

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Hon. Sean F. Cox

v.

Case No. 77-71100

CITY OF DETROIT, *et al.*,

Defendants.

THE DETROIT WATER AND SEWERAGE DEPARTMENT'S MOTION FOR ORDER ADOPTING THE ROOT CAUSE COMMITTEE PLAN OF CLARIFICATION OF NOVEMBER 8, 2012 [D.E. NO. 2505] AND FOR A FURTHER EXTENSION OF TIME FOR DWSD TO FILE ITS SUPPLEMENTAL BRIEF IN SUPPORT OF ITS VERIFIED MOTION FOR INTERIM ORDER CLARIFYING NOVEMBER 4, 2011 ORDER

The Detroit Water and Sewerage Department ("DWSD") hereby moves the Court to (1) adopt the Root Cause Committee Plan of Clarification of November 8, 2012 (D.E. No. 2505 ("Plan Clarification")) as an order of the Court and (2) for an extension of time for DWSD to file its Supplemental Brief in support of its Verified Motion For Interim Order Clarifying November 4, 2011 Order required by the October 5, 2012 Opinion & Order Regarding The DWSD'S Motion For Interim Order (D.E. No. 2489 ("October 5 Order")) until 14 days after the Court decides DWSD's instant motion to adopt the Plan Confirmation. In support of this motion, DWSD states as follows:

1. On September 9, 2011, the Court issued an Opinion and Order (D.E. No. 2397 ("September 9 Order")), in which it concluded, based on a substantial body of record evidence, that fundamental changes that "*will likely override the City of Detroit's Charter, its local ordinances, and/or some existing contracts*" were necessary to enable DWSD to achieve

sustained compliance with the federal Clean Water Act (“CWA”) and DWSD’s NPDES Permit. (*Id.* at 42 (emphasis in original)).

2. In the September 9 Order, the Court also recognized that, in exercising its authority to order equitable relief necessary to achieve CWA Compliance, the Court was not constrained by either the City of Detroit’s (the “City’s”) charter or its ordinances. (*Id.* at 42-43). The Court, however, further considered established law providing that the Court’s exercise of its broad equitable authority in this regard should be “tempered by precepts of comity and federalism” and 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 43).

3. The Court, accordingly, appointed a committee comprised of local officials (“the Root Cause Committee”) to propose a plan that addressed the root causes of noncompliance and ordered that, in doing so, the committee “shall not be constrained by any local Charter or ordinance provisions or by the provisions of any existing contracts.” (*Id.*)

4. On November 2, 2011, the Root Cause Committee submitted its proposed Plan of Action to the Special Master. (D.E. No. 2409-1 (the “Plan of Action”)). On November 4, 2011, the Court ordered implementation of the Plan of Action finding, consistent with applicable precepts of comity and federalism, that it provided for the least intrusive means to adequately address most of the root causes of DWSD non-compliance. (D.E. No. 2410 (“November 4 Order”) at 4). Among other things, through its adoption of the Plan of Action, the November 4 Order required DWSD to simultaneously (a) continue to be a City Department but also (b) operate independently from the traditional City structures and requirements in the areas of law, finance, human resources, and procurement.

5. On September 24, 2012, DWSD filed its “Verified Motion for Interim Order Clarifying November 4, 2011 Order and for Expedited Briefing Schedule” (D.E. No. 2473, (“Verified Motion”). The Verified Motion sought an interim order that resolved continuing uncertainties and ambiguities related to the November 4 Order’s requirements that DWSD be a City Department but also operate independently from the traditional City structures in specific areas.

6. Macomb County filed a reply brief in support of the Verified Motion on September 28, 2012. (D.E. No. 2475.) The City filed a response brief opposing several requests for relief made by the Verified Motion. (D.E. No. 2480.) Oakland County filed a response partially supporting and partially opposing the Verified Motion. (D.E. No. 2483.)

7. The Court addressed DWSD’s Verified Motion in its October 5 Order, in which the Court (a) granted the motion in part, (b) denied the motion in part, (c) took certain requests made in the motion under advisement, and (d) ordered that DWSD may file a supplemental brief (the “Supplemental Brief”) regarding certain aspects of the Verified Motion no later than October 26, 2012. (D.E. No. 2489).

8. The due date for DWSD to file any Supplemental Brief was later extended to November 16, 2012, to enable meetings between representatives of the City’s Corporation Counsel and DWSD to achieve their intended purpose of narrowing and focusing the issues requiring supplemental briefing. (D.E. No. 2497). These meetings accomplished their purpose of narrowing the issues requiring Supplemental Briefing, as reflected in the letter agreement that has been filed with the Court. (D.E. No. 2495, Letter Agreement). On November 2, DWSD reached agreement with the City’s Chief Financial Officer that further focused and narrowed the issues requiring supplemental briefing. (See November 13 Letter, copy attached as Exhibit A).

9. On November 8, 2012, the Root Cause Committee presented the Special Master with its “Root Cause Committee Plan of Action Clarification of November 8, 2012,” which the Special Master has filed in the official court record of this action. (D.E. No. 2505, (the “Plan Clarification”). The Plan Clarification updates the Plan of Action to account for recent developments and addresses many of the issues raised by DWSD’s Verified Motion.

10. DWSD respectfully submits that the Root Cause Committee’s Plan 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 Clarification proposes 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 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.

11. If and to the extent that the Court adopts the Plan Clarification, the need for the parties to file supplemental briefs and for the Court to consider those supplemental briefs will be reduced. Thus, to avoid the expenditure of potentially unnecessary time and expense and conserve judicial resources, DWSD moves for an extension of time for DWSD to file its Supplemental Brief until 14 days after the Court decides DWSD’s motion to adopt the Plan Confirmation. DWSD proposes that the time for other parties to respond to any Supplemental Brief filed by DWSD be extended by a similar period of time.

Respectfully submitted,

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Date: November 15, 2012

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**BRIEF SUPPORTING THE DETROIT WATER AND SEWERAGE
DEPARTMENT'S MOTION FOR ORDER ADOPTING THE ROOT
CAUSE COMMITTEE PLAN OF CLARIFICATION OF NOVEMBER 8,
2012 [D.E. NO. 2505] AND FOR A FURTHER EXTENSION OF TIME FOR
DWSD TO FILE ITS SUPPLEMENTAL BRIEF IN SUPPORT OF ITS VERIFIED
MOTION FOR INTERIM ORDER CLARIFYING NOVEMBER 4, 2011 ORDER**

INTRODUCTION

In support of its Motion for Order Adopting The Root Cause Committee Plan Of Clarification of November 8, 2012 [D.E. No. 2505] And For a Further Extension Of Time For DWSD To File Its Supplemental Brief in Support of Its Verified Motion for Interim Order Clarifying November 4, 2011 Order, the Detroit Water and Sewerage Department ("DWSD") relies on the facts and assertions set forth in its foregoing motion and, to avoid duplication, limits this brief to an exposition the legal authority supporting DWSD's motion.

ARGUMENT

I. LEGAL AUTHORITY SUPPORTING THE REQUESTED COURT ADOPTION OF THE ROOT CAUSE COMMITTEE'S PLAN OF ACTION CLARIFICATION.

This Court has the authority to adopt the “Root Cause Committee Plan of Action Clarification of November 8, 2012” (D.E. No. 2505, (the “Plan Clarification”). A federal district court has inherent power to fashion equitable relief and to enforce its own judgments and orders. *See Peacock v. Thomas*, 516 U.S. 349, 356, 116 S. Ct. 862 (1996); *U.S. v. Production Plated Plastics, Inc.*, 61 F.3d 904, *7 (6th Cir. 1995) (finding court had authority to fashion equitable relief and enforce its prior orders). As such, the Court has the power to enter an order adopting the Plan Clarification because doing so would constitute a clarification of this Court’s November 4, 2011 Order.

Moreover, the Court has the equitable discretion to fashion a remedy that is no broader than necessary to remedy a violation of law. The Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 *et seq.*, permits the exercise of a court’s equitable discretion “to order that relief it considers necessary to secure prompt compliance with the Act.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320, 102 S. Ct. 1798, 1807 (1982). The Court’s authority in this regard is not constrained by state or local law. To the contrary, “Once a court has found a federal constitutional or statutory violation . . . 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 (1995) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 57-58, 110 S. Ct. 1651, 1666 (1990)). For example, “upon properly supported findings that such a remedy is necessary to rectify a violation

of federal law, the district court can approve a consent decree which overrides state law provisions.” *Id.* at 216 (emphasis in the original).

Nevertheless, “remedies that override state law must be narrowly tailored so as to infringe state sovereignty as minimally as possible.” *Id.* at 217 (citing *Jenkins*, 495 U.S. at 57, 58, 110 S. Ct. at 1666-67). “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.* at 217 (quoting *General Bldg. Contractors v. Pennsylvania*, 458 U.S. 375, 399, 102 S. Ct. 3141, 3154 (1982)).

Like the present action, *Bylinski v. City of Allen Park*, 8 F. Supp. 2d 965 (1998) was an action brought to enforce provisions of the CWA in connection with the operations of a municipally owned sewer system. The court had entered a consent decree which, among other things, ordered system improvements that were intended to bring the defendant municipalities’ operation of the sewer system into compliance with the Act and obligated the defendant municipalities to either pay for their share of the costs of the required improvements in cash or levy taxes to pay for them.

In *Bylinski*, the court rejected a claim by taxpayers seeking to enjoin certain of the municipalities from levying taxes required by the consent decree on the ground that they violated taxation limitations imposed by state law. The court ruled, relying upon *Missouri v. Jenkins*, that its order requiring the levying of taxes was valid even if such taxes were otherwise proscribed by state law. The court, citing the Constitution’s general welfare clause and commerce clause, found that there was a Constitutional basis for its enforcement of a local government unit tax levy to satisfy the mandates of the Clean Water Act, “despite state statutory or constitutional

limitations on taxation.” *Id. at 971*. Thus, a federal court has the power to issue an order to take actions prohibited by state law that are necessary to comply with the Act.

Here, the adoption of the Plan Clarification is an appropriate means necessary to achieve the sustained compliance required by the CWA and an appropriate clarification by the Court of its own order. Therefore, this Court has the inherent authority to adopt the Plan Clarification to enforce, clarify, and aid in the implementation of its November 4, 2011 Order.

II LEGAL AUTHORITY SUPPORTING THE REQUESTED TIME EXTENSION

In support of its motion for an extension of time, DWSD relies upon Rule 6(b)(1)(A) of the Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, the Court should adopt the Plan Clarification as an order of this Court. In addition, the Court should extend the time for DWSD to file its Supplemental Brief until 14 days after the Court decides DWSD’s motion to adopt the Plan Confirmation and extend the related briefing dates by a similar period of time.

Respectfully submitted,

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Dated: November 15, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record and that I caused copies of same to be mailed via U.S. mail as follows:

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