

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 VERIFIED
MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE AND
OTHER RELIEF NECESSARY TO PROTECT THE PUBLIC SAFETY
AND THE ENVIRONMENT, ENFORCE THE CLEAN WATER ACT AND
EFFECTUATE AND PREVENT FRUSTRATION OF THIS COURT'S ORDERS**

The Detroit Water and Sewerage Department ("DWSD") hereby moves this Court for preliminary and permanent equitable relief that is necessary to prevent conduct detrimental to the public health and safety and the environment, enforce the Clean Water Act, and effectuate and prevent the frustration of orders lawfully issued by this Court in light of an imminently threatened and illegal strike by unions representing DWSD employees working on critical services. The illegal strike addressed by this motion is threatened by the American Federation of State, County and Municipal Employees Council 25 ("Council 25") and its member Locals 207 and 2920.

DWSD specifically moves for the following relief:

1. A temporary restraining order, a preliminary injunction and a permanent injunction prohibiting Council 25 and Locals 207 and 2920, their members employed by DWSD, and any and all persons acting in concert with them from engaging in the contemplated strike, including prohibiting the specific acts associated with such a strike as detailed in the prayer for relief set forth at the conclusion of this motion;

2. An Order declaring that (a) the job duties performed by DWSD employees represented by Council 25 and its Locals 207 and 2920 who will participate in the threatened strike perform job duties that impact the public safety and (b) the threatened strike by such employees will harm the safety of the public.

In support of its motion, DWSD states as follows:

1. The United States Environmental Protection Agency (“EPA”) initiated this action in 1977 against the City of Detroit (“the City”) and DWSD, alleging violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (“the Clean Water Act”). The violations involve the DWSD’s wastewater treatment plant (“WWTP”) and its National Pollutant Discharge Elimination System (“NPDES”) permit. (Order dated November 4, 2011 (“November 4 Order”), Docket Entry No. 2410 at 1).

2. On September 9, 2011, this Court entered an Opinion & Order (“September 9 Order,” Docket Entry No. 2397) denying, without prejudice, the City’s and DWSD’s motion to dismiss this action. In the September 9 Order this Court found, *inter alia*, as follows:

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 2).

3. In the September 9 Order this Court also concluded that the extensive record in this action established that, unless corrective measures more fundamental than those previously taken were implemented to address institutional and bureaucratic barriers to compliance and “root causes” of non-compliance, sustained compliance with the Clean Water Act simply would not occur. (*Id.* at 2). In this regard, the Court stated:

[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.

(*Id.*)

4. This Court unquestionably has broad equitable power to order relief necessary to achieve compliance with the Clean Water Act that override state and local laws. However, it is well-established that remedies that override state or local law should be narrowly tailored and, to the extent possible, local officials should at least have the opportunity to devise solutions to remedy the ongoing Clean Water Act violations. (*Id.* at 2).

5. In light of these considerations, this Court appointed a "root cause" committee (the "Committee") comprised of local officials to propose a plan that addressed the root causes of noncompliance identified in the September 9 Order. The root causes to be addressed by the Committee included obstacles posed by CBAs and work rules applicable to DWSD's unionized employees. The September 9 Order made clear that, in fashioning a plan, the Committee would not be constrained by existing CBAs and further provided that, if the Committee were unable to devise and propose a workable solution to remedy the underlying causes of the recurrent Clean Water Act violations, the Court would order a remedy on its own. (*Id.* at 43-44).

6. In accordance with the September 9 Order, 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 Committee submitted a written proposed “Plan of Action” to the Special Master, which the Special Master then submitted to this Court on that same date. (Docket Entry No. 2409). The Committee members noted that they were “permitted to solicit and receive input from various sources” with knowledge of the DWSD and utility operations and 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. (Docket Entry No. 2409–1 at 2).

7. This Court then issued its November 4 Order in which it found that the proposed Plan of Action adequately addressed the majority of the root causes of non-compliance outlined in the September 9 Order. (Docket Entry No. 2410). This Court, accordingly, adopted the Plan of Action proposed by the Committee and ordered its implementation. (*Id.* at 4.)

8. In addition to its agreement on a Plan of Action, the Committee recognized that certain provisions of the CBAs covering both DWSD and non-DWSD employees and certain work rules were limiting DWSD’s ability to maintain long-term environmental compliance and that the existing CBAs, accordingly, needed to be changed. The Committee, however, could not agree on how to achieve the necessary changes. (Docket Entry No. 2409-1 at 4.)

9. In the November 4 Order, this Court agreed with the Committee’s findings described in the preceding paragraph and made its own finding that certain CBA provisions and work rules were “impeding the DWSD from achieving and maintaining both short-term and long-term compliance with its NPDES permit and the Clean Water Act” and, indeed, had been doing so over a long period of time. (Docket Entry No. 2410 at 4).

10. Because the Committee's proposed Plan of Action did not adequately address collective bargaining and other impediments to compliance posed by CBAs and other aspects of DWSD's relationship with unions representing its employees, and on an extensive supporting record in this action that was consistent with the Committee's conclusions on such matters, this Court considered and addressed this issue on its own. (Docket Entry No. 2410 at 4-7).

11. After carefully considering all options, including those identified by the Committee, this Court ordered the implementation of the least intrusive means of effectively remedying the union, CBA and work-rule impediments to compliance. Specifically, the Court ordered that the following steps (sometimes hereinafter referred to as the "Labor Mandates") be taken:

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 (i.e., 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 re-view 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.

12. To ensure consistency in the interpretation and application of the Labor Mandates and prevent other tribunals from undermining them, this Court also enjoined the Wayne County Circuit Court and the Michigan Employment Relations Commission (“MERC”) from exercising jurisdiction over disputes arising from the changes required by the November 4 Order and further enjoined every union representing DWSD employees from filing any grievance, unfair labor

practices, or arbitration demands over disputes arising from such changes. (Docket Entry No. 2410 at 7, ¶ 13).

13. Michigan AFSCME Council 25 (“Council 25”) is a labor union that historically has represented both DWSD and non-DWSD employees of the City.

14. AFSCME Local 207 (“Local 207”) and AFSCME Local 2920 (“Local 2920”) are Council 25 labor union locals. Local 207 represents approximately 1,000 operations, maintenance, security, and other personnel at DWSD, including many employees who perform critical functions at the WWTP. Local 207’s members include many sewerage and water operators and sewage plant helpers and attendants. Local 2920’s more than 200 members include persons who perform clerical support, mail room operations, customer services and collections.

15. From July 1, 2008 until June 30, 2012, Council 25 and its Locals 207 and 2920 (collectively the “AFSCME Unions”) and the City of Detroit were parties to a Master Collective Bargaining Agreement (the “Master Agreement”) that covered both DWSD and non-DWSD City employees. (See Master Agreement, Exhibit A). The Master Agreement is, accordingly, one of the CBAs covered by the November 4 Order’s Labor Mandates, including the mandate that it be replaced by a CBA covering DWSD employees only.

16. Although the Master Agreement expired on June 30, 2012, its terms and conditions remain effective by operation of law, except to the extent that they have been superseded by the City of Detroit imposed Terms and Conditions of Employment pursuant to its Financial Stability Agreement, known as “the CET” as discussed below. (Exhibit A, Master Agreement, Article 51, p. 81).

17. On June 26, 2012, to eliminate any uncertainty regarding the terms and conditions of employment governing unionized DWSD employees following the City's entry into the Financial Stability Agreement with the State of Michigan, the Detroit Board of Water Commissioners ("BOWC") passed a resolution providing that City Employment Terms ("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 DWSD imposes its own terms and conditions of employment on that union. The Resolution, a copy of which is attached as Exhibit B, was adopted to recognize and declare that, until a union signs a CBA with DWSD, it is still subject to the City's actions with respect to its last CBA including terms and conditions of employment applicable to City unions that are not inconsistent with this Court's Orders.

18. One of the terms and conditions of the Master Agreement that remains in effect and binding on the AFSCME Unions is their agreement "to refrain from engaging in any strike, work stoppage, slowdown or interference of any kind with the operations of the City during the term of this Agreement." (Exhibit A at p. 68). This prohibition mirrors Michigan law, which prohibits strikes by public employees. (*See* Public Employment Relations Act, M.C.L. § 423.202).

19. The Master Agreement further permits DWSD to, among other things, discharge or take disciplinary action against an AFSCME Union member employee who refuses to cross a primary picket line or to perform work behind any primary picket line if such refusal is in any way "detrimental to the public health or safety." (Exhibit A at p. 68).

20. Since entry of the November 4 Order, DWSD has worked diligently to attempt to comply with that Order's Labor Mandates with respect to all of the unions and union locals

representing DWSD employees. As a result of those efforts, DWSD has entered into new CBAs that conform to the Labor Mandates and other requirements of the November 4 Order with twelve of the twenty unions that represent DWSD employees.

21. Despite diligent efforts, however, DWSD has been unsuccessful in reaching such new CBAs with the AFSCME Unions. Specifically, the AFSCME Unions have been adamant in their refusal to agree upon outsourcing language, among other language, that is required by this Court's November 4, 2011 order, instead proposing status quo language on that subject. In addition, the two sides are dramatically far apart on economic terms including wages, health care, retirement, longevity pay, and shift premiums, among others.

22. Indeed, during negotiations conducted on September 27, 2012, the negotiator for the AFSCME Unions informed DWSD representatives that, on September 26, 2012, members of Locals 207 and 2920 had authorized a strike (the "Strike") against DWSD and threatened to initiate the Strike "in accordance with the contract [the Master Agreement]." (See also, Union newsletters and other documents attached as Exhibits C-E).

23. The fact that both the Master Agreement and applicable Michigan law prohibit the Strike renders the AFSCME locals' negotiators statement nonsensical and shows that the initiation of the unlawful Strike is imminent.

24. The Strike would be highly detrimental to the public health and safety and the environment and prevent DWSD from complying with the Clean Water Act and this Court's orders implementing that federal law, including the November 4 Order, in at least the following particulars.

25. AFSCME Local 207's membership includes the technical and support personnel who operate and maintain the heavy industrial wastewater collection and treatment equipment in

place at the WWTP. That equipment includes clarifiers, dewatering equipment and incinerators. This equipment, if not operated and maintained properly, can lead to discharge of effluent that is not in compliance with the NPDES permit and DWSD's Administrative Consent Order with the Michigan Department of Environmental Quality.

26. Without incinerator operators, DWSD would be forced to shut down its incinerator complexes, leaving DWSD with insufficient capacity to dispose of solids. Failure to meet required NPDES permit limits can cause the receiving bodies of water to be unsafe for human contact and can cause damage to aquatic species.

27. The impact of having this heavy equipment break due to improper operation and maintenance would have long-lasting negative consequences, as the repairs can be expensive and time consuming, and lead times for replacement parts can be extensive.

28. Local 207's members also include skilled personnel in other critical areas of DWSD's operations, including but not limited to meter and instrumentation and water and sewer main repairs. A prolonged interruption of these critical services may result in DWSD being unable to adequately monitor and control its water transmission and sewer collection systems. As DWSD has implemented Supervisory Control and Data Acquisition (SCADA) systems over the last 20 years, DWSD has also become dependent upon these computerized systems for providing needed information to Systems Control on a regular basis so that informed operational decisions can be made to account for changing demand levels.

29. Local 207 also includes all non-managerial security personnel who are responsible for the safety of the entire DWSD operation, including the WWTP, Water operations, and customer service centers for bill payments.

30. Local 2920's membership includes DWSD personnel responsible for clerical support, mail room operations, Customer Service Representatives (CSRs) who answer customer inquiries and collect payments, tellers who collect bill payments at the three DWSD payment centers, and Field Service Representatives (FSRs). The interruption of services by CSRs and tellers will inconvenience the public and eventually disrupt the collection of revenue critical to maintaining compliance. The interruption of services by FSRs will negatively impact the ability of real estate transactions to be conducted within the City of Detroit, as this group does turn ons, turn offs, real estate closing reads, and shut offs for nonpayment.

31. The Strike would also undermine other important aspects of the November 4 Order's provisions seeking to remedy the root causes of noncompliance. Indeed, Local 207's newsletter notifying its membership of the September 26, 2012 strike authorization vote (Exhibit C) specifically identifies frustration of DWSD's efforts to improve compliance and efficiency based on input received from its consultant, EMA Inc. ("EMA") as a primary objective of the threatened strike.

32. Finally the Strike, if not enjoined, would raise a substantial risk that other DWSD unions who have not voted to authorize a strike will engage in undesirable and prohibited activity which could significantly impact other areas of DWSD operation.

WHEREFORE, based on all of the foregoing and to prevent injury to the public interest and safety, enforce the Clean Water Act, and effectuate and prevent the frustration of orders lawfully issued by this Court, DWSD moves this Court for a temporary restraining order, a preliminary injunction and a permanent injunction prohibiting the AFSCME Unions, their members employed by DWSD, and any and all persons acting in concert with them from engaging in any of the following activities:

1. Engaging in the Strike;
2. Obstructing, preventing or unlawfully interfering with DWSD or any of its employees or any other person or persons from entering DWSD property and/or the WWTP;
3. Unlawfully trespassing on DWSD property;
4. Committing any acts of force, violence, assault or battery at or near DWSD and/or the WWTP against any of DWSD's officers, agents, representatives, employees or any persons having business at the WWTP and/or DWSD;
5. Committing any acts of vandalism or destruction of the property of DWSD or its officers, agents, representatives, employees or any other persons having business with DWSD;
6. Failing to report to work or conduct work in accordance with DWSD personnel and attendance policies; and
7. Authorizing, causing, inducing, conducting, continuing or engaging in any acts, threats, obstructions, interferences and hindrances that interfere with DWSD business operations or otherwise breach the peaceful operation of and activities at the DWSD and/or WWTP or that constitute an immediate threat to a breach of such peace, including any act that interferes with or threatens any other person, entity or employer or the regular activities of any other person, entity or employer.

DWSD further prays for an Order declaring that the (a) job duties performed by DWSD employees represented by the AFSCME Unions who will participate in the threatened work stoppage perform job duties that impact the safety of the public safety and (b) the threatened work stoppage by such employees will harm the safety of the public.

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Date: September 28, 2012

VERIFICATION

STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

MATTHEW SCHENK, being first duly sworn, states that he has read the foregoing Verified Motion and states that the statements and allegations of fact contained therein are true to his own personal knowledge and belief or, where so stated, are true to the best of his information and belief.



MATTHEW SCHENK
Chief Operating Officer / Chief Compliance
Officer
Detroit Water and Sewerage Department

Subscribed and sworn to before
me this 28th day of September, 2012.



Notary Public, Wayne County, Michigan
My Commission Expires: 3-2-2018
Acting in Wayne County


DEBRA L RAGLAND
Notary Public - Michigan
Wayne County
My Commission Expires Mar 2, 2018
Acting in the County of Wayne

DYKEMA COSSETT, A PROFESSIONAL LIMITED LIABILITY COMPANY 400 RENAISSANCE CENTER • DETROIT, MICHIGAN 48243

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.

**BRIEF IN SUPPORT OF THE DETROIT WATER AND SEWERAGE
DEPARTMENT'S VERIFIED MOTION FOR PRELIMINARY AND PERMANENT
INJUNCTIVE AND OTHER RELIEF NECESSARY TO PROTECT THE PUBLIC
SAFETY AND THE ENVIRONMENT, ENFORCE THE CLEAN WATER ACT AND
EFFECTUATE AND PREVENT FRUSTRATION OF THIS COURT'S ORDERS**

STATEMENT OF ISSUES PRESENTED

Should the Court issue a temporary restraining order, a preliminary injunction and a permanent injunction, pursuant to the All Writs Act, prohibiting AFSCME Council 25 and AFSCME Locals 207 and 2920, their members employed by DWSD, and any and all persons acting in concert with them from engaging in a work stoppage in order to prevent injury to the public interest and safety, enforce the Clean Water Act, and effectuate and prevent the frustration of orders lawfully issued by this Court?

In the alternative, should this Court find that a temporary restraining order and preliminary injunction is appropriate pursuant to Fed. R. Civ. P. 65 to prohibit AFSCME Council 25 and AFSCME Locals 207 and 2920, their members employed by DWSD, and any and all persons acting in concert with them from engaging in an illegal strike?

CONTROLLING AND MOST APPROPRIATE AUTHORITY

DWSD relies on Title 28 of the U.S.C.A. § 1651(a) (“All Writs Act”), the Clean Water Act, 33 U.S.C.A. § 1251, et seq., Fed. R. Civ. P. 65, and the law and authorities cited to in its Brief in Support.

INTRODUCTION

In support of its Verified Motion For Preliminary And Permanent Injunctive And Other Relief Necessary To Protect The Public Safety And The Environment, Enforce The Clean Water Act And Effectuate and Prevent Frustration Of This Court's Orders ("Verified Motion"), the Detroit Water and Sewerage Department ("DWSD") relies on the facts and assertions set forth in its Verified Motion and, to avoid duplication, limits this Brief to an exposition of the legal authority supporting DWSD's Verified Motion and the relief that it seeks.

ARGUMENT

I. THIS COURT SHOULD AWARD INJUNCTIVE RELIEF PROHIBITING THE AFSCME UNIONS' ILLEGAL ACTS PURSUANT TO THE ALL WRITS ACT.

Title 28 of the U.S.C.A. § 1651(a) (the "All Writs Act") states:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The United States Supreme Court has clearly stated that the All Writs Act authorizes a federal court "to issue such commands ... as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in exercise of jurisdiction otherwise obtained." *U.S. v. New York Telephone Co.*, 434 U.S. 159, 98 S.Ct. 364 (1977); *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 106 S.Ct. 355 (1985).

In *New York Telephone*, the Supreme Court held that the All Writs Act authorizes federal district courts to issue orders compelling action on the part of a third party not related to the underlying action. In that case, the district court had issued an order authorizing the Federal Bureau of Investigation ("FBI") to use pen registers (devices which track a number dialed from a particular phone) on two telephone lines. The court also directed the New York Telephone Company ("the Company"), which was not connected to the underlying action, to provide all

information, assistance and facilities necessary for the FBI to install and utilize the pen registers. The Company objected to providing facilities and assistance to the FBI, fearing in good faith that such an order could be issued only in connection with a wiretap order meeting the requirements of the Omnibus Crime Control and Safe Streets Act of 1968. On the Company's motion to vacate the portion of the order directing it to furnish facilities and assistance, the district court ruled that pen registers were not governed by the proscriptions of the Act and concluded that the All Writs Act provided authority to the court to direct the Company to assist the FBI.

On appeal, the Supreme Court upheld the district court on both points. In upholding the district court's assertion that it had the authority to issue an order to a third party, the Supreme Court considered several factors:

- (1) the remoteness of the party from the underlying controversy,
- (2) the extent of the burden imposed by the order on the party,
- (3) and the availability of alternatives that the FBI might use.

The Court considered the Company sufficiently related to the underlying cause in part because, without its cooperation, the FBI initiative would not succeed, and also because the Company regularly employed the same monitoring devices without court orders for billing and other business purposes. The Court also found that the Company was not overly burdened since the FBI was required to reimburse the Company, and the actions the Company was ordered to take were similar to those the Company provided on a daily basis.

This Court [by Judge Feikens] recognized the applicability of the All Writs Act to enforce court orders in this action. For example, in 2000 Judge Feikens entered an order directing the Army Corps of Engineers "to accept dredged waste material in order to prevent the frustration of a consent judgment designed to address water pollution problems in the greater

Detroit area.” *U.S. v. City of Detroit*, 329 F.3d 515, 517 (6th Cir. 2003). Although the Sixth Circuit Court of Appeals initially vacated that order, it affirmed that order on rehearing *en banc*, ruling that “the All Writs Act provides district courts with the authority to bind nonparties in order to prevent the frustration of consent decrees such as those entered in this action that determine parties’ obligations under the law.” *Id.*

As shown above, the AFSCME Unions and their members who are employees of DWSD are integrally related to the resolution of the water and sewage treatment problem, and DWSD’s ability to sustain short and long-term compliance with this Court’s orders and the Clean Water Act. Also, the Strike unquestionably would be highly detrimental to the public health and safety and the environment. Indeed, without an immediate order requiring the AFSCME Unions’ membership to perform their daily duties and to permit uninhibited access to the WWTP, DWSD may be unable to stop the discharge of inadequately treated sewage into the Detroit River and other bodies of water in violation of federal and state laws and the November 4, 2011 Order (“November 4 Order,” Docket Entry No. 2410”). *See* Verified Motion at ¶24-31; *see also* Section II.C.2, *infra*, discussing irreparable harm. No feasible solution other than the requested injunctive relief exists to maintain DWSD operations. Further, no burden would be imposed on the AFSCME Unions because DWSD as merely asking this Court to enjoin them from conduct that is illegal.

II. INJUNCTIVE RELIEF IS NECESSARY AND APPROPRIATE TO PREVENT THE AFSCME UNIONS’ ILLEGAL CONDUCT BEFORE IT CAUSES IMMINENT IRREPARABLE HARM

A. Introduction And Criteria For Granting Preliminary Injunctive Relief

Even if the All Writs Act did not give this Court the authority to issue the injunction sought by DWSD, DWSD would nevertheless be entitled to the injunctive relief it seeks because

it is supported by each of the pertinent factors applicable to awarding such relief under Fed. R. Civ. P. 65.

This Court has the discretion to grant both a temporary restraining order and preliminary injunction to prevent irreparable injury for which there is no adequate remedy at law. Fed. R. Civ. P. 65. In determining whether a request for such provisional injunctive relief should be granted, the federal courts use general equitable principles in establishing the standards for measuring the appropriateness of granting a preliminary injunction under Rule 65. *In re DeLorean Motor Co.*, 755 F.2d 1223 (6th Cir. 1985). The general purpose of a preliminary injunction is to preserve the status quo and to prevent irreparable injury for which there is no adequate remedy at law. *Psychological Services of Bloomfield, Inc. v Blue Cross & Blue Shield*, 144 Mich. App. 182, 184-85; 375 N.W.2d 382 (1985). When considering a motion for preliminary injunction, a district court must balance four factors:

- (1) whether the movant has a strong likelihood of success on the merits;
- (2) whether the movant would suffer irreparable injury without the injunction;
- (3) whether issuance of the injunction would cause substantial harm to others; and
- (4) whether the public interest would be served by the issuance of the injunction.

Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 542 (6th Cir. 2007); *see also Neveux v. Webcraft Technologies, Inc.*, 921 F. Supp. 1568, 1570 (E.D. Mich. 1996). The foregoing are factors to be balanced, not prerequisites to be met. *In re DeLorean Motor Co.* at 1229 (6th Cir. 1985). The court also may issue a temporary restraining order and preliminary injunction if the movant “at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.” *Frisch’s Restaurant, Inc. v. Shoneys, Inc.*, 759 F.2d 1261, 1270 (6th Cir. 1985).

Issuance of temporary restraining order and preliminary injunction in this case would be proper because DWSD has shown each of the aforementioned factors. Further, the Michigan Supreme Court has explicitly held that an injunction is an appropriate remedy to force public employees striking in violation of PERA to return to work. *Lamphere Schools v. Lamphere Federation of Teachers*, 400 Mich. 104, 252 N.W.2d 818 (1977) (“Equitable relief, of course, is always available via injunction.”).

B. Injunctive Relief Is Properly Binding On The AFSCME Unions Who Represent DWSD Employees.

This Court can properly enjoin the AFSCME Unions and their member employees of DWSD pursuant to Fed. R. Civ. P. 65(d)(2)(B) and (C). The basic rule is that “one is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S.Ct. 1562 (1969). “The courts ... may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law.” *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13, 65 S.Ct. 478 (1945). However, Fed. R. Civ. P. 65(d)(2) does bind persons who participate with a party or a party’s employees who are otherwise enjoined. Fed. R. Civ. P. 65(d)(2) states in relevant part:

Persons Bound. The order binds only the following who receive actual notice of it by personal service or otherwise:

- (A) the parties;
- (B) the parties’ officers, agents, servants, employees, and attorneys; and
- (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

As such, the employees of DWSD already are subject to injunctive orders (e.g., the November 4 Order) that bind DWSD. Moreover, because the employees are bound by any injunction affecting DWSD, under Fed. R. Civ. P. 65(d)(2)(C) such an injunction also binds the AFSCME Unions which, as shown above, are in “active concert and participation” with their member employees to violate this Court’s November 4 Order. The rule binding such persons “is derived from the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control.” *Regal Knitwear*, 324 U.S. at 14. “To determine whether a person is one who acts in concert or is identified in interest with the enjoined party, the court must look to the actual relationship between the person enjoined and the person thought to be bound by the injunction.” *Blackard v. Memphis Area Medical Center for Women, Inc.*, 262 F.3d 568, 574 (6th Cir. 2001) (citing *Regal Knitwear*, 324 U.S. at 14). *See also National Labor Relations Board v. Laborers’ International Union of North America*, 882 F.2d 949, 954-55 (5th Cir. 1989) (finding non-party labor union who conspired with local chapter who was bound by prior order to have “knowingly aided and abetted [the local union chapter] in avoiding the order of the court and held the nonparties liable for contempt).

Here, it is clear that the employees of DWSD are bound by the November 4 Order and their illegal Strike would impair and perhaps completely prevent compliance with the Order. Because the employees of DWSD are subject to injunction of this Court, the AFSCME Unions are also bound because they are acting in direct concert with the employees of DWSD in causing the violations of the Order of this Court. Specifically, the November 4 Order enjoined DWSD as it relates to its CBAs with the unions representing DWSD employees. (*See* Docket Entry No. 2410 at 5-7). The November 4 Order ordered “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.” (*Id.* at p. 5). By electing to strike, the Unions are directly interfering with DWSD’s ability to comply with this provision of the Order. The Unions are also interfering with DWSD’s ability to sustain both short and long-term compliance with the NPDES permit and the Clean Water Act.¹ Because DWSD is directly dependent on the work of its employees to sustain short and long-term compliance with the Clean Water Act and this Court’s orders, such actions taken by the Unions on behalf of the employees may be enjoined in order to enforce the orders of this Court and stop the interference with DWSD’s implementation of the November 4 Order.

C. The Traditional Factors Require Entry Of The Requested Injunctive Relief Even If Such Relief Were Not Authorized By The All Writs Act

1. DWSD Will Ultimately Prevail on the Merits

Any strike would be a violation of the Public Employment Relations Act (“PERA”), M.C.L. § 423.202, which unequivocally states that “[a] public employee shall not strike....” PERA further prohibits any person of authority, supervision or direction from authorizing, approving or consenting to a strike by public employees. M.C.L. § 423.203. A violation of this statute may result in termination (M.C.L. § 423.206 (2)) and, in certain situations, monetary penalties of up to \$5000 per day may be imposed upon bargaining representatives in addition to one day pay upon each employee (M.C.L. § 423.202a).

The primary purpose of PERA, as stated in its preamble, is the prohibition of a strike. *Melvindale-Northern Allen Park Federation of Teachers v. Melvindale-Northern Allen Park Public Schools*, 216 Mich. App. 31, 36, 549 N.W.2d 6 (1996). MERC has gone so far as to find

¹ The November 4 Order also enjoined the Unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by the Court and permitted DWSD management to explore all available means and methods to achieve compliance with its NPDES permit and the Clean Water Act. *Id.* at § 5, 13, p. 6, 7.

that a union's letter of intent to strike was an unfair labor practice prior to mediation and fact finding and in light of already scheduled bargaining sessions. *Mona Shoers Bd. of Educ.*, 2 MPER ¶ 20081 (1989) (adopting ALJ Bixler's recommended order where no exceptions were filed). The DWSD is a public employer. The Unions represent public employees. There is no genuine question of material fact that the Unions are in violation of MCL 423.202.

The strike would also be a violation of the parties' own mutually agreed upon collective bargaining agreement. "Interference with Work: The Union agrees to refrain from engaging in any strike, work stoppage, slowdown or interference of any kind with the operations of the City during the term of this Agreement." (Master Agreement, Exhibit A at 68). It is clear that the imminently threatened actions are in direct violation of both Michigan law and the AFSCME Unions' own agreed upon CBA. DWSD, accordingly, will prevail on the merits.

2. *DWSD, As Well As The Public At Large, Will Be Irreparably Harmed*

The Unions' imminently threatened and illegal Strike and other interferences with the proper functioning of DWSD and its Wastewater Treatment Plant ("WWTP"), will inevitably create irreparable harm both to DWSD and the public at large by, among other things:

- A. allowing the discharge of inadequately treated sewage into the Detroit River and other bodies of water in violation of federal and state laws and the November 4 Order;
- B. endangering the health of humans, fish, shellfish and other wildlife and plants by the discharge of additional wastewater not receiving secondary treatment;
- C. affecting the aquatic life and eutrophication of the Detroit River and other bodies of water by decreasing clarity, odor and taste of water;
- D. prohibiting the normal recreational uses of the Detroit River and other bodies of water; and

E. delaying and interfering with the implementation of the November 4 Order.

This irreparable harm likely would lead to untold environmental harm. Only by preventing the AFSCME Unions' illegal conduct can such harm be avoided.

3. *The Injury to the Unions, If Any, Would Be Far Outweighed By The Potential Injury To The DWSD*

Although the decision whether or not to grant a preliminary injunction usually involves balancing the hardships between the parties, that procedure is unnecessary in the present case. The AFSCME Unions' imminently threatened behavior is in violation of both the no-strike provisions of PERA and their own agreed-upon Master Agreement. As the Unions have no legitimate interest whatsoever in engaging in this illegal conduct, no balancing of the hardships is required. The statute further permits discipline, including termination, in the event an employee is found to have engaged in an illegal strike. Demanding that the AFSCME Unions and employees comply with their statutory obligation will ensure that they retain their reputation among the community and their employment with DWSD. Thus, an injunction will not harm the Unions or the employees of DWSD.

4. *The Granting Of A Preliminary Injunction Would Be In The Public Interest*

As discussed more fully above, the consequences of a weakened or partially operating treatment plant at the DWSD are potentially disastrous. The public has a substantial interest in the cleanliness of the waters of the state of Michigan as indicated in the Clean Water Act, 33 U.S.C. § 1251 *et seq.* The public policy also holds that governmental employees, unlike employees in the private industry, cannot be permitted to strike and endanger the public welfare through the cessation of their services. The public interest decidedly weighs in favor of enjoining the illegal Strike and associated conduct of the AFSCME Unions.

CONCLUSION

For the foregoing reasons, this Court should enter a temporary restraining order, a preliminary injunction and a permanent injunction prohibiting the AFSCME Unions and their members employed by DWSD, and any and all persons acting in concert with them from engaging in each of the following activities:

1. Engaging in the Strike;
2. Obstructing, preventing or unlawfully interfering with DWSD or any of its employees or any other person or persons from entering DWSD property and/or the WWTP;
3. Unlawfully trespassing on DWSD property;
4. Committing any acts of force, violence, assault or battery at or near DWSD and/or the WWTP against any of DWSD's officers, agents, representatives, employees or any persons having business at the WWTP and/or DWSD;
5. Committing any acts of vandalism or destruction of the property of DWSD or its officers, agents, representatives, employees or any other persons having business with DWSD;
6. Failing to report to work or conduct work in accordance with DWSD personnel and attendance policies; and
7. Authorizing, causing, inducing, conducting, continuing or engaging in any acts, threats, obstructions, interferences and hindrances that interfere with DWSD business operations or otherwise breach the peaceful operation of and activities at the DWSD and/or WWTP or that constitute an immediate threat to a breach of such peace, including any act that interferes with or threatens any other person, entity or employer or the regular activities of any other person, entity or employer.

This Court should also enter an Order declaring that the (a) job duties performed by DWSD employees represented by AFSCME who will participate in the threatened work stoppage perform job duties that impact the safety of the public safety and (b) the threatened work stoppage by such employees will harm the safety of the public.

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Date: September 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 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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