTIFY that I served by *Certified Mail* a copy of Charging Party's **Unfair Labor Practice Charge (and Pleadings)** and this **Proof of Service** upon the City of Detroit, Water & Sewage at:

Steven H. Schwartz, Esq.
Steven H. Schwartz & Assoc., PLC
31600 West 13 Mile Rd., Ste 125
Farmington Hills, MI 48334

Terri Conway, Director of Human Serv.
DWSD
735 Randolph
Detroit, MI 48226

City of Detroit Law Department
660 Woodward Ave., #1650
First Nat'l Bldg.
Detroit, MI 48226

I declare that the statements above are true to the best of my information, knowledge, and belief.

BY:


Brandon Redli, Support Staff

Dated: May 16, 2014

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

City of Detroit, Detroit Water and Sewage Dept
Respondent-Public Employer,

Unfair Labor Practice Charge

-and-

AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL EMPLOYEES,
MICHIGAN COUNCIL 25, and Locals 207, 2394 & 2920
Charging Party-Labor Organization,

**CHARGING PARTY-LABOR ORGANIZATION'S UNFAIR LABOR PRACTICE
CHARGE AGAINST RESPONDENT CITY OF DETROIT- DETROIT WATER AND
SEWAGE DEPT.**

NOW COMES Charging Party, MI AFSCME Council 25, ("Union") and its affiliated Locals 207, 2394 and 2920, by and through its attorney, Tere M. McKinney, and files this Unfair Labor Practice Charge against Respondent, City of Detroit- Detroit Water and Sewage Dept, ("Employer") and hereby states as follows:

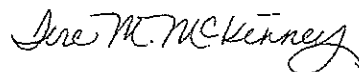
1. The Union is the exclusive bargaining representative of certain classifications within the Detroit Water and Sewage Department.
2. On March 25, 2014, the Employer verbally informed the Union of its plan to move more than 1,100 Union members into other non AFSCME Bargaining Units in what is called an "optimization plan".
3. On April 8, 2014, the Employer responded to the Union's request for information with respect to potential changes in job classifications as a result of its optimization plan. Ex. 1

4. As of May 5, 2014, members of the Union are being required to reapply for their current positions as re-titled under the Employer's optimization plan.

5. The Employer has unilaterally sought to alter the unit placement of numerous positions, refused to bargain over the impact of layoffs, changes to wages and other conditions of employment good faith bargaining in violation of PERA 10 (1) (e).

WHEREFORE, Charging Party alleges that Respondent has violated section 10(1) (e) of PERA by unilaterally changing a mandatory subject of bargaining and refusing to engage in good faith bargaining with respect to non mandatory subjects. Charging party respectfully asks that the Employer be ordered to take affirmative action to remedy the Unfair Labor Practice:

Respectfully Submitted,



BY: _____

Tere M. McKinney (P71567)
Counsel for Charging Party-Labor Organization
Michigan AFSCME Council 25, AFL-CIO
600 W. Lafayette Blvd., Suite 500
Detroit, MI 48226
Phone: 313-964-1711 Ext. 2237
Fax: 313-964-0230

Dated: 5/16/14

bsr/324iuoeaficio

Exhibit

1

April 8, 2014

Catherine Phillips, Staff Representative
AFSCME, Michigan Council 25
600 W. Lafayette, Suite 500
Detroit, MI 48226

RE: Information Request dated March 26, 2014

Dear Ms. Phillips:

In response to the above information request, I have enclosed a copy of a guide that describes the "mapping" used for current DWSD job classifications. As requested, a list of Unions that DWSD has assigned to the classifications is as follows:

Accountant – **Senior Accountants, Appraisers & Analysts Association**
Customer Service Specialist – **AFSCME Local 2920**
Field Service Coordinator – **UWA Local 504**
Office Support Specialist – **IUOE Local 324**
Procurement Specialist – **Senior Accountants, Appraisers & Analysts Association**
Professional Administrative Analyst – **N/A**
Service Desk Analyst – **N/A**
Investigator – **AFSCME Local 207**
Automotive Fleet Technician – **AFSCME Local 207**
Electrical Instrumentation Control Technician – **Building Trades Council**
Maintenance Technician – **Teamsters Local 214**
Plant Technician – **IUOE Local 324**
Security Officer – **AFSCME Local 207**
Systems Technician – **AFSCME Local 207**
Water Technician – **AFSCME Local 207**

The Optimization Plan implementation is ongoing. We do not have a specific date set to move employees into the various bargaining units.

Sincerely,



Terri Tabor Conerway
Organizational Development Director

Enclosure(s)

Current Classification	Eligible Assessment Classification
Accountant I	Accountant
Administrative Assistant Grade II, III	Professional Administrative Analyst
Administrative Specialist I	Office Support Specialist Professional Administrative Analyst
Analytical Chemist	Chemist
Assistant Chemical Engineer	Engineer
Assistant Chief W&S Sec. Adm.	Security Lieutenant Security Project Manager Security Sergeant
Assistant Head Sewage Plant Operator	Plant Technician
Assistant Safety Officer	Environmental Health and Safety Coordinator
Assistant Sewerage Plant Laboratory Supervisor	Team Leader
Assistant Storekeeper	Material Management Specialist
Assistant Supt Water Systems Maint & Construction	Manager
Assistant Water Systems Investigator	Investigator Inspector
Assistant Water Systems Chemist	Chemist
Associate Chemical Engineer	Engineer
Associate Civil Engineer	Engineer
Associate Electrical Engineer	Engineer
Associate Mechanical Engineer	Engineer
Auto Mechanic	Automotive Fleet Technician
Repair Foreman	Team Leader
Repair Helper	Automotive Fleet Technician
Operator	Plant Technician

Current Classification	Eligible Assessment Classification
Bricklayer	Field Services Technician
Building & Grounds Maintenance Supervisor	Not Mapped
Building Attendant A	Not Mapped
Building Operations Supervisor	Not Mapped
Building Operator I	Not Mapped
Building Trades Helper	Maintenance Technician
Building Trades Worker-General	Maintenance Technician
Business Systems Support Specialist I.	Professional Administrative Analyst
Business Systems Support Specialist II	Application Analyst
	Database Analyst
	Infrastructure Administrator
	Manager - IT Service Delivery
	Manager - IT Infrastructure
	Manager - IT Application Delivery
	Professional Administrative Analyst
	Project Manager
ServiceDesk Analyst	
Carpenter Foreman	Maintenance Technician
	Team Leader
Carpenter Sub-Foreman	Maintenance Technician
Chemical Engineer	Engineer
Clerk	Office Support Specialist
Commercial Operations Specialist I, II, III	Customer Service Specialist
Construction Equipment Foreman	Field Services Technician
	Team Leader
Construction Equipment Operator	Field Services Technician
Construction Equipment Operator - 50 Ton Crane	Field Services Technician
Construction Inspector	Inspector

Current Classification	Eligible Assessment Classification
Control Instrument Technician Foreman	Electrical Instrumentation Control Technician
Control Instrument Technician Sub-Foreman	Electrical Instrumentation Control Technician
Customer Service Representative I, II, III	Customer Service Specialist
Customer Service Supervisor	Not Mapped
Data Processing Programmer Analyst / Database Administrator / Dept IT Network Specialist	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
	Project Manager
	Service Desk Analyst
Delivery Driver	Material Management Specialist
Electrical Repair Worker	Electrical Instrumentation Control Technician
Electrical Repair Worker - General	Electrical Instrumentation Control Technician
Electrical Worker - Apprentice	Electrical Instrumentation Control Technician
Electrical Worker - General	Electrical Instrumentation Control Technician
Electrical Worker Sub Foreman	Electrical Instrumentation Control Technician
Elevator Mechanic	Not Mapped
Engineer of Water Systems	Engineer
Engineer of Wastewater Systems	(Engineer)*
Engineering Support Specialist II	(Engineering Technician)*
	Inspector
Environmental Specialist III	Not Mapped
Executive Secretary I, II, III	Office Support Specialist
	(Professional Administrative Analyst)*
Field Operations Supervisor	Not Mapped
Field Services Representative	Field Services Technician

Current Classification	Eligible Assessment Classification
Finish Carpenter	Maintenance Technician
Finish Painter	Maintenance Technician
Garage Attendant	Not Mapped
General Auto Mechanic	Automotive Fleet Technician
General Blacksmith	Field Services Technician
	Maintenance Technician
General Machinist	Maintenance Technician
General Manager	Manager
General Welder	Field Services Technician
	Maintenance Technician
Graphic Designer	Public Affairs Specialist
Head Clerk	Office Support Specialist
Head Construction Inspector	Inspector
Head Engineer	Engineer
	Manager
Head Governmental Analyst	Professional Administrative Analyst
Head Sewage Plant Operator	Plant Technician
Head Storekeeper	Material Management Specialist
Head Water Plant Operator	Chemist
	Water Technician
Horseshoer	Not Mapped
Human Resources Generalist	Human Resources Generalist
Human Resources Technician	Human Resources Generalist
	(Professional Administrative Analyst)*
Intermediate Governmental Analyst	Professional Administrative Analyst

Current Classification	Eligible Assessment Classification
Intermediate Data Processing Programmer Analyst / Information Technology Client Support Assistant / Information Technology Networks Manager	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
	Project Manager
	Service Desk Analyst
Industrial Waste Control Manager	Not Mapped
Junior Chemist	Chemist
	Water Technician
Junior Clerk	Office Support Specialist
Junior Governmental Analyst	Professional Administrative Analyst
Machinist Sub-Foreman	Maintenance Technician
	Team Leader
Mail Processor	Office Support Specialist
Maintenance Millwright	Maintenance Technician
Manager I, II	Manager
Master Electrician of Record	Electrical Instrumentation Control Technician
Mechanical Helper	Maintenance Technician
Messenger	Office Support Specialist
Microbiologist	Chemist
Microcomputer Support Specialist	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
	Manager - IT Service Delivery
	Manager - IT Infrastructure
	Manager - IT Application Delivery
	Project Manager
Service Desk Analyst	
Office Assistant I, II, III	Office Support Specialist
Office Automation Support Assistant	Office Support Specialist
Office Management Assistant	Office Support Specialist

Current Classification	Eligible Assessment Classification
Offset Printer	Not Mapped
Painter Foreman	Maintenance Technician
Park Maintenance Foreman	Not Mapped
Park Maintenance Sub-Foreman	Not Mapped
Park Maintenance Worker	Not Mapped
Permit Investigator - Water Services	(Customer Services Specialist)*
Pitometer Technician	Not Mapped
Plant Equipment Operator Mechanic	(Plant Technician)
Plant Maintenance Foreman	Maintenance Technician
	Team Leader
Plant Maintenance Mechanic	Maintenance Technician
Plant Maintenance Sr. Foreman	Maintenance Technician
	Team Leader
Plant Maintenance Sub-Foreman	Maintenance Technician
	Team Leader
Plumber	Field Services Technician
	Maintenance Technician
Plumber Apprentice	Maintenance Technician
Preventive Maintenance Coordinator	Team Leader
Principal Accountant	Accountant
Principal Analytical Chemist	Chemist
Principal Clerk	Office Support Specialist
Principal Data Processing Programmer Analyst	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
	Project Manager
	Service Desk Analyst

Current Classification	Eligible Assessment Classification
Principal Governmental Analyst	Professional Administrative Analyst
Principal Graphic Designer	Not Mapped
Principal Purchases Agent	Procurement Specialist
Process Control Center Operator	Maintenance Technician
	Plant Technician
	Systems Technician
Process Control Center Supervisor	Maintenance Technician
	Plant Technician
	Systems Technician
Process Control Network Administrator	Not Mapped
Process Control System Administrator	Not Mapped
Process Control System Manager	(Manager)*
Promotional Activities Assistant	Public Affairs Specialist
Publicist I	Public Affairs Specialist
Purchases Agent I, II, III	Procurement Specialist
Purchasing Assistant	Procurement Specialist
Repair Mechanic	Maintenance Technician
Safety Officer	Environmental Health and Safety Coordinator
Security Specialist	Security Lieutenant
	Security Sergeant
	Security Specialist
sr. Accountant	Accountant
sr. Analytical Chemist	Chemist
sr. Assistant Arch. Engineer	Engineer
sr. Assistant Chemical Engineer	Engineer
sr. Assistant Civil Engineer	Engineer
sr. Assistant Electrical Engineer	Engineer

Current Classification	Eligible Assessment Classification
Sr. Assistant Mechanical Engineer	Engineer
Sr. Associate Civil Engineer	Engineer
Sr. Associate Electrical Engineer	Engineer
Sr. Associate Mechanical Engineer	Engineer
Sr. Auto Repair Foreman	Team Leader
Sr. Clerk	Office Support Specialist
Sr. Construction Inspector	Inspector
Sr. Data Processing Equipment Operator	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
	Project Manager
Sr. Data Processing Programmer Analyst	Service Desk Analyst
	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
Sr. Data Processing Telecommunications Technician	Project Manager
	Service Desk Analyst
	Application Analyst
	Database Administrator
	GIS Analyst
Sr. GIS Support Technician	GIS Analyst
Sr. Governmental Analyst	Professional Administrative Analyst
Sr. Industrial Wastewater System Investigator	Investigator
Sr. Info Tech Client Support Assistant	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
	Project Manager
	Service Desk Analyst

Current Classification	Eligible Assessment Classification
Sr. Pitometer Tech	Not Mapped
Sr. Promotional Activities Assistant	Public Affairs Specialist
Sr. Service Guard – Water	Security Lieutenant
	Security Project Manager
	Security Sergeant
Sr. Sewage Plant Operator	Plant Technician
Sr. Storekeeper	Material Management Specialist
Sr. Supervisor of Mechanical Maintenance	Field Technician
	Team Leader
Sr. Teller	Customer Service Specialist
Sr. Training Specialist	Training Specialist
Sr. Voucher Audit Clerk	Office Support Specialist
Sr. Water Distribution System Investigator	Investigator
Sr. Water Meter Mechanic	Field Technician
Sr. Water Plant Operator	Systems Technician
	Water Technician
Sr. Water Systems Chemist	Chemist
Sr. Water Systems Laboratory Technician	Chemist
Sr. Water Systems Maintenance Dispatcher	Field Services Coordination Specialist
Sr. Water Systems Mechanic	Field Services Technician
Service Guard – Public Utility	Security Officer
	Security Sergeant
Service Information Clerk	Not Mapped
Sewage Plant Attendant	Plant Technician
Sewer Inspector	Not Mapped
Sewerage Plant Laboratory Supervisor	Chemist
	Team Leader

Current Classification	Eligible Assessment Classification
Sewage Plant Operation Superintendent	Team Leader
Sewage Plant Operator	Plant Technician
Sewage Plant Supervisor	Plant Technician Team Leader
Sheet Metal Worker	Maintenance Technician
Steamfitter	(Maintenance Technician)*
Storekeeper	Material Management Specialist
Stores Operations Supervisor	Material Management Specialist
Superintendent of Engineering	Manager
Superintendent of Building & Mechanical Maintenance	Manager
Superintendent of Operations	Manager
Superintendent of Water Sys Maint. & Constr.	Manager
Supervising Building Attendant - Grade I, II	Not Mapped
Supervising Service Guard Gr. I,II	Security Lieutenant
	Security Project Manager
	Security Sergeant
Supervisor of Filtration	Chemist
	Water Technician
Supervisor of Printing	Not Mapped
Supervisor of Industrial Waste Control-Field Investigation	Not Mapped
Supervisor of Water Systems Maintenance & Construction	Not Mapped
Survey Technician	Inspector
System Programming Coordinator	Application Analyst
	Database Administrator
	GIS Analyst
	Infrastructure Administrator
	Project Manager
	Service Desk Analyst

Current Classification	Eligible Assessment Classification
Telecommunication Center Supervisor	Not Mapped
Teller	Customer Service Specialist
Vehicle Operator I,II,III	Field Services Technician
Wastewater Plant Maintenance Superintendent	Team Leader
Wastewater Process Controller	Plant Technician
Wastewater Systems Training Superintendent	Training Specialist
Wastewater Treatment Plant Technician	Plant Technician
Water Meter Foreman	Field Services Technician Team Leader
Water Meter Mechanic	Field Services Technician
Water Meter Worker	Field Services Technician
Water Plant Attendant	Water Technician
Water Plant Operator	Water Technician
Water Production & Operation Manager	Manager
Water Systems Chemist	Chemist
Water Systems Control Instrument Technician	Electrical Instrumentation Control Technician
Water Systems Helper	Field Services Technician
Water Systems Investigator	Investigator Inspector
Water Systems Maintenance Dispatcher	Field Services Coordination Specialist
Water Systems Mechanic	Field Services Technician

Current Classification	Eligible Assessment Classification
Water Systems Repair Worker	Field Services Technician
Water Systems Foreman	Field Services Technician Team Leader
Water Treatment Plant Manager	Manager
Web Editor (content)	Public Affairs Specialist

*Classifications in parenthesis were assigned by HR

EXHIBIT 2



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
Michael Zimmer
EXECUTIVE DIRECTOR

STEVEN ARWOOD
DIRECTOR

May 29, 2014

City of Detroit
660 Woodward Ave., #1650
First Nat'l Building
Detroit, MI 48226

Steven H. Schwartz
Attorney at Law
31600 W. 13 Mile Rd., Ste. 125
Farmington Hills, MI 48334

Terri Conway
Director of Human Services, DWSD
735 Randolph
Detroit, MI 48226

Tere M. McKinney
AFSCME Council 25
600 W. Lafayette, Ste 500
Detroit, MI 48226

Re: **City of Detroit (DWSD) –and- AFSCME Council 25 and its
affiliated Locals 207, 2394 and 2920**
Case No. C14 E-060 Docket No. 14-009883-MERC

To the Parties:

Attached find a Complaint in the above unfair labor practice charge, filed on May 21, 2014. Because of the pending City of Detroit bankruptcy proceedings, no hearings are being scheduled at this time on unfair labor practice charges filed against the City.

Sincerely,

Julia C. Stern
Administrative Law Judge

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Cadillac Place • 3026 W. Grand Blvd., Suite 2-700 • Detroit, Michigan 48202
www.michigan.gov • PHONE (313) 456-2712 FAX 313 456 3681

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:

Docket No.: 14-009883-MERC

Detroit, City of,
Respondent

Case No.: C14 E-060

v

Agency: Michigan Employment
Relations Commission

AFSCME Council 25,
Charging Party

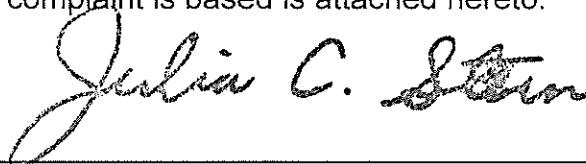
Case Type: MERC Unfair Labor
Practice

COMPLAINT

PLEASE TAKE NOTICE that:

1. Complaint is hereby issued against you alleging violation of Section 10 of Act 336, PA 1947, as amended, Public Employment Relations Act (PERA), MCLA 423.210, MSA 17.455(10).
2. A copy of the charges on which said complaint is based is attached hereto.

DATED: 5/29/2014



COPY TO:
Tere McKinney
Steven Schwartz
Detroit, City of
AFSCME Council 25

ADMINISTRATIVE LAW JUDGE

Direct correspondence to the ALJ at:
Michigan Administrative Hearing System
3026 W. Grand Boulevard
2nd Floor Annex, Suite 2-700
Detroit, Michigan 48202
Phone: 313.456.2712
FAX: 313.456.3681

14-009883-MERC

EXHIBIT 3

EXHIBIT 6.3

MICHIGAN DEPARTMENT OF LABOR & ECONOMIC GROWTH
 EMPLOYMENT RELATIONS COMMISSION
 LABOR RELATIONS DIVISION
PETITION FOR REPRESENTATION PROCEEDINGS

INSTRUCTIONS: Submit an original and 4 copies of this Petition to: Employment Relations Commission, Cadillac Place, 3026 W. Grand Boulevard, Suite 2-750, PO Box 02988 Detroit MI 48202-2988. (Use additional sheets if necessary.)	DO NOT WRITE IN THIS SPACE	
	Case Number <i>UC14 F- 010</i>	Date Filed <i>6/16/14</i>

1. Purpose of this Petition: (Check only the one box which is appropriate.)

- A. **RC - CERTIFICATION OF REPRESENTATIVE** - 30% or more of employees in the unit wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining. (A 30% showing of interest must accompany this form or be submitted within 48 hours.)
- B. **RM - REPRESENTATION (EMPLOYER)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- C. **RD - DECERTIFICATION** - 30% or more of employees in the unit assert that the certified or currently recognized bargaining representative is no longer their representative. (A 30% showing of interest must accompany this form or be submitted within 48 hours.)
- D. **SD - SELF-DETERMINATION** - Multiple units represented by the same representative seek to be represented in one unit. (No showing of interest required.)
- E. **UC - UNIT CLARIFICATION** - A labor organization is currently recognized by the employer, but Petitioner seeks clarification of placement of certain employee(s). (A petition for unit clarification does not raise a question concerning representation, and may not be used where an RC or RM petition is appropriate.)

RECEIVED
 JUN 22 2 14 PM '14
 EMPLOYMENT RELATIONS COMMISSION

2. NAME AND ADDRESS OF EMPLOYER: City of Detroit, Water and Sewerage Department 735 Randolph St. Detroit, MI 48226	TELEPHONE NUMBER: (313.00) 2,678,000.00
---	--

3. TYPE OF EMPLOYER: Check appropriate box: Governmental Private

4. DESCRIPTION OF CLAIMED BARGAINING UNIT INVOLVED: In UC petition, describe present bargaining unit and attach specific description of proposed clarification. Please use additional paper if necessary. INCLUDED: See attached pleadings and exhibits EXCLUDED:	5. APPROXIMATE NUMBER OF EMPLOYEES IN UNIT: 1,000.00
	6. DATE OF DEMAND FOR RECOGNITION: 4/3/14 DATE EMPLOYER DECLINED RECOGNITION:

7. RECOGNIZED OR CERTIFIED BARGAINING AGENT, OR PARTIES OTHER THAN PETITIONER WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES, AND OTHER UNIONS INTERESTED IN THE EMPLOYEES DESCRIBED IN ITEM 4 ABOVE (if NONE, so state): NAME AND ADDRESS: IUOA-500 Hulet Drive, Bloomfield Twnsp., 48302; See attached	DATE OF RECOGNITION OR CERTIFICATION: Note applicable DATE OF CLAIM: (Required only if RM Petition) Not applicable
--	---

8. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY: Month: April Day: 30.00 Year: 2,018.00

I HAVE READ THE ABOVE PETITION AND IT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

PETITIONER AND AFFILIATION, IF ANY:
Michigan AFSCME Council 25, AFL-CIO, Locals 207 & 2920

NAME OF REPRESENTATIVE OR PERSON FILING PETITION: SIGNATURE: <i>Tere McKinney</i> PRINTED: Tere M. McKinney	TITLE, IF ANY: Staff Attorney
--	----------------------------------

ADDRESS: 600 W. Lafayette Blvd., 5th Floor Detroit, Michigan 48226	TELEPHONE: <i>313 964-1711</i>
---	-----------------------------------

The Department of Labor & Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

**CITY OF DETROIT, WATER AND SEWERAGE DEPARTMENT
UNIT CLARIFICATION PETITION**

Additional Interested Parties

UAW Local 504, 8000 E Jefferson Ave, Detroit, MI 48214

Building Trades, 1640 Porter St., Detroit, MI 48216

Teamsters, 2825 Trumbull St., Detroit, MI 48216

IUOE Local 324, 1550 Howard St., Detroit, MI 48216

dat/324iuoeafcio

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

DETROIT WATER AND SEWERAGE DEPARTMENT
Respondent-Public Employer,

Unit Clarification Petition

-and-

AMERICAN FEDERATION OF STATE
COUNTY AND MUNICIPAL EMPLOYEES,
MICHIGAN COUNCIL 25, LOCALS 207 & 2920
Petitioner-Labor Organization,

RECEIVED
2014 JUN 16 PM 2:47
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

**PETITIONER-LABOR ORGANIZATION'S
UNIT CLARIFICATION PETITION**

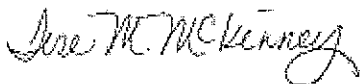
NOW COMES Petitioner, AFSCME Council 25, and its affiliated Locals 207 and 2920, by and through its attorney, Tere M. McKinney, files this Unit Clarification Petition Pursuant to Rule 423.143 and hereby states as follows:

1. The Employer City of Detroit – Department of Water and Sewage (Employer) and Michigan AFSCME Council 25, and its affiliated local 2920 (Union), are parties to a collective bargaining agreement (CBA) 2013-2018 (Ex. 1). Local 207 is and employer are parties to an expired agreement (Ex. 2). On or about October 5, 2012 the employer imposed the “City Employment Terms” (CET) on all bargaining units without a ratified agreement. (Ex. 3)
2. The Union and its affiliated locals 207 & 2920 represent a bargaining unit of all permanent full-time non-supervisory employees within the Department of Water and Sewage Division within the maintenance and clerical classifications. (Exhibit 1 & 2 , Article 1, Recognition of the Union and Exhibit 1)
3. On or around March 25, 2014 the Employer verbally notified the Union that it planned to remove a number of positions from the AFSMCE bargaining units and place those positions in non-AFSCME units resulting in a displacement of over 1100 AFSCME members.
4. The employer seeks to unilaterally upset decades of established unit structure by re-titling certain positions. (Ex. 4)

5. The employer plans to implement its new classification system by July 6, 2014.
6. Petitioner requests clarification on the newly created and re-titled positions as there is no substantial change in duties that justify such drastic measures.

WHEREFORE, Petitioner respectfully requests that the Commission direct a hearing to clarify the unit with regards to the newly created and re-titled positions.

Respectfully Submitted,



BY:
Tere M. McKinney (P71567)
Attorney for Petitioner-Labor Organization
600 W. Lafayette Blvd., Suite 500
Detroit, MI 48226
Phone: 313-964-1711
Fax: 313-964-0230

Dated: June 13, 2014

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L 3311-207-14



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN EMPLOYMENT RELATIONS COMMISSION
BUREAU OF EMPLOYMENT RELATIONS
RUTHANNE OKUN
DIRECTOR

STEVE ARWOOD
DIRECTOR

June 23, 2014

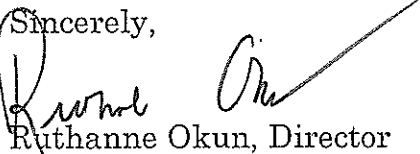
Michigan AFSCME Council 25, AFL-CIO
Ms. Tere McKinney
600 W. Lafayette Blvd. 5th Floor
Detroit, MI 48226

Re: City of Detroit, Water and Sewerage Dept.
MERC Case No.: UC14 F-010

Dear Ms. Tere McKinney:

As you are aware, the City of Detroit is in bankruptcy and all matters involving the City of Detroit are automatically stayed at this time. MERC is not able to take any further actions unless you can provide our Office that we have authority to proceed. Your Unit Clarification Petition filed June 16, 2014, concerning the Detroit Water and Sewerage Department is being held in abeyance at this time.

Sincerely,


Ruthanne Okun, Director
Bureau of Employment Relations/MERC

Cc: City of Detroit, Water and Sewerage Department
Attorney Steven Schwartz
IUOE, Local 324
Teamsters
Building Trades
UAW Local 504

LARA is an equal opportunity employer/program.
Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.

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EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.

OPINION & ORDER
DENYING WITHOUT PREJUDICE
THE CITY OF DETROIT'S MOTION TO DISMISS

The United States Environmental Protection Agency (“EPA”) initiated this action in 1977 against the City of Detroit (“the City”) and the Detroit Water and Sewerage Department (the “DWSD”), alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“the Clean Water Act”). The violations, which are undisputed, involve the DWSD’s wastewater treatment plant (“WWTP”) and its National Pollutant Discharge Elimination System (“NPDES”) permit.

For the more than 34 years during which this action has been pending, the City and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the City and the DWSD agree to a detailed remedial plan aimed at compliance, but the DWSD is unable to follow the plan and is again cited for the same or similar violations. Although this Court has taken various measures, designed to eliminate the various impediments to compliance that have been identified by experts and acknowledged by the City, those measures have proven inadequate to achieve sustained compliance.

Upon taking office in May of 2009, Mayor Dave Bing inherited these now institutionalized problems at the DWSD and this action. Beginning in September 2009, the DWSD was again unable to maintain compliance with its NPDES permit and was again cited for violations by the Michigan Department of Environmental Quality (“DEQ”).

From the outset of his involvement, Mayor Bing expressed a strong desire to bring the DWSD into compliance and end this litigation. In January of this year, he appointed a highly-qualified Chief Operating Officer who assumed the position of acting Director of the DWSD. During the past nine months, progress has been made at the DWSD and at the WWTP. In addition, the City has been diligently working with the DEQ to develop another plan for compliance and has been working with Oakland County, Wayne County and Macomb County to resolve longstanding issues regarding the DWSD.

On July 8, 2011, the City and the DEQ entered into an Administrative Consent Order (“the ACO”), aimed at achieving long-term compliance with the DWSD’s NPDES permit and the Clean Water Act. After the ACO was executed, the City filed the instant “Motion to Dismiss and for Relief from the Second Amended Consent Judgment.” In this motion, the City asks this Court to order that the requirements set forth in the ACO are substituted for the requirements of the Second Amended Consent Judgment, find that the DWSD has made substantial progress toward achieving full compliance with its NPDES permit and the Clean Water Act, and dismiss this case.

As explained below, although this case is now in its fourth decade, the Court must DENY the City’s Motion to Dismiss. Notably, *after* executing the ACO on July 8, 2011, the DWSD has self-reported serious violations of its NPDES permit to the DEQ. Thus, the City has not

established that the DWSD has achieved even short-term compliance with the ACO and the Clean Water Act. Moreover, this Court concludes that the record in this case establishes that, unless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to compliance, sustained compliance with the Clean Water Act and the ACO will simply not occur.

Although the City has had ample opportunity to propose solutions to the root causes of noncompliance that were identified early on in this case, to date, it has not proposed or implemented a plan that has sufficiently addressed those root causes.

To be fair, the City has been constrained in the measures it has proposed or implemented to date because the City is bound by various provisions of the City's Charter and ordinances, and by existing contracts, that prevent the City from making fundamental changes in the identified problem areas. This Court, however, has broad equitable power to order any relief necessary to achieve compliance with the Clean Water Act and this Court *is not* constrained by the provisions of the City's Charter or ordinances. Nevertheless, this Court is mindful that remedies that override state or local law should be narrowly tailored and that, to the extent possible, local officials should at least have the opportunity to devise their own solutions to remedy a violation of federal law.

Accordingly, the Court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a member of the current Board of Water Commissioners (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, devise a plan to address the root causes of non-compliance that are discussed in this Opinion & Order. In doing so, they *shall not* be constrained by any local

Charter or ordinance provisions, or by the provisions of union or other contracts. If these local officials fail to devise and propose a workable solution to remedy the underlying causes of the serious and recurrent violations of the Clean Water Act in this case, this Court will directly order a more intrusive remedy.

BACKGROUND

On July 25, 2011, the City filed its “Motion to Dismiss and for Relief from the Second Amended Consent Judgment.” (D.E. No. 2365). The City notes that the DEQ and the DWSD recently entered into the ACO and asks this Court to order that the requirements set forth in that ACO are substituted for the requirements of the August 30, 2000 Second Amended Consent Judgment. The City also asserts that the DWSD has made substantial progress toward achieving full compliance with its NPDES permit and the Clean Water Act and, as a result, the Court should dismiss this action.

Thereafter, this Court held a Status Conference/Settlement Conference with the parties on July 28, 2011, to discuss the pending motion.

Because many of the facts relevant to the pending motion are undisputed, this Court instructed the parties to meet and confer in order to present the Court with a statement of stipulated facts. After having met and conferred, the City of Detroit, the Counties of Wayne, Oakland and Macomb, and the State of Michigan on behalf of the DEQ, jointly filed a statement of stipulated facts. (D.E. No. 2395). In addition, as to any facts upon which the parties did not agree, the parties were permitted to file proposed findings of fact. (*See* D.E. Nos. 2388 & 2383).

Responses to the City of Detroit’s Motion to Dismiss were filed by Oakland County (D.E. No. 2374) and Macomb County (D.E. No. 2375) on August 8, 2011.

The City filed a Reply Brief on August 19, 2011. (D.E. No. 2390).

After the City filed its Motion to Dismiss, the Court requested that the DEQ provide information to the Court regarding the DWSD's compliance during the past three months. The DEQ provided that information to the Court on September 7, 2011.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the facts stipulated to by the parties, the evidence submitted by the parties, and all matters of record in this action, and having applied the governing legal principles, the Court makes the following findings of fact¹ and conclusions of law.

FINDINGS OF FACT

On May 6, 1977, the EPA initiated this case against the State of Michigan, the City, and the DWSD. The action was originally assigned to the Honorable John Feikens. The State of Michigan was realigned as a party plaintiff because of the mutuality of interest in the subject matter of this case. (Joint Stmt. of Stipulated Facts at ¶ 1). By Order dated June 29, 1977, Judge Feikens joined as parties the 17 governmental entities that received wholesale sewerage services from the DWSD pursuant to written contracts (the "First Tier Customers"). By Order dated July 6, 1977, Judge Feikens joined as parties all communities whose wastewater was treated by the DWSD pursuant to either First Tier Customer contracts with the DWSD or contracts between such First Tier Customers and their constituent community customers. (Joint Stmt. of Stipulated Facts at ¶¶ 7 & 8).

The EPA's May 6, 1977 Complaint alleged, among other things, that the discharged

¹The stipulated facts from the parties' Joint Statement of Stipulated Facts, D.E. No. 2395, will be identified as such below.

effluent from the DWSD's WWTP was in violation of the federal Clean Water Act. (Joint Stmt. of Stipulated Facts at ¶ 2). The Complaint further alleged that: "the number of personnel employed [at the WWTP] has not been sufficient, personnel are not adequately trained, and purchasing of necessary and required supplies and equipment has not been timely or at an acceptable level . . ." (Joint Stmt. of Stipulated Facts at ¶ 3).

The DWSD provides wastewater collection, treatment and disposal services for Detroit and approximately 76 municipal suburban communities. The DWSD also provides water service to approximately four million people in Detroit and neighboring Southeast Michigan communities. (Joint Stmt. of Stipulated Facts at ¶ 4).

The DWSD was created, operates and is managed as a unitary department – i.e., its water and wastewater systems are commonly managed and operated under the same City of Detroit Charter ("the Charter") authority. (Joint Stmt. of Stipulated Facts at ¶ 5). The DWSD is a department of city government, although managed as a separate enterprise fund. (D.E. No. 2374-9, Wastewater Master Plan Vol. 4).

Pursuant to Section 6-405 of the Charter, "[u]pon request, the corporation counsel shall give legal advice or opinions to the mayor, a member of the city council or the head of any agency."

Pursuant to Section 7-1501 of the Charter, the entire unitary DWSD is headed by a seven member board of water commissioners ("the Board"). Section 7-1501 of the Charter further provides that the "[B]oard shall appoint, with the approval of the mayor, a director and deputy director for the department. The director and deputy director serve at the pleasure of the [B]oard." (Section 7-1501 of the Charter).

The Board also has the authority to establish water and sewerage rates charged by the DWSD to its customers and direct the supply of water, drainage and sewerage services within and outside the City, pursuant to Section 7-1502 of the Charter. (Joint Stmt. of Stipulated Facts at ¶ 5; Section 7-1502 of the Charter).

Although the Charter vests the authority to establish water and sewerage rates charged by DWSD with the Board alone, because of M.C.L. § 117.5e, during this action the Detroit City Council has also been required to approve rates.

M.C.L. § 117.5e provides that a municipal water or sewage system “which serves more than 40% of the population of the state” shall “[h]old at least 1 public hearing at least 120 days before a proposed rate increase is scheduled to take effect” and that “[a] final vote by the governing body of the city to implement a proposed rate increase shall not be taken until the hearings provided for in this subdivision are concluded and the results of those hearings are considered by the city’s governing body.” M.C.L. § 117.5e(b).

According to the most recent census data collected by the U.S. Census Bureau, the City’s population declined during the past decade. This Court has not been provided with evidence to establish whether or not the DWSD currently serves more than 40% of Michigan’s population. If it no longer serves more than 40% of Michigan’s population, then M.C.L. § 117.5e does not require the Detroit City Council to approve rates charged by the DWSD.

The DWSD’s nature and function as a unitary department manifests itself in many ways. For example, the majority of DWSD employees perform services for both the water and wastewater systems, including the critically important functions of Department management and administration, procurement and contract management. Moreover, many DWSD resources and

facilities directly serve both the water and wastewater systems. (Joint Stmt. of Stipulated Facts at ¶ 6).

On September 14, 1977, Judge Feikens entered a Consent Judgment (the “1977 Consent Judgment”) establishing a compliance schedule for the DWSD to address and correct the Clean Water Act violations. The 1977 Consent Judgment required, among other things, that the DWSD prepare and implement a staffing program detailing its manpower needs, repair and maintain certain dewatering equipment, and prepare and implement a procurement plan to ensure that necessary procurements of supplies, materials and equipment were made. (Joint Stmt. of Stipulated Facts at ¶¶ 9 & 10; 1977 Consent Judgment, Appendix to Opin. & Order² No. 1, at §§ III. A, D and E).

Less than a year after the Consent Judgment was issued, however, it became clear to Judge Feikens “that compliance would not be achieved easily or quickly.” (*See* D.E. No. 1872 at 3).

In 1978, testing at the WWTP revealed that the DWSD failed to comply with the terms of the 1977 Consent Judgment. On November 21, 1978, Judge Feikens entered an Order appointing Professor Jonathan W. Bulkley as Court Monitor in this action, ordering him to study the operations of the WWTP and report his findings to the Court, and make recommendations to facilitate compliance with the Consent Judgment. (D.E. No. 366, Appendix to Opin. & Order No. 2).

²Because this action was commenced in 1977, many of the docket entries are not accessible on the Court’s Case Management / Electronic Case Files (“CM/ECF”) System. This Court has created an Appendix of such materials and other documents submitted to the Court (“Appendix to Opin. & Order”).

On December 29, 1978, Dr. Bulkley submitted a written report to the Court (“Dr. Bulkley’s 1978 Report”). (D.E. No. 381, Appendix to Opin. & Order No. 3). Dr. Bulkley’s 1978 Report stated that several activities at the DWSD were not in compliance with the requirements of the 1977 Consent Judgment, including: 1) staffing; and 2) procurement.

As to the area of staffing, Dr. Bulkley’s 1978 Report stated: 1) “[T]he current judgment states that on or before July 1, 1978, Detroit shall procure and maintain all persons required to operate and maintain the existing treatment program. The city is not in compliance with this critical portion of the consent judgment.”; 2) “[I]t is clear that major shortfalls have been experienced in terms of experienced personnel in the operations group at the wastewater treatment plant.”; 3) “The City has consistently failed to respond in terms of adequate staffing.”; 4) “It is imperative that the city take action to obtain qualified personnel to fill the present vacancies above the entry level positions.”; 5) “In addition to chronic and severe understaffing, the management of the wastewater treatment plant has been seriously hampered by inefficient city personnel practices.”; 6) “Extensive delays of five months or more have been experienced in filling vacant positions above the entry level.”; 7) “Inadequate staffing at the Detroit wastewater treatment plant has been an identified problem for more than four years.”; 8) “[C]ritical vacancies currently exist at all levels above the entry level position.”; 9) “All of these staffing problems are going to be compounded as the facility attempts to achieve the higher plant performance required by the effluent limitations” that are “scheduled to become operational 1 January 1980.” (*Id.* at 58-64).

As to the area of procurement, Dr. Bulkley’s 1978 Report stated that “[i]n practice excessive delays have occurred in the processing of purchase requisitions for critical replacement

and/or repair parts.” The report then gave a specific example of necessary parts not being received until almost six months after the initial requisition was written. (*Id.* at 82). It further explained: “The ineffective procurement system contributes to operational problems at the plant. For example, if a particular equipment item is inoperative and parts are ordered to repair it, the long delay before the requisition parts arrive may result in maintenance crews acting to cannibalize the inoperable unit for spares to keep other units working. Accordingly, once the initial requisition of parts arrives, the unit is still inoperative.” (*Id.* at 83). Dr. Bulkley concluded that “[i]t is essential that the city devise, design, implement, and maintain procurement procedures which are responsive to the reality of keeping the wastewater treatment plant fully operational. These procurement procedures must provide for the acquisition of equipment, service, spare parts, and other items on a timely and efficient basis.” (*Id.* at 84). Dr. Bulkley also stated that “[t]he fact that the city had to implement the provisions of SPECIAL FINANCE DIRECTIVE* dated November 22, 1978 demonstrates the severity of the prior procurement procedure.” (*Id.* at 84). The report attached that directive, which authorized the Director of Purchasing to process requisitions by the DWSD on an emergency basis and waive the City’s requirements for competitive bid processes. (*Id.* at Attachment 6). Dr. Bulkley recommended that “[t]he emergency purchase provision of services, equipment, and materials specified in this Directive [] be extended until more responsive and effective procurement policies are adopted and implemented.” (*Id.* at 84).

On March 21, 1979, after reviewing Dr. Bulkley’s 1978 Report, and after consideration of evidence presented by the parties, Judge Feikens issued an order appointing the current mayor of the City of Detroit, Coleman A. Young, as Special Administrator of the DWSD. (*See* D.E. No.

1848-3).

Judge Feikens created the position of Special Administrator because he found that compliance with the Consent Judgment the parties had negotiated required the exercise of the Court's equitable powers. (Joint Stmt. of Stipulated Facts at ¶ 13; D.E. No. 1872). His Order gave the Special Administrator very broad powers to take various actions that otherwise would have been prohibited by the Charter, including bypassing the Board and the Detroit City Council on, *inter alia*, matters relating to the procurement of materials and services that DWSD needed to comply with the 1977 Consent Judgment. (*Id.*).

After testing at the WWTP revealed that the DWSD failed to comply with the terms of the 1977 Consent Judgment, an Amended Consent Judgment was entered on April 23, 1980 (the "Amended Consent Judgment"), that modified the schedule for achieving compliance with effluent limitations for the WWTP set forth in the DWSD's NPDES Permit. (Joint Stmt. of Stipulated Facts at ¶ 11). The Amended Consent Judgment required, among other things, that the DWSD maintain all personnel required to operate and maintain the WWTP, maintain certain dewatering equipment and submit a plan for improving dewatering capacity, and procure all materials needed to comply with the Amended Consent Judgment. (Joint Stmt. of Stipulated Facts at ¶ 12; Amended Consent Judgment, Appendix to Opin. & Order No. 4, at §§ III. A and D).

On August 25, 1983, after Detroit had achieved compliance with certain requirements of the Amended Consent Judgment, the State of Michigan Water Resources Commission issued a new NPDES permit to the DWSD. On June 8, 1984, Judge Feikens entered an Order that took judicial notice of the DWSD's NPDES permit and terminated those Amended Consent Judgment

provisions that the DWSD had satisfied. That Order also identified the Amended Consent Judgment provisions with which the DWSD was still required to comply and provided that the Court retained jurisdiction to ensure full compliance with the Amended Consent Judgment. (Joint Stmt. of Stipulated Facts at ¶ 14).

The Michigan Water Resources Commission reissued NPDES permits to the DWSD effective February 1, 1990, and December 1, 1992, respectively.³ On July 1, 1997, the DEQ reissued a NPDES permit to the DWSD and reissued permits to the DWSD in September 2003; on September 28, 2007 (as modified on March 10, 2010); and modified the permit on June 28, 2011. (Joint Stmt. of Stipulated Facts at ¶ 15).

In 1994, the DWSD commissioned an operational and organizational review (the “OOR Report”) of the department. (Joint Stmt. of Stipulated Facts at ¶ 16). The resulting OOR Report was provided to the DWSD on March 24, 1995. (OOR Report, Appendix A to D.E. No. 1649, Appendix to Opin. & Order No. 5). “A multi-disciplined team of four firms was selected by the DWSD to perform the [OOR].” (*Id.* at 1-1). The OOR Report found, among other things, that: 1) “the City’s personnel and procurement system” have “helped shape the current DWSD management problem.”; 2) “The City’s personnel system, procurement system, and general City policies do not necessarily recognize the different management requirements of a utility enterprise . . .”; 3) the “primary obstacles are associated with a personnel system that may not be based on current job descriptions.”; 4) “There is no method to evaluate employees for

³In 1995, the Governor of the State of Michigan created the Michigan Department of Environmental Quality (“DEQ”) and transferred all of the statutory powers, duties and functions of the Michigan Department of Natural Resources relevant herein to DEQ. The name has changed several times throughout the years. For ease of reference, this Department will be referred to as DEQ throughout.

performance or advancement potential. The procurement system is not necessarily responsive to the need for timely and quality procurement to meet regulatory and operational emergencies. There is no strategic plan.”; 5) “Administration of the procurement system within DWSD, in combination with the City system, creates both delays and difficulties in securing equipment needed to ensure both the water and wastewater systems function as required.”; 6) “Equipment and procedures acceptable to the City may not meet DWSD’s basic regulatory compliance needs.”; and 7) “the utility neglects to continually invest in an adequate program of facility maintenance and renewal . . .”. (*Id.* at 1-4, 1-5, 1-6 & 3-4; *see also* Joint Stmt. of Stipulated Facts at ¶ 16). The OOR Report’s recommendations included: 1) “Revise and implement new procurement procedures” and 2) “Develop and implement new staff selection, training and career advancement personnel system with [City] Human Resources Staff.” (*Id.*).

In 1997, the DWSD *again* fell out of compliance with its NPDES permit due to insufficient dewatering capacity, and in August 1997, the DWSD reported certain violations of its NPDES permit to DEQ. (Joint Stmt. of Stipulated Facts at ¶ 17). Thereafter, Judge Feikens appointed a committee to investigate the cause of the renewed violations. (Joint Stmt. of Stipulated Facts at ¶ 18; *see also* D.E. No. 1872, wherein Judge Feikens explained that he “appointed a committee to investigate why, after so many years of court oversight, the [WWTP] was not able to remain in compliance” with the Clean Water Act.). That committee consisted of: 1) Dr. Bulkley, the Court Monitor; 2) Gary Fujita, the DWSD’s Assistant Director; 3) Paul Blakeslee, the DEQ’s Chief of Field Operations - Surface Water Quality Division; 4) Commissioner Marilyn Gosling, of the DWSD’s Board of Water Commissioners; 5) Sarah Lile, Director of the Department of Environmental Affairs for the City of Detroit; and 6) Frank Porta,

Senior Consultant with Water and Wastewater Utilities. (See D.E. No. 1649 at Section 14).

The court-appointed committee completed a report of the causes of the noncompliance in January 2000 (the “2000 Investigative Report”). (Joint Stmt. of Stipulated Facts at ¶ 18; D.E. No. 1649, Appendix to Opin. & Order No. 6).

The 2000 Investigative Report noted the severity and on-going nature of the DWSD’s renewed violations:

From August 1997 through March 1999, the DWSD’s [WWTP] was in violation of suspended solids and related effluent limitations specified in its NPDES discharge permit, No. MI 0022802. These violations were caused by the inability of the WWTP to remove and dispose of sewage solids (termed “solids”) in the incoming wastewater from its service area as well as solids contained in the recycle flows from treatment processes within the WWTP. The WWTP was unable to remove solids at a sustained rate equivalent to the rate solids were being concentrated and produced by the primary and secondary wastewater treatment processes. The failure to adequately remove these solids caused an over accumulation (back up) of solids in wastewater treatment plan processes. Ultimately, this accumulation of solids became so great that it was relieved via the plant’s effluent outfalls to the receiving waters. This resulted in excessive concentration of the solids in the plant’s effluent on an *on-going basis* that *significantly exceeded* permitted discharge limits and *violated the City’s NPDES Permit during the period of August 1997 through March 1999.*

(*Id.* at Section 1, page 1) (emphasis added).

The 2000 Investigative Report found that DWSD leadership failed to take action, over a period of years, to avoid the violations, even though it was aware of numerous issues that if left unresolved would eventually result in violations of the NPDES permit. (Joint Stmt. of Stipulated Facts at ¶ 19). It concluded that the “technical deficiencies [with dewatering equipment] and operating conditions at the plant level were caused by the deficiencies and ineffectiveness of four major DWSD and City Programs.” (*Id.*) (quoting D.E. No. 1649 at 1). These programs were capital improvements, finance, purchasing and materials management, and human resources.

The Report noted that the human resources issues included a “chronic inability to adequately staff the skilled trades, engineers and other professional personnel” and a “failure to provide adequate programs for training, career development and succession planning.” (Joint Stmt. of Stipulated Facts at ¶ 19) (quoting D.E. No. 1649). The Report noted that these failures were “symptoms of two institutional causes in areas of management and leadership and policy.” The 2000 Investigative Report found, among other things, the following causes of the NPDES violations: “failure to replace aged and deteriorated sludge dewatering facilities,” “failure to adequately maintain sewage solids dewatering equipment,” and “inability to remove solids.” It also attributed the problems, in part, to City processes and procedures: “The City’s purchasing process[es] . . . are not executed timely and result in delays;” “Lack of staffing in the City’s staff departments contributes to delays in provision of essential support services;” and “The City’s personnel policies restrict the compensation, recruitment and prompt hiring of needed personnel to the City’s norm versus what is needed to operate and maintain compliant operations and facilities.” (Joint Stmt. of Stipulated Facts at ¶ 19) (quoting D.E. No. 1649).

The 2000 Investigative Report noted that “[o]nly through actions taken by operations personnel that bypassed the impediments created by the City and DWSD policies and procedures for the procurement of materials and supplies has the plant returned to compliance. If these extraordinary (and costly) stop-gap measures had not been taken, the WWTP would have remained in violation of its NPDES permit.” (D.E. No. 1649, Section 1 at 4) (emphasis added). It further stated that “[t]his recovery may be short lived unless timely and decisive actions can be taken to fully support plant operations, and prioritize the responsibility to sustain compliance with the City’s NPDES permit.” (*Id.*).

The City of Detroit filed a written response to the 2000 Investigative Report. (D.E. No. 1650). Among other things, the City of Detroit stated that “[t]he report correctly identified purchasing as a significant cause of violations at the Wastewater Treatment Plant.” (*Id.* at 10). The City, in its conclusion section of the response, suggested that another appointment of a Special Administrator for the DWSD was needed to achieve short-term compliance:

It is the mission of the City of Detroit to operate and maintain its wastewater treatment plant in compliance with all applicable state and federal laws including the Amended Consent Judgment and its NPDES permits for the benefit of the public in general and specifically for the benefit of the customers which it serves, both inside and outside of the City of Detroit. To that end, the Mayor of the City of Detroit, the Honorable Dennis Archer, has agreed, in the short term, to be appointed the Administrator of Operations of the [DWSD] should the Court decide to do so.

DWSD believes that the appointment of an Administrator of Operations empowered to manage, control and direct the procurement of all goods and services, the hiring, compensation and firing of personnel, entering into contracts, payment for services and the collection of receivables, and to do all things necessary to accomplish the same, would provide a short-term solution to contracting, purchasing and personnel issues.

(*Id.* at 24).

In light of the 2000 Investigative Report, Judge Feikens expressed concern about the possibility of “renewed non-compliance,” and as a result, the authority of the Special Administrator was again delegated to the current mayor of the City of Detroit. On February 7, 2000, with the consent of both DEQ and the City, Judge Feikens entered an Order appointing Mayor Dennis Archer as Special Administrator. (Joint Stmt. of Stipulated Facts at ¶ 20; D.E. No. 1848-4 at 4). In that order, Judge Feikens stated that “[t]he *nearly two-year period of non-compliance as well as the prospect of renewed non-compliance, unless the causes of non-compliance are corrected, presents a serious health, safety, and environmental risk* to the people

of Southeastern Michigan.” (*Id.* at 3) (emphasis added). The Order stated that the actions that had been taken by the City of Detroit “do not address the causes of non-compliance, and cannot be sustained to provide reliable, compliant operation of the WWTP.” (*Id.*). The Order appointed Mayor Archer as “Special Administrator of the Detroit WWTP for the purposes of correcting the causes of non-compliance as found by the Committee and the purposes of achieving long-term, sustained compliance with the NPDES permit” and gave him broad powers over the DWSD:

The Special Administrator, or his designee, the Chief Operations Officer, shall have full power and authority to control, manage, and operate the WWTP, including all functions and powers of the Detroit City Council, the Detroit Board of Water Commissioners, the DWSD, and any other departments, boards, or divisions of the City of Detroit to the extent that they affect the ability of the Special Administrator to meet the requirements of sustained compliance with the NPDES permit, the Supplemental Consent Judgment to be entered in this case, or the specific responsibilities of the Special Administrator outlined below.

(*Id.* at 4). The Order then outlined various responsibilities of the Special Administrator, including:

G. Human Resources

1. The Special Administrator, or his designee, the Chief Operations Officer is required to carry out the programs hereinafter set forth:
 - a. Training:
 - i. Perform an assessment of training needs to update the training curriculum.
 - ii. Require WWTP training staff to train WWTP personnel exclusively.
 - b. Hiring:
 - i. Revisit existing union contracts and civil service rules so that people outside the civil service system are able to compete with those inside the system for advanced positions.
 - ii. Shorten turn-around time on hiring decisions.
 - c. Compensation:
 - i. Implement the following recommendations:

- a. Rewrite job descriptions to make them compatible with those that exist in external job markets, i.e., both private and public;
- b. Undertake a total compensation study;
- c. Review existing union contracts and civil service rules and develop recommendations to make compensation and compensation increases similar to those that exist in the external market, including the use of performance evaluations in granting merit pay increases;
- d. Develop a methodology so that compensation stays competitive with the external market after the Special Administrator's tenure ends and after other compensation reforms are implemented;
- e. Develop recruiting strategies to attract employees from outside the civil service.

(*Id.* at 8-9).

On August 30, 2000, Judge Feikens entered a Second Amended Consent Judgment (“SACJ”) that set forth yet another compliance schedule for the DWSD to address and correct the NPDES permit violations. (Joint Stmt. of Stipulated Facts at ¶ 21; SACJ, D.E. No. 1688). The SACJ incorporated by reference the Order Appointing Special Administrator and “supplant[ed] and superced[ed] the Amended Consent Judgment entered on April 25, 1980.” (Joint Stmt. of Stipulated Facts at ¶ 21; D.E. No. 1688 at 13).

In December 2001, Judge Feikens entered an Order transferring authority of the Special Administrator to the newly elected mayor, Kwame Kilpatrick, effective January 1, 2002, noting that the position of Special Administrator had been created to prevent future violations of the DWSD's NPDES permit. (Joint Stmt. of Stipulated Facts at ¶ 22; D.E. No. 1848-5).

By virtue of an Order issued on November 25, 2002, the Court ordered that the consulting firm Infrastructure Management Group, Inc. (“IMG”), selected by then-current DWSD Director

Victor Mercado, be retained by the DWSD to review contracts over the amount of \$500,000.00. (D.E. No. 1742). IMG's contracts were renewed by various court orders issued by Judge Feikens such that it performed those services from November 2002 through November 2010. (*See, e.g.*, D.E. Nos. 1742 and 2308).

On September 26, 2005, Oakland County filed a "Motion To Replace DWSD's Court-Appointed Special Administrator, Mayor Kwame Kilpatrick, With A Joint Management Committee." (D.E. No. 1848). In an Opinion & Order entered on January 5, 2006, Judge Feikens terminated the Order appointing Mayor Kilpatrick as Special Administrator, concluding that the DWSD's record of compliance had improved in the last few years, and denied Oakland County's motion. (D.E. No. 1872).

His belief that progress was being made, however, did not last long. On May 2, 2008, Judge Feikens issued an "Order For Briefing Regarding Compliance." (D.E. No. 2122). The opening paragraph of that order explained:

I am deeply concerned about the ability of the [DWSD] to sustain compliance. DWSD has a long history in this case of periods of remarkable progress and compliance, which have unfortunately often been followed by permit violations and amendments to the consent judgment to address the causes of that non-compliance. As described below, I am concerned that history is about to repeat itself, and require briefing from the City of Detroit [] and the DWSD regarding a plan for addressing a number of issues that pose a real threat to continued compliance in the near future.

(*Id.* at 1-2). In discussing his concerns, Judge Feikens noted that "[o]ne programmatic cause of failure identified by the Committee was the capital improvement program. The Committee found the failure to replace aged and deteriorated capital equipment and to maintain solids dewatering facilities led to a failure to sustain compliance with the NPDES permit. (Report at

1.). In the monthly oversight meetings, the Director [of the DWSD] has repeatedly informed me of his attempts to gain approval of the rates that support in part the capital improvement programs. To date, these attempts have not been successful.” Judge Feikens noted that failure to approve rates adequate to fund necessary projects puts compliance at risk. (*Id.* at 4).

Judge Feikens also stated that “Human resources is the greatest area of current concern in terms of sustaining compliance.” (*Id.* at 5). He noted:

A recent study undertaken at my direction by [IMG] found that eight percent of the current management and lead operations positions at the WWTP are vacant, and 79 percent of the current staff in those positions will be eligible to retire with full pension benefits by the end of 2009. The current WWTP operations staff eligible to retire with full retirement benefits rises to 83 percent by 2012. The problem extends through the mid-level positions in WWTP operations, where 73 percent of the positions are filled by someone eligible to retire with full benefits in 2009 – and that number increases to 81 percent by 2012.

There is a similar crisis brewing with the WWTP maintenance staff. Of the management and lead maintenance positions at the WWTP, 25 percent are currently vacant, and 100 percent of the current staff in those positions will be eligible to retire with full benefits by the end of 2009. The senior maintenance staff ranks are facing a similar situation: 36 percent of the positions are currently vacant, and 63 percent of the current staff in those positions are eligible for full retirement benefits in 2009- the percentage increased to 88 percent by 2012. This problem is compounded by the fact that, as reported by [IMG], DWSD pays significantly below-market rates for a vast swath of positions. Since the WWTP is the biggest facility of its kind in the county, and thus demands more than usual from its staff, this is especially glaring . . . Therefore, there is ample reason to believe that a wave of retirements will result in vacancies in positions that are vital to compliance. Moreover, the current personnel levels and salaries assume the rates cover the costs of service. Failure to adequately support the costs of providing the service through appropriate rate levels may very well exacerbate the personnel crisis that is brewing.

(*Id.* at 5-6). Judge Feikens further stated:

Next year will clearly be one that is incredibly challenging for DWSD: in 2009, approximately three-quarters or more of the upper and mid-level staff of the

WWTP will be gone or eligible to retire with a full pension, and any increased failure to pass rate increases will likely start to impact compliance-mandated projects. The Director of DWSD's contract also expires at the end of 2009. This Court has concern, therefore, that just at the point that DWSD is facing financial and human resource crises that are likely to have a negative impact on compliance (as they have in the past), the experienced leadership needed to handle these issues may not be present.

(*Id.* at 7). Judge Feikens ordered the City/DWSD to respond to the above concerns in writing and further stated that “[s]uch briefing must go beyond the boilerplate language of the quarterly progress reports” that the DWSD had been submitting to the Court. (*Id.* at 7).

In responding to that May 2, 2008 Order, the City stated that it had retained IMG to prepare a report addressing various issues. (D.E. No. 2130). That report from IMG, titled “DWSD Succession Plan Final Report, November 30, 2007,” was attached as Exhibit A to the City’s brief. (D.E. No. 2130-3). Notably, in that report, IMG repeated its finding that it had reported to Judge Feikens during the past year:

The physical improvements at the wastewater treatment plant and CSO stations, which were required under Section II of the SACJ and identified as the remedies to address and eliminate the technical causes of non-compliance in the Committee’s report, have either been completed or have been initiated and are expected to be satisfactorily completed.

Other remedies that are more people related or that involve organizational and governance issues continue to be troublesome and could possibly *jeopardize sustained compliance*. Staffing elements including hiring, career development, succession planning, and compensation remain partially unresolved. *Little has been achieved in some of these areas due to the City of Detroit personnel practices, bargaining unit agreements and civil service constraints.*

(*Id.* at 2) (emphasis added). IMG further stated that these “systemic problems” “need to be addressed in the long term.” (*Id.*).

The report found several problems in terms of human resources and staffing. IMG noted that there is “an alarmingly low number of certified operators for the size and complexity of the DWSD wastewater treatment plant, which is one of the largest wastewater treatment plants in the country.” (*Id.* at 8). It also found that civil service rules and union rules and agreements compound the problems with recruiting and retaining qualified staff. (*Id.* at 10-11). It stated that “[i]n terms of governance, City Council maintains control over all employment matters. All employees of DWSD, with the exception of the Director and Deputy Director, fall under the City of Detroit Civil Service. Job descriptions, pay rates and classifications are all subject to input and approval by the Civil Service Commission (CSC),” and “[a]ny changes to job descriptions must also be reviewed by unions.” (*Id.*) Because of these constraints, the DWSD has “limited control over who gets hired, what they get paid and job classification revisions.”

The recommendations made in IMG’s report included:

7. Consider creating an independent DWSD HR Department

It does not appear that the city HR department can adequately address the unique needs of DWSD. Water and wastewater utility workforce requirements may be better served by a dedicated department that would provide recruiting and workforce training.

(D.E. No. 2130-3 at 17) (emphasis in original). As to this recommendation made in IMG’s November 30, 2007 report, the City of Detroit’s May 23, 2008 brief stated that the “DWSD has discussed this option with the Mayor’s office, which is reviewing it.” (D.E. No. 2130 at 4). The City’s brief also stated that the Mayor would appoint an interim Director of DWSD and would “initiate a national search for a qualified, permanent Director of DWSD.” (*Id.* at 9).

The recommendations by IMG also included restructuring numerous civil service classifications at the DWSD. The report explained: “Many of the current job descriptions are

outdated, and do not reflect the current or future skills needs of DWSD” and that IMG recommended that the “job descriptions and qualifications” for 17 different types of job positions within the DWSD be redeveloped. (D.E. No. 2130-3 at 15). As to this recommendation made in IMG’s November 30, 2007 report, the City of Detroit’s May 23, 2008 brief stated that the DWSD Director had “forwarded two requests to the City of Detroit’s Human Resources Department to create new job classifications” and that the “City of Detroit’s Human Resources Department is reviewing DWSD’s requests.” (D.E. No. 2130 at 4).

The last time that the DWSD had a permanent Director was on June 30, 2008. (Joint Stmt. of Stipulated Facts at ¶ 48).

In May 2009, Oakland, Wayne, and Macomb Counties (the “Counties”) and the City of Detroit agreed to a “global settlement” (“Global Settlement”) that was intended to resolve many outstanding issues and legal claims. Among other things, the Global Settlement resolved: a) the Counties’ claims with respect to the utilization of DWSD funds for the purchase and acquisition of the 800 MHZ Radio Communication System; b) the Macomb sewer collapse; c) certain sewer rate issues; and d) certain objections raised by the Counties regarding the contract procurement process of DWSD. (Joint Stmt. of Stipulated Facts at ¶ 25; Global Settlement, D.E. No. 2219).

As Judge Feikens had predicted, however, 2009 proved to be a difficult year for the DWSD and it again fell out of compliance.

In September 2009, the DWSD fell out of compliance with its NPDES permit. (Joint Stmt. of Stipulated Facts at ¶ 26). On November 12, 2009, DEQ issued a Notice of Violation to the DWSD for NPDES permit violations for exceeding the limits for discharge of Total Suspended Solids (“TSS”) in the months of September and October 2009. (Joint Stmt. of

Stipulated Facts at ¶ 27). In a certified letter to the DWSD's Director dated December 2, 2009, the DEQ noted additional concerns and additional violations for the month of November. (Joint Stmt. of Stipulated Facts at ¶ 28).

Upon receipt of the December 2, 2009 Certified Letter, Judge Feikens requested that Dr. Bulkley, the Court's appointed Monitor, investigate the renewed NPDES violations and report to the Court. (Joint Stmt. of Stipulated Facts at ¶ 29).

On April 14, 2010, DEQ issued a Second Notice of Violation to the DWSD which alleged that the violations identified in the November 12, 2009 Violation were continuing: "Key Indicator Reports submitted by DWSD indicate that, despite an increase in reported dewatering capacity, solids inventories have increased since the Violation Notice was issued and currently stand at roughly four times the desired amount." (Joint Stmt. of Stipulated Facts at ¶ 30). It further stated that "the DWSD's inability to remove solids from the treatment process at a rate that ensured proper operations and compliance with NPDES permit effluent limits is the same issue that caused the violations that resulted in the need for the SAJC [Second Amended Consent Judgment entered August 3, 2000]." (Joint Stmt. of Stipulated Facts at ¶ 31) (Second Violation Notice dated 4/14/10, Appendix to Opin. & Order No. 7).

On June 15, 2010, Dr. Bulkley provided a written report to the Court (the "2010 Bulkley Report"). (D.E. No. 2296). In that report, Dr. Bulkley stated that "DWSD has been cited for significant violations for seven consecutive months (September, 2009 – March, 2010). Most of the violations relate to Total Suspended Solids, but exceedances have also been reported for Mercury and PCB." (Joint Stmt. of Stipulated Facts at ¶ 32) (quoting D.E. No. 2296 at 2). Dr. Bulkley further stated "[i]t is apparent that the current permit violations are similar to the

problems that have occurred since the issuance of the original Consent Judgment in 1977.” (Joint Stmt. of Stipulated Facts at ¶ 33) (quoting D.E. No. 2296 at 4). He continued by stating that “[t]he nine (9) causes identified in the January 12, 2000 Report of the Committee of Investigation are very similar to certain of the issues that appear to be contributing to the current Total Suspended Solids NDPES violations from the DWSD’s wastewater treatment plant.” (*Id.*). As such, Dr. Bulkley attached a copy of the 2000 Investigative Report – which found serious problems with human resources, capital improvement, and purchasing in 2000 – to his 2010 report. The 2010 Bulkley Report concluded “[t]he changes implemented in 2000 were apparently *insufficient to maintain compliance over the long term*, as evidence by the recurring solids build up problem and the related permit violations. *It may be appropriate to consider more fundamental corrective measures to address the institutional problems which are adversely impacting the performance of DWSD’s wastewater treatment plant.*” (D.E. No. 2296) (emphasis added).

Following the renewed violations in 2009, the Engineering Society of Detroit was asked to assess and identify immediate emergency corrective steps and a sustainable, long-term remediation strategy for the DWSD. On July 26, 2010, its written report, the “Engineering Society of Detroit Consensus Action Report Detroit Water & Sewerage Department Waste Water Treatment Plant: The Road To Compliance And Beyond” (the “Consensus Action Report”) was submitted to the City. (Appendix to Opin. & Order No. 8). The Consensus Action Report was also provided to the Court, and to the DEQ, by the City. (*Id.* at 1). It noted continuing problems with the City’s practices, as they relate to the DWSD, in the areas of human resources and purchasing.

The Consensus Action Report stated “[a] critical problem facing DWSD and WWTP is lack of sufficient qualified personnel” and that this “stark reality” drives home the importance of human resources. (*Id.* at 7). Nevertheless, it found serious problems with existing human resources services provided to the DWSD, stating that the City of Detroit’s Human Resources Department “has provided inconsistent or nonexistent services to DWSD in the past.” (*Id.* at 8). It stated that there “is little, if any, on going training of plant supervision personnel” and “[t]here is no succession planning for plant supervision personnel.” (*Id.* at 7). Further addressing human resources problems, it stated:

Faced with its own staff reduction of over 34%, Human Resources fully understands the challenges. The current process barriers driven by real or perceived *requirements due to city ordinances, civil service rules and procedures, requisition practices and collection bargaining agreements have impacted the ability of the Human Resources Department to fill the personnel needs of DWSD and WWTP.* Workings between DWSD and HR are bureaucratic in nature and the process challenges each face in carrying out their responsibilities with the other have not been fully shared. Each has legitimate reasons why the process has not been successful, but joint problem-solving efforts have not yet occurred.

Putting any fault assessment aside, the lack of an effective succession planning process has again resulted in workarounds that increase the risk of noncompliance due to lack of qualified personnel.

(*Id.* at 8) (emphasis added).

In addressing practices in purchasing, the Consensus Action Report noted “[t]he often needless labyrinth of process and procedures required to award a significant contract.” (*Id.* at 9). It further stated, “[i]n a word, the City’s Purchasing Department was in the dark, after the fact and out of the loop regarding much of DWSD’s purchasing activities leading to formalistic and bureaucratic procedures that treated symptoms and not causes.” (*Id.*). It further stated that “bidding procedures introduce problems, as well. There are significant difficulties in obtaining

clearances and certifications, and the number of levels of management approval needlessly burdens the process. What appeared missing was a management communication and process linkage that could address the inefficiencies and hurdles to the timely and cost-effective purchase of the staffing, parts and capital needs of DWSD and WWTP.” (*Id.*). It further stated:

All of this is compounded by the overarching approval process relating to purchases over \$25,000. Essential DWSD purchases often exceed this amount. The process requirement sometimes results in over 17 steps with a resulting 6- to 12-month delay in the delivery of goods and services. The sequential processing of contracts with original documents transferred from office to office exacerbates this condition. With the likelihood that a part or piece of equipment over \$25,000 would fail at any time and shut down WWTP, it is no wonder that outsourcing under approved existing subcontracts has become the rule instead of the exception. And, ironically, despite this dollar approval limitation, no WWTP purchasing request has, at least in collective recent memory of plant personnel, ever been rejected.

(*Id.* at 9) (emphasis added). The Consensus Action Report also explained how these flawed purchasing processes adversely impact operations at the WWTP:

Aging filter belt presses, centrifuges, conveyor belts and incineration equipment result in 350 to 400 new maintenance work orders each week. Staff can only complete approximately 50% of these work orders, often due to lack of parts. As a result, little maintenance work is routine or without risk of adverse consequences to operations.

(*Id.* at 7).

In response to the Second Notice of Violation dated April 14, 2010, on September 15, 2010, the DWSD filed a Corrective Action Plan (“CAP”) dated August 31, 2010, which represented its “Roadmap for sustainable compliance.” (Joint Stmt. of Stipulated Facts at ¶ 35) (quoting D.E. No. 2309 at 7). In connection with the development of the CAP, the DWSD undertook an “in-depth examination of the root causes that contributed to the solids violations in

the DEQ Second Notice of Violation” and “identified the steps necessary to achieve compliance.” (Joint Stmt. of Stipulated Facts at ¶ 35) (quoting D.E. No. 2309 at 7). The DWSD’s CAP identified, as causes of the current violations, problems that had been identified as the causes of the previous violations in 1997. Among the causes identified in the CAP were: failed maintenance planning (D.E. No. 2309 at 12); lack of skilled trades (*Id.*) and other key personnel (D.E. No. 2309 at 24); and significant shortcomings in the purchasing and procurement areas (D.E. No. 2309 at 25). (Joint Stmt. of Stipulated Facts at ¶ 36). The CAP also recognized the existence of “systematic management issues that have affected compliance.” (Joint Stmt. of Stipulated Facts at ¶ 37) (quoting D.E. No. 2309 at 22). The CAP stated that the City intended to create an Empowered Enterprise Change Office (“EECO”) to serve “as both a unifier and an enabler bringing together under one umbrella entity key representatives of the City, DWSD and the WWTP” and that the EECO’s mission is to oversee and drive the implementation of the CAP. (*Id.* at 5).

On October 13, 2010, DEQ responded to the CAP. DEQ stated that, although the CAP adequately addressed the immediate short term action items needed to achieve compliance, “it failed to adequately address the issues that are critical to ensuring long term compliance such as staffing, purchasing, long term solids disposal and maintenance planning.” (Joint Stmt. of Stipulated Facts at ¶ 38) (quoting DEQ’s 10/13/10 Letter, Appendix to Opin. & Order No. 9). It further stated that “[i]n addressing DWSD’s long term compliance issues the CAP is inadequate and incomplete. Schedules for long term actions to correct the critical issues contributing to the current noncompliance are vague, open-ended, and assume that the EECO will have adequate authority to effect change across City departments.” (*Id.* at 7).

On November 29, 2010, after Judge Feikens retired, this case was reassigned to this Court. (D.E. No. 2323).

The following month, on December 15, 2010, a federal Grand Jury issued a thirty-eight count First Superseding Indictment against Kwame Kilpatrick, the former Mayor of Detroit and the former Special Administrator of the DWSD, along with Victor Mercado, the former Director of the DWSD, and others. It charges that, while Kilpatrick was the Mayor of Detroit, and during and after his appointment as the DWSD Special Administrator, Kilpatrick and Mercado extorted and rigged municipal contracts. The majority of the contracts alleged in the First Superseding Indictment were contracts paid for by the DWSD.⁴ (See D.E. No. 20 in Criminal Case No. 10-20403).

In February of 2011, the City, along with the above counties, determined that a more empowered Board would enhance the DWSD's ability to comply with its NPDES permit and the Clean Water Act. (See 2/11/11 Stipulated Order, D.E. No. 2334, at 1) (“[T]he parties agree that the DWSD's ability to comply with environmental laws and its NPDES Permit will be enhanced by the Board's exercise of its powers and authority to the fullest extent of the law.”)

The Stipulated Order provides that Board members must have at least seven years of experience in a regulated industry, a utility, engineering, finance or law and that the Board will be compensated. (*Id.*). It further provides that the Board “will be supported by certain staff having expertise in the fields of law, finance, and technology pertinent to DWSD operations (i.e.

⁴Although not relevant to this Court's rulings, the Court notes that this is not the first time that allegations of corruption have been made relating to DWSD contracts. See e.g. *United States v. Bowers*, 828 F.2d 1169 (6th Cir. 1987) (describing convictions and guilty pleas of a former DWSD Director and others relating to sludge-hauling contracts.).

engineering and/or water or wastewater operations).” (Joint Stmt. of Stipulated Facts at ¶ 41; D.E. No. 2334 at 2). The Stipulated Order further provides that “[w]ithin six months of the date of this Order, any party may file a motion with the Court to demonstrate that the [DWSD] is in substantial compliance with its NPDES Permit and the consent judgments of this Court. If the Court is satisfied that substantial compliance has been achieved, it shall dismiss this lawsuit.” (*Id.*).

In compliance with the February 11, 2011 Stipulated Order (the “Stipulated Order”), on April 1, 2011, Mayor Bing appointed a new Board that the parties believe is equipped to lead the DWSD to achieve sustained compliance with the Clean Water Act. (Joint Stmt. of Stipulated Facts at ¶ 41). On July 27, 2011, the Board amended its by-laws, to incorporate the provisions of the Stipulated Order. (Appendix to Opin. & Order No. 10).

During the past six months, the City and the DWSD have been working with the DEQ to develop yet another plan for compliance.

Effective July 8, 2011, the City, the DWSD and DEQ entered into the ACO, aimed at achieving compliance with the DWSD’s NPDES permit and the Clean Water Act. (D.E. No. 2365-1).

On July 25, 2011, the City filed a “Motion to Dismiss and for Relief from the Second Amended Consent Judgment.” (D.E. No. 2365). In that motion, the City notes that the DEQ and the DWSD recently entered into the ACO and asks this Court to order that the requirements set forth in that ACO are substituted for the requirements of the August 30, 2000 Second Amended Consent Judgment. The City also asserts that the DWSD has made substantial progress toward achieving full compliance with its NPDES permit and the Clean Water Act and, as result, the

Court should dismiss this action.

Recent documentation provided to the Court by the DEQ, however, reflects that after executing the ACO on July 8, 2011, the DWSD self-reported new violations of its NPDES permit to the DEQ. (*See* Appendix to Opin. & Order No. 11). These new violations include the WWTP's total suspended solids (TSS). In a letter dated September 7, 2011, the DEQ advised the DWSD that these violations of the DWSD's "NPDES permit effluent limitations occurring after the effective date of the ACO, July 8, 2011 are violations of the ACO" and that stipulated penalties may be assessed for these new violations under the ACO. (*Id.* at 2-3). That letter further states that the violations are expected to continue: "[b]ased on the Outfall 050A TSS concentrations reported in July and the data for the first 15 days of August, it appears that DWSD will continue to be in violation of the TSS 30 discharge-day concentration limit at Outfall 050A for at least the next 30 discharge days." (*Id.*).

Section 9-510 of the Charter mandates that incentives be given to local firms in the competition for City contracts. This provision is implemented by Section 18-5-2 of the Detroit City Code. These local preferences are prohibited by the federal government when using federal funds under the EPA. (Joint Stmt. of Stipulated Facts at ¶ 45) (quoting Title 40, Chapter I, Subchapter B, 35.936-29(c)). These local preferences, in practice, have increased the cost of DWSD's procurement of goods and services and limited the pool of vendors bidding on various DWSD contracts.

Currently, many of the terms and conditions governing the relationship between the DWSD and its employees are governed by City-wide collective bargaining agreements. Collectively, DWSD employees are members of 21 collective bargaining units, most of which

include many non-DWSD employees. (Joint Stmt. of Stipulated Facts at ¶ 46). City-Wide collective bargaining agreements and other City requirements currently restrict the compensation that can be offered to prospective DWSD employees. (Joint Stmt. of Stipulated Facts at ¶ 47).

The DWSD has been without a permanent Director since June 30, 2008. The role of the DWSD Director is currently being filled by the Chief Operating Officer of the City of Detroit. (Joint Stmt. of Stipulated Facts at ¶ 48).

Since its inception in October 2010, the EECO has held approximately 11 monthly meetings. This Court's Special Master, David Ottenwess, attended several of those meetings and this Court was provided with minutes of several meetings.

The DWSD's November 1, 2010 Update Report was drafted soon after the EECO began meeting. (Appendix to Opin. & Order No. 12). It states that "[a]s of September 30, 2010, the WWTP had 537 Full Time Employees (FTE) staff positions filled. (*Id.* at 13). The Appendix then states that the average filled positions for the quarter was 68%. As to purchasing, its states that during the quarter "the Purchasing Division received 1,947 purchase requisitions Department-wide that were assigned to buyers, 677 (35%) of these assigned requisitions were processed into actual purchase orders." (*Id.* at 12).

The most recent Update Report received from the DWSD is its August 1, 2011 Update Report and it reflects that virtually no progress in terms of human resources and purchasing has been made since the EECO was formed. (D.E. No. 2383-7). It states that as of June 30, 2011, "the WWTP had 584 Full Time Employees (FTE) staff positions filled." (*Id.* at 13). The Appendix then states that the average filled positions was 66% for the second quarter and 70% for the third quarter of the year. As to purchasing, its states that during the quarter "the

Purchasing Division received 1,943 purchase requisitions Department-wide that were assigned to buyers, 774 (37%) of these assigned purchase requisitions were processed into actual purchase orders.” (*Id.* at 11).

As demonstrated by the most recent violations, and shown by the quarterly reports filed by the DWSD during the past year, despite earnest efforts of those involved, the EECO has not been successful in remedying the longstanding purchasing or human resources problems at the DWSD that are impeding compliance.

The Court finds that human resources issues have been a chronic problem for the DWSD for the past 34 years. Specifically: 1) having an insufficient number of qualified personnel at the WWTP has been a chronic problem for the DWSD; 2) there are excessive and unnecessary delays in hiring qualified personnel across all job positions at the DWSD; 3) the DWSD’s required use of the City’s Human Resources Department results in significant delays in filling critical positions at the DWSD; 4) the City’s personnel policies, civil service rules, and union rules and agreements restrict the compensation, recruitment and prompt hiring of necessary personnel at the WWTP; 5) there is insufficient training of personnel at the DWSD and its WWTP; 6) the DWSD’s WWTP has an insufficient number of certified operators for a wastewater treatment plant of its size and complexity; 7) the DWSD is currently facing a serious staffing crisis as a significant portion of its experienced workforce is ready to retire; 8) the City has failed to develop an adequate succession plan as to the DWSD and the WWTP; and 9) the job descriptions and qualifications for various positions within the DWSD are obsolete.

The above human resources issues have prevented the DWSD from achieving sustained compliance with its NPDES permit, the various remedial plans in this action, and the Clean

Water Act.

In addition, the DWSD's lack of a qualified, permanent Director is impeding compliance. Yet the DWSD is unlikely to attract and hire a highly qualified Director while the above institutional barriers to compliance exist and the DWSD is under federal court oversight.

The Court finds that the DWSD has also experienced chronic and serious problems in the areas of purchasing and procurement over the past 34 years.

Purchasing of necessary equipment and supplies for the WWTP has not been timely or at an acceptable level. There is a long history of excessive delays in the processing of purchase requisitions for critical repair and/or replacement parts. The City of Detroit's flawed purchasing practices and procedures impede preventative maintenance and adversely impact operations at the DWSD's WWTP.

The City's ineffective procurement system also causes and contributes to operational problems at the WWTP. The City lacks procurement procedures that are responsive to the reality of keeping the WWTP fully operational. Essential DWSD purchases often exceed the amount of \$25,000. The approval process for purchases over \$25,000, created by City's Charter and/or ordinances, unnecessarily delays contracts for essential parts, equipment, and services at the DWSD. The City's bidding and certification requirements also unnecessarily delay contract approvals.

The above purchasing and procurement problems have prevented the DWSD from achieving sustained compliance with its NPDES permit, the various remedial plans in this action, and the Clean Water Act.

The failure to replace aged and deteriorated capital equipment and to maintain solids

dewatering facilities is a also root cause of the continuing cycle of noncompliance at the DWSD. The failure to promptly approve rates adequate to fund necessary capital improvement projects at the DWSD, and adequate to support the costs of filling and retaining adequate staff at the WWTP, threatens compliance with the DWSD's NPDES permit, the ACO and the Clean Water Act.

CONCLUSIONS OF LAW

The objective of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). “Section 301 of the CWA makes the discharge of pollutants into navigable waters unlawful, unless such discharge is authorized by permit.” *Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1445 (1st Cir. 1992); 33 U.S.C. § 1311(a). The purpose of the Clean Water Act is to be achieved by compliance with the Act, which includes compliance with permit⁵ requirements. *Weinberger*, 456 U.S. at 314.

“[E]nforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act.” *Weinberger*, 456 U.S. at 318. Nevertheless, a district court has broad equitable discretion in remedying violations of the Act and is not limited to such orders. *Id.*; see also *United States v. Metropolitan District Commission*, 930 F.2d 132, 135 (1st Cir. 1991) (“The law confers broad

⁵Each National Pollutant Discharge Elimination System (“NPDES”) permit sets out the specific conditions necessary to ensure that a permit holder’s discharge of pollution will comply with the water standards mandated by the Clean Water Act. *Lake Carriers’ Assoc. v. E.P.A.*, ___ F.3d ___, 2011 WL 2936926 (D.C. Cir. 2011); 33 U.S.C. § 1342(a)(2).

legal authority upon a *district* court to choose appropriate remedies for violation of the Clean Water Act.”) (emphasis in original). The Clean Water Act permits “the exercise of a court’s equitable discretion” to “order relief that will achieve *compliance* with the Act.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (emphasis in original).

A federal court’s equitable power to remedy a violation of federal law is not constrained by state or local law. Rather, once the court has found a violation of federal law, “a state law cannot prevent a necessary remedy. Under the Supremacy Clause, the federal remedy prevails. ‘To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them.’” *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 57-58 (1990)); *see also United States v. Metropolitan District Commission*, 930 F.2d at 136 (“Considerations of comity and federalism,” do not give a state or municipality “the legal power to violate the law, to continue violations that have taken place over a fifteen-year period, or to place at risk a major compliance plan . . .”).

Nevertheless, a district court’s broad equitable authority “is tempered by precepts of comity and federalism. As the Supreme Court has stated:

[A]ppropriate consideration must be given to principles of federalism in determining the availability *and scope* of equitable relief.

Kendrick v. Bland, 740 F.2d 432, 437 (6th Cir. 1984) (emphasis in original) (Quoting *Rizzo v. Goode*, 423 U.S. 362, 379 (1976)). Thus, “[r]emedies that override state law must be narrowly tailored so as to infringe state sovereignty as minimally as possible.” *Perkins*, 47 F.3d at 217 (citing *Jenkins*, 495 U.S. at 57-58). “Federal remedial powers can ‘be exercised only on the basis

of a violation of the law and [can] extend no farther than required by the nature and extent of the violation.” *Id.* (citing *General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, 399 (1982)); *Kendrick*, 740 F.2d at 437 (The federal equity court in fashioning a remedy must afford relief which is no broader than necessary to remedy the constitutional violation.).

In *Jenkins*, the Supreme Court “emphasized that although the ‘remedial powers of an equity court must be adequate to the task, . . . they are not unlimited,’” and “one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.” *Jenkins*, 495 U.S. at 51. While “[b]y no means should a [federal] district court grant a local government *carte blanche*,” the “local officials should at least have the opportunity to devise their own solutions” to remedy a federal violation. *Id.* at 52. In the event that a local government fails or is unable to avail itself of such an opportunity to correct the violations, however, a “federal court may implement a more intrusive remedy.” *Kendrick*, 740 F.2d at 439.

Here, it is undisputed that, over the course of the past 34 years, the DWSD has had serious and recurring permit violations – which constitute violations of the Clean Water Act. The Court finds that the DWSD’s violations of its NPDES permit and the Clean Water Act are serious and continuing and present a serious health, safety and environmental risk to the people of Southeastern Michigan.

As stated *supra*, “enforcement actions typically result, by consent or otherwise, in a remedial order setting out a detailed schedule of compliance designed to cure the identified violation of the Act.” *Weinberger*, 456 U.S. at 318. From its inception, that collaborative approach was attempted in this action. Rather than contest the violations, the City and the

DWSD entered into a consent judgment that set out a detailed compliance plan designed to cure the violations. As the record reflects, however, that approach has not stopped the violations. Despite entering into *a series* of agreements containing detailed compliance plans, the DWSD has been unable to comply with those plans, resulting in repeated violations of the Clean Water Act. For the more than 34 years during which this action has been pending, the City and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the City negotiates and agrees to a detailed remedial plan for compliance, but the DWSD is unable to follow the plan and is again cited for the same or similar violations. Thus, although a collaborative approach employing detailed remedial plans has been attempted, that approach has not resulted in compliance with the Clean Water Act and the violations have continued.

Recognizing that a detailed remedial plan alone would not lead to sustained compliance, Judge Feikens took numerous actions, detailed in the preceding Findings of Fact, aimed at enabling the City and the DWSD to achieve long-term compliance with the DWSD's NPDES permit and the Clean Water Act.

For example, Judge Feikens appointed a highly qualified⁶ environmental expert, Dr. Jonathan W. Bulkley, to act as Court Monitor. He also used more intrusive means designed to eliminate, at least temporarily, the institutional impediments to sustained compliance, including successive appointments of Detroit Mayors as Special Administrators, who were empowered to take actions on behalf of the DWSD irrespective of the City's Charter, ordinances, policies and contracts.

⁶ See Appendix to Opin. & Order No. 13).

Judge Feikens also had the DWSD use outside consultants to assist with troubled areas such as contracting. For example, from November 2002 through November 2010, the consulting firm IMG was retained to examine and review DWSD contracts over \$500,000.00. (*See, e.g.*, D.E. Nos. 1742 & 2308).

Most significantly, Judge Feikens took additional measures designed to help the DWSD attain sustained compliance by having Dr. Bulkley, and various other experts, investigate the underlying root causes for the recurring cycle of violations. The City and the DWSD had direct participation with those studies and the City commissioned some of its own. The record is replete with detailed reports from such investigations:

- 1) Dr. Bulkley's 1978 Report, which was done after the City/DWSD failed to comply with the terms of the 1977 Consent Judgment;
- 2) The 1994 Operational and Organizational Review of the DWSD;
- 3) The 2000 Investigative Report, which was done after the DWSD again fell out of compliance with its NPDES permit in 1997;
- 4) The DWSD Succession Plan Report, prepared by IMG in 2007;
- 5) Dr. Bulkley's 2010 Report, done after violations recurred again in 2009; and
- 6) The Engineering Society of Detroit Consensus Action Report in 2010, also done after violations recurred in 2009.

These experts that have studied the DWSD have consistently, over many years, opined that the same root causes are an obstacle to compliance with the DWSD's NPDES permit, the remedial orders agreed to in this case, and the Clean Water Act: 1) the DWSD having an insufficient number of qualified personnel at the WWTP; 2) excessive and unnecessary delays in hiring qualified personnel across all job positions at the DWSD; 3) the DWSD's required use of

the City's Human Resources Department, resulting in significant delays in filling critical positions at the DWSD; 4) the City's personnel policies, civil service rules, and union rules and agreements, restricting the compensation, recruitment and prompt hiring of necessary personnel at the WWTP; 5) insufficient training of personnel at the DWSD and WWTP; 6) lack of a succession plan at the DWSD; 7) obsolete job descriptions and qualifications for various positions within the DWSD; 8) untimely and inadequate purchasing of necessary equipment and supplies for the WWTP; 9) excessive delays in the processing of purchase requisitions for critical repair and/or replacement parts; 10) the City's flawed purchasing practices and procedures; 11) the City's ineffective procurement system; 12) the approval process for purchases over \$25,000, created by the City's Charter and/or ordinances, unnecessarily delaying contracts for essential parts, equipment, and services at the DWSD; 13) the City's bidding and certification requirements, delaying contract approvals; and 14) the DWSD's repeated failure to replace aged and deteriorated capital equipment and to maintain solids dewatering facilities at the WWTP.

The EPA and the DEQ have also identified many of these same root causes as impeding compliance. Notably, from the inception of this case in 1977, the EPA voiced its concerns regarding these very same issues. (*See, e.g.*, D.E. No. 1 at ¶ 26) ("the number of personnel employed [at the WWTP] has not been sufficient, personnel are not adequately trained, and purchasing of necessary and required supplies and equipment has not been timely or at an acceptable level . . ."). The DEQ has also identified these same root causes of noncompliance. (*See, e.g.*, DEQ's 10/13/10 Response To CAP) (Stating that CAP "failed to adequately address the issues that are critical to ensuring long term compliance such as staffing, purchasing, long term solids disposal and maintenance planning.").

The Court agrees that these are the root causes behind the DWSD's inability to sustain compliance with its NPDES permit, the remedial orders in this case, and the Clean Water Act.

While the DWSD has achieved short-term compliance with its NPDES permits at various times during the course of this action, it has only been able to do so because Judge Feikens used the Court's equitable powers to take actions to temporarily suspend institutional barriers. But even those measures have resulted in what experts have accurately characterized as a "sine curve of compliance and violation[s]." (Consensus Action Report at 6). This is demonstrated by the most recent events in this action.

During the past six months, the City has been diligently working with the DEQ to develop yet another plan for compliance. On July 8, 2011, the City and the DEQ entered into an Administrative Consent Order, aimed at achieving compliance with the DWSD's NPDES permit and the Clean Water Act. After the ACO was executed, the City filed the instant "Motion to Dismiss and for Relief from the Second Amended Consent Judgment." (D.E. No. 2365).

Although this case is now in its fourth decade, the Court must DENY the City's Motion to Dismiss. Notably, *after* executing the ACO on July 8, 2011, the DWSD self-reported new violations of its NPDES permit to the DEQ. (*See* Appendix to Opin. & Order No. 11). These new violations include the WWTP's total suspended solids (TSS) and are the same kinds of violations that have been occurring throughout this action. These new violations of the DWSD's NPDES permit effluent limitations, that occurred after the effective date of the ACO, constitute violations of the ACO and the Clean Water Act. Accordingly, the City has not shown that the DWSD has achieved even *short-term* compliance with its NPDES permit, the July 8, 2011 ACO, or the Clean Water Act.

Moreover, this Court concludes that, in order to achieve *long-term* compliance with the Clean Water Act, other less intrusive measures, over many years and many attempts, having proved unsuccessful, more fundamental and intrusive corrective measures are required. The record in this case establishes that, unless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to sustained compliance that have been identified by experts and acknowledged by the City, the DWSD will remain in this recurring cycle and will never achieve sustained compliance with its NPDES permit, the ACO, and the Clean Water Act.

The Court further concludes that an effective equitable remedy to achieve sustained compliance will require this Court to order structural changes regarding the DWSD that will likely override the City of Detroit's Charter, its local ordinances, and/or some existing contracts.

This Court does not arrive at this conclusion lightly. As noted above, Judge Feikens attempted several less intrusive measures, over several decades, but those less intrusive measures have not enabled the DWSD to achieve sustained compliance. In addition, although the City has had ample opportunity to devise and implement its own solutions to the underlying causes of noncompliance that have been identified and discussed since the inception of this case, to date, it has not proposed or implemented a plan that has sufficiently addressed those root causes.

To be fair, the City has been constrained in the measures it has proposed or implemented to date because the City is bound by various provisions of the City's Charter and ordinances, and existing contracts, that prevent *the City* from making fundamental changes in the identified problem areas.

This Court, however, has broad equitable power to order any relief necessary to achieve

compliance with the Clean Water Act and this Court *is not* constrained by the provisions of the City's charter or ordinances. *Weinberger*, 456 U.S. at 318; *Perkins*, 47 F.3d at 216.

This Court appreciates that its broad equitable authority is to be “tempered by precepts of comity and federalism.” *Kendrick*, 740 F.2d at 437. As then-Judge (now Justice) Stephen Breyer explained in *Metropolitan District Commission*,⁷ considerations of comity and federalism, however, do not give a state or municipality the legal power to violate federal law or to continue violations of the Clean Water Act over a thirty-four year period. *United States v. Metropolitan District Commission*, 930 F.2d at 136. Maintaining the status quo is not an option.

Nevertheless, this Court is mindful that remedies that override state or local law should be narrowly tailored and that, to the extent possible, local officials should at least have the opportunity to devise their own solutions to remedy a violation of federal law.

Accordingly, the Court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a current member of the Board (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, propose a plan that addresses the root causes of non-compliance that are discussed in this Opinion & Order. In making such recommendations to the Court, these individuals *shall not* be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts. If the local officials fail to devise and propose a workable solution to remedy the underlying causes of the recurrent violations of the Clean Water Act in this case, this Court will order a more intrusive remedy on its own.

⁷*United States v. Metropolitan District Commission*, sometimes referred to as the Boston Harbor case, is another case involving Clean Water Act violations continuing over many years.

CONCLUSION & ORDER

For the reasons set forth above, IT IS ORDERED that the City of Detroit's Motion to Dismiss is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and one current member of the Board (to be chosen by the Board) shall meet and confer, in person, in order to devise a plan for remedying the root causes of non-compliance discussed in this Opinion & Order. In making such recommendations to the Court, these individuals *shall not* be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts.

IT IS FURTHER ORDERED that **on November 4, 2011 at 8:30 a.m., the above individuals shall appear at a Status Conference in this matter, with their plan.**

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: September 9, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 9, 2011, by electronic and/or ordinary mail.

S/Jennifer Hernandez

Case Manager

EXHIBIT 5

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.

ORDER

The United States Environmental Protection Agency (“EPA”) initiated this action in 1977 against the City of Detroit (“the City”) and the Detroit Water and Sewerage Department (the “DWSD”), alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“the Clean Water Act”). The violations, which are undisputed, involve the DWSD’s wastewater treatment plant (“WWTP”) and its National Pollutant Discharge Elimination System (“NPDES”) permit.

As set forth in this Court’s September 9, 2010¹ Opinion & Order (Docket Entry No. 2397):

For the more than 34 years during which this action has been pending, the City and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the City and the DWSD agree to a detailed remedial plan aimed at compliance, but the DWSD is unable to follow the plan and is again cited for the same or similar violations. Although this Court has taken various measures, designed to eliminate the various impediments to compliance that have been identified by experts and acknowledged by the City, those measures have proven inadequate to achieve sustained compliance.

(*Id.* at 1).

In September 2009, the DWSD was again unable to maintain compliance with its NPDES

permit and was again cited for violations by the Michigan Department of Environmental Quality (“DEQ”). In January of 2010, Detroit Mayor Dave Bing appointed a Chief Operating Officer who assumed the position of acting Director of the DWSD. Thereafter, the City worked with the DEQ to develop another plan for compliance and worked with Oakland County, Wayne County and Macomb County to resolve longstanding issues regarding the DWSD.

On July 8, 2011, the City and the DEQ entered into an Administrative Consent Order (“the ACO”), aimed at achieving long-term compliance with the DWSD’s NPDES permit and the Clean Water Act. After the ACO was executed, the City filed a motion asking the Court to order that the requirements set forth in the ACO are substituted for the requirements of the Second Amended Consent Judgment, find that the DWSD has made substantial progress toward achieving full compliance with its NPDES permit and the Clean Water Act, and dismiss this case.

As explained in detail in this Court’s September 9, 2011¹ Opinion & Order, this Court denied that motion. In doing so, this Court noted that *after* executing the ACO on July 8, 2011, the DWSD self-reported serious violations of its NPDES permit to the DEQ. Thus, the City had not established that the DWSD has achieved even short-term compliance with the ACO and the Clean Water Act. In addition, this Court concluded that the extensive record in this case establishes that, unless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to compliance, sustained compliance with the Clean Water Act and the ACO will simply not occur. This Court further explained:

Although the City has had ample opportunity to propose solutions to the root causes of noncompliance that were identified early on in this case, to date, it

has not proposed or implemented a plan that has sufficiently addressed those root causes.

To be fair, the City has been constrained in the measures it has proposed or implemented to date because the City is bound by various provisions of the City's Charter and ordinances, and by existing contracts, that prevent the City from making fundamental changes in the identified problem areas. This Court, however, has broad equitable power to order any relief necessary to achieve compliance with the Clean Water Act and this Court *is not* constrained by the provisions of the City's Charter or ordinances. Nevertheless, this Court is mindful that remedies that override state or local law should be narrowly tailored and that, to the extent possible, local officials should at least have the opportunity to devise their own solutions to remedy a violation of federal law.

(*Id.* at 2).

Accordingly, this Court ordered the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a current member of the Board of Water Commissioners ("BOWC") (to be chosen by the BOWC) to meet and confer and, within 60 days of the date of this order, propose a plan that addresses the root causes of non-compliance that are discussed in this Opinion & Order. (*Id.* at 44). The Court directed that, in making such recommendations to the Court, these individuals *shall not* be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts. Finally, the Court cautioned that "[i]f the local officials fail to devise and propose a workable solution to remedy the underlying causes of the recurrent violations of the Clean Water Act in this case, this Court will order a more intrusive remedy on its own." (*Id.* at 43).

Following this Court's September 9, 2010 Opinion & Order, the above individuals have been meeting and conferring in order to devise and propose a workable solution to remedy the underlying root causes of noncompliance ("the Root Cause Committee"). On November 2,

2011, the Root Cause Committee submitted a written proposed “Plan of Action” to the Special Master in this action, which the Special Master then submitted to the Court on that same date. (Docket Entry No. 2409).

I. The Court Adopts The Plan Proposed By The Root Cause Committee.

Having studied the Plan of Action proposed by the Root Cause Committee, the Court concludes that the Plan of Action adequately addresses the majority of the root causes of non-compliance that are outlined in this Court’s September 9, 2011 Opinion & Order. As such, the Court **ADOPTS** the Plan of Action proposed by the Root Cause Committee (Ex. A to this Order), which includes a DWSD Procurement Policy (Ex. B to this Order), and **ORDERS** that the Plan of Action shall be implemented in order to remedy the recurring violations of the Clean Water Act in this case.

As the Committee noted in the Plan of Action, **the changes being ordered do not restructure the DWSD as a separate entity. The DWSD, and all of the assets of the DWSD, shall remain a department of the City of Detroit.**

II. The Court Concludes That The Plan Does Not Adequately Address CBA Issues And Orders Additional Relief Necessary For The DWSD To Achieve Short-Term And Long-Term Compliance.

DWSD employees are members of 20 different collective bargaining units, each of which has its own collective bargaining agreement (“CBA”) that expires on June 30, 2012. (*See* Docket Entry No. 2409, Ex. C, Appx. 12). The Root Cause Committee reviewed the record in this case, and consulted with several outside sources, and concluded that “[i]t is evident from the various historical reports, and current conditions, that certain CBA provisions and work rules have limited DWSD from maintaining long-term environmental compliance.” (Plan of Action at

3). The Root Cause Committee agreed that certain changes to existing CBAs need to occur. Despite earnest efforts of all members, however, the Committee could not agree on how to achieve the necessary changes.

Based on the record in this case, the Court concludes that certain CBA provisions and work rules are impeding the DWSD from achieving and maintaining both short-term and long-term compliance with its NPDES permit and the Clean Water Act. Given that the Committee was unable to agree on a proposed solution for remedying these impediments to compliance, this Court shall order its own remedy.

As the Root Cause Committee recognized, this Court may elect from several potential options in ordering a remedy to these impediments to compliance, including:

(i) the approach provided in State legislation for emergency managers that would terminate all collective bargaining agreements; (ii) suspension of the duty to bargain for 5 years as provided in certain State emergency laws; (iii) establishing a regional authority as a new employer for DWSD employees; (iv) terminating the workforce so DWSD would start with a blank slate; (v) outsourcing plant operations so corporate representations or warranties of compliance could be enforced; and (vi) ordering that negotiations take place to address the various identified problems.

(Plan of Action at 3). The Court has carefully considered all options and concludes that the least intrusive means of effectively remedying these impediments to compliance is to: 1) keep all current CBAs that cover DWSD employees in force, but strike and enjoin those current CBA provisions or work rules that threaten short-term compliance; and 2) Order that, in the future, the DWSD shall negotiate and sign its own CBAs that cover only DWSD employees, and prohibit future DWSD CBAs from containing certain provisions that threaten long-term compliance.

Specifically, the Court hereby **ORDERS** that:

1. The Director of the DWSD, with the input and advice of union leadership, shall develop a DWSD employee training program, a DWSD employee assessment program, and a DWSD apprenticeship training program.
2. Any City of Detroit Executive Orders imposing furlough days upon City employees shall not apply to DWSD employees.
3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees (“DWSD CBAs”). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD.
4. The Court hereby strikes and enjoins any provisions in current CBAs that allow an employee from outside the DWSD to transfer (“bump”) into the DWSD based on seniority. Future DWSD CBAs shall adopt a seniority system for the DWSD that does not provide for transfer rights across City of Detroit Departments (ie., does not provide for “bumping rights” across city departments).
5. DWSD management must be able to explore all available means and methods to achieve compliance with its NPDES permit and the Clean Water Act. DWSD CBAs shall not prohibit subcontracting or outsourcing and the Court hereby strikes and enjoins any provisions in current CBAs that prohibit the DWSD from subcontracting or outsourcing.
6. DWSD CBAs shall provide that excused hours from DWSD work for union activities are limited to attending grievance hearings and union negotiations, with prior notification to DWSD management. The Court strikes and enjoins any current CBA provisions to the contrary.
7. DWSD CBAs shall include a three-year time period pertaining to discipline actions.
8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of DWSD employee classifications to increase workforce flexibility. Future DWSD CBAs

shall include those revised employee classifications.

9. DWSD CBAs shall provide that promotions in the DWSD shall be at the discretion of management and based upon skill, knowledge, and ability, and then taking seniority into account. The Court strikes and enjoins and current CBA provisions to the contrary.
10. Past practices on operational issues shall not limit operational changes initiated by management with respect to DWSD CBAs.
11. The Court strikes and enjoins any provisions in existing CBAs that prevent DWSD management from assigning overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management. DWSD CBAs shall provide that management has the discretion to assign overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management.
12. Any existing work rules, written or unwritten, or past practices that are contrary to these changes are hereby terminated.
13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

III. The Court Orders Further Study Regarding Concepts And Issues That Are Not Fully Developed At This Time.

In a section of the Plan of Action titled “Additional Considerations” (Plan of Action at 6), the Root Cause Committee discussed the concepts of: 1) an “Efficient Compliance Payment;” and 2) a Payment in Lieu of Taxes arrangement. The Plan of Action also notes that the implementation of the Plan of Action may result in a reduction in chargeback revenues to the

City of Detroit from the DWSD that will need to be addressed during the transition period. The Committee stated that while it “believes these concepts are all important and that some combination of these concepts is critical to the long-term viability of this Plan, the Committee was unable to achieve consensus on a recommended path due to the complexity of the concepts under consideration and the amount of research required to complete this task in the time available.” (*Id.*).

The Court **ORDERS** the Root Cause Committee to continue to meet and confer, and to gather necessary financial records, in order to make specific recommendations regarding how the reduction in chargeback issue should be addressed during the transition period. Within 60 days of this Order (by January 4, 2012), the Root Cause Committee shall submit a written supplement to the Plan of Action to the Special Master regarding that issue and recommendations regarding same.

The Court further **ORDERS** that the Root Cause Committee shall continue to meet and confer in order to further study the concepts of an “Efficient Compliance Payment” and/or a Payment in Lieu of Taxes arrangement. Within 90 days of this Order (by February 4, 2012), the Root Cause Committee may submit a written supplement to the Plan of Action to the Special Master regarding those concepts and any recommendations regarding same.

IV. The Court Orders Implementation Of The Adopted Plan Of Action And The Additional Relief Ordered By This Court.

The Court hereby **ORDERS** the following with respect to implementation of the Plan of Action, and the additional relief ordered by this Court:

1. Implementation of the Plan of Action shall be the responsibility of the Mayor of the City of Detroit (or his designee) until such time as a

permanent Director of the DWSD has been hired. Once a new Director of the DWSD has been hired, that new Director shall assume primary responsibility for implementing this Order and shall join the Root Cause Committee.

2. Until the Plan of Action has been fully implemented, or this case has been dismissed, the Root Cause Committee shall meet at least once per month, at which time the individual vested with primary responsibility for implementing the Plan of Action shall apprise the Root Cause Committee of the status of the implementation.
3. In order to facilitate prompt implementation, until the Plan of Action has been fully implemented, or this case has been dismissed, the BOWC member that was chosen by the BOWC to serve on the Root Cause Committee shall serve as interim Chair of the BOWC.
4. The BOWC shall amend its by-laws within 60 days of this Order (by January 4, 2012), to make them consistent with the adopted Plan of Action and this Order.
5. Within 6 months from the date of this Order (by May 4, 2012), the Director of DWSD shall prepare a written Report of Compliance with the ACO that identifies any current or anticipated barriers to long-term compliance with the ACO and the Clean Water Act (“the Director’s Report of Compliance”). The Director of the DWSD shall include within that report any additional recommendations or changes that are necessary to achieve long-term compliance.
6. The Director’s Compliance Report shall be provided to the BOWC, the Mayor of the City of Detroit, the Detroit City Council, the DEQ, and the Special Master. The Director’s Compliance Report shall request any comments, suggestions, or recommendations from the BOWC, the Mayor of the City of Detroit, the Detroit City Council, and the DEQ within 30 days.
7. To provide adequate time for review and consideration of the comments, suggestions, and recommendations made, and to allow an opportunity to

make necessary changes, the Director of the DWSD shall submit, to the Special Master, a final report to the Court on the status of compliance with the ACO, any remaining barriers to long-term compliance, together with proposed solutions, within 90 days of submission of the initial Director's Report of Compliance.

8. After receiving the final Director's Report of Compliance, the Court will determine whether it shall modify or amend this Order. If the Court determines that this Order needs to be amended, the amended order will be issued within 30 days after the Courts receipt of the final Director's Report of Compliance.
9. Thereafter, the DWSD may file a motion seeking to dismiss this case if it believes there has been substantial compliance with this Order (and any amendment of this order) and the July 8, 2011 ACO.

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: November 4, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on November 4, 2011, by electronic and/or ordinary mail.

S/Jennifer Hernandez

Case Manager

November 2, 2011

Hand Delivered

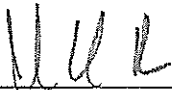
David M. Ottenwess
Ottenwess Allman & Taweel, PLC
535 Griswold Street, Ste. 850
Detroit, MI 48226

Re: DWSD Root Cause Committee

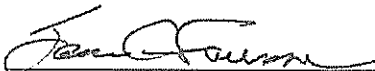
Dear Mr. Ottenwess:

Pursuant to Federal District Court Judge Sean Cox's Order of September 9, 2011, the undersigned met to develop a plan for the Detroit Water and Sewerage Department (DWSD) to comply with its NPDES permit and the Clean Water Act.

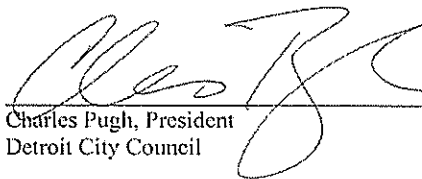
The undersigned were the Committee members as identified in the Order or appointed as representatives. We met numerous times over the last sixty days. The Committee members conducted research into the root cause issues and solutions. Enclosed is our consensus Plan of Action, which includes a separate document consisting of the Committee's proposed broad-stroke DWSD Procurement Policy. Although it is not part of the Committee's Plan of Action, because it is referenced in the Plan of Action, we are also enclosing a copy of a report that the Acting Director of the DWSD provided to the Committee. We are asking you, as the special master in Case No. 77-71100, to transmit this letter and document to the Court on our behalf.



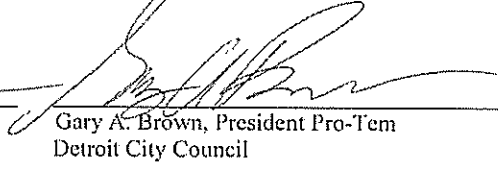
Chris Brown
City of Detroit Chief Operating Officer
Mayor's Office



James G. Fausone
DWSD
Board of Water Commissioners



Charles Pugh, President
Detroit City Council



Gary A. Brown, President Pro-Tem
Detroit City Council

COMMITTEE'S PLAN OF ACTION
November 2, 2011

I. PREAMBLE

On September 9, 2011, the Court entered an Opinion and Order that created this Root Cause Committee to review barriers to short and long-term compliance. Pursuant to that order, this Committee was given sixty days to develop a plan and present that plan to the Court for its consideration. While the Committee was bound by a Confidentiality Order to its internal process, the members of the Committee were permitted to solicit and receive input from various sources with knowledge of the Detroit Water and Sewerage Department (hereinafter "DWSD" or "the Department") operations and utility operations more generally. Specifically, the Committee received input from the following sources:

- The Detroit City Council
- The Board of Water Commissioners
- DWSD Management Staff
- Union Representatives
- Management-side Labor Counsel
- Industry Professionals
- Current DWSD Vendors
- Rate Consultant
- Regulatory Agency Input

The Committee had available and reviewed the historical reports prepared on the Department's root cause issues. After careful study of the problems and based on our meetings, our review of the Findings of Facts by the Parties, by the Court through its own findings contained in its Opinion and Order of September 9, 2011 through our review of various studies and reports contained therein, the Committee has determined that there are essentially five root cause issues which must be addressed in order to allow DWSD to achieve accountability and long-term compliance with state and federal laws. The five areas of concern we will address with more specificity below include:

- Human Resources
- Procurement
- Law
- Finance
- Rates

It is important to note that the changes recommended by the Committee in these areas are significant, but critical to changing the environment of non-compliance at DWSD. It is equally important to note that **these changes do not contemplate DWSD becoming a separate entity.**

That is to say, **DWSD, and all of the assets of the DWSD, shall remain a department of the City of Detroit**, despite any changes in structure or governance recommended by this Committee.

This Committee's recommended Plan of Action ("the Plan") is organized into 3 main categories: Governance, Legal Barriers, and Transition Issues. In putting this Plan together, the Committee has attempted to respond to all known root causes and provide recommended solutions. However, in recognizing that the Court's judicial relief must be as minimally intrusive as possible to achieve long-term compliance, we believe that there may need to be additional changes made in the future, possibly through a second-phase plan once we have the ability to work with the implementation of this Plan.

II. GOVERNANCE

The structure of DWSD is essentially a unitary department whose water and wastewater systems are currently managed and operated by the City of Detroit as a department of city government, although managed as a separate enterprise fund. The DWSD provides water service to less than four million people in Detroit and neighboring southeast Michigan communities. The DWSD also provides wastewater collection and treatment for Detroit and approximately 76 municipal suburban communities.

The combined functions of the DWSD are recommended to be broken into two divisions – operations and administration. We have examined these separate divisions in detail in order to make recommendations to address the long-term problems at DWSD and to streamline the function of both aspects of the Department.

The operations side of DWSD deals with the infrastructure and day-to-day operations of water treatment and sewage removal. The administrative component will include the functions of human resources, finance, legal and procurement services for the entire Department. These services are currently subject to the institutional procedures applied to City Departments. In general we conclude that operations can best be streamlined through recommendations in sub-paragraph (A). The administrative end of DWSD may be best addressed by streamlining the approval process in the above-mentioned key areas as outlined in sub-paragraph (C).

A. OPERATIONS

(1) Divisional Structure within DWSD Administration

DWSD shall establish an autonomous administrative structure within the Department to provide for its own divisions of Purchasing, Human Resources, Law, and Finance. These divisions shall report to the Director of DWSD and shall not have any reporting requirements to the similar functions of the City of Detroit.

(2) Procurement Policy for DWSD

Since the Committee has determined that DWSD should be exempted from following the requirements of the City of Detroit's procurement ordinance in order to promote efficiency and ensure long-term compliance, the Committee has prepared the attached DWSD Procurement Policy to govern the procurement activities of DWSD. We recognize that the policy is a broad overview of a full procurement process and may need to be expanded to be fully implemented by the Department. At the same time, we understand that this policy will ultimately require formal adoption by the Board of Water Commissioners at a later time, consistent with the parameters we have laid out.

(3) Immediate needs for Human Resources

(a) Employees Covered by Collective Bargaining Agreements

The Committee reviewed the historical reports referenced earlier which discussed the root cause issues of non-compliance. It is evident from the various historical reports, and current conditions, that certain CBA provisions and work rules have limited DWSD from maintaining long-term environmental compliance. These issues, along with others, at least contribute to not achieving and maintaining long-term compliance by limiting manpower and workforce flexibility.

The Acting Director of DWSD submitted to the Committee a report on root cause problems and solutions. That report also provided recommendations for specific collective bargaining agreement (hereinafter "CBA") and work rules changes. The Department requested relief from specific items across all CBAs. In particular, Appendix 12 of the Plan was reviewed and discussed. The Appendix listed approximately 30 specific provisions and changes in the AFSCME CBA and seeks to apply similar changes to all the CBAs that apply to DWSD employees.

The Committee was aware that there are various approaches to addressing the concerns referenced in that report that fall along a scale of intrusiveness including: (i) the approach provided in State legislation for emergency managers that would terminate all collective bargaining agreements; (ii) suspension of the duty to bargain for 5 years as provided in certain State emergency laws; (iii) establishing a regional authority as a new employer for DWSD employees; (iv) terminating the workforce so DWSD would start with a blank slate; (v) outsourcing plant operations so corporate representations or warranties of compliance could be enforced; and (vi) ordering that negotiations take place to address the various identified problems.

The Committee spent considerable time discussing the option of negotiating the changes requested, or that may be necessary, with the 20 unions that represent the DWSD workforce.

The Committee agreed that all collective bargaining agreements that apply to DWSD workforce shall remain in force. However, the Committee agreed that certain changes to the CBAs need to occur. The Committee could not agree on how to achieve the desired changes.

The problem areas that were identified and require solutions are:

1. Effective employee training programs, employee assessment programs, and apprenticeship training programs should be developed and provided for by DWSD.
2. DWSD should act on behalf of the City of Detroit to have its own collective bargaining agreements after July 1, 2012. In other words, agreements with DWSD should not include employees of other City of Detroit departments.
3. DWSD should adopt a separate seniority system for the department that does not provide for rights across city of Detroit departments. This should also eliminate the confusion caused by bumping rights from other departments into DWSD.
4. Any prohibition on subcontracting or outsourcing should be eliminated from the CBAs. DWSD must be free to explore all available avenues to achieve long-term compliance.
5. Excused hours from work for union activities should be limited to attending grievance hearings and union negotiations, with prior notification to DWSD Management.
6. The timeline on use of past discipline should be three years.
7. The number of DWSD employee classifications should be reduced to the minimum identified by the Director to assure flexibility and long term compliance.
8. Promotions should be at the discretion of management and based upon the individual's skill, knowledge and ability, and then taking seniority into account.
9. Past practices on operational issues should not limit operational changes initiated by management.
10. Overtime should be assigned to employees most capable of performing work in a classification, at the discretion of management.

It was recognized that the provisions of all the CBAs would have to be modified with respect to each of the issues listed above, and ancillary provisions interpreted consistent with these changes. Any work rules, written or unwritten, which exist that are contrary to these changes would have to be terminated.

While the Committee was able to identify the above CBA and work rule challenges, it could not agree if the solution to these challenges could/should be left to negotiations or if Court ordered implementation was required.

(b) DWSD Executive Management Team

DWSD shall develop an Executive Management Team of exempt non-union, at-will positions. The members of the Executive Management Team, other than the Director of DWSD, shall serve at the pleasure of the Director of DWSD and may be removed with or without cause. The Executive Management Team cannot exceed ten percent (10%) of the total workforce of DWSD. This Executive Management Team is in addition to the three technical advisors to the BOWC, as outlined the Court's stipulated order of February 11, 2011. Nothing in this Plan will prevent the Director of DWSD from hiring non-employees of DWSD to perform some or all of the services of the Executive Management Team if that is deemed necessary to improve the operations of DWSD to ensure Long-Term Compliance.

The DWSD Executive Management Team should develop a formal succession plan to be presented to the BOWC for its review and approval.

B. RATES

(1) Approval Authority

In the past, City Council has been required to approve water and sewerage rates charged by DWSD. The City Council assumed this responsibility pursuant to MCL §117.5e which provides that a municipal water or sewerage system:

which serves more than 40% of the population of the state shall hold at least 1 public hearing at least 120 days before a proposed rate increase is scheduled to take effect and that [a] final vote by the governing body of the city to implement a proposed rate increase shall not be taken until the hearings provided for in this subdivision are concluded and the results of those hearings are considered by the city's governing body. M.C.L. § 117.5e(b).

According to the most recent census data collected by the U.S. Census Bureau, the City of Detroit has received documentation that DWSD does not service more than 40% of Michigan's population. As a consequence, City Council no longer need to approve water and sewerage rates for DWSD customers pursuant to State law, City Ordinance, or City Charter.

It is, however, the recommendation of the Committee that retail rates for the citizens of the City of Detroit shall still require City Council approval, only after a public hearing for City of Detroit residents. All wholesale rates will be fully and finally approved by the Board of Water Commissioners.

(2) Additional Considerations

The Committee spent a substantial amount of time discussing the need to create an incentive within Detroit and DWSD to support making difficult decisions that would promote improving the efficiency of DWSD. This Efficient Compliance Payment concept would allow for a calculation and cost sharing whereby the savings associated with a reduction in operating expenses is shared by DWSD, the City of Detroit, Staff of DWSD, and the customers of DWSD. This type of arrangement will help focus everyone's efforts on the ultimate goal of insuring long-term compliance, continually improving efficiency of operations, and ultimately reducing the administrative component¹ of the rate expense. The Acting Director of DWSD presented a detailed proposal on computing the Efficient Compliance Payment at Appendix 13 of the attached report.

Additionally, the transition to a more autonomous DWSD will result in a substantial reduction in chargeback revenues to the City of Detroit from the operations of DWSD. This is the result of DWSD no longer reimbursing the City of Detroit for the cost of staff associated with City Departments within Finance, Procurement, Law, Human Resources, and Information Technology Services. Since the ability of DWSD to hire its own staff to fulfill these functions will be quicker than the City's ability to reduce its staff and expenses commensurate with those changes, a budget deficit will be created within the City that the Committee feels needs to be addressed. Therefore, the Committee discussed the need for a temporary, time-limited, transition payment to the City of Detroit to prevent the implementation of this plan from causing a deficit within the City of Detroit's General Fund. The Committee was unable to reach consensus on the amount and the number of years needed for the transition payment at this time.

Further, the Committee agreed that there was a need to explore Payment in Lieu of Taxes arrangements for DWSD that would mirror agreements in place with other public utilities throughout the State of Michigan.

While the Committee believes that these concepts are all important and that some combination of these concepts is critical to the long-term viability of this Plan, the Committee was unable to achieve consensus on a recommended path due to the complexity of the concepts under consideration and the amount of research required to complete this task in the time available.

C. ADMINISTRATIVE - APPROVAL AUTHORITY

In order to assist the City and DWSD in achieving substantial compliance, we have

¹It is understood that wholesale rates consist globally of two components: Capital Expenditures and Operating Expenditures. Since Capital Expenditures are tied to investing in the core business of the utility, it is not helpful to the long-term interest of DWSD to provide an incentive to lower the Cap Ex commitment. Rather, the incentive should rest on reducing the administrative expenses which are solely under the control of DWSD management.

determined that there is a need to streamline the approval process for various activities within the DWSD operations and create a more direct culture of accountability within the staff at DWSD. To achieve this objective, the Committee has agreed to reduce, and in many instances, eliminate, redundant approval processes and provide for clearer lines of approval. The approval authority we propose is divided along two lines: final approvals to be housed within DWSD and final approvals to be held by the Detroit City Council. These approvals are outlined in greater detail below.

As previously stated, the DWSD will remain a department of the City of Detroit. Nevertheless, there is an efficiency of operations need to allow final approval authority to vest in the Director of DWSD with respect to the signing of several types of legal documents on behalf of DWSD's operations. Therefore, it is recommended that the Director of DWSD be vested with delegated authority to sign documents of the type referenced within this Plan and that the delegated authority shall include the right to bind the City of Detroit to the terms of the agreements contained therein.

In addition to all powers currently vested in DWSD pursuant to the City Charter, City Ordinances, State Law, and the By-Laws for the Detroit Water and Sewerage Department Board of Water Commissioners ("BOWC"), DWSD, acting through its Director upon authorization by the Board of Water Commissioners, shall have final authority to approve the following types of documents without any further approvals from other departments, board, agencies, or offices of the City of Detroit:

- Legal Settlements and Claims paid by DWSD;
- Collective Bargaining Agreements for employees of DWSD;
- Terms and Conditions of Employment for employees of DWSD;
- The Budget for DWSD (Subject to approval of Rates) as outlined above;
- Wage scales for DWSD employees, subject to City Council's veto rights as outlined below; and
- Those procurements not covered by the Board of Water Commissioners' and the Detroit City Council's approval outlined in the attached DWSD Procurement Policy.

The Committee also examined the process for the recruitment, hiring, and dismissal of the DWSD Director and believes that there is an opportunity to improve that process. At the same time, we recognize that efforts to fill the current vacancy in the Director position is well on its way to completion and that a new process for recruitment should not impact the current search. With this in mind, we recommend that the process be amended as follows:

- (a) A Director search committee should be established that will include representation from the Mayor's office, a member of the Board of Water Commissioners selected by the Board and who is not a resident of Detroit, and a member of the Detroit City Council appointed by the President.
- (b) The hiring of the Director should be unchanged from the current process.
- (c) The removal of the Director should require either

EXHIBIT 6

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.

ORDER

For the reasons set forth in this Court's September 9, 2011 Opinion & Order (Docket Entry No. 2397), and this Court's November 4, 2011 Order (Docket Entry No. 2410), based upon the extensive record in this case, this Court concluded that certain collective bargaining agreement ("CBA") provisions and work rules are impeding the DWSD from achieving and maintaining both short-term and long-term compliance with its NPDES permit and the Clean Water Act and ordered certain injunctive relief in its November 4, 2011 Order. Among other things, this Court ordered that:

3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees ("DWSD CBAs"). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD.

(Id. at 6, ¶ 3). The above paragraph was intended to sever DWSD employees from existing bargaining units that were comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees. The November 4, 2011 Order also included several other provisions that relate to CBAs and work rules.

In addition, the Court enjoined the Michigan Employment Relations Commission (“MERC”) from exercising jurisdiction over disputes arising from the changes ordered by the Court. (*Id.* at 7, ¶ 13).

This matter is now before the Court on the DWSD’s Motion for Relief Essential to Compliance with this Court’s November 4, 2011 Order Mandating DWSD-Specific Collective Bargaining Agreements (Docket Entry No. 2469). In this motion, the DWSD states that, in defiance of this Court’s November 4, 2011 Order, the Association of Municipal Engineers (“AME”), the Association of Detroit Engineers (“ADE”), and the Association of Professional and Technical Employees (“APTE”) have adamantly refused to either negotiate separate DWSD-specific CBAs or agree to the severance of DWSD employees from the pre-existing mixed bargaining units. In addition, although the Association of Professional Construction Inspectors (“APCI”) has entered into an agreement with DWSD on behalf of its DWSD employees, it has refused to agree to the formal severance of the bargaining unit. The DWSD therefore filed Unit Clarification Petitions with MERC, seeking severance of DWSD employees from each of those four mixed bargaining units.

MERC, however, has declined to take action on those petitions, out of concern that doing so may violate this Court’s November 4, 2011 Order (i.e., paragraph 13 on Page 7). MERC advised the DWSD that the petitions would be held in abeyance pending further direction from this Court. MERC advised that it would act on the petitions if the DWSD obtained written clarification of this Court’s November 4, 2011 Order. (*See* Docket Entry No. 2469, Page ID 15954-55).

As a result, the DWSD’s motion asks this Court to clarify its November 4, 2011 Order

and either: a) order that DWSD employees are severed from each union mixed bargaining unit, thus establishing a separate DWSD bargaining unit; or b) require MERC to sever DWSD employees from each Union mixed bargaining unit, thus establishing a separate DWSD bargaining unit.

Having considered the DWSD's motion, its brief in support, and the Declaration of Lamont Satchel, Labor Relations Director of the City of Detroit, and the Court being fully advised in the premises, the Court hereby:

- 1) CLARIFIES that Paragraph 3 on Page 6 of this Court's November 4, 2011 Order was intended to, and shall be construed as, ordering the severance of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees; and
- 2) ORDERS that MERC is not enjoined from ruling on the DWSD's pending Clarification Petitions, in order to effectuate the above severancing ordered by this Court.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: August 23, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 23, 2012, by electronic and/or ordinary mail.

S/Jennifer Hernandez
Case Manager

EXHIBIT 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.

OPINION & ORDER
REGARDING THE DWSD'S MOTION FOR INTERIM ORDER

This matter is currently before the Court on a "Motion for Interim Order Clarifying November 4, 2011 Order and for Expedited Briefing Schedule" (D.E. No. 2473), filed by the Detroit Water and Sewerage Department ("DWSD") on September 24, 2012. The Court issued orders setting forth an expedited briefing schedule, and the briefing on this motion has concluded. The Court finds that oral argument would not significantly aid the decisional process. *See* Local Rule 7.1(f)(2), U.S. District Court, Eastern District of Michigan. The Court therefore orders that the motion will be decided without oral argument.

For the reasons that follow, the Court shall grant the motion in part, deny the motion in part, take certain requests under advisement, and order supplemental briefing regarding certain requests in the motion. The Court shall GRANT the motion to the extent that it shall:

- 1) Enjoin the City from applying any existing or future Charter provisions, ordinances, resolutions, executive orders, city policies, regulations, procedures or similar rules or practices that are inconsistent with the express terms of this Court's Orders;

- 2) Order that the City and its employees and agents shall work cooperatively with the DWSD to implement this Court's Orders in a timely and efficient manner;
- 3) Declare that the BOWC's June 26, 2012 Resolution is in accordance with this Court's November 4th Order and shall be effective and controlling until this Court orders otherwise;
- 4) Clarify that the DWSD's General Counsel, rather than the City's Corporation Counsel, may provide legal advice to the DWSD regarding implementing this Court's orders;
- 5) Declare that in determining whether monetary approval thresholds are triggered under the existing DWSD Procurement Policy adopted by this Court, amounts are to be determined on a fiscal year basis for multi-year contracts;
- 6) Declare that expert witness engagements and other expert consulting contracts on pending legal matters authorized by the DWSD's General Counsel shall be exempt from the competitive bidding requirements of the DWSD Procurement Policy;
- 7) Declare that the DWSD has the authority to purchase its own information technology systems, which may differ from those of the City;
- 8) Declare that: a) the DWSD is free to establish its own sub-units and programs within its Finance Division to implement the November 4 Order, including debt management, accounts payable, accounts receivable, accounting, budget, cash management, asset management, and deferred compensation; and b) the DWSD is not bound by City Finance Policies;
- 9) Declare that: a) the DWSD is exempt from the application of City ordinances, the City's human resources policies and regulations, Civil Service Commission Rules, and City resolutions and orders, pertaining to payroll, employee benefits, and employee and labor relations; and b) the DWSD is not bound by the Civil Service Commission as provided in Section 6-405 of the City's Charter;
- 10) Enjoin any Charter provision, ordinance, resolution, or any other rule or practice, that prohibits or restricts the DWSD's ability to rehire DWSD's employees following their retirement from the DWSD;
- 11) Order that the current BOWC members may establish terms of office for

existing members and a rotation schedule; and

- 12) Clarify that the Court does not construe the Root Cause Committee's Plan of Action, or this Court's November 4, 2011 Order adopting it, as prohibiting the DWSD's organizational structure from being modified in the future.

The Court shall DENY the motion to the extent that the Court shall DENY:

- 1) Any request for an order enjoining the City from applying existing or future Charter provisions, ordinance, etc. "that are inconsistent with the operational independence of DWSD necessary to achieve short and long term compliance";
- 2) Any request for the Court to delegate authority to the DWSD to interpret this Court's Orders and bind the City to such interpretations;
- 3) The DWSD's request for the Court to clarify or declare that "the November 4 Order grants DWSD authority to proceed with contracts to assess outsourcing opportunities and/or to outsource functions of DWSD solely upon the approval of the BOWC and without regard to the dollar value of the contract";
- 4) The DWSD's request that the DWSD be exempted from the City of Detroit's Prevailing Wage Ordinance; and
- 5) The DWSD's request that it be granted authority to adopt additional Local Economic Development policies.

The Court shall allow SUPPLEMENTAL BRIEFING from the parties with respect to the following issues / requests for relief:

- 1) Specific requests regarding the chargeback of transition services;
- 2) The DWSD's request that the BOWC be allowed to delegate settlement approval authority to the Director of the DWSD;
- 3) The DWSD's requests regarding Sections 7.5-208 and 7.5-209 of the Detroit City Charter;
- 4) Any requested alternative method for obtaining tax clearances;
- 5) The DWSD's request that the BOWC be granted authority to further define

the DWSD Procurement Policy;

- 6) Whether the DWSD may obtain and utilize its own Employer Identification Number;
- 7) Establishing separate bank accounts and establishing a separate self insurance fund;
- 8) Issuance and approval of debt;
- 9) Obtaining and utilizing a separate EIN; and
- 10) Requests relating to a Defined Contribution Plan.

Finally, the Court shall take the following requests UNDER ADVISEMENT:

- 1) The DWSD's request for clarification from the Court as to MERC's jurisdiction over matters relating to the DWSD; and
- 2) The DWSD's request for an additional six months to file the Director's Final Compliance Report.

BACKGROUND

This action, which was filed in 1977 and has been active since that time, has an exceptionally long history that is more fully set forth in this Court's September 9, 2011 Opinion & Order (D.E. No. 2397) and its November 4, 2011 Order (D.E. No. 2410).

The United States Environmental Protection Agency ("EPA") initiated this action in 1977 against the City of Detroit ("the City") and the DWSD, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("the Clean Water Act"). The violations, which are undisputed, involve the DWSD's wastewater treatment plant ("WWTP") and its National Pollutant Discharge Elimination System ("NPDES") permit. As explained in this Court's September 9, 2011 Opinion & Order:

For the more than 34 years during which this action has been pending, the

City and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the City and the DWSD agree to a detailed remedial plan aimed at compliance, but the DWSD is unable to follow the plan and is again cited for the same or similar violations. Although this Court has taken various measures, designed to eliminate the various impediments to compliance that have been identified by experts and acknowledged by the City, those measures have proven inadequate to achieve sustained compliance.

(*Id.* at 1).

In September of 2009, the DWSD was again unable to maintain compliance with its NPDES permit and was again cited for violations by the Michigan Department of Environmental Quality (“MDEQ”). In January of 2010, Detroit Mayor Dave Bing appointed a Chief Operating Officer who assumed the position of acting Director of the DWSD. Thereafter, the City worked with the MDEQ to develop another plan for compliance and worked with Oakland County, Wayne County and Macomb County to resolve longstanding issues regarding the DWSD.

On July 8, 2011, the City and the MDEQ entered into an Administrative Consent Order (“the ACO”), aimed at achieving long-term compliance with the DWSD’s NPDES permit and the Clean Water Act. After the ACO was executed, the City filed a motion asking the Court to order that the requirements set forth in the ACO are substituted for the requirements of the Second Amended Consent Judgment, find that the DWSD has made substantial progress toward achieving full compliance with its NPDES permit and the Clean Water Act, and dismiss this case.

This Court denied that motion. In doing so, this Court noted that *after* executing the ACO on July 8, 2011, the DWSD self-reported serious violations of its NPDES permit to the MDEQ. Thus, the City had not established that the DWSD has achieved even short-term compliance with the ACO and the Clean Water Act. In addition, this Court concluded that the extensive record in this case establishes that, unless more fundamental corrective measures are taken to address the

institutional and bureaucratic barriers to compliance, sustained compliance with the Clean Water Act and the ACO will simply not occur.

Thus, this Court was faced with the unenviable task of determining how to remedy these ongoing and serious violations of the Clean Water Act, given the complex nature of the problem and the fact that the rather extraordinary actions taken over the past four decades have proven inadequate.

Rather than order a remedy on its own, without input from the City, this Court considered other options and ultimately decided to take an admittedly unique approach:

The Court further concludes that an effective equitable remedy to achieve sustained compliance will require this Court to order structural changes regarding the DWSD that will likely override the City of Detroit's Charter, its local ordinances, and/or some existing contracts.

This Court does not arrive at this conclusion lightly. As noted above, Judge Feikens attempted several less intrusive measures, over several decades, but those less intrusive measures have not enabled the DWSD to achieve sustained compliance. In addition, although the City has had ample opportunity to devise and implement its own solutions to the underlying causes of noncompliance that have been identified and discussed since the inception of this case, to date, it has not proposed or implemented a plan that has sufficiently addressed those root causes.

To be fair, the City has been constrained in the measures it has proposed or implemented to date because the City is bound by various provisions of the City's Charter and ordinances, and existing contracts, that prevent *the City* from making fundamental changes in the identified problem areas.

This Court, however, has broad equitable power to order any relief necessary to achieve compliance with the Clean Water Act and this Court *is not* constrained by the provisions of the City's charter or ordinances. *Weinberger*, 456 U.S. at 318; *Perkins*, 47 F.3d at 216.

This Court appreciates that its broad equitable authority is to be "tempered by precepts of comity and federalism." *Kendrick*, 740 F.2d at 437. As then-Judge (now Justice) Stephen Breyer explained in *Metropolitan District Commission*,¹ considerations of comity and federalism, however, do not give a state or

¹*United States v. Metropolitan District Commission*, sometimes referred to as the Boston Harbor case, is another case involving Clean Water Act violations continuing over many years.

municipality the legal power to violate federal law or to continue violations of the Clean Water Act over a thirty-four year period. *United States v. Metropolitan District Commission*, 930 F.2d at 136. Maintaining the status quo is not an option.

Nevertheless, this Court is mindful that remedies that override state or local law should be narrowly tailored and that, to the extent possible, local officials should at least have the opportunity to devise their own solutions to remedy a violation of federal law.

Accordingly, the Court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a current member of the Board (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, propose a plan that addresses the root causes of non-compliance that are discussed in this Opinion & Order. In making such recommendations to the Court, these individuals *shall not* be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts.

(*Id.* at 42-43) (emphasis in original). This Court ordered the above individuals to submit their proposed plan no later than November 4, 2011. (*Id.* at 44).

Following this Court's September 9, 2011 Opinion & Order, the City leaders and BOWC member identified therein met to devise and propose a workable solution to remedy the underlying root causes of noncompliance ("the Root Cause Committee"). On November 2, 2011, the Root Cause Committee submitted a written proposed "Plan of Action" to the Special Master in this action, which the Special Master then submitted to the Court on that same date. (Docket Entry No. 2409). The Root Cause Committee spent considerable time in developing their proposed Plan of Action. The Root Cause Committee members noted that they were "permitted to solicit and receive input from various sources" with knowledge of the DWSD and utility operations and they noted that they received input from: 1) the Detroit City Council; 2) the Board of Water Commissioners; 3) DWSD Management Staff; 4) Union Representatives; 5) Management-side Labor Counsel; 6) Industry Professionals; 7) Current DWSD Vendors; 8) a Rate Consultant; and 9) Regulatory Agency Input. (D.E. No. 2409-1 at 2).

On November 4, 2011, this Court issued an Order (D.E. No. 2410), wherein this Court found that the proposed Plan of Action adequately addresses the majority of the root causes of non-compliance outlined in this Court's September 9, 2011 Opinion & Order. This Court therefore adopted the Plan of Action (D.E. No. 2410-1), which includes a DWSD Procurement Policy (D.E. No. 2410-2), proposed by the Root Cause Committee and ordered its implementation. (D.E. No. 2410).

Although the Root Cause Committee agreed that certain changes to existing collective bargaining agreements ("CBAs") need to occur, despite earnest efforts, the Committee could not agree on how to achieve the necessary changes. Because the proposed Plan of Action did not adequately address collective bargaining issues, the Court considered the issue on its own:

Based on the record in this case, the Court concludes that certain CBA provisions and work rules are impeding the DWSD from achieving and maintaining both short-term and long-term compliance with its NPDES permit and the Clean Water Act. Given that the Committee was unable to agree on a proposed solution for remedying these impediments to compliance, this Court shall order its own remedy.

....

The Court has carefully considered all options and concludes that the least intrusive means of effectively remedying these impediments to compliance is to: 1) keep all current CBAs that cover DWSD employees in force, but strike and enjoin those current CBA provisions or work rules that threaten short-term compliance; and 2) Order that, in the future, the DWSD shall negotiate and sign its own CBAs that cover only DWSD employees, and prohibit future DWSD CBAs from containing certain provisions that threaten long-term compliance.

Specifically, the Court hereby **ORDERS** that:

1. The Director of the DWSD, with the input and advice of union leadership, shall develop a DWSD employee training program, a DWSD employee assessment program, and a DWSD apprenticeship training program.

2. Any City of Detroit Executive Orders imposing furlough days upon City employees shall not apply to DWSD employees.
3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees (“DWSD CBAs”). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD.
4. The Court hereby strikes and enjoins any provisions in current CBAs that allow an employee from outside the DWSD to transfer (“bump”) into the DWSD based on seniority. Future DWSD CBAs shall adopt a seniority system for the DWSD that does not provide for transfer rights across City of Detroit Departments (ie., does not provide for “bumping rights” across city departments).
5. DWSD management must be able to explore all available means and methods to achieve compliance with its NPDES permit and the Clean Water Act. DWSD CBAs shall not prohibit subcontracting or outsourcing and the Court hereby strikes and enjoins any provisions in current CBAs that prohibit the DWSD from subcontracting or outsourcing.
6. DWSD CBAs shall provide that excused hours from DWSD work for union activities are limited to attending grievance hearings and union negotiations, with prior notification to DWSD management. The Court strikes and enjoins any current CBA provisions to the contrary.
7. DWSD CBAs shall include a three-year time period pertaining to discipline actions.
8. The Director of the DWSD shall perform a review of

the current employee classifications at the DWSD and reduce the number of DWSD employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.

9. DWSD CBAs shall provide that promotions in the DWSD shall be at the discretion of management and based upon skill, knowledge, and ability, and then taking seniority into account. The Court strikes and enjoins and current CBA provisions to the contrary.
10. Past practices on operational issues shall not limit operational changes initiated by management with respect to DWSD CBAs.
11. The Court strikes and enjoins any provisions in existing CBAs that prevent DWSD management from assigning overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management. DWSD CBAs shall provide that management has the discretion to assign overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management.
12. Any existing work rules, written or unwritten, or past practices that are contrary to these changes are hereby terminated.
13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

(D.E. No. 2410 at 4-7).

Thereafter, Sue McCormick was hired as the Director of the DWSD and began work on

January 1, 2012. In addition, following a request by the Root Cause Committee, this Court issued an order authorizing the DWSD to hire a Chief Operating Officer / Compliance Officer. (See D.E. No. 2456, “the Court agrees that, given the volume and nature of the work entailed to implement this Court’s November 4, 2011 Order, and comply with the ACO, the creation of a new position at the DWSD is warranted and appropriate.”). Matt Schenk was then hired as the DWSD’s COO/CO.

The DWSD has been working toward implementing this Court’s November 4th Order, pursuant to which it was to file certain reports by specified dates. The November 4th Order required the Director to file an initial compliance report by May 4, 2012, identifying any additional barriers to long-term compliance with the ACO and the Clean Water Act, and making any additional requests needed for compliance. The Order provided for that report to be circulated among the BOWC, the Mayor of the City of Detroit, the Detroit City Council, and the MDEQ, who could then provide comments, suggestions and recommendations to the Director before a final Director’s Report of Compliance would be filed with the Court on August 4, 2012. (D.E. No. 2410 at 9-10).

On May 4, 2012, the DWSD filed an initial compliance report (D.E. No. 2460) that, for several reasons, asked the Court to extend the date for the filing of the Director’s Final Compliance Report to October 4, 2012. (*Id.* at 17-18). This Court granted that request in an Order issued on May 17, 2012 (D.E. No. 2461) and, therefore, the Final Director’s Report was due to be filed on October 4, 2012.

On August 20, 2012, the DWSD filed a “Motion for Relief Essential to Compliance with this Court’s November 4, 2011 Order Mandating DWSD-Specific Collective Bargaining

Agreements.” (D.E. No. 2469). This Court issued an Order that granted that motion, to the extent that it ordered as follows:

[T]he Court hereby:

- 1) CLARIFIES that Paragraph 3 on Page 6 of this Court’s November 4, 2011 Order was intended to, and shall be construed as, ordering the severance of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees; and
- 2) ORDERS that MERC is not enjoined from ruling on the DWSD’s pending Clarification Petitions, in order to effectuate the above severancing ordered by this Court.

IT IS SO ORDERED.

(D.E. No. 2470 at 3).

On September 24, 2012, the DWSD filed the instant “Motion for Interim Order Clarifying November 4, 2011 Order and for Expedited Briefing Schedule.” (D.E. No. 2473). The DWSD asserts that it needs an interim order to address uncertainties and ambiguities that arise out of this Court’s November 4th Order, that are impeding the DWSD’s ability to implement the November 4th Order. The pending motion includes multiple requests for injunctive relief.

On September 25, 2012, this Court granted the request for expedited consideration and issued an order for expedited briefing providing that parties may file responses to the motion no later than 4:00 p.m. on October 1, 2012.

On September 28, 2012, Macomb County filed a response brief indicating that it supports the DWSD’s motion, but stating that any clarification from the Court with respect to additional Local Economic Development policies “should contain a clear directive that all policies pertaining to procurement shall insure that goods and services are provided in a cost-effective

manner and contractors are selected by cost and qualification.” (D.E. No. 2475).

Oakland County also filed a response brief, indicating that it generally supports the relief requested by the DWSD, but that it objects to the requested six-month extension for filing the Director’s Final Compliance Report. (D.E. No. 2483). Oakland County asserts that a three-month extension should be adequate. (*Id.* at 1 n.1).²

On October 1, 2012, the City filed a 23-page response brief challenging several requests for relief contained in the motion and requesting additional time to respond to the DWSD’s Motion. (D.E. No. 2480).

Thereafter, on October 2, 2012, this Court held a Status Conference with the parties to address the City’s request for additional time to respond to the motion. At the conference, Counsel for the City advised that, although the City filed a brief responding to multiple issues, it may, or may not, wish to supplement that brief. The City requested that it be allowed until October 5, 2012, at 12:00 p.m. to supplement its brief. The Court granted that request; but, on October 4, 2012, the City advised that it would not be filing a supplemental brief. Thus, the briefing as to this motion has now concluded.

Standard For Granting Injunctive Relief

Rule 65 of the Federal Rules of Civil Procedure governs injunctions and provides, in pertinent part, that “[e]very order granting an injunction and every restraining order” must state the reasons why it issued, state its terms specifically, and describe in reasonable detail the act or acts restrained or required. Fed. R. Civ. P. 65(d)(1).

As the Supreme Court has explained, the specificity requirements of Rule 65(d) are

²Oakland County’s motion also addresses issues not raised in the pending motion.

“designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). An injunction “should clearly let defendant know what he is ordered to do or not to do.” *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1203 (11th Cir. 2001). Rule 65(d) is satisfied “only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required.” *Petrello v. White*, 533 F.3d 110, 114 (2d Cir. 2008); 11A FED. PRAC. & PROC. CIV. § 2955, *Form and Scope of Injunctions or Restraining Orders* (2d ed.) (The standard established by Rule 65(d) “is that an ordinary person reading the court’s order should be able to ascertain from the document itself exactly what conduct is proscribed.”).

ANALYSIS

With the above standard in mind, the Court shall address the relief requested in the pending motion. The DWSD’s motion contains nine separately titled sections that contain specific requests for injunctive relief. Each section will be addressed in turn.

I. Request for Comprehensive Equitable Relief

The first section of the pending motion, titled “Request for Comprehensive Equitable Relief,” contains three requests.

First, the DWSD asks the Court to enjoin “the City from applying any existing or future Charter provisions, ordinances, resolutions, executive orders, city policies, regulations, procedures or similar rules or practices that are inconsistent with the operational independence of DWSD necessary to achieve short and long term compliance.” (DWSD’s Motion at 3). The DWSD asserts that such relief is needed because “experience has shown that neither DWSD nor

the Court can identify every City ordinance, charter provision, resolution, executive order, policy, or procedure that is currently inconsistent with and/or is adversely impacting the long-term path to compliance with the November 4 Order.” (*Id.* at 3).

The specific injunctive relief requested by DWSD – an order enjoining the City from applying existing or future Charter provisions, ordinances, etc. “that are inconsistent with the operational independence of DWSD necessary to achieve short and long term compliance” – would not satisfy the specificity requirements of Rule 65(d). Every order for injunctive relief “should clearly let defendant know what he is ordered to do or not to do. A court order should be phrased in terms of objective actions, not legal conclusions.” *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1203 (11th Cir. 2001). Rule 65(d) is satisfied “only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required.” *Petrello v. White*, 533 F.3d 110, 114 (2d Cir. 2008). If this Court were to order the requested injunctive relief, the City would not be able to ascertain, from the terms of the order, whether a given Charter provision or ordinance is enjoined or not by virtue of being “inconsistent with the operational independence of DWSD necessary to achieve short and long term compliance.”

Nevertheless, the Court concludes that an order enjoining the City from applying any existing or future Charter provisions, ordinances, resolutions, executive orders, city policies, regulations, procedures or similar rules or practices *that are inconsistent with the terms of this Court’s Orders* is appropriate and within the permissible scope of Rule 65(d). Accordingly, the Court hereby **ENJOINS** the City from applying any existing or future Charter provisions, ordinances, resolutions, executive orders, city policies, regulations, procedures or similar rules or

practices that are inconsistent with the terms of this Court's Orders.

Second, the DWSD asks the Court to order the "City to work cooperatively with DWSD to implement the November 4 Order in an efficient and timely manner". (DWSD's Motion at 3). Although not explicitly stated in the November 4th Order, this Court fully expects the City to work cooperatively with the DWSD to implement the changes ordered by this Court. To the extent that such clarification is necessary, the Court hereby **ORDERS** that the City and its employees and agents shall work cooperatively with the DWSD to implement this Court's Orders in a timely and efficient manner. The Court further directs that, if the City and/or its agents and employees fail or refuse to implement the terms of this Court's Orders, the DWSD shall file a motion so advising the Court, at which time the Court may order the City and/or its employees and agents to show cause why they should not be held in contempt.

Third, the DWSD asks the Court to authorize the City "to pass along charges" for "transition services" provided to the DWSD, at the City's "actual cost." (DWSD's Motion at 3).

The City objects to this request, noting that no specific services are identified in the motion.

The Root Cause Committee's Plan of Action stated that implementation may result in a reduction in chargeback revenues to the City from the DWSD that would need to be addressed but also stated it did not have adequate information to make a recommendation as to that issue. (Plan of Action, D.E. No. 2410-1, at 6). In adopting the Plan of Action, this Court ordered the Root Cause Committee to "continue to meet and confer, and to gather necessary financial records, in order to make specific recommendations regarding how the reduction in chargeback issue should be addressed during the transition period" and to submit a written recommendation

to the Court by January 4, 2012. (11/4/11 Order, D.E. No. 2410, at 8). To date, however, the Court has not received a written submission with specific recommendations on this issue, and the DWSD's pending motion does not contain any specific recommendations or requests regarding the chargeback of transition services. Thus, the DWSD's motion does not provide sufficient detail as to this requested relief such that the Court can properly evaluate it at this time. The Court therefore **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

II. The City of Detroit's Financial Stability Agreement

The second section of the pending motion relates to the City of Detroit's Financial Stability Agreement ("FSA"), which the City entered into after this Court's November 4, 2011 Order. The FSA does not address its applicability to the DWSD. Because it was issued before the FSA existed, the November 4th Order does not address whether, or to what extent, the FSA applies to the DWSD.

This Court ordered that "DWSD shall act on behalf of the City of Detroit to have its own [collective bargaining agreements ("CBAs")] that cover DWSD employees" and that such CBAs "shall not include employees of any other City of Detroit departments." (11/4/11 Order at 6). The November 4th Order also provides that the "Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD." (*Id.*).

The DWSD's verified motion states that, following the November 4th Order, the DWSD

has entered into new DWSD-specific CBAs with eleven of the twenty unions that represent DWSD employees. That leaves nine unions, comprised of DWSD employees, whose most recent CBAs expired that have not reached a new agreement with the DWSD.

“When most City union contracts expired in June 2012, the City imposed terms of employment (City Employment Terms or “CET[s]”).” (City’s Br. at 5). The City, however, has not applied the CETs to any DWSD personnel because of this Court’s November 4th Order. That leaves the DWSD in a position where the CBAs that previously governed DWSD employees have expired and, for those unions who have not reached a new DWSD-specific CBA, the DWSD must determine what employment terms will be in effect until new agreements are reached.

It appears undisputed that, absent this Court’s Order, the City’s CETs would be applied. On June 26, 2012, the BOWC passed a Resolution that CETs are applicable to DWSD unions that have not settled CBAs until such time as: (a) the relevant union signs an agreement with the DWSD; (b) negotiations reach an impasse and the DWSD imposes its own terms and conditions of employment on that union. (*See* D.E. No. 2476-3).

The DWSD’s motion asks this Court to clarify or declare “that the FSA is applicable to DWSD only to the extent that it is not inconsistent with the November 4 Order and the other orders of this Court”. (DWSD’s Motion at 5). But as the City notes, the DWSD “identifies only one provision of the FSA that it wants applied” – the City’s CETs that were imposed on non-DWSD City unions after their contracts expired in June of 2012. (City’s Br. at 5).

The DWSD also asserts that, “[d]espite the Resolution and DWSD’s sharing information regarding its adoption with the City’s Labor Relations Division, the City has not implemented the

Resolution.” (DWSD’s Motion at 5). It asks the Court to clarify or declare “the Resolution adopted by the BOWC on June 26, 2012 implements and is consistent with the November 4 Order and is effective and controlling, regardless of whether it might otherwise be impacted by the FSA.” (DWSD’s Motion at 5).

In response, the City states that it has no objection to DWSD implementing the City’s CETs – if directed to do so by the Court. (*Id.* at 6). The City has not done so to date, however, for several reasons, including that it believed that doing so may be contrary to this Court’s November 4th Order.

The Court agrees that, in order for the DWSD to continue to progress in implementing this Court’s November 4th Order, the Court must provide the parties clarification and direction on this issue. The Court **DECLARES** that the BOWC’s June 26, 2012 Resolution is in accordance with this Court’s November 4th Order and shall be effective and controlling until this Court orders otherwise.

III. Legal Representation and Authority

The third section of the pending motion, titled “Legal Representation and Authority”, contains three requests for injunctive relief.

The DWSD first asks the Court to clarify or declare “that legal authority for interpreting the November 4 Order and advising the Director of DWSD regarding legal aspects of its implementation lies with DWSD’s General Counsel”. (DWSD’s Motion at 7). The DWSD asserts that “on several occasions during the past several months, City administrative departments have declined to act in accordance with the Director’s interpretation of the November 4 Order and the Director’s plan for implementing that order and/or have expressed

their disagreement with the Director's interpretation of the November 4 Order. Examples of this are the City's Labor Relations Director's refusing to recognize that the CETs applied to City unions that did not sign agreements with DWSD prior to implementation of the CETs; City Law Department advice that DWSD is still bound by the tax-clearance process identified by the City Finance Department prior to awarding a contract rather than a DWSD alternative process; and City Labor Relations' and Law Department's interpreting an employee reversion as being distinguishable from this Court's November 4 Order to prevent transferring and bumping of employees from the City to DWSD, and others." (*Id.* at 5-6).

The Court is unsure as to precisely what relief DWSD is requesting. To the extent that the DWSD asks the Court to clarify that the DWSD's General Counsel, rather than the City's Corporation Counsel, may provide legal advice to the DWSD regarding implementing this Court's orders, the Court agrees that the DWSD's General Counsel may provide such advice and counsel to the DWSD and **GRANTS** that request.

To the extent that the DWSD is asking for some type of delegated authority to interpret this Court's Orders and bind the City to such interpretations, that request is **DENIED**. Again, in order to comply with the specificity requirements of Rule 65, the DWSD and the City should be able to ascertain from the four corners of this Court's orders what acts are required or enjoined. To the extent that a provision in this Court's orders is unclear, or the DWSD and the City disagree as to whether the order requires or enjoins a given act, the parties should seek clarification from this Court. In addition, as stated above, the Court is directing that, if the City and/or its agents and employees fail or refuse to implement the terms of this Court's Orders, or violate the terms of the Orders, the DWSD should file a motion so advising the Court, at which

time the Court may order the City and/or its employees or agents to show cause why they should not be held in contempt.

The Root Cause Committee's Plan of Action, adopted by this Court in its November 4th Order, provides that the "DWSD, acting through its Director upon authorization by the Board of Water Commissioners, shall have final authority to approve" "Legal Settlements and Claims paid by DWSD." (Plan of Action, D.E. No. 2410-1, at 7). As its second request in this section of the motion, the DWSD asks this Court to clarify or declare "that the BOWC may delegate certain approval threshold limits to DWSD management for approval of legal settlements, contract claims, and pre-litigation settlement offers without further BOWC approval". (DWSD's Motion at 7).

In its response brief, the City states that it does not oppose this request but states that "it might be prudent for the Court to set the threshold amount that may be delegated. (City's Br., D.E. No. 2480, at 8).

The DWSD's motion, however, does not identify a requested threshold amount and it does not explain why it wishes to have the above provision modified in order to delegate approval authority. The Court concludes that the DWSD's motion does not provide sufficient information such that the Court can properly evaluate this requested relief and **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012 that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

As its third request in this section of the motion, the DWSD asks the Court to clarify or

declare that “Sections 7.5-208 and 7.5-209 of the Detroit City Charter regarding intra-governmental disputes and enforcement of the Charter shall not apply to issues related to DWSD and the implementation of and applicability of this Court’s Orders”. (DWSD’s Motion at 7). The DWSD’s motion, however, does not discuss the substance of either of the above Charter provisions, nor does it sufficiently explain how the DWSD believes that those provisions are impeding the DWSD from complying with its NPDES Permit, the Clean Water Act, the current ACO with the MDEQ, or this Court’s orders. In addition, it is unclear to this Court as to the precise relief that the DWSD is requesting as to these two Charter provisions. The Court therefore **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

IV. Procurement

The fourth section of the pending motion, which relates to procurement issues, contains numerous requests for injunctive relief. (DWSD’s Motion at 7-13).

First, the DWSD asks the Court to clarify or declare that “the November 4 Order grants DWSD authority to proceed with contracts to assess outsourcing opportunities and/or to outsource functions of DWSD solely upon the approval of the BOWC and without regard to the dollar value of the contract”. (DWSD’s Motion at 12). In support of this first request for relief, the DWSD notes that the Root Cause Committee’s Plan of Action stated:

In order to achieve long-term compliance, this committee agrees that DWSD will need to be relieved of the requirement to fully comply with the existing provisions

of the City of Detroit's Procurement Ordinance. As a by-product of this decision, it is also clear that DWSD cannot be expected to fully comply with the Charter provisions related to Privatization (Charter Section 6-307).

(Plan of Action, D.E. No. 2410-1, at 8). The DWSD asserts that the Root Cause Committee's Plan of Action, which was adopted by this Court, therefore "intended to provide limits on City Council's role in being involved in DWSD's decisions to outsource work of the Department." (DWSD's Motion at 9). The DWSD further asserts that the Root Cause Committee recognized that the "recommended Procurement Policy would not cover all types of procurements and, accordingly, provided for a general catch all on page 7". (*Id.*). It contends that the Plan of Action thus evidences an "intent to leave procurements not specifically addressed in the Plan to the sole discretion of the DWSD Director with approval from the Board of Water Commissioners." (*Id.* at 10). The DWSD argues that "there is an ambiguity concerning whether DWSD's outsourcing authority discussed therein was intended to be limited by the dollar thresholds for approval authority by the BOWC and the Council" within the Procurement Policy. The DWSD contends that the Order should be read so as to grant it the authority to proceed with contracts to assess outsourcing opportunities solely upon the approval of the BOWC and without regard to the dollar value of the contract.

The Court agrees that the Root Cause Committee's Plan of Action and Procurement Policy, which were both adopted by this Court, intended to provide limits on City Council's role in approving contracts. But those limits are set forth in the Procurement Policy's provision governing the approval required for various contracts:

(6) Approval of Contracts

(A) Approval by the Director of DWSD

The DWSD Director shall have full and final approval to approve procurements of the following types of goods and services at dollar values that do not exceed the following limits:

- (i) Personal Services contracts that do not exceed \$50,000;
- (ii) Goods or commodities contracts that do not exceed \$100,000;
- (iii) Professional Services contracts that do not exceed \$250,000;
- (iv) Construction contracts that do not exceed \$500,000; and
- (v) Sale of land or equipment contracts that do not exceed \$500,000, pursuant to a written appraisal from a licensed appraiser.

(B) Approval by the Board of Water Commissioners

The Board of Water Commissioners shall be required to approve the following types of procurements prior to execution by the DWSD Director:

- (i) Personal Services contracts that exceed \$50,000;
- (ii) Goods or commodities contracts that exceed \$100,000;
- (iii) Professional Services contracts that exceed \$250,000;
- (iv) Construction contracts that exceed \$500,000 and
- (v) Sale of land or equipment contracts that exceed \$500,000, pursuant to a written appraisal from a licensed appraiser.

(C) Approval by the Detroit City Council

In addition to requiring approval of the Board of Water Commissioners, the following types of procurements shall also require the approval of the Detroit City Council prior to execution by the Director of DWSD:

- (i) Personal Services contracts that exceed \$150,000;
- (ii) Goods or commodities contracts that exceed \$2,000,000;

- (iii) Professional Services contracts that exceed \$2,000,000;
- (iv) Construction contracts that exceed \$5,000,000; and
- (v) Sale of land or equipment contracts that exceed \$2,500,000, pursuant to a written appraisal from a licensed appraiser.

(Procurement Policy, D.E. No. 2410, at 6-7). Thus, the Procurement Policy agreed to by the Root Cause Committee and adopted by this Court, provides that: 1) professional services contracts that do not exceed \$250,000 can be approved by the Director of the DWSD, without approval from the BOWC or the Detroit City Council; 2) professional services contracts that exceed \$250,000 require the approval of both the Director of the DWSD and the BOWC; and 3) professional services contracts that exceed \$2,000,000 require the approval of the Detroit City Council, in addition to the approval of the Director of the DWSD and the BOWC. The Court finds no ambiguity in the Procurement Policy agreed to by the Root Cause Committee, and adopted by this Court, and shall **DENY** this request.³

Second, the DWSD asks the Court to clarify or declare that “in determining whether monetary approval thresholds are triggered under the existing DWSD Procurement Policy, amounts should be determined on a fiscal year basis for multi-year contracts”. (DWSD’s Motion at 12). The Procurement Policy recommended by the Root Cause Committee, and adopted by

³The DWSD’s Reply Brief states that it is seeking a declaration that City Council approval is not necessary for it to “move forward with the EMA Contract and other outsourcing matters” and asserts that it believes that unions comprised of DWSD employees will put inordinate political pressure on City Council not to approve the EMA Contract or other contracts that deal with outsourcing and therefore this Court should declare that the EMA Contract and future outsourcing contracts do not require City Council approval. (DWSD’s Reply Br. at 4-5). The Court finds that argument, based on a hypothetical scenario, and lacking an explanation as to how such relief is necessary for compliance with the DWSD’s NPDES Permit, the Clean Water Act, or this Court’s November 4th Order, premature.

this Court, contains a section that governs the approval of contracts (Procurement Policy, D.E. No. 2410-2, at 6-7). The DWSD asks the Court to clarify that the monetary approval thresholds provided in that section are determined on a fiscal year basis for multi-year contracts. The Court agrees that although implicit in the Root Cause Committee's Plan of Action, the Court should clarify this issue and hereby **DECLARES** that in determining whether the monetary approval thresholds are triggered under the existing DWSD Procurement Policy, amounts should be determined on a fiscal year basis for multi-year contracts.

Third, the DWSD asks the Court to clarify or declare that "DWSD is not bound by the City's Prevailing Wage Ordinance". (DWSD's Motion at 12). The Root Cause Committee did not make any recommendations to the Court regarding the DWSD being exempt from the City's Prevailing Wage Ordinance, and the Court's November 4th Order did not order DWSD exempt from the City's Prevailing Wage Ordinance. Moreover, although the DWSD's motion asks the Court to now declare that the DWSD is not bound by the City's Prevailing Wage Ordinance, the DWSD's motion does not explain why such relief is needed in order to achieve compliance with the DWSD's NPDES permit, the Clean Water Act, or this Court's November 4, 2011 Order. The Court hereby **DENIES** this request.

Fourth, the DWSD asks the Court to clarify or declare that "expert witness engagements as well as other expert consulting contracts on pending legal matters authorized by DWSD's General Counsel are exempted from the competitive bidding requirements of the DWSD Procurement Policy". (DWSD's Motion at 7 & 12). The DWSD asserts that it needs to retain expert witnesses and consultants on pending legal matters quickly and therefore such contracts should not be subject to the competitive bidding requirements in the Procurement Policy. The

Court agrees that, if the DWSD were required to follow the competitive bidding requirements for such contracts, the DWSD would be unable to meet court-imposed deadlines. Due to the expedited nature of the need to hire expert witnesses and consultants in the course of litigation, such contracts must be exempt from the competitive bidding requirements of the Procurement Policy. The Court hereby **GRANTS** this request and **DECLARES** that expert witness engagements and other expert consulting contracts on pending legal matters authorized by the DWSD's General Counsel are exempted from the competitive bidding requirements of the DWSD Procurement Policy.

Fifth, the DWSD asks the Court to grant "DWSD authority to establish its own process to define and obtain tax clearances that is consistent with applicable state law and, upon doing so, will no longer be bound by the City's tax-clearance process". (DWSD's Motion at 12). The DWSD's motion, however, does not sufficiently explain what the City's current tax-clearance process is, what specific substitute process it wishes to use, or how complying with the City's current process impedes the DWSD's ability to comply with its NPDES Permit, the Clean Water Act, or this Court's November 4th Order. The Court therefore **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

Sixth, the DWSD asks the Court to clarify or declare that the BOWC has the authority "to further define the procurement policy over time to address areas not inconsistent with the Court's orders includes the authority to (a) modify the bid protest and appeal process, (b) include

a debarment process within the Procurement Policy, (c) add additional definitions to the Procurement Policy, (d) provide for additional exemptions, by category, from the competitive bidding process, and (e) define and establish a separate approval process for grant applications, grant agreements, and intergovernmental agreements”. (DWSD’s Motion at 12).

The Procurement Policy agreed to by the Root Cause Committee, and adopted by this Court, contains a provision governing bid protests and appeals. (Procurement Policy, D.E. No. 2410-2, at 7). The DWSD’s motion does not explain how the BOWC wishes to modify that provision or why such a modification is needed. Nor does the DWSD’s motion explain: 1) what additional definitions in the Procurement Policy need to be added or why such definitions are needed; 2) what additional exceptions from the competitive bidding process are needed and why such definitions are needed; 3) what kind of approval process is needed for grant applications, grant agreements and intergovernmental agreements, and why such a process is needed. The Court therefore **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on these issues. No later than November 16, 2012, the DWSD may file a reply brief.

Seventh, the DWSD asks the Court to clarify or declare that “the requirement that DWSD have its own separate finance, human resources and procurement functions includes its authority to purchase its own information technology systems which may differ from those of the City”. (DWSD’s Motion at 12). In response, the City notes that its own Human Resources Deputy Director agrees in principle “that DWSD should obtain its own payroll system.” (City’s Br. at

12). The City asserts, however, that implementing such a system will take a significant amount of time and asserts that, because the City may soon be implementing its own new system, implementing both systems simultaneously will be difficult. (*Id.* at 12-13).

The Court concludes that, in order to implement the changes set forth in this Court's November 4th Order, which are needed for long-term compliance with the DWSD's NPDES Permit, the Clean Water Act, and the ACO, the DWSD must be able to obtain its own payroll system. The Court hereby **DECLARES** that the requirement that DWSD have its own separate finance, human resources, and procurement functions includes its authority to purchase its own information technology systems which may differ from those of the City. The Court further **ORDERS** that the City and its employees and administrators shall give the DWSD necessary access to existing systems during the transition process.

Eighth, the DWSD asks the Court to clarify or declare "whether DWSD was intended to be free to adopt additional Local Economic Development policies or whether the equalization credits contained within the Root Cause Committee's recommended Procurement Policy were intended to be exclusive local business preference for DWSD contracts". (DWSD's Motion at 12-13). The Root Cause Committee's Procurement Policy sets forth specific equalization credits, that were agreed to by the Root Cause Committee, that would apply to the bidding of DWSD contracts. (Procurement Policy, D.E. No. 7, at 4-5). In adopting that provision, this Court enjoined the application of any contrary City Charter provisions or ordinances to the DWSD. The DWSD's motion does not state what additional local economic development policy or equalization credits it wishes to adopt, nor does it explain why the equalization credits agreed to by the Root Cause Committee should be modified or how a modification is needed to comply with

the DWSD's NPDES Permit, the Clean Water Act, or this Court's November 4th Order. The Court **DENIES** this request.

V. Finance

The Fifth Section relates to finance and includes multiple requests for relief.

First, it asks the Court to clarify or declare that "DWSD (i) is authorized to establish bank accounts that are separate from the accounts of the City Treasurer and is, therefore, not bound by section 6-305 of the Detroit City Charter, (ii) is free to establish its own sub-units and programs within its Finance Division to implement the November 4 Order, including debt management, accounts payable, accounts receivable, accounting, budget, cash management, asset management, deferred compensation, and any other sub-units that it deems appropriate, (iii) is not bound by City Finance Policies (i.e., debt management, investment, budget, etc.), and (iv) may pursue the establishment of its own self-insurance fund separate from the City's". (DWSD's Motion at 13-14).

With respect to the request set forth in subsections (ii) and (iii) above, the Court shall GRANT those requests. As set forth in this Court's September 9, 2011 Opinion, and the Plan of Action adopted by the Court in its November 4th Order, one of the central causes of the DWSD's inability to achieve long-term compliance with its NPDES and the Clean Water Act has been bureaucratic and institutional barriers relating to finance. This relief is necessary for the DWSD to fully implement the Plan of Action, adopted by this Court's November 4th Order. The Court hereby **DECLARES** that: 1) the DWSD is free to establish its own sub-units and programs within its Finance Division to implement the November 4th Order, including debt management, accounts payable, accounts receivable, accounting, budget, cash management, asset management,

and deferred compensation; and 2) the City is not bound by City Finance Policies.

With respect to the requests for relief set forth in subsections (i) and (iv), however, the DWSD's motion does not sufficiently explain why the requested relief is necessary to comply with its NPDES Permit, the Clean Water Act, the ACO, or this Court's November 4th Order. The Court therefore **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

Second, the DWSD asks the Court to clarify or declare that "(i) DWSD may issue new debt, refinance existing debt, and/or enter into loan agreements upon the approval of the BOWC and (ii) approval of the City and the City Council is required only in circumstances where DWSD's debt issuance would involve a pledge of the City's full faith and credit". (D.E. No. 2374). The Court again concludes that the DWSD's motion does not sufficiently explain why the requested relief is necessary to comply with its NPDES Permit, the Clean Water Act, the ACO, or this Court's November 4th Order. The Court therefore **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

VI. Human Resources

The Sixth Section of the pending motion relates to human resources and includes multiple

requests for relief.

The DWSD asks the Court to Clarify or declare that “DWSD is exempt from application of City Ordinances, Human Resource Policies, Human Resource Regulations, Civil Service Commission Rules, City Council Resolutions, Administrative or Executive Orders, and other such City Human Resources documents and requirements pertaining to payroll, employee benefits, employee relations, labor relations, and other Human Resource matters”. (DWSD’s Motion at 16). It also asks the Court to “Clarify or declare that “DWSD is not bound by the Civil Service Commission as provided in Section 6-405 of the Detroit City Charter”. (*Id.* at 17). As explained in this Court’s September 9, 2011 Opinion, human resources issues have been a chronic problem for the DWSD since the inception of this case. Over the past four decades, the City’s personnel policies, civil service rules, and other restrictions have repeatedly been identified by experts, and acknowledged by the City, as impediments to the DWSD’s compliance with its NPDES Permit and the Clean Water Act. (*See, e.g.* 9/9/11 Opinion, D.E. No. 2397, at 12-15, 17-18, 21-23, and 26). The Court shall **GRANT** this request and **DECLARES** that: 1) the DWSD is exempt from the application of City ordinances, the City’s human resources policies and regulations, Civil Service Commission Rules, and City resolutions and orders, pertaining to payroll, employee benefits, and employee and labor relations; and 2) the DWSD is not bound by the Civil Service Commission as provided in Section 6-405 of the City’s Charter.

The DWSD also asks the Court to Clarify or declare that “DWSD’s status and rights as an employer that (i) has authority to determine the terms and conditions of employment for its non-union employees as well as its unionized employees, (ii) may pursue its own payroll services separate and apart from the rest of the City, and (iii) may utilize its own Employer Identification

Number (“EIN”) if its determines that doing so would serve DWSD’s best interest”. The requests for relief in the first two subsections (i) and (ii) have already been addressed and granted in this Opinion & Order.

As to the remaining request, set forth in subsection (iii), the Court notes that the City has objected to that relief, questioning whether the DWSD, as a department of the City, may legally obtain its own EIN. (City’s Br. at 13). Moreover, the Court concludes that the DWSD’s motion does not sufficiently explain why the requested relief is necessary to comply with its NPDES Permit, the Clean Water Act, the ACO, or this Court’s November 4th Order. The Court therefore **ORDERS** that the DWSD may file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is needed. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

The DWSD also asks the Court to clarify or declare that “DWSD may (i) nominate its own Plan Administrator for implementation of the Defined Contribution Plan as required by DWSD’s collective bargaining agreements, (ii) develop the plan design and documents necessary to implement the Defined Contribution Plan for its employees, and (iii) provide for the authority of its Plan Administrator pursuant to its plan documents”. (DWSD’s Motion at 17). The City objects to this request for relief and, among other things, questions whether state law or Internal Revenue Service rules allow a department of a municipal corporation to establish a separate employee retirement benefit plan. (City’s Br. at 15). The Court concludes that supplemental briefing as to this request is also warranted. The Court therefore **ORDERS** that the DWSD may

file a supplemental brief no later than October 26, 2012, that explains precisely what the DWSD is requesting and why the requested relief is necessary for compliance with its NPDES Permit, the Clean Water Act, or this Court's Orders. No later than November 9, 2012, the City, and any other party, may file a response to any supplemental brief filed by the DWSD on this issue. No later than November 16, 2012, the DWSD may file a reply brief.

The DWSD also asks the Court to clarify or declare that, "to the extent Section 2-106.5 of the Detroit City Charter would otherwise prohibit DWSD from rehiring any DWSD employee to perform services for DWSD for a period of one-year after employment, such provision shall not apply to DWSD". (DWSD's Motion at 15-17). This Court's September 9, 2011 Opinion & Order sets forth, in detail, how human resource and succession planning problems have plagued the DWSD for decades. (*See e.g.*, D.E. No. 2397 at 9, 15, 17-18, 20-23, 26, 28, & 33-34). In short, the DWSD is at a juncture where a significant portion of its experienced staff, who have key institutional knowledge and technical expertise, are eligible for retirement and the DWSD has not had a succession plan in place to adequately account for that. It is imperative that the DWSD, if needed, be able to rehire experienced employees, on a contractual basis, following their retirement. Any Charter provision, ordinance, or resolution that prohibits the DWSD from doing so threatens the DWSD's ability to comply with its NPDES Permit, the Clean Water Act, and its current Administrative Consent Order with the MDEQ, which includes minimum staffing levels. Accordingly, the Court **GRANTS** this request and **ENJOINS** any Charter provision, ordinance, resolution, or any other rule or practice, that prohibits or restricts the DWSD's ability to rehire DWSD's employees following their retirement from the DWSD.

VII. Board of Water Commissioners

The seventh section of the pending motion relates to the Board of Water Commissioners (“BOWC”) and it includes two requests for relief.

First, it asks the Court to clarify or declare that “the current BOWC members may establish terms of office for existing members and proposed rotation schedule going forward”. (DWSD’s Motion at 18). The Court shall **GRANT** this first request for relief. As explained in this Court’s September 9, 2011 Opinion (D.E. No. 2397 at 29-30), on February 11, 2011, the City, along with the counties of Wayne, Oakland and Macomb, determined that a more empowered BOWC would enhance the DWSD’s ability to comply with its NPDES permit and the Clean Water Act, and entered into a Stipulated Order to that effect. (*See* D.E. No. 2334). That Stipulated Order provides for minimum qualifications for BOWC members and provides them with support staff. It also provides that no more than two current members of the BOWC could remain on the BOWC and that the remaining five members would be newly appointed. In compliance with the Stipulated Order, on April 1, 2011, Mayor Bing appointed a new BOWC, which consisted of two current members of the BOWC and five newly appointed members. On July 27, 2011, the BOWC amended its by-laws to incorporate the provisions of the Stipulated Order. (9/9/11 Opinion at 30).

The February 11, 2011 Stipulated Order did not address the terms for BOWC members. The City’s Charter provides that the term of membership on the BOWC is four years and that not more than two of the seven members’ terms may expire in a given year. Because the Stipulated Order provides that five new members were appointed in 2011, however, unless the terms of the existing BOWC members are adjusted, the terms of five members will expire in one given year.

This Court agrees that it would be detrimental to the BOWC and the DWSD for more than two BOWC members' terms to expire in a given year. Accordingly, the Court hereby **ORDERS** that the current BOWC members may establish terms of office for existing members and a rotation schedule.

Second, the pending motion asks the Court to clarify or declare that "DWSD may adopt an organizational structure other than one comprised of two divisions (Operations and Administration), as long as DWSD provides adequately for succession planning within them". (DWSD's Motion at 18). DWSD has not brought to the Court's attention, however, any Charter provision, or any state or local ordinances, that would prohibit the DWSD from adopting a different organizational structure. Moreover, although the Root Cause Committee's Plan of Action recommended breaking down the DWSD "into two divisions – operations and administration", it appears that it did so for purposes of making specific recommendations as to changes needed in each of the divisions. The Court does not construe the Root Cause Committee's Plan of Action, or this Court's November 4, 2011 Order adopting it, as prohibiting the DWSD's organizational structure from being modified in the future.

VIII. Michigan Employment Relations Commission Jurisdiction

The eighth section relates to the jurisdiction of the Michigan Employment Relations Commission ("MERC") and it asks the Court to: 1) clarify or declare "the scope of MERC's authority and jurisdiction to decide issues relating to DWSD consistent with the November 4 Order" and 2) clarify or declare that "MERC lacks the authority and jurisdiction to mediate and engage in fact-finding, including the requests from AFSCME requesting mediation and from both ADE and AME for fact finding related to the current round of negotiations being conducted

pursuant to the November 4 Order”. (DWSD’s Motion at 18).

In its November 4th Order, this Court enjoined “the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court” and enjoined “the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.” (11/4/11 Order at 7). Following the November 4th Order, the DWSD and several individuals and/or unions filed various petitions with MERC but MERC has declined to take action on those petitions, out of concern that doing so may violate this Court’s November 4th Order. (*See, e.g.*, D.E. No. 2469-1). MERC has directed the parties to such petitions to seek clarification from this Court as to whether MERC may proceed with the petitions in light of this Court’s November 4th Order. This Court has already acted with respect to one such request – clarifying that: 1) this Court’s November 4, 2011 Order was intended to order the severance of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees; and 2) that MERC is not enjoined from so ruling on any petitions in order to effectuate or confirm the severancing ordered by this Court.

Although unintended, it is now apparent that this Court’s November 4th Order does not provide MERC with sufficient direction as to the scope of its jurisdiction over petitions filed relating to the DWSD. The Court agrees that clarification by this Court is needed. The Court shall take this request under advisement, until the supplemental briefing on this motion has concluded, at which time it will address this issue. Any party desiring to file a supplemental brief on this issue may do so by October 26, 2012.

IX. Final Director's Compliance Report

In this Court's November 4th Order, the Director of the DWSD was ordered to file an initial compliance report by May 4, 2012, identifying any additional barriers to long-term compliance with the ACO and the Clean Water Act, and making any additional requests to this Court that are needed for compliance. The Order provides for that report to be circulated among the BOWC, the Mayor of the City of Detroit, the Detroit City Council, and the MDEQ, who could then provide comments, suggestions and recommendations to the Director before a final Director's Report of Compliance would be filed with the Court on August 4, 2012. (11/4/11 Order at 9-10).

On May 4, 2012, the DWSD filed an initial compliance report that, for several reasons, asked that the Court to extend the date for the filing of the Director's Final Compliance report to October 4, 2012. This Court granted that request in an Order issued on May 17, 2012, and, therefore, the Final Director's Report was due to be filed on October 4, 2012.

The final section of the DWSD's pending motion, however, again asks the Court to extend the date for the filing of that report. It asks the Court to "[e]xtend the date for filing the Final Director's Compliance Report from October 4, 2012 to April 4, 2013." (DWSD's Motion at 21).

The Court shall extend the filing date beyond the current deadline, which has now passed. But as to the request for additional six months to file the report, the Court shall take that request under advisement until after the supplemental briefing on this motion has concluded.

CONCLUSION & ORDER

For the reasons above, IT IS ORDERED that the DWSD's motion is GRANTED IN

PART. The motion is GRANTED to the extent that the Court:

- 1) ENJOINS the City from applying any existing or future Charter provisions, ordinances, resolutions, executive orders, city policies, regulations, procedures or similar rules or practices that are inconsistent with the express terms of this Court's Orders;
- 2) ORDERS that the City and its employees and agents shall work cooperatively with the DWSD to implement this Court's Orders in a timely and efficient manner;
- 3) DECLARES that the BOWC's June 26, 2012 Resolution is in accordance with this Court's November 4th Order and shall be effective and controlling until this Court orders otherwise;
- 4) CLARIFIES that the DWSD's General Counsel, rather than the City's Corporation Counsel, may provide legal advice to the DWSD regarding implementing this Court's orders;
- 5) DECLARES that in determining whether monetary approval thresholds are triggered under the existing DWSD Procurement Policy adopted by this Court, amounts are to be determined on a fiscal year basis for multi-year contracts;
- 6) DECLARES that expert witness engagements and other expert consulting contracts on pending legal matters authorized by the DWSD's General Counsel shall be exempt from the competitive bidding requirements of the DWSD Procurement Policy;
- 7) DECLARES that the DWSD has the authority to purchase its own information technology systems which may differ from those of the City;
- 8) DECLARES that: a) the DWSD is free to establish its own sub-units and programs within its Finance Division to implement the November 4 Order, including debt management, accounts payable, accounts receivable, accounting, budget, cash management, asset management, and deferred compensation; and b) the DWSD is not bound by City Finance Policies;
- 9) DECLARES that: a) the DWSD is exempt from the application of City

ordinances, the City's human resources policies and regulations, Civil Service Commission Rules, and City resolutions and orders, pertaining to payroll, employee benefits, and employee and labor relations; and b) the DWSD is not bound by the Civil Service Commission as provided in Section 6-405 of the City's Charter;

- 10) ENJOINS any Charter provision, ordinance, resolution, or any other rule or practice, that prohibits or restricts the DWSD's ability to rehire DWSD's employees following their retirement from the DWSD;
- 11) ORDERS that the current BOWC members may establish terms of office for existing members and a rotation schedule; and
- 12) CLARIFIES that the Court does not construe the Root Cause Committee's Plan of Action, or this Court's November 4, 2011 Order adopting it, as prohibiting the DWSD's organizational structure from being modified in the future.

IT IS FURTHER ORDERED that the motion is DENIED IN PART. The motion is DENIED to the extent that the Court:

- 1) DENIES the DWSD's request for an order enjoining the City from applying existing or future Charter provisions, ordinance, etc. "that are inconsistent with the operational independence of DWSD necessary to achieve short and long term compliance";
- 2) DENIES any request for the Court to delegate authority to the DWSD to interpret this Court's Orders and bind the City to such interpretations;
- 3) DENIES the DWSD's request for the Court to clarify or declare that "the November 4 Order grants DWSD authority to proceed with contracts to assess outsourcing opportunities and/or to outsource functions of DWSD solely upon the approval of the BOWC and without regard to the dollar value of the contract";
- 4) DENIES the DWSD's request that the DWSD be exempted from the City of Detroit's Prevailing Wage Ordinance; and
- 5) DENIES the DWSD's request that it be granted authority to adopt additional Local Economic Development policies.

IT IS FURTHER ORDERED that supplemental briefing shall be allowed with respect to

the following issues / requests for relief:

- 1) Specific requests regarding the chargeback of transition services;
- 2) The DWSD's request that the BOWC be allowed to delegate settlement approval authority to the Director of the DWSD;
- 3) The DWSD's requests regarding Sections 7.5-208 and 7.5-209 of the Detroit City Charter;
- 4) Any requested alternative method for obtaining tax clearances;
- 5) The DWSD's request that the BOWC be granted authority to further define the DWSD Procurement Policy;
- 6) Whether the DWSD may obtain and utilize its own Employer Identification Number;
- 7) Establishing separate bank accounts and establishing a separate self-insurance fund;
- 8) Issuance and approval of debt;
- 9) Obtaining and utilizing a separate EIN; and
- 10) Requests relating to a Defined Contribution Plan.

IT IS FURTHER ORDERED that the following requests are taken under advisement by

the Court:

- 1) The DWSD's request for clarification from the Court as to MERC's jurisdiction over matters relating to the DWSD;⁴ and
- 2) The DWSD's request for an additional six months to file the Director's Final Compliance Report.

⁴Any party may file a supplemental brief regarding this issue, as provided in this Opinion & Order.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: October 5, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 5, 2012, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

EXHIBIT 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.

OPINION & ORDER

This matter is currently before the Court on a “Motion For Order Adopting The Root Cause Committee’s Plan of Clarification Of November 8, 2012” (D.E. No. 2507), filed by the Detroit Water and Sewerage Department (“DWSD”) on November 15, 2012. No briefs in opposition to the motion have been filed and the Court finds that oral argument would not significantly aid the decisional process. *See* Local Rule 7.1(f)(2), U.S. District Court, Eastern District of Michigan. The Court therefore orders that the motion will be decided without oral argument.

For the reasons that follow, the Court shall grant the unopposed motion to the extent that the Court shall: 1) adopt the Root Cause Committee’s Plan of Clarification as an order of the Court and **order the City of Detroit and the DWSD to immediately implement the order**; and 2) grant another extension for supplemental briefs on the DWSD’s requests for relief as to two Charter Provisions (Sections 7.5-208 and 7.5-209 of the Detroit City Charter) and requests relating to the scope of the Court’s injunction as to the Michigan Employment Relations

Commission (“MERC”). To the extent that the DWSD seeks an extension of time for filing a supplemental brief as to its request for another extension for filing the Final Director’s Report, that request is denied. The Court is prepared to rule on that request and concludes that further briefing is not warranted.

For the reasons stated below, the Court shall: 1) clarify its ruling as to “CETs”; and 2) order that the Final Director’s Report shall be submitted no later than March 15, 2013.

BACKGROUND

This action, which was filed in 1977 and has been active since that time, has an exceptionally long history that is more fully set forth in this Court’s September 9, 2011, Opinion & Order (D.E. No. 2397) and its November 4, 2011 Order. (D.E. No. 2410).

The United States Environmental Protection Agency (“EPA”) initiated this action in 1977 against the City of Detroit (“the City”) and the DWSD, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“the Clean Water Act”).

The violations alleged in this case, which are undisputed, involve the DWSD’s wastewater treatment plant (“WWTP”) and its National Pollutant Discharge Elimination System (“NPDES”) permit. Although this action was initiated by the EPA, the Michigan Department of Environmental Quality (“MDEQ”) was later joined in the action and the MDEQ is the entity that now directly oversees the DWSD’s NPDES permit. As explained in this Court’s September 9, 2011, Opinion & Order:

For the more than 34 years during which this action has been pending, the City and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the City and the DWSD agree to a detailed remedial plan aimed at compliance, but the DWSD is unable to follow the plan and is again cited for the same or similar violations. Although this Court has

taken various measures, designed to eliminate the various impediments to compliance that have been identified by experts and acknowledged by the City, those measures have proven inadequate to achieve sustained compliance.

(*Id.* at 1).

In September of 2009, the DWSD was again unable to maintain compliance with its NPDES permit and was again cited for violations by the MDEQ. In January of 2010, Detroit Mayor Dave Bing appointed a Chief Operating Officer who assumed the position of acting Director of the DWSD. Thereafter, the City worked with the MDEQ to develop another plan for compliance and worked with Oakland County, Wayne County and Macomb County to resolve longstanding issues regarding the DWSD.

On July 8, 2011, the City and the MDEQ entered into an Administrative Consent Order (“the ACO”), aimed at achieving long-term compliance with the DWSD’s NPDES permit and the Clean Water Act. After the ACO was executed, the City filed a motion asking the Court to order that the requirements set forth in the ACO are substituted for the requirements of the Second Amended Consent Judgment, find that the DWSD has made substantial progress toward achieving full compliance with its NPDES permit and the Clean Water Act, and dismiss this case.

This Court denied that motion. In doing so, this Court noted that, *after* executing the ACO on July 8, 2011, the DWSD self-reported serious violations of its NPDES permit to the MDEQ. Thus, the City had not established that the DWSD has achieved even short-term compliance with the ACO and the Clean Water Act. In addition, this Court concluded that the extensive record in this case establishes that, unless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to compliance, sustained compliance

with the Clean Water Act and the ACO will simply not occur.

Thus, this Court was faced with the unenviable task of determining how to remedy these ongoing and serious violations of the Clean Water Act, given the complex nature of the problem and the fact that the rather extraordinary actions taken over the past four decades have proven inadequate.

Rather than order a remedy on its own, without input from the City, this Court considered other options and ultimately decided to take an admittedly unique approach:

The Court further concludes that an effective equitable remedy to achieve sustained compliance will require this Court to order structural changes regarding the DWSD that will likely override the City of Detroit's Charter, its local ordinances, and/or some existing contracts.

This Court does not arrive at this conclusion lightly. As noted above, Judge Feikens attempted several less intrusive measures, over several decades, but those less intrusive measures have not enabled the DWSD to achieve sustained compliance. In addition, although the City has had ample opportunity to devise and implement its own solutions to the underlying causes of noncompliance that have been identified and discussed since the inception of this case, to date, it has not proposed or implemented a plan that has sufficiently addressed those root causes.

To be fair, the City has been constrained in the measures it has proposed or implemented to date because the City is bound by various provisions of the City's Charter and ordinances, and existing contracts, that prevent *the City* from making fundamental changes in the identified problem areas.

This Court, however, has broad equitable power to order any relief necessary to achieve compliance with the Clean Water Act and this Court *is not* constrained by the provisions of the City's charter or ordinances. *Weinberger*, 456 U.S. at 318; *Perkins*, 47 F.3d at 216.

This Court appreciates that its broad equitable authority is to be "tempered by precepts of comity and federalism." *Kendrick*, 740 F.2d at 437. As then-Judge (now Justice) Stephen Breyer explained in *Metropolitan District Commission*,¹ considerations of comity and federalism, however, do not give a state or municipality

¹*United States v. Metropolitan District Commission*, sometimes referred to as the Boston Harbor case, is another case involving Clean Water Act violations continuing over many years.

the legal power to violate federal law or to continue violations of the Clean Water Act over a thirty-four year period. *United States v. Metropolitan District Commission*, 930 F.2d at 136. Maintaining the status quo is not an option.

Nevertheless, this Court is mindful that remedies that override state or local law should be narrowly tailored and that, to the extent possible, local officials should at least have the opportunity to devise their own solutions to remedy a violation of federal law.

Accordingly, the Court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a current member of the Board (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, propose a plan that addresses the root causes of non-compliance that are discussed in this Opinion & Order. In making such recommendations to the Court, these individuals *shall not* be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts.

(*Id.* at 42-43) (emphasis in original). This Court ordered the above individuals to submit their proposed plan no later than November 4, 2011. (*Id.* at 44).

Following this Court's September 9, 2011, Opinion & Order, the City official and BOWC member identified therein ("the Root Cause Committee") met to devise and propose a workable solution to remedy the underlying root causes of noncompliance.

On November 2, 2011, the Root Cause Committee (hereinafter "RCC") submitted a written proposed "Plan of Action" to the Special Master in this action, which the Special Master then submitted to the Court on that same date. (D.E. No. 2409). The RCC² spent considerable time in developing their proposed Plan of Action. The RCC's Plan of Action recommended specific structural and governance changes for the DWSD and the adoption of a separate

²The Root Cause Committee members noted that they were "permitted to solicit and receive input from various sources" with knowledge of the DWSD and utility operations and they noted that they received input from: 1) the Detroit City Council; 2) the Board of Water Commissioners; 3) DWSD Management Staff; 4) Union Representatives; 5) Management-side Labor Counsel; 6) Industry Professionals; 7) Current DWSD Vendors; 8) a Rate Consultant; and 9) Regulatory Agency Input. (D.E. No. 2409-1 at 2).

Procurement Policy for the DWSD. The RCC made clear, however, that their recommended changes “**do not contemplate DWSD becoming a separate entity**. That is to say, **DWSD, and all of the assets of the DWSD, shall remain a department of the City of Detroit**, despite any changes in structure or governance recommended by this Committee.” (D.E. No. 2410-1 at 3) (bolding in original). The RCC’s Plan of Action recognized that additional changes may need to be made in the future, as the Plan of Action is actually implemented. (*Id.* at 3) (“[W]e believe that there may need to be additional changes made in the future, possibly through a second-phase plan once we have the ability to work with the implementation of this Plan.”).

On November 4, 2011, this Court issued an Order (D.E. No. 2410), wherein this Court found that the proposed Plan of Action adequately addresses the majority of the root causes of non-compliance outlined in this Court’s September 9, 2011 Opinion & Order. This Court therefore adopted the Plan of Action (D.E. No. 2410-1), which includes a DWSD Procurement Policy (D.E. No. 2410-2), proposed by the RCC and ordered its implementation. (D.E. No. 2410).

Although the RCC agreed that certain changes to existing collective bargaining agreements (“CBAs”) need to occur, despite earnest efforts, the RCC could not agree on how to achieve the necessary changes. Because the proposed Plan of Action did not adequately address these issues, the Court considered the issue on its own and ordered specific relief relating to CBAs. Among other things, the Court ordered that “[t]he DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees (‘DWSD CBAs’). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD.” (D.E. No. 2410 at 6).

The November 4th Order also contains the following provision:

13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

(*Id.* at 7).

The November 4th Order provides that, until the order has been fully implemented, or this case has been dismissed, the RCC shall meet at least once a month to discuss the implementation of the plan.

Thereafter, Sue McCormick was hired as the Director of the DWSD and began work on January 1, 2012. In addition, following a request by the RCC, this Court issued an order authorizing the DWSD to hire a Chief Operating Officer / Compliance Officer. (*See* D.E. No. 2456, “the Court agrees that, given the volume and nature of the work entailed to implement this Court’s November 4, 2011 Order, and comply with the ACO, the creation of a new position at the DWSD is warranted and appropriate.”). Matt Schenk was then hired as the DWSD’s COO/CO.

The DWSD has been working toward implementing this Court’s November 4th Order, pursuant to which it was to file certain reports by specified dates. The Director was required to file an initial compliance report by May 4, 2012, identifying any additional barriers to long-term compliance with the ACO and the Clean Water Act, and making any additional requests needed for compliance. The Order provided for that report to be circulated among the BOWC, the Mayor of the City of Detroit, the Detroit City Council, and the MDEQ, who could then provide comments, suggestions and recommendations to the Director before a final Director’s Report of

Compliance would be filed with the Court on August 4, 2012. (D.E. No. 2410 at 9-10).

On May 4, 2012, the DWSD filed an initial compliance report (D.E. No. 2460) that, for several reasons, asked the Court to extend the date for the filing of the Director's Final Compliance Report to October 4, 2012. (*Id.* at 17-18). This Court granted that request in an Order issued on May 17, 2012 (D.E. No. 2461) and, therefore, the Final Director's Report was due to be filed on October 4, 2012.

On August 20, 2012, the DWSD filed a "Motion for Relief Essential to Compliance with this Court's November 4, 2011, Order Mandating DWSD-Specific Collective Bargaining Agreements." (D.E. No. 2469). This Court issued an Order that granted that motion, to the extent that it: 1) clarified that Paragraph 3 on Page 6 of this Court's November 4th Order was intended to, and shall be construed as, ordering the severance of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees; and 2) ruled that MERC is not enjoined from ruling on the DWSD's pending Clarification Petitions, in order to effectuate the above severancing ordered by this Court. (D.E. No. 2470 at 3).

On September 24, 2012, the DWSD filed a "Motion for Interim Order Clarifying November 4, 2011 Order and for Expedited Briefing Schedule." (D.E. No. 2473). The DWSD asserted that it needs an interim order to address uncertainties and ambiguities that arise out of this Court's November 4th Order, that are impeding the DWSD's ability to implement it. That motion included multiple requests for injunctive relief.

On September 25, 2012, this Court granted the request for expedited consideration and issued an order for expedited briefing.

Both Macomb County and Oakland County submitted briefs generally supporting the relief requested in the motions. (D.E. No. 2475 & 2483). No response briefs were submitted by Wayne County, the MDEQ, or the EPA. On October 1, 2012, however, the City filed a response brief opposing some requests for relief contained in the motion. (D.E. No. 2480).

On October 5, 2012, this Court issued an “Opinion & Order Regarding The DWSD’s Motion For Interim Order” (D.E. No. 2489). This Court granted the motion in part, denied it in part, took certain requests under advisement, and ordered supplemental briefing regarding certain requests.

This Court granted the motion with respect to several requests. (*See* D. E. No. 2489 at 39-40). Among other things, this Court “declared that the BOWC’s June 26, 2012 Resolution is in accordance with this Court’s November 4th Order and shall be effective and controlling until this Court orders otherwise.” (*Id.* at 39). This Court also denied the motion in several respects. (*Id.* at 40).

This Court ordered that the following two requests were taken under advisement: 1) the DWSD’s request for clarification from the Court as to MERC’s jurisdiction over matters relating to the DWSD; and 2) the DWSD’s request for an additional six months to file the Director’s Final Compliance Report. It ordered that any party could file a supplemental brief as to the MERC jurisdictional issue by October 26, 2012.

This Court ordered that supplemental briefing would be allowed with respect to the following: 1) specific requests regarding the chargeback of transition services; 2) the DWSD’s request that the BOWC be allowed to delegate settlement approval authority to the Director of the DWSD; 3) the DWSD’s requests regarding Sections 7.5-208 and 7.5-209 of the Detroit City

Charter; 4) any requested alternative method for obtaining tax clearances; 5) the DWSD's request that the BOWC be granted authority to further define the DWSD Procurement Policy; 6) whether the DWSD may obtain and utilize its own Employer Identification Number; 7) establishing separate bank accounts and establishing a separate self-insurance fund; 8) issuance and approval of debt; 9) obtaining and utilizing a separate EIN; and 10) requests relating to a Defined Contribution Plan. The Court ordered that the DWSD's supplemental brief was to be filed by October 26, 2012, and that the City, or any other party, could file a response to any supplemental brief filed by the DWSD no later than November 9, 2012.

On October 23, 2012, the DWSD filed a motion seeking an extension of time to file its supplemental brief in support of its Motion for Interim Order. (D.E. No. 2496). In that motion, the DWSD stated that, following this Court's October 5, 2012, Opinion, representatives of the DWSD have been meeting with representatives of the City to see if they could work together to resolve any of the remaining issues. That motion, and a related filing (D.E. No. 2495), reflected that the DWSD and the City had reached agreement as to some issues, but were still discussing others. As such, the DWSD requested that the Court extend the date for filing of its supplemental brief until November 16, 2012. This Court granted the requested extension. (D.E. No. 2497). Thus, the Court was expecting to receive the DWSD's supplemental brief on November 16, 2012.

Meanwhile, the RCC was still meeting on a regular basis to discuss the implementation of the November 4, 2011, Order.

On November 9, 2012, the Special Master submitted a "Root Cause Committee Plan of Action Clarification of November 8, 2012" to the Court, that had been submitted to the Special

Master on November 8, 2012. (*See* D.E. No. 2505). The document was submitted by the RCC, consisting of: 1) Charles Pugh, President of the Detroit City Council; 2) Gary Brown, Detroit City Council President Pro Tem; 3) Mayoral Representative Chris Brown, then-Chief Executive Officer of the City of Detroit; 4) James Fausone, Chairman of the Board of Water Commissioners; 5) Sue McCormick, Director of the DWSD; and 6) Matt Schenk, Chief Operating Officer/Compliance Officer for the DWSD. (*Id.* at 2).

The RCC's Plan of Action Clarification states that the RCC is aware of the pending motion seeking clarification of the November 4th Order and, because it actually devised the Plan of Action that was adopted by the Court, it "felt it was important to issue this interim report and weigh in on some of the items under consideration for the Court." (D.E. No. 2505 at 3).

The RCC notes that its original Plan of Action "recommended that DWSD's new administrative functions of Law, Human Resources, Finance, and Procurement would operate independently of the equivalent functions within the City." (*Id.* at 2). The RCC states that its original "Plan of Action was never expected to answer every operational question that could arise over time, but rather set forth a framework for the DWSD to operate in a more autonomous and Independent manner while maintaining a clear statement of City of Detroit ownership and control over the assets of DWSD." (*Id.* at 1).

The RCC stated that it "has reviewed the items that were granted within the Court's [October 5, 2012] order, and we agree with those items and the decision that was issued by the Court. The Court's order, in these areas, is fully consistent with the Root Cause Committee's Plan of Action." (*Id.* at 5). The RCC further states that "[t]here were ten specific requests for clarification sought by DWSD that the Court requested supplemental briefing to address. The

need for the supplemental briefing, we believe, was brought on by the Detroit City Law Department objecting to the specific requests, though neither the Mayor nor the City Council authorized the Law Department to file objections.” (*Id.* at 6). The RCC states that “there have been a series of meetings between DWSD and the City’s new Chief Financial Officer to discuss the specific requests that relate to finance. As a result of those meetings, most of the objections from the Law Department” have been resolved. (*Id.*). It then states:

“As a result, the Root Cause Committee would recommend the following actions with respect to the items ordered for supplemental briefing:

- (1) That the Court adopt this Root Cause Committee supplemental Plan of Action in lieu of requiring supplemental briefing on the items contained within this report.
- (2) That DWSD reimburse the City of Detroit for all actual costs, which include the indirect cost, of providing transition services to DWSD.
- (3) That the Board of Water Commissioners be authorized to delegate its final approval authority at threshold of its choosing for the settlement of litigation and for the resolution of contract claims paid by DWSD to the DWSD Director or DWSD General Counsel.
- (4) That DWSD work with the City’s Chief Financial Officer to establish a reasonable fee for access to the City’s tax system that would enable DWSD to perform its own Tax Clearances.
- (5) That the Board of Water Commissioners is authorized to amend its procurement policy upon the affirmative vote of five members provided that any amendment to the policy that changes the approval threshold limits for the Board of Water Commissioners and/or the Detroit City Council shall also require approval by a super-majority vote of an Ad Hoc Root Cause Committee consisting of the Chairman of the Board of Water Commissioners, the Director of DWSD, the President of the Detroit City Council, the Chair of the Detroit City Council’s Public Health and Safety Committee, and a representative appointed by the Mayor of the City of Detroit.
- (6) That DWSD is authorized to establish bank accounts in its own name without

the City Treasurer as a signer, provided that the City is able to obtain information on those accounts necessary for the City's external auditors to perform required work related to the Certified Annual Financial Reports ("CAFR").

- (7) That DWSD be authorized to establish its own self-insurance fund.
- (8) That DWSD be authorized to approve the issuance of debt and to refinance debt upon the sole approval of the Board of Water Commissioners unless the debt contains a full or partial general obligation pledge of the City of Detroit, in which case City Council approval would be required prior to issuance.
- (9) That DWSD be given additional time to work with the City of Detroit to better understand the financial impact, if any, that DWSD's establishment of a Defined Contribution Plan would have upon the City of Detroit's general fund. If DWSD ultimately moves forward with its request to establish its own Defined Contribution Plan or to act as its own Plan Administrator, then DWSD should be expressly authorized to obtain its own Employee Identification Number ("EIN"). If not, there is likely not a reason for DWSD to maintain its own EIN.
- (10) That DWSD should file a supplemental brief with respect to the issue of whether Corporation Counsel should be enjoined from acting under Sections 7.5-208 and 7.5-209 of the Detroit City Charter with respect to DWSD. The Root Cause Committee understands that it is inconsistent with the Plan of Action and the November 4, 2011 order for Corporation Counsel to Independently act to file suit over Court orders that expressly find certain sections of the Charter inapplicable to DWSD. Similarly, the Plan of Action has clearly contemplated operational independence for DWSD in a number of areas that could lead to inter-governmental disputes between DWSD and administrative departments of the City. We recognize that this Court, and not the Corporation Counsel's mediation dispute mechanism, is the proper forum for addressing concerns over the interpretation of this Court's Orders."

(Id. at 6-8).

The RCC states that "the repeal of Public Act 4 and some Charter amendments in the City of Detroit lead to some uncertainty over the future of the City's financial stability agreement and the potential impacts on imposed terms and conditions of employment that may take substantial time to resolve." *(Id.* at 2). The RCC agrees that clarification is needed as to MERC's role in

DWSD labor relations matters going forward, but offers no recommendation on that issue. (*Id.* at 6).

The RCC concludes by stating, “[w]e continue to believe that the Root Cause Committee, with its composition of City of Detroit elected officials and representatives and DWSD board and staff representatives are in a better position to recommend a workable solution to resolve the long-term compliance struggles of DWSD than a more intrusive alternative from the Court.” (*Id.* at 7).

On November 15, 2012, the DWSD filed the instant “Motion For Order Adopting The Root Cause Committee Plan Of Clarification” (D.E. No. 2507) wherein the DWSD moves the Court to: 1) adopt the RCC’s Plan of Clarification as an order of the Court; and 2) extend the time for the DWSD to file its supplemental brief until fourteen (14) days after the Court rules on the Motion to Adopt the RCC’s Plan of Clarification. The motion states:

DWSD respectfully submits that the Root Cause Committee’s Plan of Clarification provides much of the needed clarification of the November 4 Order sought by DWSD’s Verified Motion and provides an excellent resolution of issues raised by the Verified Motion, including the majority of the issues identified for supplemental briefing. Moreover, in several respects in this regard, it mirrors the agreements that DWSD has reached with the City’s Corporation Counsel (D.E. No. 2495) and Chief Financial Officer (Exhibit A). DWSD further submits that the Plan of Clarification proposed an excellent accommodation of the somewhat competing interests of achieving CWA compliance and the precepts of comity and federalism with respect to issues raised by the Verified Motion and designated for supplemental briefing. DWSD, accordingly, moves the Court to adopt the Plan of Clarification as an order of the Court in the same manner that the Court adopted the original Plan of Action in the November 4 Order.

(D.E. No. 2507 at 4).

Any party who objects to the DWSD’s November 15, 2012, Motion for Order Adopting the RCC’s Plan of Action Clarification was required to file a brief in opposition to the motion no

later November 29, 2012. (*See* Local Rule 7.1(d)(2)). As of this date, however, no party has filed any objection to the pending motion or sought an extension of time for doing so. Thus, the motion stands unopposed.³

ANALYSIS

I. The Court Shall Adopt The RCC's Plan Of Clarification As An Order Of The Court

This long-standing case was reassigned to this Court in November of 2010. As of September 9, 2011, this Court was faced with the unenviable task of determining how to remedy these ongoing and serious violations of the Clean Water Act, given the complex nature of the problem and the fact that the rather extraordinary actions taken over the past four decades proved inadequate. In addition, this Court concluded, based on the voluminous record in this action, that an effective equitable remedy to achieve sustained compliance would require this Court to order structural changes regarding the DWSD that would override the City of Detroit's Charter, its local ordinances, and some existing contracts. Yet this Court was mindful that such remedies that override state or local law should be narrowly tailored and that, to the extent possible, local

³On October 12, 2012, the EPA filed a "Notice" (D.E. No. 2492), stating that the MDEQ recently informed it about a specific contract proposal that the DWSD was considering ("the EMA proposal") and that it has not had a chance to review it. The EPA stated that it is "not taking any position on any aspect of the proposal before DWSD" but nevertheless seeks a period of forty-five (45) days "to evaluate the potential impacts of the proposal on CWA compliance and asks this Court not to take any actions that would open the way for DWSD to initiate implementation of that proposal prior to that time." (*Id.* at 2). On December 3, 2012, the EPA and MDEQ filed a Joint Statement (D.E. No. 2509) wherein they state that, after reviewing the proposal, they are not seeking any relief from the Court at this time because they believe that safeguards are already in place to minimize the risk that any reductions in staffing levels might undermine DWSD's ability to comply with its NPDES permit (i.e., the fact that the MDEQ must approve any changes to the minimum staffing levels under the ACO's approved Staffing Plan). Neither the EPA nor the MDEQ have filed any objections to the pending motions.

officials should at least have the opportunity to devise their own solutions to remedy a violation of federal law. *See, e.g., Missouri v Jenkins*, 495 U.S. 33 (1990); *Kendrick v. Bland*, 740 F.3d 432, 437 (6th Cir. 1984).

Rather than order a remedy on its own, without input from the City, this Court considered other options and ultimately took an admittedly unique approach that allowed local officials to devise and propose a workable solution:

Accordingly, the Court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a current member of the Board (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, propose a plan that addresses the root causes of non-compliance that are discussed in this Opinion & Order. In making such recommendations to the Court, these individuals *shall not* be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts.

(*Id.* at 42-43) (emphasis in original).

Although it was far from easy, these local officials did what was asked of them and presented the Court with a detailed initial Plan of Action, and a separate Procurement Policy. In doing so, they noted their belief that there may need to be additional changes made in the future, once implementation of the plan was underway. The Court adopted the Plan of Action and ordered its implementation in its November 4, 2011 Order.

On November 8, 2012, approximately a year into the implementation of the order, the RCC submitted its Plan of Clarification and the DWSD is now asking the Court to adopt that Plan of Clarification as an order of the Court. Having carefully considered this unopposed request, the Court concludes that it is appropriate to do so because it comports with this Court's over-arching goal of allowing local officials to devise their own solution to remedy the DWSD's recurrent violations of the Clean Water Act. Accordingly, the Court shall adopt the RCC's Plan

of Clarification as an order of this Court.

II. The Court Shall Clarify Its Ruling As To CETs

As explained in this Court's October 5, 2012, Opinion & Order, when most City of Detroit CBAs expired in June 2012, the City imposed terms of employment (City Employment Terms or "CETs.") The City, however, had not applied the CETs to any DWSD personnel because of this Court's November 4th Order which required the DWSD to enter into DWSD-specific CBAs.

Thereafter, on June 26, 2012, the Board of Water Commissioners ("BOWC") passed a Resolution that CETs are applicable to DWSD unions that have not settled CBAs until such time as: (a) the relevant union signs an agreement with DWSD; or (b) negotiations reach an impasse and the DWSD imposes its own terms and conditions of employment on that union. The DWSD's September 24, 2012, Motion for Clarification asked the Court to clarify or declare that the Resolution adopted by the BOWC on June 26, 2012, implements and is consistent with the November 4th Order and is effective and controlling.

After considering the request, this Court declared that "the BOWC's June 26, 2012 Resolution is in accordance with this Court's November 4th Order and shall be effective and controlling until this Court orders otherwise." (D.E. No. 2489 at 39).

In so declaring, this Court's intent was to confirm that this Court's November 4, 2011, Order does not stand as an obstacle to the DWSD implementing the CETs for DWSD employees – if permitted to do so under otherwise applicable law. The Court's intent was to confirm that if the City of Detroit may impose the CETs on unions with CBAs with the City, pursuant to Public Act 4, the City's Financial Stability Agreement with the State of Michigan, or some other

authority, then the DWSD is not prohibited from doing so by virtue of this Court's November 4, 2011 Order. In other words, the Court's intent was to rule that, with respect to the ability to impose CETs, the DWSD-specific unions stand in the same shoes as other unions that have CBAs with the City of Detroit. At the time that the Court issued its October 5, 2012, Opinion & Order, there appeared to be no dispute that the City could impose its CETs.

After this Court's October 5, 2012 Opinion & Order was issued, however, Public Act 4 was repealed by voter referendum. As the RCC notes in its Plan of Clarification, "the repeal of Public Act 4 and some Charter amendments in the City of Detroit lead to some uncertainty over the future of the City's financial stability agreement and the potential impacts on imposed terms and conditions of employment that may take substantial time to resolve." (D.E. No. 2505 at 2).

This Court believes that it is now appropriate to clarify its ruling and shall declare that this Court's November 4, 2011 Order does not stand as an obstacle to the DWSD implementing the CETs for DWSD employees – if permitted to do so under otherwise applicable law. As to this issue, the DWSD-unions stand in the same shoes as other unions with CBAs with the City of Detroit.

III. The Court Shall Order Supplemental Briefing On The DWSD's Requests Relating To Two Specific Charter Provisions And Requests Relating To The Scope Of The Court's Injunction As To MERC

In its September 24, 2012, Motion for Clarification, the DWSD asked the Court to clarify or declare that "Sections 7.5-208 and 7.5-209 of the Detroit City Charter regarding intra-governmental disputes and enforcement of the Charter shall not apply to issues related to DWSD and the implementation of and applicability of this Court's Orders." (DWSD's Motion at 7). The DWSD's motion, however, did not discuss the substance of either of the above Charter

provisions, nor did it sufficiently explain how the DWSD believes that those provisions are impeding the DWSD from complying with its NPDES Permit, the Clean Water Act, the current ACO with the MDEQ, or this Court's orders. In addition, it was unclear to this Court as to the precise relief that the DWSD is requesting as to these two Charter provisions. This Court, therefore, ordered that DWSD could file supplemental brief relating to these requests.

The DWSD's September 24, 2012 motion also asked the Court to clarify the scope of its injunction as to MERC. This Court agreed that clarification by the Court, as to the scope of its injunction as to MERC, was needed. The Court took the request under advisement and ruled that any party could file a supplemental brief on the issue.

In the pending motion, the DWSD asks for another extension for filing its supplemental brief relating to these two Charter provisions and its requests relating to the scope of the Court's injunction as to MERC.

The Court shall grant these requests and shall order DWSD to file its supplemental brief no later than January 4, 2013. Any party that wishes to file a brief in response to that supplemental brief shall do so by January 18, 2013, and if the DWSD wishes to file a reply it must do so no later than January 25, 2013. No further extensions will be granted.

IV. The Court Shall Order The Director's Final Report To Be Filed No Later Than March 15, 2013.

In this Court's November 4th Order, the Director of the DWSD was ordered to file an initial compliance report by May 4, 2012, identifying any additional barriers to long-term compliance with the ACO and the Clean Water Act, and making any additional requests to this Court that are needed for compliance. The Order provides for that report to be circulated among

the BOWC, the Mayor of the City of Detroit, the Detroit City Council, and the MDEQ, who could then provide comments, suggestions and recommendations to the Director before a final Director's Report of Compliance would be filed with the Court on August 4, 2012. (11/4/11 Order at 9-10).

On May 4, 2012, the DWSD filed an initial compliance report that, for several reasons, asked that the Court to extend the date for the filing of the Director's Final Compliance report to October 4, 2012. This Court granted that request in an Order issued on May 17, 2012, and, therefore, the Final Director's Report was due to be filed on October 4, 2012.

The DWSD's September 24, 2012 Motion for Clarification sought yet another extension for the filing of that report and asked the Court to "[e]xtend the date for filing the Final Director's Compliance Report from October 4, 2012 to April 4, 2013." (D.E. No. 2473 at 21).

The Court shall extend the filing date beyond the current deadline, which has now passed. But the Court concludes that there is no reason why the Final Director's Report cannot be submitted by March 15, 2013. Accordingly, the Court shall order that the Final Director's Report be submitted no later than **March 15, 2013**, and shall order that no further extensions will be granted absent a very compelling reason. After the filing of the Final Director's Report, any party wishing to file a motion seeking to dismiss this action may do so.

CONCLUSION & ORDER

For the reasons set forth above, it is ORDERED that the RCC's Plan of Clarification is hereby ADOPTED AS AN ORDER OF THIS COURT and this Court therefore ORDERS that:

- 1) The DWSD shall reimburse the City of Detroit for all actual costs, which include the indirect cost, of providing transition services to DWSD;

- 2) The BOWC is hereby authorized to delegate its final approval authority at threshold of its choosing for the settlement of litigation and for the resolution of contract claims paid by DWSD to the DWSD Director or DWSD General Counsel;
- 3) The DWSD shall work with the City's Chief Financial Officer to establish a reasonable fee for access to the City's tax system that will enable DWSD to perform its own Tax Clearances;
- 4) The BOWC is authorized to amend its procurement policy upon the affirmative vote of five members provided that any amendment to the policy that changes the approval threshold limits for the Board of Water Commissioners and/or the Detroit City Council shall also require approval by a super-majority vote of an Ad Hoc Root Cause Committee consisting of the Chairman of the Board of Water Commissioners, the Director of DWSD, the President of the Detroit City Council, the Chair of the Detroit City Council's Public Health and Safety Committee, and a representative appointed by the Mayor of the City of Detroit;
- 5) The DWSD is authorized to establish bank accounts in its own name without the City Treasurer as a signer, provided that the City is able to obtain information on those accounts necessary for the City's external auditors to perform required work related to the Certified Annual Financial Reports ("CAFR");
- 6) The DWSD is authorized to establish its own self-insurance fund;
- 7) The DWSD is authorized to approve the issuance of debt and to refinance debt upon the sole approval of the Board of Water Commissioners unless the debt contains a full or partial general obligation pledge of the City of Detroit, in which case City Council approval would be required prior to issuance; and
- 8) The DWSD shall work with the City of Detroit to better understand the financial impact, if any, that DWSD's establishment of a Defined Contribution Plan would have upon the City of Detroit's general fund.

IT IS FURTHER ORDERED that the City and the DWSD shall immediately implement this order.

IT IS FURTHER ORDERED that this Court hereby DECLARES that this Court's November 4, 2011, Order does not stand as an obstacle to the DWSD implementing the CETs for DWSD employees – if permitted to do so under otherwise applicable law. As to this issue, the DWSD-unions stand in the same shoes as other unions with CBAs with the City of Detroit.

IT IS FURTHER ORDERED that, no later than **January 4, 2013**, the DWSD may file a supplemental brief on its requests for relief as to two Charter Provisions (Sections 7.5-208 and 7.5-209 of the Detroit City Charter) and its requests related to the scope of the Court's injunction as to MERC. If it files such a brief, any party that wishes to file a brief in response to that supplemental brief shall do so by **January 18, 2013**, and if the DWSD wishes to file a reply it must do so no later than **January 25, 2013**. IT IS FURTHER ORDERED that no further extensions will be granted.

IT IS FURTHER ORDERED that the Final Director's Report shall be submitted to the Special Master in this action no later than **March 15, 2013**. IT IS FURTHER ORDERED that no further extensions will be granted absent a very compelling reason.

IT IS FURTHER ORDERED that, after the filing of the Final Director's Report, any party wishing to file a motion seeking to dismiss this action may do so.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: December 14, 2012

I hereby certify that a copy of the foregoing document was served upon counsel of record on

December 14, 2012, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

EXHIBIT 9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.
_____ /

OPINION & ORDER
RULING ON REMAINING REQUESTS
IN THE DWSD'S MOTION FOR INTERIM ORDER

This matter is currently before the Court with respect to three outstanding requests for relief that were initially raised in a Motion for Interim Order (D.E. No. 2473) filed by the Detroit Water and Sewerage Department ("DWSD") on September 24, 2012. In compliance with this Court's orders, the DWSD filed a supplemental brief regarding these outstanding requests on January 4, 2013. The City of Detroit filed a supplemental brief, objecting to requests by the DWSD relating to two Charter provisions. No other briefs regarding the remaining requests for relief have been filed and the time permitted for doing so has expired. The Court finds that oral argument would not significantly aid the decisional process. *See* Local Rule 7.1(f)(2), U.S. District Court, Eastern District of Michigan. The Court therefore orders that the remaining requests for relief will be decided without oral argument.

As explained below, the Court shall DENY the DWSD's requests relating to the Michigan Employment Relations Commission ("MERC"). Nevertheless, the Court shall clarify the limited scope of its injunction as to the MERC and the Wayne County Circuit Court. In

addition, the Court shall DENY the DWSD's requests relating to two Charter provisions because the Court is not convinced that the provisions at issue are impeding the DWSD from complying with its NPDES Permit, the Clean Water Act, the current ACO with the MDEQ, or this Court's orders.

BACKGROUND

This action, which was filed in 1977 and has been active since that time, has an exceptionally long history that is more fully set forth in this Court's September 9, 2011, Opinion & Order (D.E. No. 2397), its November 4, 2011 Order (D.E. No. 2410), and its October 5, 2012 Opinion & Order Regarding The DWSD's Motion For Interim Order (D.E. No. 2489). Only a truncated version of the background facts is included here.

The United States Environmental Protection Agency ("EPA") initiated this action in 1977 against the City of Detroit ("the City") and the DWSD, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("the Clean Water Act"). The undisputed violations in this case involve the DWSD's wastewater treatment plant and its National Pollutant Discharge Elimination System ("NPDES") permit. As explained in this Court's September 9, 2011, Opinion & Order:

For the more than 34 years during which this action has been pending, the City and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the City and the DWSD agree to a detailed remedial plan aimed at compliance, but the DWSD is unable to follow the plan and is again cited for the same or similar violations. Although this Court has taken various measures, designed to eliminate the various impediments to compliance that have been identified by experts and acknowledged by the City, those measures have proven inadequate to achieve sustained compliance. (*Id.* at 1).

In September of 2011, this Court was faced with the unenviable task of determining how

to remedy these ongoing and serious violations of the Clean Water Act, given the complex nature of the problem and the fact that extraordinary actions taken over the past four decades proved inadequate. Rather than order a remedy on its own, without input from the City, this Court considered other options and ultimately took a unique approach. (D.E. No. 2397 at 42-43). This Court ordered “the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a current member of the Board (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, propose a plan that addresses the root causes of non-compliance that are discussed in this Opinion & Order. In making such recommendations to the Court, these individuals *shall not* be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts.” (*Id.* at 42-43) (emphasis in original).

Thereafter, the City officials and BOWC member identified therein (“the Root Cause Committee”, hereafter the “RCC”) met to devise and propose a workable solution to remedy the underlying root causes of noncompliance. On November 2, 2011, the RCC submitted a written proposed “Plan of Action” (D.E. No. 2409), which this Court found adequately addressed the majority of the root causes of non-compliance outlined in this Court’s September 9, 2011, Opinion & Order. On November 4, 2011, this Court issued an Order adopting the Plan of Action proposed by the RCC and ordered its implementation. (D.E. No. 2410).

Although the RCC agreed that certain changes to existing collective bargaining agreements (“CBAs”) needed to occur, it did not agree on how to achieve the necessary changes.

Accordingly, this Court considered the issue on its own and ordered specific relief relating to CBAs. Among other things, the Court ordered that “[t]he DWSD shall act on behalf of the City

of Detroit to have its own CBAs that cover DWSD employees ('DWSD CBAs'). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD." (D.E. No. 2410 at 6). The November 4th Order also contains the following provision:

13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

(*Id.* at 7).

The DWSD has since been working toward implementing this Court's November 4, 2011, Order. That order provides that, until the order has been fully implemented, or this case has been dismissed, the RCC shall meet at least once a month to discuss the implementation of the plan.

On September 24, 2012, the DWSD filed a "Motion for Interim Order Clarifying November 4, 2011 Order and for Expedited Briefing Schedule." (D.E. No. 2473). The DWSD asserted that it needs an interim order to address uncertainties and ambiguities that arise out of this Court's November 4, 2011, Order, that are impeding the DWSD's ability to implement it. That motion included multiple requests for injunctive relief.

On October 5, 2012, this Court issued an "Opinion & Order Regarding The DWSD's Motion For Interim Order" (D.E. No. 2489). This Court granted the motion in part, denied it in part, took certain requests under advisement, and ordered supplemental briefing regarding certain requests.

Meanwhile, the RCC was still meeting on a regular basis to discuss the implementation of the November 4, 2011, Order.

On November 9, 2012, the Special Master submitted a “Root Cause Committee Plan of Action Clarification of November 8, 2012” to the Court, that had been submitted to the Special Master. (*See* D.E. No. 2505). The RCC’s Plan of Action Clarification stated that the RCC was aware of the pending motion seeking clarification of the November 4th Order and, because it actually devised the Plan of Action that was adopted by the Court, it “felt it was important to issue this interim report and weigh in on some of the items under consideration for the Court.” (D.E. No. 2505 at 3). The RCC made recommendations regarding several of the DWSD’s pending requests for relief. Among other things, the RCC recommended that the “DWSD should file a supplemental brief with respect to the issue of whether Corporation Counsel should be enjoined from acting under Sections 7.5-208 and 7.5-209 of the Detroit City Charter with respect to DWSD.” (*Id.*). The RCC agreed that clarification is needed as to MERC’s role in DWSD labor relations matters going forward, but offered no recommendation on that issue. (*Id.* at 6).

On November 15, 2012, the DWSD filed a “Motion For Order Adopting The Root Cause Committee Plan Of Clarification” (D.E. No. 2507) wherein the DWSD moved the Court to: 1) adopt the RCC’s Plan of Clarification as an order of the Court; and 2) extend the time for the DWSD to file its supplemental brief until fourteen (14) days after the Court rules on the Motion to Adopt the RCC’s Plan of Clarification.

On December 14, 2012, this Court issued an Opinion & Order (D.E. No. 2512) wherein it: 1) adopted the RCC’s Plan of Clarification as an order of the Court, thereby resolving the majority of the requests for relief that had been raised in the DWSD’s Motion for Interim Order;

and 2) granted another extension for supplemental briefs on the DWSD's requests for relief as to two Charter provisions (Section 7.5-208 and 7.5-209 of the Detroit City Charter) and requests relating to the scope of the Court's injunction as to MERC.

On January 4, 2013, the DWSD filed its supplemental brief on these outstanding requests. On January 18, 2013, the City filed a supplemental brief objecting to the DWSD's requests relating to two Charter provisions. On January 25, 2013, the DWSD filed a supplemental reply brief. No other briefs relating to the remaining requests for relief have been filed and the time permitted for doing so has expired.

ANALYSIS

I. The Court Shall Deny The DWSD's Requested Relief As To MERC But Shall Nevertheless Clarify The Narrow Scope Of Its Injunction As To MERC And The Wayne County Circuit Court.

This Court's November 4, 2011, Order enjoined MERC and the Wayne County Circuit Court from "exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court." (D.E. No. 2410 at 7).

As this Court later realized, however, the above language left the parties and MERC unsure as to the scope of that injunction.

This Court's August 23, 2012, Order later clarified that: 1) Paragraph 3 on Page 6 of this Court's November 4, 2011, Order was intended to, and shall be construed as, ordering the severance of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that

cover only DWSD employees; and 2) MERC is not enjoined from ruling on clarification petitions, in order to effectuate the above severancing ordered by this Court. (D.E. No. 2470 at 3).

The DWSD's September 24, 2012, Motion for Clarification asked the Court to further address issues relating to the jurisdiction of MERC.

This Court's October 5, 2012, Opinion & Order recognized that further clarification of the scope of its injunction as it relates to MERC is needed:

Although unintended, it is now apparent that this Court's November 4th Order does not provide MERC with sufficient direction as to the scope of its jurisdiction over petitions filed relating to the DWSD. The Court agrees that clarification by this Court is needed.

(D.E. No. 2489 at 37). The Court allowed the parties to file supplemental briefs on the issue.

The DWSD's supplemental brief states that "MERC presently has before it requests (1) from AFSCME for mediation and (2) from both the Association of Detroit Engineers ('ADE') and the Association of Municipal Engineers ('AME') for fact-finding related to the current round of negotiations" for new union contracts following this Court's November 4, 2011, Order. (DWSD's Supp. Br. at 5). The DWSD states that the "issues which are unresolved in DWSD's eight unsettled bargaining units" concern "wage, health insurance, pension, other fringe benefits and other terms and conditions of employment." (*Id.* at 13).

The DWSD asks the Court to "declare that MERC is prohibited from exercising jurisdiction over disputes arising from the CBA changes ordered by the Court or, in the alternative, limit MERC's exercise of jurisdiction to avoid interference with DWSD's implementation of this Court's Orders." (*Id.* at 8).

The Court will address these requests in turn. First, the DWSD asks the Court to declare

that MERC is “prohibited from exercising jurisdiction over disputes arising from the CBA changes ordered by the Court.” But so ordering would clarify little, if anything, for the parties or for MERC.

In its November 4, 2011, Order, this Court ordered the following injunctive relief that relates to DWSD unions and CBAs:

Specifically, the Court hereby **ORDERS** that:

1. The Director of the DWSD, with the input and advice of union leadership, shall develop a DWSD employee training program, a DWSD employee assessment program, and a DWSD apprenticeship training program.
2. Any City of Detroit Executive Orders imposing furlough days upon City employees shall not apply to DWSD employees.
3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees (“DWSD CBAs”). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have final authority to approve CBAs for employees of the DWSD.
4. The Court hereby strikes and enjoins any provisions in current CBAs that allow an employee from outside the DWSD to transfer (“bump”) into the DWSD based on seniority. Future DWSD CBAs shall adopt a seniority system for the DWSD that does not provide for transfer rights across City of Detroit Departments (ie., does not provide for “bumping rights” across city departments).
5. DWSD management must be able to explore all available means and methods to achieve compliance with its NPDES permit and the Clean Water Act. DWSD CBAs shall not prohibit subcontracting or outsourcing and the Court hereby strikes and enjoins any provisions in current CBAs that prohibit the DWSD from subcontracting or outsourcing.
6. DWSD CBAs shall provide that excused hours from DWSD work for union activities are limited to attending grievance hearings and union negotiations, with prior notification to DWSD management. The Court strikes and enjoins

any current CBA provisions to the contrary.

7. DWSD CBAs shall include a three-year time period pertaining to discipline actions.
8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of DWSD employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.
9. DWSD CBAs shall provide that promotions in the DWSD shall be at the discretion of management and based upon skill, knowledge, and ability, and then taking seniority into account. The Court strikes and enjoins and current CBA provisions to the contrary.
10. Past practices on operational issues shall not limit operational changes initiated by management with respect to DWSD CBAs.
11. The Court strikes and enjoins any provisions in existing CBAs that prevent DWSD management from assigning overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management. DWSD CBAs shall provide that management has the discretion to assign overtime work to employees most capable of performing the necessary work within a classification, at the discretion of management.
12. Any existing work rules, written or unwritten, or past practices that are contrary to these changes are hereby terminated.
13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

(Docket Entry No. 2410 at 6-7).

This Court's injunction as to MERC (and the Wayne County Circuit Court) was intended to be quite limited in scope. This Court only intended to enjoin MERC and the Wayne County

Circuit Court from: 1) ruling that the various items of specific relief relating to CBAs that were ordered by this Court constitute unfair labor practices; or 2) exercising jurisdiction over any grievances, unfair labor practice charges, or arbitration demands that are based upon the specific relief ordered by this Court. This Court did not intend to enjoin MERC from exercising jurisdiction over every dispute relating to collective bargaining that involves the DWSD. For example, this Court did not intend to enjoin MERC from exercising jurisdiction over the union requests that are currently pending before it, which relate to negotiations for new union contracts and involve disputes over wages, health insurance, fringe benefits, and other conditions of employment.

Second, the DWSD asserts that unless this Court either enjoins MERC from exercising jurisdiction over DWSD-related labor disputes altogether, or issues an order creating new DWSD-specific processes and procedures for MERC to follow, the resolution of labor disputes by MERC will delay the implementation of this Court's November 4, 2012 Order.

The Court disagrees. This Court has already ordered the severancing of DWSD employees from existing bargaining units that are comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees. Those new DWSD-specific units must now negotiate new CBAs. But until they execute such agreements, this Court has expressly enjoined those few provisions of currently-existing CBAs that have been shown to impede compliance with the Clean Water Act and the DWSD's NPDES permit. For example, this Court's November 4, 2011 Order "strikes and enjoins any provisions in current CBAs that allow an employee from outside the DWSD to transfer ('bump') into the DWSD based on seniority" and "strikes and enjoins any provisions in

current CBAs that prohibit the DWSD from subcontracting or outsourcing.” (D.E. No. 2410 at 6, ¶¶ 4 & 5). Thus, MERC exercising jurisdiction over disputes relating to negotiations for new union contracts, which involve disputes over issues such as wages and health insurance, will not impede this Court’s November 4, 2011 Order as it relates to the specific CBA provisions and work rules that this Court found to be impeding the DWSD from achieving and maintaining compliance with its NPDES permit and the Clean Water Act.

Accordingly, this Court will now clarify the limited scope of its injunction as to MERC and the Wayne County Circuit Court. To the extent that the DWSD asks the Court for a broader injunction, or an order creating new DWSD-specific processes and procedures for MERC to follow, those requests shall be denied.

II. The Court Shall Deny The DWSD’s Requests Relating To Two Specific Charter Provisions.

In its September 24, 2012, Motion for Clarification, the DWSD asked the Court to clarify or declare that “Sections 7.5-208 and 7.5-209 of the Detroit City Charter regarding intra-governmental disputes and enforcement of the Charter shall not apply to issues related to DWSD and the implementation of and applicability of this Court’s Orders.” (DWSD’s Motion at 7). The DWSD’s motion, however, did not discuss the substance of either of the above Charter provisions, nor did it sufficiently explain how the DWSD believes that those provisions are impeding the DWSD from complying with its NPDES Permit, the Clean Water Act, the current ACO with the MDEQ, or this Court’s orders. In addition, it was unclear to this Court as to the precise relief that the DWSD is requesting as to these two Charter provisions. This Court, therefore, ordered that DWSD and other parties could file supplemental brief relating to these requests.

The DWSD filed its supplemental brief on January 4, 2013. On January 18, 2013, the City filed its supplemental brief, wherein it objects to both requests. On January 25, 2013, the DWSD filed a supplemental reply brief.

Having reviewed the DWSD's supplemental briefs, and the City's objections, the Court is not convinced that the two Charter provisions at issue are impeding the DWSD from complying with its NPDES Permit, the Clean Water Act, the current ACO with the MDEQ, or this Court's orders. As such, the Court shall DENY the DWSD's requests relating to Sections 7.5-208 and 7.5-209 of the Detroit City Charter.

CONCLUSION & ORDER

IT IS ORDERED that the Court hereby CLARIFIES the limited scope of the injunction imposed relating to MERC and the Wayne County Circuit Court. This Court is only enjoining MERC and the Wayne County Circuit Court from: 1) ruling that the various items of specific relief relating to CBAs that were ordered by this Court constitute unfair labor practices; or 2) exercising jurisdiction over any grievances, unfair labor practice charges, or arbitration demands that are based upon the specific relief ordered by this Court.

Accordingly, the Court now ORDERS that it SHALL NOT constitute an unfair labor practice for the DWSD:

- 1) to take actions to develop a DWSD employee training program, a DWSD employee assessment program, or a DWSD apprenticeship training program;
- 2) to not apply any City of Detroit Executive Orders imposing furlough days to DWSD employees;
- 3) to act on behalf of the City of Detroit to have its own CBAs that cover only DWSD employees;

- 4) to prohibit or prevent a City of Detroit employee from outside the DWSD to transfer (“bump”) into the DWSD based on seniority;
- 5) to adopt a seniority system for the DWSD that does not provide for transfer rights across City of Detroit Departments (ie., does not provide for “bumping rights” across city departments);
- 6) to require or, demand during contract negotiations, that DWSD CBA’s do not contain any provisions that prohibit subcontracting or outsourcing;
- 7) to limit excused hours from DWSD work to attending grievance hearings and union negotiations, with prior notification to DWSD management;
- 8) to require or, demand during contract negotiations, that DWSD CBAs limit excused hours from DWSD work for union activities to attending grievance hearings and union negotiations, with prior notification to DWSD management;
- 9) to consider a three-year time period when considering employee discipline actions;
- 10) to require or, demand during contract negotiations, that DWSD CBAs include a three-year time period pertaining to discipline actions;
- 11) to perform a review of current employee classifications at the DWSD and reduce the number of DWSD employee classifications;
- 12) to require or, demand during contract negotiations, that DWSD CBAs include those revised and reduced employee classifications;
- 13) to promote DWSD employees based upon skill, knowledge, and ability, and then taking seniority into account;
- 14) to require or, demand during contract negotiations, that DWSD CBAs contain provisions stating that DWSD employees shall be promoted based upon skill, knowledge, and ability, and then taking seniority into account;
- 15) to assign overtime work to employees most capable of performing necessary work within a classification; or

- 16) to require or, demand during contract negotiations, that DWSD CBAs contain provisions stating that DWSD shall assign overtime work to employees most capable of performing necessary work within a classification.

The Court FURTHER ORDERS that both MERC and the Wayne County Circuit Court are ENJOINED from exercising jurisdiction over any grievances, unfair labor practice charges, or arbitration demands that are based upon:

- 1) the development of a new DWSD employee training program, DWSD employee assessment program, or DWSD apprenticeship training program;
- 2) DWSD employees being exempted or excluded from any City of Detroit Executive Orders imposing furlough days upon City of Detroit employees;
- 3) actions of the DWSD to have its own CBAs that cover only DWSD employees;
- 4) the prohibition of any City of Detroit employee from outside the DWSD from transferring (“bumping”) into the DWSD based on seniority;
- 5) the adoption or application of a seniority system for the DWSD that does not provide for transfer rights across City of Detroit Departments (ie., does not provide for “bumping rights” across city departments);
- 6) contract negotiation statements or demands that DWSD CBAs do not contain any provisions that prohibit subcontracting or outsourcing;
- 7) the DWSD limiting excused hours from DWSD work to attending grievance hearings and union negotiations, with prior notification to DWSD management;
- 8) contract negotiation statements or demands that DWSD CBAs limit excused hours from DWSD work for union activities to attending grievance hearings and union negotiations, with prior notification to DWSD management;
- 9) application of a three-year time period when considering employee discipline actions for DWSD employees;
- 10) contract negotiation statements or demands that DWSD CBAs include a

- three-year time period pertaining to discipline actions for DWSD employees;
- 11) the DWSD's court-ordered review and reduction of current employee classifications;
 - 12) contract negotiation statements or demands that DWSD CBAs include those court-ordered revised and reduced employee classifications;
 - 13) contract negotiation statements or demands that DWSD CBAs contain provisions stating that DWSD employees shall be promoted based upon skill, knowledge, and ability, and then taking seniority into account; and
 - 14) contract negotiation statements or demands that DWSD CBAs contain provisions stating that DWSD shall assign overtime work to employees most capable of performing necessary work within a classification.

IT IS FURTHER ORDERED That, to the extent that the DWSD asks the Court for additional injunctive relief, or for a broader injunction, those requests are DENIED.

IT IS FURTHER ORDERED that, with respect to the DWSD's requests for relief as to two Charter Provisions (Sections 7.5-208 and 7.5-209 of the Detroit City Charter), those requests are DENIED.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: January 30, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on January 30, 2013, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager

EXHIBIT 10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, et al.,

Case No. 77-71100

Defendants.

_____ /

OPINION & ORDER
TERMINATING SECOND AMENDED CONSENT JUDGMENT
AND CLOSING THIS CASE

The United States Environmental Protection Agency (“EPA”) initiated this litigation on May 6, 1977, against the City of Detroit and the Detroit Water and Sewerage Department (“DWSD”), alleging violations of the Clean Water Act, 33 U.S.C. § 1251 et seq. (“the Clean Water Act”). The violations alleged in this case, which are undisputed, involve the DWSD’s wastewater treatment plant (“WWTP”) and its National Pollutant Discharge Elimination System (“NPDES”) permit.

This case was originally assigned to the Honorable John Feikens. As explained below, Judge Feikens presided over this case for decades, during which time he took various actions aimed at allowing the DWSD to achieve short and long-term compliance with its NPDES permit and the Clean Water Act. Although Judge Feikens took various measures, designed to eliminate the impediments to compliance that have been identified by multiple experts and acknowledged by the City, those measures proved inadequate and the violations continued.

This case was reassigned to this Court on November 29, 2010, following Judge Feikens's retirement. At that time, the Michigan Department of Environmental Quality ("MDEQ")¹ was addressing renewed permit violations with the DWSD and negotiating yet another remedial plan.

Effective July 8, 2011, the City, the DWSD, and the MDEQ entered into an Administrative Consent Order, setting forth a detailed remedial plan. Thereafter, the City filed a motion asking this Court to dismiss this action and close the case, asserting that the City had achieved substantial compliance.

This Court, however, denied that motion in a detailed Opinion & Order issued on September 9, 2011. This Court concluded that the DWSD had not achieved even short-term compliance with its NPDES permit, as it self-reported new violations shortly after signing the Administrative Consent Order. This Court further concluded that the record in this case establishes that, unless more fundamental corrective measures were taken to address the underlying root causes of non-compliance, the DWSD would remain in a recurring cycle where the DWSD is cited for permit violations, the DWSD and the MDEQ agree to a detailed remedial plan, but the DWSD is unable to follow it and is again cited for the same type of violations. Rather than order a remedy on its own, without input from City leaders, the Court took a somewhat unorthodox approach. This Court created a court-ordered committee ("the Root Cause Committee") to devise and propose a workable plan to address and remedy the underlying root causes of the DWSD's inability to comply with its NPDES permit and the Clean Water Act.

¹In 1995, the Governor of the State of Michigan created the Michigan Department of Environmental Quality ("MDEQ") and transferred all of the statutory powers, duties and functions of the Michigan Department of Natural Resources relevant herein to the MDEQ. The name has changed several times throughout the years. For ease of reference, this Department will be referred to as MDEQ throughout this Opinion & Order.

On November 4, 2011, this Court adopted the Root Cause Committee's Plan of Action, and its proposed procurement policy, and ordered its implementation. Thereafter, the DWSD hired its first permanent Director since 2008, who began working on implementing the changes ordered.

Pursuant to the procedure set forth in the November 4, 2011 Order, this Court ordered the DWSD's Director to submit a Final Director's Report of Compliance. That report was filed on March 15, 2013, after several extensions.

Having reviewed the Final Director's Report of Compliance ("FDRC"), this Court is satisfied that the changes agreed to by the parties, and the changes ordered by this Court, have been substantially implemented. A more empowered Board of Water Commissioners has been established and it has made tremendous progress. The DWSD now has its own fully-functional, in-house, human resources department and the DWSD is now meeting the Administrative Consent Order's staffing requirements. The DWSD has a new and improved procurement policy and substantial progress as to other changes ordered by the Court has been made such that further Court intervention is not necessary.

The Court notes that the FDRC references a new, unsolicited proposal from the Root Cause Committee, asking this Court to order a regional authority and order or approve the transfer of the DWSD's assets to a regional authority. The Court shall deny any requests relating to this proposal because this Court lacks the authority to order the changes that are now being proposed. And even if this Court had such authority, it would decline to order the relief requested for a multitude of reasons.

The FDRC contains five requests for clarification or relief that the Court shall address.

First, this Court declines to modify the rate settlement agreements between the parties. If the DWSD and its customer communities desire to modify those agreements, they are free to negotiate any changes needed without the involvement of the Court. Second, to the extent that the DWSD leadership has a real concern and is unable to resolve any issues with vendors who demand adequate assurances regarding payment, such issues are more properly addressed to City Administration. Third, the Court declines any further requests regarding the DWSD establishing its own Defined Contribution Plan because that is an issue to be resolved between the DWSD and the City. Fourth, the Court declines to exempt Board of Water Commissioner members from the current City of Detroit Charter provision that provides that “[n]o member of the Board shall be a City official or employee, or a principal or employee of contractor of the City.” Fifth, the Court declines to restrict who may negotiate on behalf of DWSD-specific unions.

Having reviewed the FDRC, and having held a status conference on March 21, 2013, this Court finds that while the DWSD’s compliance record is still not perfect, it is vastly improved, especially in the historically problematic areas. The MDEQ recently issued a new NPDES permit to the DWSD, with an effective date of May 1, 2013, and an expiration date of October 1, 2017. This Court concludes that the MDEQ, the environmental agency charged with issuing and overseeing the DWSD’s NPDES permit, will continue to work with the DWSD to resolve any issues that may arise over time regarding that permit.

The Court concludes that, after more than thirty-five years of federal court oversight, the DWSD has achieved substantial compliance with its NPDES permit and the Clean Water Act. This Court shall therefore terminate the Second Amended Consent Judgment and close this case because the existing Administrative Consent Order is a sufficient mechanism to address any

future issues regarding compliance with the DWSD's NPDES permit and the Clean Water Act.

I. Background

This case, which is now in its fourth decade, has an exceptionally long history that is more fully set forth in this Court's September 9, 2011, Opinion & Order (D.E. No. 2397) and this Court's November 4, 2011, Order (D.E. No. 2410). Below is a condensed summary.

A. Actions Taken While Judge Feikens Presided Over This Case

The EPA initiated this action on May 6, 1977, against the City and the DWSD, alleging violations of the Clean Water Act. The action was originally assigned to the Honorable John Feikens. The State of Michigan was realigned as a party plaintiff because of the mutuality of interest in the subject matter of this case.²

The DWSD provides wastewater collection, treatment and disposal services for Detroit and approximately 76 municipal suburban communities. The DWSD also provides water service to approximately four million people in Detroit and neighboring Southeast Michigan communities.

The violations alleged in this case, which were undisputed, involve the DWSD's WWTP and its NPDES permit. Although this action was initiated by the EPA, the MDEQ was later joined in the action and the MDEQ is the entity that now directly oversees the DWSD's NPDES permit.

The EPA's Complaint alleged that the discharged effluent from the DWSD's WWTP was

²By Orders dated June 29, 1977, and July 6, 1977, Judge Feikens also joined as parties various governmental entities that received wholesale sewerage services from the DWSD pursuant to written contracts and communities whose wastewater was treated by the DWSD pursuant to contract.

in violation of the Clean Water Act. It further alleged that the number of personnel employed at the WWTP has not been sufficient, personnel are not adequately trained, and purchasing of necessary and required supplies and equipment has not been timely or at an acceptable level. (EPA's Compl.).

On September 14, 1977, Judge Feikens entered a Consent Judgment establishing a compliance schedule for the DWSD to address and correct the Clean Water Act violations. The 1977 Consent Judgment required, among other things, that the DWSD prepare and implement a staffing program detailing its manpower needs, repair and maintain certain dewatering equipment, and prepare and implement a procurement plan to ensure that necessary procurements of supplies, materials and equipment were made.

This case, however, was not closed upon entry of the 1977 Consent Judgment. In November of 1978, Judge Feikens entered an Order appointing Professor Jonathan W. Bulkley as Court Monitor, ordering him to study the operations of the WWTP and report his findings to the Court, and make recommendations to facilitate compliance with the 1977 Consent Judgment. (D.E. No. 366). On December 29, 1978, Dr. Bulkley submitted his report ("Dr. Bulkley's 1978 Report"). (D.E. No. 381). It found that several activities at the DWSD were not in compliance with the requirements of the 1977 Consent Judgment, including: 1) staffing; and 2) procurement activities. (See D.E. No. 381 & D.E. 2397 at 9-10).

After receipt of Dr. Bulkley's 1978 Report, Judge Feikens issued an order appointing the current mayor of the City of Detroit, Coleman A. Young, as Special Administrator of the DWSD. (D.E. No. 1848-3). Judge Feikens created the position of Special Administrator because he found that compliance with the 1977 Consent Judgment required the exercise of the Court's

equitable powers. His Order gave the Special Administrator very broad powers to take various actions that otherwise would have been prohibited by the City of Detroit's Charter, including bypassing the Board of Water Commissioners and the Detroit City Council on, among other things, matters relating to procurement of material and services.

After testing at the WWTP revealed that the DWSD failed to comply with the terms of the 1977 Consent Judgment, an Amended Consent Judgment was entered on April 23, 1980, that modified the schedule for achieving compliance with effluent limitations for the WWTP set forth in the DWSD's NPDES Permit.

On August 25, 1983, after the City of Detroit had met certain requirements of the Amended Consent Judgment, the MDEQ issued a new NPDES permit to the DWSD. On June 8, 1984, Judge Feikens entered an Order that took judicial notice of the DWSD's NPDES permit and terminated those Amended Consent Judgment provisions that the DWSD had satisfied. That Order also identified the Amended Consent Judgment provisions with which the DWSD was still required to comply and provided that the Court retained jurisdiction to ensure full compliance with the Amended Consent Judgment.

NPDES permits were re-issued to the DWSD effective February 1, 1990, and December 1, 1992, respectively.

In 1994, the DWSD commissioned an operational and organizational review ("the OOR Report") of the department. That report found the same problems and issues identified by Dr. Bulkley in his 1978 Report. (*Id.*; D.E. No. 2397 at 12-13).

In 1997, the DWSD again fell out of compliance with its NPDES permit due to insufficient dewatering capacity, and in August 1997, the DWSD reported certain violations of

its NPDES permit to the MDEQ. Thereafter, Judge Feikens appointed a committee, which included Dr. Bulkley, to investigate the cause of the renewed violations. (See D.E. No. 1872, wherein Judge Feikens explained that he “appointed a committee to investigate why, after so many years of court oversight, the [WWTP] was not able to remain in compliance” with the Clean Water Act.). The committee completed a report of the causes of the noncompliance in January 2000 (the “2000 Investigative Report”). (D.E. No. 1649). It concluded that the “technical deficiencies [with dewatering equipment] and operating conditions at the plant level were caused by the deficiencies and ineffectiveness of four major DWSD and City Programs.” (D.E. No. 1649 at 1). These programs were capital improvements, finance, purchasing and materials management, and human resources. (See D.E. No. 2397 at 14-15). The 2000 Investigative Report noted that “[o]nly through actions taken by operations personnel that bypassed the impediments created by the City and DWSD policies and procedures for the procurement of materials and supplies has the plant returned to compliance. If these extraordinary (and costly) stop-gap measures had not been taken, the WWTP would have remained in violation of its NPDES permit.” (D.E. No. 1649, Section 1 at 4).

The City of Detroit filed a written response to the 2000 Investigative Report, suggesting that another appointment of a Special Administrator for the DWSD was needed to achieve short-term compliance. (D.E. No. 1650). Thereafter, Judge Feikens entered an order appointing then-Mayor Dennis Archer as Special Administrator. (D.E. No. 1848-4).

On August 30, 2000, Judge Feikens entered a Second Amended Consent Judgment that set forth yet another compliance schedule for the DWSD to address and correct the NPDES permit violations. (D.E. No. 1688). It incorporated by reference the Order Appointing Special

Administrator and “supplant[ed] and superced[ed] the Amended Consent Judgment entered on April 25, 1980.” (D.E. No. 1688 at 13). The Second Amended Consent Judgment provides that it “shall terminate on the date a written Order of Termination is signed by the federal court.” (Id. at 15).

This case, however, did not close upon the entry of the Second Amended Consent Judgment. Judge Feikens continued to oversee the DWSD.

On May 2, 2008, Judge Feikens issued an order requesting briefing regarding compliance. (D.E. No. 2122). In that order, he expressed concern regarding several problem areas, including staffing and human resources issues. He asked the DWSD to respond to concerns in writing, and directed it to go beyond the “boilerplate language” of the quarterly reports it had been submitting.

In response, the City retained Intrastructure Management Group, Inc. to prepare a report addressing various issues. (D.E. No. 2130). Like the reports submitted by others in the past, the report noted the same problems areas. It suggested that the long-standing systemic problems at the DWSD required structural changes. (See D.E. No. 2130-3).

In September 2009, the DWSD again fell out of compliance with its NPDES permit. Judge Feikens then requested that Dr. Bulkley investigate the renewed violations. On June 15, 2010, Dr. Bulkley provided another written report to the Court (the “2010 Bulkley Report”). (D.E. No. 2296). It stated “[i]t is apparent that the current permit violations are similar to the problems that have occurred since the issuance of the original Consent Judgment in 1977.” (Id. at 4). Dr. Bulkley continued by stating that “[t]he nine (9) causes identified in the January 12, 2000 Report of the Committee of Investigation are very similar to certain of the issues that appear to be contributing to the current Total Suspended Solids NPDES violations from the

DWSD's wastewater treatment plant." (Id.). As such, Dr. Bulkley attached a copy of the 2000 Investigative Report – which found serious problems with human resources, capital improvement, and purchasing in 2000 – to his 2010 report. The 2010 Bulkley Report concluded “[t]he changes implemented in 2000 were apparently insufficient to maintain compliance over the long term, as evidence by the recurring solids build up problem and the related permit violations. It may be appropriate to consider more fundamental corrective measures to address the institutional problems which are adversely impacting the performance of DWSD's wastewater treatment plant.” (D.E. No. 2296).

Following the renewed violations in 2009, the Engineering Society of Detroit was also asked to assess and identify immediate emergency corrective steps and a sustainable, long-term remediation strategy for the DWSD. In July of 2010, its written report was submitted to the City, the Court, and the MDEQ. It too noted the same continuing problems with the City's practices, as they relate to the DWSD, in the areas of human resources and purchasing.

In response to the Second Notice of Violation dated April 14, 2010, on September 15, 2010, the DWSD filed a Corrective Action Plan (“CAP”) dated August 31, 2010, which represented its “Roadmap for sustainable compliance.” (D.E. No. 2309 at 7). The DWSD's CAP identified, as causes of the current violations, problems that had been identified as the causes of the previous violations in 1997, including: failed maintenance planning; lack of skilled trades and other key personnel; and significant shortcomings in the purchasing and procurement areas.

On October 13, 2010, MDEQ responded to the CAP, stating that although the CAP adequately addressed the immediate short term action items needed to achieve compliance, “it failed to adequately address the issues that are critical to ensuring long term compliance such as

staffing, purchasing, long term solids disposal and maintenance planning.” (MDEQ’s 10/13/10 Letter, Appendix to D.E. No. 2397, No. 9).

On November 29, 2010, after Judge Feikens retired, this case was reassigned to the undersigned. (D.E. No. 2323).

B. Actions Taken After This Case Was Reassigned

This case has now been pending before the undersigned for more than two years. Below is a summary of what has been accomplished during that time.

1. On February 11, 2011, The Parties Agreed To A Stipulated Order To Create A More Empowered Board Of Water Commissioners

After this action was reassigned, the Court held several conferences with the parties to discuss the status of this case and the recent violations.

In February of 2011, the City, along with the counties of Wayne, Oakland and Macomb, determined that a more empowered Board of Water Commissioners (“BOWC” or “the Board”) would enhance the DWSD’s ability to comply with its NPDES permit and the Clean Water Act. (See 2/11/11 Stipulated Order, D.E. No. 2334, at 1) (“[T]he parties agree that the DWSD’s ability to comply with environmental laws and its NPDES Permit will be enhanced by the Board’s exercise of its powers and authority to the fullest extent of the law.”)

The Stipulated Order provides that BOWC members must have at least seven years of experience in a regulated industry, a utility, engineering, finance or law and that the Board will be compensated. (Id.). It further provides that the BOWC “will be supported by certain staff having expertise in the fields of law, finance, and technology pertinent to DWSD operations (i.e. engineering and/or water or wastewater operations).” (D.E. No. 2334 at 2). The Stipulated

Order further provides that “[w]ithin six months of the date of this Order, any party may file a motion with the Court to demonstrate that the [DWSD] is in substantial compliance with its NPDES Permit and the consent judgments of this Court. If the Court is satisfied that substantial compliance has been achieved, it shall dismiss this lawsuit.” (Id.).

In compliance with the February 11, 2011 Stipulated Order (the “Stipulated Order”), on April 1, 2011, Mayor Bing appointed a new BOWC. The BOWC has since amended its by-laws, to incorporate the provisions of the Stipulated Order.

2. The City/DWSD And The MDEQ Enter Into An ACO on July 8, 2011

During the first six months following reassignment, the City and the DWSD worked with the MDEQ to develop yet another plan for compliance. Effective July 8, 2011, the City, the DWSD and MDEQ entered into the Administrative Consent Order (“ACO”), aimed at achieving compliance with the DWSD’s NPDES permit and the Clean Water Act. (D.E. No. 2365-1). The ACO sets forth a detailed remedial plan, to be accomplished over a substantial period of time, projected to extend to at least 2016. (Id. at 7).

It includes, among other things, that the DWSD would develop a written Staffing Plan to establish minimum staffing levels that would be maintained in accordance with a defined schedule. (D.E. N. 2365-1 at 9-10). The MDEQ has since approved a written Staffing Plan for the DWSD.

3. The City’s July 25, 2011 Motion To Dismiss And The Court’s Opinion & Order Denying It Without Prejudice

On July 25, 2011, the City filed a “Motion to Dismiss and for Relief from the Second Amended Consent Judgment.” (D.E. No. 2365). In that motion, the City noted that the MDEQ and the DWSD had recently entered into the ACO and asked this Court to order that the

requirements set forth in that ACO are substituted for the requirements of the August 30, 2000 Second Amended Consent Judgment. The City also asserted that the DWSD had made substantial progress toward achieving full compliance with its NPDES permit and the Clean Water Act and, as a result, the Court should dismiss this action.

Documentation provided to the Court by the MDEQ, however, reflected that after executing the ACO on July 8, 2011, the DWSD self-reported new violations of its NPDES permit to the MDEQ, which included the WWTP's total suspended solids (TSS). In a letter dated September 7, 2011, the MDEQ advised the DWSD that these violations of the DWSD's "NPDES permit effluent limitations occurring after the effective date of the ACO, July 8, 2011 are violations of the ACO" and that stipulated penalties may be assessed for these new violations under the ACO. That letter further stated that the violations were expected to continue.

At the time that the City's Motion to Dismiss was filed, the DWSD had been without a permanent Director since June 30, 2008.

This Court denied the City's Motion to Dismiss, without prejudice, in a forty-four (44) page Opinion & Order issued on September 9, 2011. (D.E. No. 2397). In doing so, this Court noted that shortly after executing the ACO on July 8, 2011, the DWSD self-reported serious violations of its NPDES permit to the MDEQ. Thus, this Court concluded that the City had not established that the DWSD had achieved even short-term compliance with the ACO and the Clean Water Act.

This Court explained that while enforcement actions typically result in a remedial plan, the Court's powers extend beyond ordering remedial plans:

"[E]nforcement actions typically result, by consent or otherwise, in a remedial

order setting out a detailed schedule of compliance designed to cure the identified violation of the Act.” Weinberger, 456 U.S. at 318. Nevertheless, a district court has broad equitable discretion in remedying violations of the Act and is not limited to such orders. *Id.*; see also *United States v. Metropolitan District Commission*, 930 F.2d 132, 135 (1st Cir. 1991) (“The law confers broad legal authority upon a district court to choose appropriate remedies for violation of the Clean Water Act.”) (emphasis in original). The Clean Water Act permits “the exercise of a court’s equitable discretion” to “order relief that will achieve compliance with the Act.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (emphasis in original).

(D.E. No. 2397 at 35-36). This Court noted that, from the inception of this case, a collaborative approach aimed at achieving compliance through consent judgments or other orders setting out a remedial plan designed to cure the violations was attempted in this case:

Rather than contest the violations, the City and the DWSD entered into a consent judgment that set out a detailed compliance plan designed to cure the violations. As the record reflects, however, that approach has not stopped the violations. Despite entering into a series of agreements containing detailed compliance plans, the DWSD has been unable to comply with those plans, resulting in repeated violations of the Clean Water Act. For the more than 34 years during which this action has been pending, the City and the DWSD have remained in a recurring cycle wherein the DWSD is cited for serious violations of its NPDES permit, the City negotiates and agrees to a detailed remedial plan for compliance, but the DWSD is unable to follow the plan and is again cited for the same or similar violations. Thus, although a collaborative approach employing detailed remedial plans has been attempted, that approach has not resulted in compliance with the Clean Water Act and the violations have continued.

(*Id.* at 37-38).

This Court also noted that, over several decades, Judge Feikens had also taken other actions, in addition to remedial plans, aimed at achieving long-term compliance:

Recognizing that a detailed remedial plan alone would not lead to sustained compliance, Judge Feikens took numerous actions, detailed in the preceding Findings of Fact, aimed at enabling the City and the DWSD to achieve long-term compliance with the DWSD’s NPDES permit and the Clean Water Act.

For example, Judge Feikens appointed a highly qualified³ environmental expert, Dr. Jonathan W. Bulkley, to act as Court Monitor. He also used more intrusive means designed to eliminate, at least temporarily, the institutional impediments to sustained compliance, including successive appointments of Detroit Mayors as Special Administrators, who were empowered to take actions on behalf of the DWSD irrespective of the City's Charter, ordinances, policies and contracts.

Judge Feikens also had the DWSD use outside consultants to assist with troubled areas such as contracting. For example, from November 2002 through November 2010, the consulting firm IMG was retained to examine and review DWSD contracts over \$500,000.00. (See, e.g., D.E. Nos. 1742 & 2308).

(Id. at 38-39).

In addition, and in this Court's view, most significantly, "Judge Feikens took additional measures designed to help the DWSD attain sustained compliance by having Dr. Bulkley, and various other experts, investigate the underlying root causes for the recurring cycle of violations. The City and the DWSD had direct participation with those studies and the City commissioned some of its own." (Id. at 39). The record reflects that the underlying root causes of the DWSD's non-compliance have been studied by experts ad nauseam (e.g., Dr. Bulkley's 1978 Report, done after the City/DWSD failed to comply with the terms of the 1977 Consent Judgment; the 1994 Operational and Organizational Review of the DWSD; the 2000 Investigative Report, which was done after the DWSD again fell out of compliance with its NPDES permit in 1997; the DWSD Succession Plan Report, prepared by IMG in 2007; Dr. Bulkley's 2010 Report, done after violations recurred again in 2009; and the Engineering Society of Detroit Consensus Action Report in 2010, also done after violations recurred in 2009).

Moreover, these experts that have studied the DWSD had consistently, over many years, opined that the same root causes stand in the way of the DWSD being able to comply with its

{ See Appendix to Opin. & Order No. 13).

NPDES permit, the remedial orders agreed to in this case, and the Clean Water Act: “1) the DWSD having an insufficient number of qualified personnel at the WWTP; 2) excessive and unnecessary delays in hiring qualified personnel across all job positions at the DWSD; 3) the DWSD’s required use of the City’s Human Resources Department, resulting in significant delays in filling critical positions at the DWSD; 4) the City’s personnel policies, civil service rules, and union rules and agreements, restricting the compensation, recruitment and prompt hiring of necessary personnel at the WWTP; 5) insufficient training of personnel at the DWSD and WWTP; 6) lack of a succession plan at the DWSD; 7) obsolete job descriptions and qualifications for various positions within the DWSD; 8) untimely and inadequate purchasing of necessary equipment and supplies for the WWTP; 9) excessive delays in the processing of purchase requisitions for critical repair and/or replacement parts; 10) the City’s flawed purchasing practices and procedures; 11) the City’s ineffective procurement system; 12) the approval process for purchases over \$25,000, created by the City’s Charter and/or ordinances, unnecessarily delaying contracts for essential parts, equipment, and services at the DWSD; 13) the City’s bidding and certification requirements, delaying contract approvals; and 14) the DWSD’s repeated failure to replace aged and deteriorated capital equipment and to maintain solids dewatering facilities at the WWTP.” (Id. at 39-40). In addition to the above experts, since the inception of this case, the EPA and the MDEQ have also identified many of these same root causes as impeding compliance. This Court found that the above are the underlying “root causes behind the DWSD’s inability to sustain compliance with its NPDES permit, the remedial orders in this case, and the Clean Water Act.” (Id. at 41).

This Court was then faced with the unenviable task of determining how to remedy the

ongoing and serious violations of the Clean Water Act, given the complex nature of the underlying root causes of non-compliance and the fact that the rather extraordinary actions taken over several decades proved inadequate.

Rather than order a remedy on its own, without input from the City, this Court considered other options and ultimately decided to take an admittedly unique approach:

[T]his Court concludes that, in order to achieve long-term compliance with the Clean Water Act, other less intrusive measures, over many years and many attempts, having proved unsuccessful, more fundamental and intrusive corrective measures are required. The record in this case establishes that, unless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to sustained compliance that have been identified by experts and acknowledged by the City, the DWSD will remain in this recurring cycle and will never achieve sustained compliance with its NPDES permit, the ACO, and the Clean Water Act.

The Court further concludes that an effective equitable remedy to achieve sustained compliance will require this Court to order structural changes regarding the DWSD that will likely override the City of Detroit's Charter, its local ordinances, and/or some existing contracts.

This Court does not arrive at this conclusion lightly. As noted above, Judge Feikens attempted several less intrusive measures, over several decades, but those less intrusive measures have not enabled the DWSD to achieve sustained compliance. In addition, although the City has had ample opportunity to devise and implement its own solutions to the underlying causes of noncompliance that have been identified and discussed since the inception of this case, to date, it has not proposed or implemented a plan that has sufficiently addressed those root causes.

To be fair, the City has been constrained in the measures it has proposed or implemented to date because the City is bound by various provisions of the City's Charter and ordinances, and existing contracts, that prevent the City from making fundamental changes in the identified problem areas.

This Court, however, has broad equitable power to order any relief necessary to achieve compliance with the Clean Water Act and this Court is not constrained by the provisions of the City's charter or ordinances. *Weinberger*, 456 U.S. at 318; *Perkins*, 47 F.3d at 216.

This Court appreciates that its broad equitable authority is to be "tempered by precepts of comity and federalism." *Kendrick*, 740 F.2d at 437. As then-Judge (now Justice) Stephen Breyer explained in *Metropolitan District*

Commission,⁴ considerations of comity and federalism, however, do not give a state or municipality the legal power to violate federal law or to continue violations of the Clean Water Act over a thirty-four year period. *United States v. Metropolitan District Commission*, 930 F.2d at 136. Maintaining the status quo is not an option.

Nevertheless, this Court is mindful that remedies that override state or local law should be narrowly tailored and that, to the extent possible, local officials should at least have the opportunity to devise their own solutions to remedy a violation of federal law.

Accordingly, the Court shall ORDER the Mayor of the City of Detroit (and/or his designee), the City Council President and President Pro Tem, and a current member of the Board (to be chosen by the Board) to meet and confer and, within 60 days of the date of this order, propose a plan that addresses the root causes of non-compliance that are discussed in this Opinion & Order. In making such recommendations to the Court, these individuals shall not be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts. If the local officials fail to devise and propose a workable solution to remedy the underlying causes of the recurrent violations of the Clean Water Act in this case, this Court will order a more intrusive remedy on its own.

(Id. at 42-43).

4. This Court's November 4, 2012 Order

Following this Court's September 9, 2010 Opinion & Order, the designated local leaders ("the Root Cause Committee") met and conferred in order to devise and propose a workable solution to remedy the underlying root causes of noncompliance. On November 2, 2011, the Root Cause Committee (hereinafter referred to as the "RCC") submitted a written proposed "Plan of Action" to the Special Master in this action, which the Special Master then submitted to the Court on that same date. (Docket Entry No. 2409).

In an Order issued on November 4, 2012 (D.E. No. 2410), this Court adopted the Plan of Action proposed by the RCC:

⁴United States v. Metropolitan District Commission, sometimes referred to as the Boston Harbor case, is another case involving Clean Water Act violations continuing over many years.

Having studied the Plan of Action proposed by the Root Cause Committee, the Court concludes that the Plan of Action adequately addresses the majority of the root causes of non-compliance that are outlined in this Court's September 9, 2011 Opinion & Order. As such, the Court ADOPTS the Plan of Action proposed by the Root Cause Committee (Ex. A to this Order), which includes a DWSD Procurement Policy (Ex. B to this Order), and ORDERS that the Plan of Action shall be implemented in order to remedy the recurring violations of the Clean Water Act in this case.

(Id. at 4). This Court noted that although it was ordering rather significant structural changes to the DWSD, the changes ordered by the Court "do not structure the DWSD as a separate entity."

(Id.). That is, the structural changes ordered by this Court did not alter the fact that the DWSD, and all of the assets of the DWSD, are owned by the City of Detroit.

The Court concluded, however, that the Plan of Action did not adequately address collective bargaining issues and ordered additional relief necessary for the DWSD to achieve short-term and long-term compliance. (Id. at 4-7).

In a section of the RCC's Plan of Action titled "Additional Considerations" (Plan of Action at 6), the RCC discussed the concepts of: 1) an "Efficient Compliance Payment;" and 2) a Payment in Lieu of Taxes ("PILOT") arrangement. But the Plan of Action stated that the RCC was unable to achieve consensus on a recommended path due to the complexity of the concepts under consideration and time constraints. As such, the Court ordered that the RCC could continue to meet and study those concepts and that it could submit a written supplement to the Plan of Action to the Special Master regarding those concepts and any recommendations no later than February 4, 2012. (D.E. No. 2410 at 8).⁵

⁵The RCC did not submit a written supplement to the Plan of Action regarding either of those concepts by February 4, 2012; nor did it request an extension.

Finally, the Court ordered implementation of the adopted Plan of Action and the additional relief ordered by the Court. (Id. at 8-10).

Recognizing that it may take several months to implement the changes ordered by the Court, the November 4, 2011, Order set forth a procedure for the submission of a final compliance report to the Court, so that the Court could make any necessary modifications before closing this case:

5. Within 6 months from the date of this Order (by May 4, 2012), the Director of DWSD shall prepare a written Report of Compliance with the ACO that identifies any current or anticipated barriers to long-term compliance with the ACO and the Clean Water Act (“the Director’s Report of Compliance”). The Director of the DWSD shall include within that report any additional recommendations or changes that are necessary to achieve long-term compliance.
6. The Director’s Compliance Report shall be provided to the BOWC, the Mayor of the City of Detroit, the Detroit City Council, the MDEQ, and the Special Master. The Director’s Compliance Report shall request any comments, suggestions, or recommendations from the BOWC, the Mayor of the City of Detroit, the Detroit City Council, and the MDEQ within 30 days.
7. To provide adequate time for review and consideration of the comments, suggestions, and recommendations made, and to allow an opportunity to make necessary changes, the Director of the DWSD shall submit, to the Special Master, a final report to the Court on the status of compliance with the ACO, any remaining barriers to long-term compliance, together with proposed solutions, within 90 days of submission of the initial Director’s Report of Compliance.
8. After receiving the final Director’s Report of Compliance, the Court will determine whether it shall modify or amend this Order. If the Court determines that this Order needs to be amended, the amended order will be issued within 30 days after the Court’s receipt of the final Director’s Report of Compliance.

(D.E. No. 2410 at 8-10).

5. Implementation Of The November 4, 2011, Order

Thereafter, Sue McCormick was hired as the Director of the DWSD and began work on January 1, 2012. The RCC, which now includes Director McCormick, has been meeting regularly with respect to implementation of the November 4, 2011, Order.

On March 22, 2012, the RCC submitted a written request to the Special Master in this action, which was then submitted to the Court:

The undersigned are the members of the Root Cause Committee originally appointed by the Hon. Sean F. Cox in his Order of September 9, 2011 with continued authorized responsibilities in his subsequent Order of November 4, 2011. The Root Cause Committee has met recently to address a number of serious issues facing the DWSD which involve matters of finance and internal structural changes originally mandated by the Court in its November 4 Order. Specifically, we have determined, based on the current level of activity required to implement the November 4th Order by the Board and the Director, it is appropriate and imperative that the DWSD management structure include the position of a Chief Operating Officer (COO) reporting to the Director. The COO should have significant experience in municipal law, municipal finance, and operations oversight which would include, human resources, procurement, finance and law. These are the four divisions DWSD must stand up to implement the November 4th Order and achieve short and long term compliance with environmental permits. We request the Court's issuance of an Order concerning the establishment of this position at DWSD.

(Ex. A to D.E. No. 2456). On March 26, 2012, this Court granted that request and ordered that "a Chief Operating Officer / Compliance Officer shall be hired at the DWSD and shall report to the Director of the DWSD." (D.E. No. 2456).

On May 4, 2012, Director McCormick submitted the Director's Compliance Report. (D.E. No. 2460). The report discussed the progress made in implementing the November 4, 2011 Order. For several reasons, however, the Director requested that the Court extend the deadline for the filing of the Director's Final Compliance Report from August 4, 2012, to October 4,

2012. This Court granted the requested extension. (D.E. No. 2461).

The DWSD then filed several motions, seeking interim relief from this Court regarding various matters. (See e.g., D.E. Nos. 2469, 2473, 2507). This Court has ruled upon all of those motions in a series of orders. (See, e.g., D.E. Nos. 2512, 2520, 2523). And, at the request of the DWSD, this Court granted additional requests for an extension of time for the filing of the Director's Final Compliance Report until March 15, 2013.

6. The Final Director's Report Of Compliance

On March 15, 2013, Director McCormick submitted the Final Director's Report of Compliance ("FDRC") to the Special Master, which was then provided to the Court and filed on the docket. (D.E. No. 2526). The FDRC is a twenty-eight (28) page report that summarizes the progress made in implementing the changes ordered by this Court, addresses the status of environmental compliance, and seeks additional relief.

The FDRC also discusses, and attaches as an exhibit, a new proposal prepared by the RCC to create a court-ordered regional authority. The FDRC appears to ask this Court to either accept and order that new proposal or allow further study of it.

II. Having Reviewed The FDRC, This Court Is Satisfied That The Changes Agreed To By The Parties, And The Changes Ordered By This Court, Have Been Substantially Implemented

Again, this Court took a unique approach to creating a plan to help ensure the DWSD's short-term and long-term compliance with its NPDES permit and the Clean Water Act. This Court created the RCC and allowed local leaders to develop a proposed plan back in September of 2011. This Court ultimately adopted that plan and, thereafter, the BOWC, the DWSD, the RCC, and this Court, have spent considerable time and effort in implementing that plan.

Moreover, as explained below, this Court is satisfied that the changes agreed to by the parties, and the changes ordered by this Court, have been substantially implemented.

A. A More Empowered BOWC Has Been Established And Has Made Tremendous Progress

By virtue of the February 11, 2011 Stipulated Order, the parties agreed that a more empowered Board of Water Commissioners (“BOWC”) would enhance the DWSD’s ability to comply with its NPDES permit and the Clean Water Act. Through this regionally-cooperative approach, the parties agreed that representatives of Wayne, Oakland, and Macomb Counties could each nominate a BOWC member, and that the four remaining BOWC members would be City of Detroit residents appointed by the Mayor of the City of Detroit. The Stipulated Order further provides that BOWC members have minimum qualifications, have professional support staff, and receive compensation. As the FDRC notes, the BOWC has put in an extraordinary amount of time in learning about the DWSD’s operations, establishing appropriate committees, and improving the BOWC’s practices and procedures. The FDRC further acknowledges that the BOWC has helped further an improved transparency of DWSD’s operations and has helped foster improved relationships with the DWSD’s customer communities.

B. The DWSD Now Has Its Own Fully Functional, In-House, Human Resources Department And The DWSD Is Meeting The ACO’s Staffing Requirements

For the past four decades, human resources issues have impeded the DWSD’s ability to achieve sustained compliance with its NPDES permit and the Clean Water Act. (See 9/9/11 Opinion & Order at 39-40, where this Court found that, as recognized by multiple experts and acknowledged by the City, the primary causes of historical non-compliance include: “1) the DWSD having an insufficient number of qualified personnel at the WWTP; 2) excessive and

unnecessary delays in hiring qualified personnel across all job positions at the DWSD; 3) the DWSD's required use of the City's Human Resources Department, resulting in significant delays in filling critical positions at the DWSD; 4) the City's personnel policies, civil service rules, and union rules and agreements, restricting the compensation, recruitment and prompt hiring of necessary personnel at the WWTP; 5) insufficient training of personnel at the DWSD and WWTP; 6) lack of a succession plan at the DWSD; 7) obsolete job descriptions and qualifications for various positions within the DWSD").

The FDRC reports that the "DWSD Human Resources Unit is fully operational." (FDRC at 15). It further explains that:

We are currently staffed at 6 HR Generalists and five HR Technicians, three trainers, two Safety Officers, one Assistant Safety Officer, and four clerical staff members under the leadership of HR Manager Terri Conerway. This staff is responsible for the day-to-day human resources operations of DWSD including labor negotiations, grievance and arbitration administration, EEOC complaints, investigations, and reporting, recruitment and selection, payroll correction monitoring, labor and employee relations, policy development, employment law compliance, training and implementation, EAP selection, roll out and monitoring and unemployment compensation administration. In addition, the training and safety components of HR are responsible for safety compliance, monitoring, inspection and reporting, environmental monitoring and maintenance; training throughout the department, including state regulated training and the corresponding record retention program.

(Id.). The FDRC further states that job redesign plans are underway and progressing well. And, perhaps most significantly, the DWSD is actually exceeding the ACO's current minimum staffing requirements. (FDRC at 8).

C. The DWSD's Now Has A New And Improved Procurement Policy

For the past four decades, procurement problems have also impeded the DWSD's ability to achieve sustained compliance with its NPDES permit and the Clean Water Act. (See 9/9/11

Opinion & Order at 40, where this Court found that, as recognized by multiple experts and acknowledged by the City, the primary causes of historical non-compliance include: “untimely and inadequate purchasing of necessary equipment and supplies for the WWTP”; “excessive delays in the processing of purchase requisitions for critical repair and/or replacement parts”; “the City’s flawed purchasing practices and procedures”; “the City’s ineffective procurement system”; “the approval process for purchases over \$25,000, created by the City’s Charter and/or ordinances, unnecessarily delaying contracts for essential parts, equipment, and services at the DWSD”; and “the City’s bidding and certification requirements, delaying contract approvals”.)

In order to remedy these long-standing procurement problems, and expedite procurement of needed equipment and supplies for the DWSD, the RCC’s plan included a separate procurement policy. That policy provides for three different levels of approval authority for various kinds of purchases. Contracts below a minimum threshold level, for example, contracts for goods that do not exceed \$100,000, can be approved by the Director of the DWSD without the approval of the BOWC or the Detroit City Council. (See D.E. No. 2410-2 at 6-7). Other contracts, that exceed certain dollar values, also require approval of the BOWC or approval of the BOWC and the Detroit City Council.

In its November 4, 2011, Order, this Court adopted the proposed procurement policy. As the FDRC notes, the BOWC has formally adopted the proposed procurement policy. By expediting and improving the procurement process, the procurement policy addresses and remedies one of the underlying root causes of the DWSD’s ability to achieve compliance with its NPDES permit and the Clean Water Act.

There is also a mechanism in place for the DWSD’s procurement policies to be updated

and adjusted over time as required (see D.E. No. 2512 at 21) and the area of purchasing is one of the areas that the MDEQ continues to maintain control over, under the terms of the ACO.

D. Other Changes

This Court ordered various other changes in its November 4, 2011, Order. Having reviewed the FDRC, the Court concludes that substantial progress has been made as to those changes and that no further involvement of the Court is required as implementation continues.

III. This Court Will Not Order The Creation Of A Regional Authority; Nor Will This Court Order Or Approve The Transfer Of The DWSD's Assets To A Regional Authority

Although this Court neither sought nor authorized another proposal from the RCC, the FDRC attaches a new, fundamentally different proposal by the RCC. (Ex. 7 to FDRC).⁶

This new proposal would entail this Court ordering the creation of two regional authorities. Under this proposal, the City of Detroit would transfer all of the DWSD's assets to the first such proposed authority that would, in turn, enter into a lease agreement with a second newly-created authority. That second authority would then make annual PILOT payments to the City of Detroit. (Id.).

This Court's jurisdiction over this case is limited to taking those actions necessary to enable the DWSD to achieve substantial compliance with its NPDES permit and the Clean Water

⁶In addition, the FDRC reflects that on March 13, 2013, the BOWC received some kind of briefing from DWSD leadership on the RCC's "final plan of action" and voted to support the plan. (FDRC at 23).

Act. This Court has no intention of ordering the creation of a regional authority and has no intention of ordering or approving the transfer of the DWSD's assets to a regional authority. This Court lacks the authority to do so.

Moreover, even this Court had the authority to order what is being now being proposed, the Court would not do so for multiple reasons.

Without providing any financial analysis, the RCC asserts that the proposed PILOT payments to the City could be up to \$70 million per year. This appears to be sheer speculation, based upon the hope that the DWSD's bond ratings would improve substantially upon the creation of the proposed authorities.

This Court is not in a position to understand or anticipate all of the potential ramifications that these proposed court-ordered actions could have on the City of Detroit. Arguably, if the Court were to order or approve the transfer of one of the City of Detroit's largest assets, at this juncture, that could potentially force the City into bankruptcy or have other highly undesirable consequences.

If the City of Detroit and/or its regional customer communities⁷ wish to pursue the creation of a regional authority, they may do so through the political/legislative process. This Court's orders do not prevent the City of Detroit from selling or leasing the DWSD's assets and thus do not prevent exploration of this concept in the appropriate arena.⁸ This Court is not the

⁷The FDRC asserts that letters of support for the proposal have been received from representatives of the customer communities. (FDRC at 23; Ex. 10 to same).

⁸The City of Detroit and its customer communities are also free to pursue enactment of the statutory trust legislation referenced in the FDRC, without the involvement of this Court, through the political/legislative process (see Ex. 11 to FDRC).

appropriate arena.

IV. Other Issues/Requests Raised In The Director's Final Report Of Compliance

In addition to asking this Court to consider adopting the unsolicited proposal from the RCC, the FDRC also raises some other issues or requests that will be addressed below.

A. Requests Regarding Rate Settlement Agreements

The FDRC appears to ask the Court to amend or void the existing rate settlement agreements between the DWSD/City of Detroit and its customer communities because the DWSD believes that those agreements: 1) prevent the PILOT payment concept from moving forward; and 2) are having an adverse impact on the DWSD's bond ratings. (FDRC at 24).

The Court denies this request. This Court will not void or alter the rate settlement agreements negotiated among the DWSD and its customer communities. As the FDRC acknowledges, the DWSD has significantly improved its relationships with its customer communities during the past two years. If the DWSD believes its would be beneficial to do so, it is free to negotiate changes or new agreements without the involvement of the Court.

B. Demands For Adequate Assurances From Vendors

The FDRC states that "various DWSD vendors have raised concerns about DWSD's on-going ability to make payments for services rendered." (FDRC at 20). Exhibit 6 to the FDRC contains a letter from a vendor who states that recent published articles stating that the City of Detroit may file for bankruptcy protection in the future have given it "grounds for insecurity with respect to the performance of the City" under its contract. (Ex. 6 to FDRC at 1).

Such issues are not for this Court to resolve or address. To the extent that DWSD leadership cannot sufficiently resolve such issues with its vendors, the DWSD is hereby directed

to seek the advice and involvement of the City Administration.

C. Request Regarding Defined Contribution Plan

The FDRC asserts that the “Detroit General Retirement System (DGRS) has refused to implement the Defined Contribution Ordinance that was adopted by the Detroit City Council in 2000, and amended in 2002, upon receiving IRS approval.” (FDRC at 24). The FDRC asks this Court to order, as requested in the unsolicited proposal from the RCC, that “the DWSD shall serve as its own plan administrator with respect to the establishment of Defined Contribution Plan.” (Id. at 25).

While this Court has encouraged the City and the DWSD to discuss this concept, to see if they could come to an agreement as to whether DWSD should, or could, have its own Defined Contribution Plan, this remains an issue between the City of Detroit and the DWSD. This Court’s jurisdiction is limited to taking those actions necessary to allow the DWSD to achieve substantial compliance with its NPDES Permit and the Clean Water Act. The DWSD establishing its own Defined Contribution Plan is not necessary for such compliance.⁹

D. BOWC Conflict Issue

The FDRC notes that Section 7-1201 of the current Charter of the City of Detroit states that “[n]o member of the Board shall be a City official or employee, or a principal or employee of contractor of the City.” (Charter of the City of Detroit, § 7-1201). The commentary to Section 7-1201 explains that “Former section 7-1501 under the 1997 Charter has been revised to prohibit city officials, city employees and employees or principals of contractors from serving as

⁹It strains credulity to assert that, given the current economic climate and local job market, the DWSD cannot hire and attract qualified staff unless the DWSD has its own Defined Contribution Plan. (See FDRC at 21 &25).

members of the Water and Sewerage Board.” Id. The FDRC states that it “has been assumed” that this Court’s orders “trumped this provision, but upon further reflection, the Board of Water Commissioners and I felt it was prudent to seek further clarification from the Court on this point.” (FDRC at 27).

No order issued by this Court overrides the provision in Section 7-1201 that “[n]o member of the Board shall be a City official or employee, or a principal or employee of contractor of the City” or exempts anyone from the provision. To the extent that the DWSD asks this Court to do so now, the request is denied.

E. Request Regarding Restriction On Negotiating Teams

The FDRC asks the Court to rule or clarify that non-DWSD City of Detroit employees may not serve on the negotiating teams for DWSD contract negotiations concerning collective bargaining agreements. (FDRC at 26).

With respect to collective bargaining agreements (“CBAs”), this Court ordered the following in its November 4, 2011 Order:

3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees (“DWSD CBAs”). DWSD CBAs shall not include employees of any other City of Detroit departments. The Director of the DWSD shall have the final authority to approve CBAs for employees of the DWSD.

(D.E. No. 2410 at 6, ¶ 3). As explained by this Court in subsequent orders, that “paragraph was intended to sever DWSD employees from existing bargaining units that were comprised of both DWSD and non-DWSD employees, thereby establishing separate DWSD bargaining units that cover only DWSD employees.” (See, e.g., D.E. No. 2470 at 1).

None of the orders issued by this Court, however, were intended to restrict who may

negotiate on behalf of DWSD-specific unions. To the extent that the DWSD asks the Court to do so now, the request is denied.

V. This Court Shall Terminate The Second Amended Consent Judgment And Close This Case Because The DWSD Has Achieved Substantial Compliance With Its NPDES Permit And The Clean Water Act, And The Existing ACO Is A Sufficient Mechanism To Ensure Sustained Compliance

Effective July 8, 2011, the City, the DWSD and MDEQ entered into the ACO, aimed at achieving compliance with the DWSD's NPDES permit and the Clean Water Act. (D.E. No. 2365-1). The ACO sets forth a detailed remedial plan. As noted in the FDRC, the ACO has since been re-negotiated as needed with the MDEQ. The Court finds that the MDEQ and the DWSD have a cooperative relationship and will be able to negotiate any further changes that are needed over time.

Although the DWSD's compliance record is still not perfect, the Court finds that it is vastly improved, especially in the historically problematic areas. The MDEQ recently issued a new NPDES permit to the DWSD, with an effective date of May 1, 2013, and expiring on October 1, 2017. (Ex. 4 to FDRC). This Court concludes that the MDEQ, the environmental agency charged with issuing and overseeing the DWSD's NPDES permit, will continue to work with the DWSD, as it does with all other permit holders, to resolve any issues that may arise over time concerning the permit.

The Court concludes that, after more than thirty-five years of federal court oversight, the DWSD has achieved substantial compliance with its NPDES permit and the Clean Water Act. This Court shall therefore terminate the Second Amended Consent Judgment and close this case because the existing ACO is a sufficient mechanism to address any future issues regarding compliance with the DWSD's NPDES permit and the Clean Water Act.

Before closing this case, however, the Court must address one final outstanding issue. In this Court's March 26, 2012, Order (D.E. No. 2456), this Court concluded that given the volume and nature of the work entailed to implement this Court's November 4, 2011 Order, and comply with the ACO, the creation of a new position at the DWSD was warranted and appropriate. This Court therefore granted the RCC's request and ordered that "a Chief Operating Officer / Chief Compliance Officer shall be hired at the DWSD and shall report to the Director of the DWSD." (Id. at 4). The Court ordered the Mayor of the City of Detroit, after meeting and conferring with the RCC, to hire a Chief Operating Officer / Compliance Officer at the DWSD. (Id.). Thereafter, that position was filled and the current Chief Operating Officer / Compliance Officer at the DWSD, Matt Schenk, was hired.

This Court's March 26, 2012, Order, however, did not address how long that position would exist. And, unlike the RCC's Plan of Action, adopted by the Court, which specifies the processes for hiring and removal as to the Director position, the Court's order set forth no such procedures as to this new position.

As stated above, this Court concludes that the changes ordered by this Court have been substantially implemented and that implementation can proceed without further involvement of the Court. The Court also concludes that the DWSD has achieved substantial compliance with its NPDES permit and the Clean Water Act. The Court is therefore terminating the Second Amended Consent Judgment and closing this case because the ACO is a sufficient mechanism to address any future issues regarding compliance. Nevertheless, in order to further long-term compliance with the current ACO, the Court concludes that the position of Chief Operating Officer / Compliance Officer should continue to exist for one year following that date of this

Order. Before or after that time, the BOWC may decide whether to make the position permanent and, if so, determine the terms and conditions of employment for the Chief Operating Officer / Compliance Officer.

CONCLUSION & ORDER

For the reasons stated above, the Court hereby ORDERS that the Second Amended Consent Judgment in this action is hereby TERMINATED.

IT IS FURTHER ORDERED that the position of Chief Operating Officer / Compliance Officer shall continue for one year following the date of this Opinion & Order and that, before or after that time, the BOWC may decide whether to make the position permanent and, if so, determine the terms and conditions of employment for the Chief Operating Officer / Compliance Officer.

IT IS FURTHER ORDERED that the existing ACO is a sufficient mechanism to ensure sustained compliance with the DWSD's NPDES permit and the Clean Water Act and this Court shall therefore close this case, and remove it from the Court's active docket for statistical purposes.¹⁰

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox
United States District Judge

Dated: March 27, 2013

¹⁰This Court shall retain limited jurisdiction for the purpose of enforcement of its orders issued on September 9, 2011, November 4, 2011, October 5, 2012, and December 14, 2012.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, et al.,

Case No. 77-71100

Defendants.

_____ /

PROOF OF SERVICE

I hereby certify that a copy of the foregoing document was served upon counsel of record on March 27, 2013, by electronic and/or ordinary mail.

S/Jennifer McCoy
Case Manager