

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff and Counter-Defendant,

Case No. 77-71100

v.

HON. SEAN F. COX

STATE OF MICHIGAN,

Defendant, Cross-Plaintiff and  
Cross-Defendant,

v.

CITY OF DETROIT, a municipal corporation  
and DETROIT WATER AND SEWERAGE  
DEPARTMENT,

Defendant and Cross-Plaintiff,

v.

ALL COMMUNITIES AND AGENCIES UNDER  
CONTRACT WITH THE CITY OF DETROIT FOR  
SEWAGE TREATMENT SERVICES, *et al.*

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**MOTION FOR APPOINTMENT  
OF INTERIM REGIONAL MANAGEMENT COMMITTEE**

Oakland County Drain Commission moves this Court for an order appointing a Regional Management Committee. Pursuant to the court rules, the Oakland County Drain Commission has conferred with the opposing parties regarding this Motion, none have concurred in the relief requested.

The grounds for this Motion are set forth in the accompanying Brief in Support.

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Dated: January 26, 2011

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**BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT  
OF INTERIM REGIONAL MANAGEMENT COMMITTEE**

TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . i

INDEX OF AUTHORITIES . . . . . iii

I. INTRODUCTION . . . . . 1

II. STATEMENT OF FACTS . . . . . 2

A. Background of DWSD and Oakland . . . . . 2

B. Initiation of This Case: First Violation of the Federal Clean Water Act . . . . . 2

C. Violation of the NDPEs Permit . . . . . 4

D. Subsequent Appointments of Detroit Mayors as Special Administrators . . . . . 5

E. Oakland’s 2005 Motion To Replace Kilpatrick and Regarding Questionable Contracts . . . . . 5

F. Oakland’s Continued Objections Regarding DWSD Contract Procurement . . . . . 8

G. The Global Settlement . . . . . 8

H. Yet Another Violation of NDPEs Permit . . . . . 9

I. Extortion of Municipal Contractors and Rigging of Public Contracts by the Mayor of Detroit and the Director of DWSD . . . . . 10

III. ARGUMENT . . . . . 14

A. This Court Has Authority To Appoint An Interim Regional Management Committee to Ensure That DWSD Moves Immediately to Break The Cycle of Repeated Violations of Federal Law and Court Orders . . . . . 14

B. The Regional Management Committee is the Least Intrusive Measure to Remedy to Ongoing Constitutional Violations . . . . . 15

C. The Operation of the Regional Management Committee . . . . . 17

1.	The Structure of the IRMC .....	18
2.	The Powers of the IRMC .....	19
IV.	CONCLUSION .....	21

**INDEX OF AUTHORITIES**

**CASES**

*BFP v. Resolution Trust Corp*  
511 U.S. 531 (1994) ..... 14

*Glover v. Johnson,*  
934 F.2d 703 (6th Cir. Mich. 1991) ..... 15,16,17

*Walbridge Aldinger Co. v. City of Detroit,*  
296 Fed. Appx. 527 (6th Cir. Mich. 2008) ..... 14,15

*Waste Management of Ohio, Inc. v. City of Dayton*  
132 F.3d 1142 (6<sup>th</sup> Cir. 1997) ..... 14

**STATUTES**

28 U.S.C. § 1331 ..... 14

33 U.S.C. § 1251, Federal Clean Water Act of 1972 ..... 3

Mich. Const. Article VII, Sec. 24 ..... 14

## I. INTRODUCTION

In 1977, the Environmental Protection Agency (“EPA”) initiated this lawsuit against the City of Detroit to correct violations of the Clean Water Act (“CWA”). More than thirty years ago, this Court correctly predicted that compliance with the requirements of the CWA would not be achieved easily. This Court recognized that DWSD may be unable to achieve compliance, and on several occasions appointed the Mayor of Detroit as the Special Administrator of DWSD. Yet even after the successive appointments of Special Administrators; prompt, meaningful, and full compliance with the CWA and the orders of this Court has still not happened. In fact, and ironically sadly, this Court now confronts the same problems as it did in 1977: rampant corruption in both the City of Detroit and within DWSD; failed management, which DWSD has admitted have affected compliance; and repeated violations of both federal law and this Court’s Orders. There is no place in the United States of America facing this magnitude of potential environmental and public health problems.

The repeated appointments of Special Administrators have not succeeded in achieving lasting compliance with the CWA. Oakland has an obligation to its residents and businesses to ensure the health and safety of the water and sewer services for which it contracts for them, and also to ensure that the contracts and agreements that it enters into on their behalf are reasonable and enforced. Oakland’s proposal for participation and oversight by way of the Interim Regional Management Committee provides an effective and efficient method for achieving the best result for all users of the DWSD, and will obviate a sure-fire calamity down the road. The “future” is now.

## II. STATEMENT OF FACTS

### A. Background of DWSD and Oakland

The DWSD provides wastewater collection, treatment and disposal services for the City of Detroit and approximately 76 municipal suburban communities. DWSD serves over four million people, three quarters of which live outside the City of Detroit. Approximately 1 million of those customers live in Oakland County. Oakland has three separate contracts with the City of Detroit for sewer services. The sewer service contracts are divided into three separate service areas, or districts: (1) the Southeastern Oakland County Sewage Disposal District (n/k/a the George W. Kuhn Drainage District); (2) the Evergreen-Farmington Sewage Disposal District; and (3) the Clinton-Oakland Sewage Disposal District. With respect to the Clinton-Oakland Sewage Disposal System, Oakland, along with Macomb County recently entered into a new 30-year contract with the City of Detroit as part of the Global Settlement (see Section G. *infra*) that, *inter alia*, transferred the Oakland-Macomb Interceptor from the City to Oakland-Macomb Interceptor Drainage District. Oakland also has a wholesale water service contract with DWSD to provide potable water in connection with the George W. Kuhn Drainage District. In addition, certain individual Oakland County municipalities contract directly with DWSD for water services.

DWSD is governed and supervised by the Detroit Board of Water Commissioners, whose members are selected by the Mayor of the City of Detroit as dictated by the Charter of the City of Detroit. By Charter, the Board approves contracts entered into by DWSD, and establishes the water and sewer rates charged by DWSD to its customers.

### B. Initiation of This Case: First Violation of the Federal Clean Water Act

In 1977, the EPA initiated this case against various defendants, including the City of Detroit and DWSD. The EPA alleged, among other things, that the discharged effluent from the Detroit



waste water treatment plant (“WWTP”) was in violation of the Federal Clean Water Act of 1972, 33 USC 1251, et seq. (the “CWA”).<sup>1</sup> In September 1977, a Consent Judgment (“1977 Consent Judgment”) was entered which, among other things, required the City of Detroit to address and correct the CWA violations.<sup>2</sup>

This Court quickly realized that the City of Detroit’s compliance with the Consent Judgment “would not be achieved easily or quickly.” (DE 1873, at 3) As a result, this Court “created the position of Special Administrator, because ...compliance with the Consent Judgment the parties had negotiated, required the exercise of this court’s equitable powers.” (DE 1873, at 3) The Special Administrator had broad powers to bypass the Detroit Water and Sewerage Board and the Detroit City Council. Specifically, this Court granted the Administrator the full power and authority to:

**Control, manage and operate the City of Detroit Wastewater Treatment Plant, including all of the functions, duties, powers and authority of the Board of Water Commissioners of the City of Detroit, the Detroit Water and Sewerage Department, and any and all departments, board or other Divisions of the City of Detroit insofar as they affect the [1977] Consent Judgment, without the necessity of any actions on the part of the Common Council of the City of Detroit when in the judgment of the Administrator the same might unavoidably delay or impede accomplishment by the City of Detroit with the provisions of the [1977] Consent Judgment.... [and]**

**...enter into and the performance of all contractual obligations of the system as pertains to the wastewater treatment plant. Such contracts shall be subject to the requirement of competitive bidding except when in the judgment of the Administrator it is necessary to waive the same....**

(DE 1848-3, ¶ 1) (emphasis added).

In March 1979, this Court appointed Coleman A. Young, then Mayor of the City of Detroit, as the first Special Administrator of the WWTP. (DE 1848-3, at 2) The Mayor of the City of

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<sup>1</sup> Oakland became a party to this case in light of Oakland’s contracts with the DWSD for both sewer and water services.

<sup>2</sup> In April 1980, an Amended Consent Judgment (“Amended Consent Judgment”) was entered modifying the schedule for achieving compliance with WWTP effluent limitations.

Detroit was selected as Special Administrator because this Court recognized that “when exercising the federal government’s power under the U.S. Constitution to override a State’s or City’s choice regarding its governance, the doctrine of separation of powers meant that “great care must be taken to reach a balance that does not summarily deny to such local government the full exercise of its authority over its affairs.” (DE 1872, at 3). The requirements of the Consent Judgment were fulfilled that year and an NPDES Permit was finally issued for the waste water treatment plant. This Court retained jurisdiction over the system.<sup>3</sup>

### C. Violation of the NDPEs Permit

In August 1997, DWSD reported certain violations of its NPDES Permit to the Michigan Department of Environmental Quality (“MDEQ”). (DE 1847, at 3) Thereafter, this Court appointed a committee to investigate the causes of the violations that led to the non-compliance. The court-appointed committee completed a report of the causes of the non-compliance in January 2000. (DE 1847-8, January 12, 2000 Report of Committee). This Court noted that even though the violations were only recently found, an internal investigation determined that they in fact had existed for several years. (DE 1872, at 4) That Report concluded that the direct and contributing causes leading to the non-compliance were caused by the **systematic deficiencies** within DWSD including failures in the areas of **capital improvements, finance, purchasing and human resources**, which the Report noted included a **chronic inability** to adequately staff the skilled trades, engineers and other professional personnel; inadequate training, career development and

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<sup>3</sup> The original Oakland-Detroit Contracts all required that the wastewater rates charged by Detroit be “reasonable.” Throughout the 30-year period of the Court’s jurisdiction over DWSD, suburban customers (including Oakland) have, on numerous occasions, challenged the wastewater rates being charged to them pursuant to their respective wastewater treatment services agreements with Detroit (the “Rate Challenges”). In addition to jurisdiction over the system, the Court took jurisdiction over all such Rate Challenges early on and has since taken jurisdiction over all disputes regarding wholesale wastewater collection/treatment and water treatment/distribution services. The Rate Challenges have resulted in numerous settlement agreements that were entered by the Court to which Oakland is a party.

succession planning. Significantly, the Report noted that these failures were symptoms of two institutional problems: (1) management, and (2) leadership and policy.

**D. Subsequent Appointments of Detroit Mayors as Special Administrators**

While noting the efforts of DWSD to operate and maintain the WWTP in compliance with the 1997 NDDES Permit and the Amended Consent Judgment, in light of the above Report, the Court was concerned with the possibility of “renewed non-compliance”. As a result, the authority of the Special Administrator was passed down to succeeding Detroit mayors. On February 7, 2000, the Court entered an Order appointing Mayor Dennis Archer as Special Administrator. [DE 1848-4, at 3] In December 2001, the Court again entered an Order transferring authority of the Special Administrator from former Mayor Archer to then current Mayor Kilpatrick. [DE 1848-5, at 2] On November 25, 2002, the Court entered an Order regarding Contract Procurement Oversight further addressing the role of Kilpatrick as Special Administrator. [DE 1848-6, at 2-3] Consistent with the very first order establishing the mayor of the City of Detroit as Special Administrator, the Court has noted that the position of the Special Administrator was created “to prevent future violations [of Detroit’s wastewater treatment plant NPDES discharge permit]”. [DE 1848-7, at 5]

**E. Oakland’s 2005 Motion to Replace Kilpatrick and Regarding Questionable Contracts**

In September 2005, Oakland filed a Motion to Replace Mayor Kilpatrick as Special Administrator and sought the appointment of a Joint Management Committee to oversee DWSD. At that time, Oakland’s Motion also requested the Court require DWSD to provide financial information as well as information regarding costs, charges, contracts, commitments or other allocations impacting (either directly or indirectly) water and/or sewer rates charged by DWSD to Oakland County and DWSD’s other suburban customers (including, the City’s new 800 MHZ Radio Communications System project). In addition, Oakland requested that the Court prohibit

DWSD from including any costs or charges from the 800 MHZ Radio Communications System in the water and wastewater rates of Oakland County, its communities. In this same motion, Oakland County raised concerns about DWSD's questionable contract procurements:

Oakland also believes DWSD routinely enters into other contracts for materials, construction and/or services in a manner that inappropriately utilize the Special Administrator's ability to: avoid traditional competitive bidding procedures, avoid the scrutiny of its retail and wholesale Customers, avoid the public scrutiny afforded by City Council review of contracts and expenditures, reward political allies and otherwise avoid reasonable management practices expected of a municipal utility such as DWSD. The result of this mismanagement, misallocation, and/or abuse is excessive rates being charged to Oakland County and other suburban customers. ...

By way of example, Oakland believes that Kilpatrick, as Special Administrator, without approval from City Council, has directed DWSD to enter into a contract with DFT Security Team ("DFT") for some of the construction and/or demolition required for the Communications System (the "DFT Contract"). Recent newspaper articles indicate that: (1) DFT was awarded the DFT Contract despite the fact that DFT was not the lowest bidder or the most qualified for the project; and (2) DFT was awarded the DFT Contract based on a personal relationship between Kilpatrick and DFT's president.

On January 5, 2006 the federal court issued an opinion and order denying Oakland's Motion to replace Mayor Kilpatrick as the Court appointed Special Administrator with a Joint Management Committee.<sup>4</sup> [DE 1848] Instead, the Court determined that the WWTP was in substantial compliance with its NPDES permit and hence that it no longer required the extraordinary measure of a "Special Administrator".<sup>5</sup> In its ruling, the federal court remarked, "[w]hen Mayor Kilpatrick came into office, I named him Special Administrator. In two key actions, Mayor Kilpatrick, acting as Special Administrator ordered both the hiring of Victor Mercado as DWSD's director, and the Infrastructure Management Group,... as consultant to DWSD." [DE 1848] Infrastructure

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<sup>4</sup> As we now know, this Court was misled by both Kilpatrick and Mercado, and the Court's reliance on them was wholly misplaced. [See Section I, *infra*].

<sup>5</sup> Again here, this outcome was a direct result of the fraud perpetrated by Kilpatrick and Mercado. [See Section I, *infra*].

Management Group (“IMG”) was responsible for assisting DWSD with evaluating contracts for efficiency opportunities and contract oversight.

This Court referred Oakland’s concerns regarding questionable contract procurement to its Special Master, F. Thomas Lewand, for investigation. On February 22, 2006 the Special Master issued a report and recommendation that concluded, among other things, that the award of the Security System Contract award was proper; the 800 MHz radio contract was essential (but its cost allocation between DWSD and the City’s General Fund should be further reviewed); and the Berg (public relations) contract required no further investigation.

Since this Court removed Mayor Kilpatrick as Special Administrator on January 5, 2006, he could no longer approve contracts without the consent of the Board of Water Commissioners and the Detroit City Council. However, on February 27, 2006, only five days following the “Report and Recommendation of Special Master”, Mayor Kilpatrick bypassed the Detroit City Council and submitted a letter to this Court requesting an Order approving certain contract changes for Ferguson Enterprises, Willie McCormack, and D’Agostini and Sons, as well as an extension to Mercado’s employment contract. The value of these contract change orders totaled \$12,077,268.82. On March 13, 2006, Oakland filed an objection to Mayor Kilpatrick’s request, specifically questioning the propriety of the contract change orders with Ferguson Enterprises. These change orders alone were in excess of \$7.5 million—an amount more than twice Ferguson Enterprises’s original \$5.278 million contract. Oakland understands that Judge Feikens referred Oakland’s objections to Special Master F. Thomas Lewand. The Special Master consequently verbally indicated to Oakland County Water Resources Commissioner John McCulloch that the Ferguson Enterprises’ contract change orders were proper. Nonetheless, this Court never specifically addressed Oakland’s objection to the Ferguson Enterprises contract change order.

#### **F. Oakland's Continued Objections Regarding DWSD Contract Procurement**

Over the next three years, Oakland persistently raised its concerns regarding the contract procurement process of DWSD with the Court, and in addition, with the payment to a number of individuals and entities appointed by the Court to assist DWSD and to "oversee" DWSD contracts. These included Oakland's objections to contracts with and payments made to Infrastructure Management Group ("IMG"), a consulting group appointed by the Court by Order dated November 25, 2002 to assist in the oversight of DWSD, including the examination of all contracts with a value over \$500,000.<sup>6</sup> [DE 1848-6, at 2-3] Oakland also objected to the appointment of and payments made to Timothy O'Brien, appointed by the Court by Order dated June 6, 2007 [See e.g., DE 1978 [12/08/06]; 2075 [7/19/07]; and 2141], and to payments to Public Sector Consultants ("PSC") for vague services provided by them in connection with the Business Leadership Group created by the Court.<sup>7</sup> [See e.g., DE 1978; 2074; 2139] The Court never specifically addressed these objections and they remained in abeyance until May 2009, when they were all dismissed in accordance with the terms of the settlement agreement reached among the parties. [DE 2219, at 2-6]

#### **G. The Global Settlement**

On May 12, 2009, Oakland, along with Wayne and Macomb Counties agreed to a so called "global settlement" ("Global Settlement") with the City of Detroit that was intended to resolve many outstanding issues and legal claims. The settlement included: (a) the counties' claims with

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<sup>6</sup> As recently as February 24, 2009, the contract with IMG was extended to "assist th[e] Court in its oversight of the [DWSD] in several ways, including by examining all contracts with a value over \$500,000.00." [DE 2203] Payments approved by the Court to IMG from just 2008 to 2010 totaled \$2,236,947.42.

<sup>7</sup> Records from 2007 to 2010 show that the Court approved payments to Timothy O'Brien of \$118,848.07, and from 2006 to 2008, payments to PSC in the amount of \$200,875.00 were approved. In addition, payments of over \$1,500,000.00 from 2002 -2010 were approved to Thomas Lewand, who was appointed as "Special Master" by the Court in 2002, and payments to Valerie Brader, appointed by the Court in 2007 as "Judicial Adjunct" were approved in the amount of \$235,932.99.

respect to the utilization of DWSD funds for the purchase and acquisition for the 800 MHZ Radio Communication System; (b) the Macomb sewer collapse; (c) sewer rate issues; and (d) the many objections raised by Oakland (and others) regarding the contract procurement process of DWSD, and in addition, the payment to a number of individuals and entities appointed by the Court to assist DWSD and to “oversee” DWSD contracts. [DE 2219, at 1-6] At the time the Global Settlement was entered into, Oakland was completely unaware that the contracts as to which the parties settled their disputes, were, a year and a half later, to become the subjects of a federal indictment alleging that they were rigged and procured by fraud.<sup>8</sup>

#### H. Yet Another Violation of ND PES Permit

In April 2010, Oakland was made aware that, astonishingly, once again the WWTP was not in compliance with its ND PES Permit, in violation of federal law and the Amended Consent Judgment. The Michigan Department of Natural Resources & Environment (“MDNRE”) issued a Second Notice of Violation on April 14, 2010. Specifically, DWSD failed to adequately remove sewage solids from the wastewater and from the treatment processes that generated solids. In response to that Notice, DWSD filed a Corrective Action Plan (“CAP”) which represented their “roadmap” for sustainable compliance. [DE 2039, at 4] In connection with the development of the CAP, DWSD undertook an “in-depth examination of the root causes that contributed to the solids violations in the MDNRE Second Notice of Violation” and “identified the steps necessary to achieve compliance.” [DE 2039, at 4]

Importantly, DWSD’s CAP identified as causes of the current violations many of the very same problems that were identified as the causes of the previous violations in 1997. For example, among the causes included in the CAP were: failed maintenance planning [DE 2039, at 9]; lack of

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<sup>8</sup> Had that been known, it is highly unlikely that any such settlement would have been reached.

skilled trade [DE 2039, at 9] other key personnel [DE 2039, at 21]; and significant shortcomings in the purchasing and procurement areas [DE 2039, at 22] And again, the CAP admitted the existence of “systematic management issues that have affected compliance”. [DE 2039, at 19]

The financial burden for correcting the problems associated with the NDPES Permit violations impacts both the City of Detroit and its suburban customers, with as much as 60 percent of the cost being shouldered by suburban wholesale customers.<sup>9</sup> Upon receiving notice of the new violations, Oakland repeatedly sought to be included in being involved in the development of a solution to break the cycle of repeated noncompliance. [Ex. 1, Letter from John McCulloch to Mayor Dave Bing] These repeated requests were ignored, and to date Oakland has been provided little to no information about how DWSD will implement a plan to remedy the violations – which plan will necessarily, be paid for, in large measure, by rate increases to Oakland’s customers.

**I. Extortion of Municipal Contractors and Rigging of Public Contracts by the Mayor of Detroit and the Director of DWSD**

On December 15, 2010, Oakland learned of the existence of a thirty-eight count federal indictment against Kwame Kilpatrick, the former Mayor of Detroit (and the former Special Administrator of DWSD), Victor Mercado, the former Director of DWSD, Bobby Ferguson, the owner of various construction companies that obtained contracts for work to be performed for DWSD and the City of Detroit, and two other individuals [Ex. 2, the “Indictment”] The Indictment revealed that a Grand Jury charged that while he was the Mayor of Detroit, and both during and after his appointment as the DWSD Special Administrator, Kilpatrick together with Mercado, extorted and rigged municipal contracts for their own benefit and the benefit of their

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<sup>9</sup> While the details of the specific CAP proposed by DWSD have not been shared with Oakland, Oakland believes that a long-term corrective action plan will cost between \$100 and \$200 million.



families and associates.<sup>10</sup> “During his tenure as DWSD’s Director, MERCADO had supervisory authority over the administration and awarding of more than \$2 billion of contracts between DWSD and private contractors.” [Ex. 2, ¶4] Of the 16 extorted and rigged contracts alleged in the Indictment, 12 of them were contracts for work paid for by DWSD.<sup>11</sup> The Indictment further alleges that Kilpatrick and Mercado extorted and rigged contracts, and helped conceal their scheme by misleading an inquiry into the contacts by a federal judge and falsely testifying under oath regarding the appropriateness of the award of one of the contracts. [Ex. 2, ¶¶ 105, 121, 122]

Critically, the very contracts that federal prosecutors alleged were rigged and extorted by Kilpatrick and Mercado are the same contracts that Oakland County has been raising questions about for years. In Oakland County’s 2005 Motion for example, the County protested the award of the Security Systems Contract to DFT. In February 2006, an investigation by the Special Master, Thomas Lewand, concluded that “[t]he contract award was proper.” [DE 1890, at 4] Federal authorities came to a different conclusion in December 2010, stating that “KWAME KILPATRICK

<sup>10</sup> This is not the first time that the contracts under the supervision of a mayor of Detroit, while acting as DWSD Special Administrator have been alleged to be rigged. In May 1979, Detroit signed a sludge disposal contract with Michigan Disposal, a sludge-hauling firm owned by the late Michael Ferrantino. In 1980, Michigan Disposal made an unsolicited proposal for a second sludge-hauling contract, covering the balance of the output of Detroit’s plant. The City rejected the proposal, believing that total dependence on a single sludge hauler would be bad policy. Ferrantino and Darralyn Bowers, a close friend of Mayor Young, contrived a scheme to procure the second sludge-hauling contract for a front company known as Vista Disposal. Vista Disposal, the front company, was held out as a sole proprietorship controlled by Jerry Owens, a man with no previous experience in the sludge hauling industry. Vista submitted a proposal which included false statements about Vista’s ownership, Owens’ experience, and other matters. Mayor Young used his powers conferred by the court as Special Administrator to award the contract to Vista without competitive bidding and without City Council approval. In 1983, a subsequent FBI investigation of the Vista scheme led to several of the foregoing being prosecuted and ultimately convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO), the Hobbs Act, and the federal mail fraud statute.

<sup>11</sup> The cost of these rigged and extorted contracts are allocated to all of DWSD’s customers, and are ultimately passed through to consumers by way of rate increases.

AND MERCADO, assisted by MILLER, rigged the evaluation and award of a contract to upgrade security systems at various DWSD facilities....” [Ex. 2, ¶105]

The ninety-one page Indictment continues, “MILLER helped conceal the scheme by funneling additional work for the contract into an unrelated contract, then misleading an inquiry authorized by a federal judge into the propriety of the security contract.” (*Id.*) While the Special Master relied on Mr. Mercado’s testimony “that the Security System Contract was completed on schedule and within the budget” (*Id.* quoting DE 1890, “Mercado Testimony, February 10, 2006” at p. 8), a rigorous federal inquiry revealed that “[i]n or about January 2006, MERCADO persuaded a different City contractor to submit a \$3.9 million change order to DWSD for an existing pump station project, \$3.1 million of which would be used as a pass-through to fund the extension of the security system to the water treatment plants.” [Ex. 2, ¶120] The Indictment further alleges that, “MERCADO falsely testified that the security contract was completed on time and on budget without extras and change orders.” [Ex. 2, ¶121] “Moreover, contrary to his deposition testimony, MERCADO had a number of meetings and conversations with FERGUSON and MILLER at critical stages during DWSD’s evaluation of the security contract, including with MILLER on January 13, 2004 and with Ferguson on February 11, 2004.” [Ex. 2, ¶121] The Indictment also distressingly notes that after the Special Master, deceived by the testimony of Mercado during the deposition hearing, concluded that “[a] formal, fair process was employed in the award of Contract DWS-844A” in his “Report and Recommendation of the Special Master” dated February 22, 2006, “[o]n or about February 27, 2006, KWAME KILPATRICK asked a federal judge to approve a \$3.9 million change order for the pump station, the bulk of which was to be used for the security system. Three of the other four change orders identified in KILPATRICK’s letter to the judge were to pay FERGUSON on unrelated contracts.” [Ex. 2, ¶122]

In yet another count of the Indictment, the contracts surrounding the Macomb Sewer collapse, one of the fundamental issues covered by the Global Settlement, were found to be fraught with fraud. In August 2004, a sewer line owned by DWSD collapsed in Sterling Heights, Michigan. “[B]etween about September 2004 and December 2005, FERGUSON and KWAME KILPATRICK schemed together in an effort to steer work to FERGUSON at [the sight of the collapse].” [Ex. 2, ¶31] Specifically, “FERGUSON and KWAME KILPATRICK, assisted by MILLER, threatened ... that the City would hold up a \$12 million amendment to *Company P*’s sewer lining contract until FERGUSON was satisfied with his financial compensation from *Company I* for work that FERGUSON wanted, but did not receive, at the sewer collapse. [Ex. 2, ¶31] As part of this plan, Ferguson extorted representatives of *Company I*, by threatening that, “people ‘Downtown’ would not understand it if [he] did not get sufficient revenue from work on the sewer collapse, which might hurt *Company P*’s chances of obtaining a contract amendment increasing the scope of the sewer lining contract.” [Ex. 2, ¶34] “On or about July 27, 2005, MERCADO moved the Board of Water Commissioners for authorization to amend *Company I*’s sewer lining contract to increase its scope by \$12 million.” [Ex. 2, ¶35] Later, “FERGUSON told representatives of *Company I* and *Company I*’s partner that DWSD would not authorize the amendment if they did not pay FERGUSON \$500,000 to \$750,000, representing profits claimed he should have received had he been given more work at the sewer collapse.” [Ex. 2, ¶36] In December 2005, “FERGUSON told a representative of *Company P*’s partner that the amendment would sit on the Mayor’s desk unapproved until FERGUSON got the compensation he wanted for the sewer collapse.” (Indictment ¶ 38) Shortly afterwards, “FERGUSON...approached a representative of *Company I* and demanded \$350,000 for the sewer collapse.” [Ex. 2, ¶40] In response to Ferguson’s demand, “*Company I* and *Company I*’s partner agreed to pay FERGUSON a total of \$350,000 for the profits

FERGUSON believed he should have received at the sewer collapse.” [Ex. 2, ¶41] “FERGUSON obtained these payments from *Company I* and *Company P*’s partner by exploiting their fear that KWAME KILPATRICK would continue to hold up approval of the amendment if they did not pay FERGUSON.” [Ex. 2, ¶41] As a result, “[a]fter *Company I* agreed to give FERGUSON an additional \$350,000 for work he did not do, KWAME KILPATRICK and MERCADO approved the \$12 million [Special Administrator Order authorizing the] amendment.” [Ex. 2, ¶¶ 31, 42]

### III. ARGUMENT

#### A. This Court Has Authority To Appoint An Interim Regional Management Committee to Ensure That DWSD Moves Immediately to Break The Cycle of Repeated Violations of Federal Law and Court Orders.

While the facts of this governmental catastrophe are complex, the law is relatively straightforward in permitting the relief Oakland seeks. The plain language of the Michigan Constitution vests the power to operate DWSD with the City of Detroit. Mich. Const. Article VII, Sec. 24. In spite of this clear language, however, the Supremacy Clause of the United States Constitution grants this Court the power to override the Michigan Constitution and other state law when it is necessary to enforce federal law, which includes the Consent Judgment and its amendments.<sup>12</sup> [DE 1872, at 9-10, citing *BFP v. Resolution Trust Corp*, 511, US 531, 546 (1994)]<sup>13</sup> Specifically, “[a]ny decision to allow suburban leaders a measure of control over the

<sup>12</sup> “The Sixth Circuit has held that district courts ‘have a duty to enforce, interpret, modify, and terminate their consent decrees as required by the circumstances.’” [DE 1848, at 7, quoting *Waste Management of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1146 (6th Cir. 1997)]

<sup>13</sup> “Federal question jurisdiction exists in ‘all civil actions arising under the Constitution, laws, or treaties of the United States.’” *Walbridge Aldinger Co. v. City of Detroit*, 296 Fed. Appx. 527, 531 (6th Cir. Mich. 2008) quoting 28 U.S.C. § 1331. In particular,

[t]he Supreme Court has identified three situations in which a case could ‘arise under’ federal law: (1) if the plaintiff’s cause of action is created by federal law; (2) if a party’s right to relief under state law requires a resolution of a substantial question of federal law in dispute; and (3) if the claim is in substance one of federal law.

Detroit Water and Sewerage Department requires [this Court] to use federal power to permit what state law forbids.” [DE 1872, at 10, citing U.S. Const. Art VI 2]

As detailed above, in its appointments of the mayors of Detroit as Special Administrators of DWSD, this Court has repeatedly invoked the power afforded to it by the United States Constitution in an effort to attempt to reach prompt, meaningful and full compliance with federal law and the Order of this Court. In doing so, this Court has noted the need to “extricat[e] the federal judiciary from the management of state governmental functions” and also the need to ensure that there is “no less intrusive means of bringing about compliance.” [DE 1872, at 9, citing *Glover v. Johnson*, 934 F.2d 703, 725, 714 (6th Cir. Mich. 1991)] In an effort to achieve these dual goals, the method chosen by this Court was the creation of the position of Special Administrator, and the appointment of various mayors of Detroit to that position.

While, in *Glover*, the Sixth Circuit noted that “the federal equity court in fashioning a remedy must afford relief which is ‘no broader than necessary to remedy the constitutional violation,’” importantly, the Sixth Circuit recognized the need, in certain cases, for broader relief, holding that “[t]he remedy may go beyond this only when there is a record of past constitutional violations and violations of past court orders.” *Id.* at 287. After more than thirty years of continued violations of federal law and Court Orders, it is this rare case that justifies the decisive response necessary to once and for all remedy these persistent constitutional abuses.

**B. The Regional Management Committee is the Least Intrusive Measure to Remedy to Ongoing Violations of Federal Law.**

In 1977, the EPA initiated this lawsuit against the City of Detroit to correct violations of the CWA. Presciently, this Court predicted that compliance “would not be achieved easily or quickly.”

[DE 1872, at 3] This Court, recognizing that DWSD may be unable to achieve compliance, on several occasions has appointed the Mayor of Detroit as the Special Administrator of DWSD. Yet, **prompt, meaningful, and full compliance** with the Consent Agreement and amendments even after the successive appointments of Special Administrators is still a pipe dream.

Over thirty years later, this Court still confronts the same systematic faults from the City of Detroit and DWSD as it did in 1977: rampant corruption in both the City of Detroit and within DWSD; systematic management issues which DWSD has admitted have affected compliance; and repeated violations of both federal law and the Consent Judgments which, in 2010, were identified as being the result of the same systemic problems that DWSD has been unable to cure for decades.<sup>14</sup> Distressingly, the appointment of the various mayors of Detroit as Special Administrators has not caused the “**extrication of the federal judiciary from the management of state governmental functions.**” [DE 1872, at 9, quoting *Glover v. Johnson*, 934 F.2d 703, 725 (6th Cir. 1991) (emphasis added)] Sadly, it has done the opposite.

Despite those appointments, repeated and consistent violations of federal law and the Consent Judgments have occurred. Indeed, Oakland has been forced, over a period of many years, to make numerous motions and objections regarding the operation of DWSD. (See Section F, *Supra* at 7). Over thirty years of this Court’s successive appointment of the Mayor of Detroit as Special Administrator have not “**ensure[d] the dual goals of prompt, meaningful, and full compliance**” with the Consent Agreement. Even the current Mayor of Detroit acknowledges that “the water system has not been managed appropriately.” (Ex. 3, *The Detroit News, Execs Offer Olive Branch*, 1/22/2011) The time has come for this Court to take action that will finally achieve that goal.

<sup>14</sup> As detailed above (See Section H, *supra* at 9), these include failed maintenance planning; lack of skilled trade and other key personnel; significant shortcomings in the purchasing and procurement areas.

While the appointment of yet another Special Administrator of DWSD may be suggested as an alternative to the imposition of an interim regional management committee as a means to achieving compliance, candidly, history has shown that this simply will not work. In 2006, this Court remarked that “[a]ny decision to allow suburban leaders a measure of control over the Detroit Water and Sewerage Department requires [this Court] to use federal power to permit what state law forbids. **Such an exercise of power...would only be appropriate when the need for a Special Administrator is acute and the probable outcome of such an appointment significantly speeds compliance with federal and state water and anti-pollution laws.** (DE 1872, at 10-11) (emphasis added). Since the appointment of the first Special Administrator in 1979, RICO indictments, extortion, contract-rigging, perjury, and obstruction of justice, have impaired the “goal” of ensuring “prompt, meaningful and full compliance” with the Consent Judgment. (Ex. 2, ¶¶ 12, 13, 31, 105, 121, 122). Moreover, the extensive and well-documented “record of past constitutional violations and violations of past court orders”, *see Glover* at 287, demonstrates such an acute need and permits the crafting of a broader and necessary remedy.

### **C. The Operation of the Interim Regional Management Committee.**

As noted by this Court more than five years ago, 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.” [DE 1848-4, at 3] In addition, the financial burden for correcting the problems associated with the NPDES Permit violations impacts both the City of Detroit and its suburban customers, with as much as 60% of the costs being shouldered by suburban wholesale customers.<sup>15</sup> Oakland has an obligation to its residents and businesses to ensure the health and safety of the sewer services for which it contracts for them, and

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<sup>15</sup> Oakland represents 24% of the sewage flow transported to Detroit for treatment at the WWTP.

also to ensure that the contracts and agreements that it enters into on their behalf are reasonable and enforced. Oakland's proposal for participation and oversight by way of the IRMC provides the most effective, efficient method for achieving the best result for all of the users of the DWSD.

### **1. The Structure of the IRMC**

The IRMC would be comprised of the Mayor of the City of Detroit or his designee, the Public Works Commissioner of Macomb County, the Water Resources Commissioner of Oakland County, the Wayne County Director of Department of Environment, or their designees, and a person designated by this Court. Structuring the IRMC with members of each county not only provides direct representation for more than 60% of the system's users, but also provides access to much needed experienced personnel within Oakland County.<sup>16</sup> DWSD has admitted that it has been unable to achieve sustained compliance as direct result of a lack of the necessary trained and experienced personnel. Oakland can offer expertise in the very areas in which DWSD is lacking, including engineers with years of experience operating and maintaining water systems, operations engineers responsible for achieving and maintaining on-going compliance in wastewater treatment and storm water management, maintenance managers, and environmental managers and supervisors. Access to all of the existing expertise and talent within the area will enable DWSD to efficiently and expediently, achieve and then sustain, compliance.

The IRMC would be given the full power and authority to control, manage and operate the WWTP and the DWSD – the same broad powers previously granted to the Special Administrator of the DWSD. As with the previous appointments of the Special Administrator, the fundamental purpose of the IRMC would be to correct and eliminate the causes of non-compliance of

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<sup>16</sup> While Oakland can only speak for itself, a similar level of experience and expertise is also present within Macomb and Wayne counties.



Wastewater Treatment Plant's National Pollutant Discharge Elimination System ("NPDES Permit") and achieve long-term, sustained compliance with the NPDES Permit.

**2. The Powers of the IRMC.**

As with the Special Administrators, the IRMC should have full power and authority to control, manage, and operate the WWTP and DWSD, including all functions and power of the Detroit City Council, the Detroit Board of Water Commissioners, DWSD, and any other departments, boards or divisions of the City of Detroit to the extent that affect the ability of the IRMC to meet the requirements of sustained compliance with the NPDES permit and the orders of this Court, including the consent judgments previously entered by this Court. It shall have the authority to manage, control and deal with all items, assets, contracts, properties that constitute or are related to the WWTP or DWSD and shall have the authority required or necessary for the complete management and control of the DWSD. Specifically, the IRMC shall have the authority to manage, control and deal with all items, assets, contracts, properties that constitute or are related to the WWTP or DWSD and shall have the authority required or necessary for the complete management and control of the DWSD, including but not limited to:

- (i) Ensuring DWSD's functions and strategies are acted upon successfully.
- (ii) Ensuring there is sufficient human, financial, technological, information and material resources available to carry out DWSD functions and strategies.
- (iii) Ensuring the necessary business relationships, organizational structures and motivational schemes are in place to carry out the DWSD functions and strategies.
- (iv) Responsible for ensuring and maintaining the financial health of DWSD.
- (v) Responsible for DWSD administration, legal affairs and the internal information technology infrastructure.

- (vi) Entering and performance of all contractual obligations of the system as it pertains to the DWSD, which shall be subject to the requirements of competitive bidding.
- (vii) To make and execute proposed alterations, changes, and extensions of the DWSD improvements, facilities, or services authorized herein; to locate, acquire, purchase, construct, alter, repair, maintain, and operate the improvements, facilities, and services authorized herein and enter into and execute contracts therefor.
- (viii) Enter into intergovernmental agreements, as necessary, for the administration, operation and management of the WWTP or DWSD.
- (ix) Enter into and execute agreements with units of government, for the use of any DWSD improvements, facilities, or services and the collection of rates, charges, and assessments; and to make all necessary rules governing the use and operation of such improvements, facilities, or services.
- (x) Obtain or prepare data for and determine rates, charges, and assessments to be imposed and collected for any improvements, facilities, and services authorized herein; to review and make adjustments of rates, charges, and assessments where the same are deemed excessive or inadequate.
- (xi) Collection of its receivables.
- (xii) Payment of DWSD debts.
- (xiii) Shall work to address concerns and issues raised by wholesale customers as to (i) DWSD decisions regarding the operation of sewer facilities owned or operated by DWSD that serve the wholesale customers, (ii) rates, or (iii) other issues.
- (xiv) The supervision of all employees of the system, including the hiring or dismissal thereof.
- (xv) The hiring of consultants, contractors, engineering firms or legal counsel that the IRMC deems necessary.
- (xvi) To act as the applicant, agents, or sponsor for the City in the borrowing or loaning of money, issuing of notes or bonds and receiving of any gift or grant of funds or property for the purposes authorized herein; and pledging of security therefor as necessary subject to the established rights of existing bondholders.

- (xvii) Establishing and adoption of policies for the administration of contracts, employees and contracts<sup>17</sup>

#### IV. CONCLUSION

For the reasons stated above, Oakland respectfully requests the Court to enter an Order: Appointing a five-member Interim Regional Management Committee consisting of the Mayor of the City of Detroit or his designee, the Public Works Commissioner of Macomb County, the Water Resources Commissioner of Oakland County, the Wayne County Director of Department of Environment or their designees, and a person designated by this Court and vesting the IRMC with the full power and authority to control, manage and operate the WWTP and the DWSD.

YOUNG & SUSSER, P.C.

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Dated: January 26, 2011

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<sup>17</sup> Proposed Bylaws governing the conduct of business by the IRMC are attached hereto as Ex. 4.

**CERTIFICATE OF SERVICE**

I certify that on January 26, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification to the following: Charles E. Barbieri, Valerie J.M. Brader, Jonathan W. Bulkley, Peter A. Caplan, George G. Constance, Timothy L. Cronin, Robert J. Franzinger, Beth S. Gotthelf, R. Craig Hupp, George G. Kemsley, Charles S. Kennedy, III, Annette M. Lang, F. Thomas Lewand, Miles T. Macik, Robert A. Marzano, Patrick B. McCauley, Marilyn A. Peters, David W. Potts, Barry A. Seifman, John D. Staran, David S. Steingold, James E. Tamm, Robert C. Walter and Avery K. Williams. I caused the following to be served through U.S. Mail to: Joseph W. Colaianne, John H. Fildew, Robert J. Hribar, Mark D. Jacobs, Charles E. Lowe, William W. Misterovich, and Pamela J. Stevenson.

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