

BY-LAWS
FOR THE
DETROIT WATER AND SEWERAGE DEPARTMENT
BOARD OF WATER COMMISSIONERS

Preamble: The Charter of the City of Detroit creates a Board of Water Commissioners (Board), which shall have charge of the Water and Sewerage Department. The Commission is comprised of a seven member Board who is appointed by and serves at the pleasure of the Mayor. Under the direction of the Board, the Detroit Water and Sewerage Department (Department), an enterprise agency, shall supply water, drainage, and sewerage services within and outside of the City of Detroit.

ARTICLE I
General Powers and Duties

Section 1. The Board shall have the authority to: enter into such contracts, to make such purchases of goods and services, to obtain financing, and to hire, maintain and develop human resources as it shall deem necessary in order to conduct the business of the Department; construct such administrative rules, policies and procedures as shall be necessary to conduct its business; periodically establish equitable rates to be paid: (a) by the owner or occupant of each property using water, drainage, or sewerage services, and (b) by any person, municipality, or public or private entity making a wholesale purchase of water, drainage or sewerage services from the city of Detroit; unless otherwise provided by contract, the unpaid charges for water, drainage and sewerage services with interest shall be a lien of the city upon the real property using or receiving them; make all necessary adjustments in the collection of water, drainage or sewerage charges. The Board has the authority to establish rates by practice, policy and ordinance. The Board shall appoint, with the approval of the Mayor, a Director and a Deputy Director for the department, who shall serve at the pleasure of the Board, subject to Article XVIII of these By-Laws.

ARTICLE II
Principal Address

Section 1. The principal address of the Board of Water Commissioners shall be 735 Randolph, Detroit, Michigan 48226.

ARTICLE III
Appointment, Qualifications, Compensation and Tenure

Section 1. The members of the Board shall be appointed by the Mayor of the City of Detroit. The term of membership on the Board is four years or until replaced. Not more than two members' terms shall expire each year.

Section 2. The Board shall have seven members.

Section 3. At least four members of the Board must be residents of Detroit.

Section 4. A member must be a citizen of the United States, a resident of Michigan and shall have at least seven years experience in a regulated industry, a utility, engineering, finance or law.

Section 5. Members of the Board shall be compensated at a rate of \$10,000.00 per year plus \$250.00 per meeting, not to exceed \$20,000.00 in total. The Board may adjust this compensation with the consent of the Mayor, the Wayne County Executive, the Oakland County Water Resources Commissioner and the Macomb County Public Works Commissioner.

Section 6. Any vacancy in office shall be filled by the Mayor for the remainder of the un-expired term.

ARTICLE IV
Officers

Section 1. The officers of the Board shall be the Chair and Vice Chair who shall be elected at the annual meeting of the Board and shall hold office for one year or until their successors are duly elected at the annual meeting.

Section 2. The Commissioners, in their discretion, may appoint additional officers and committees of the Board as deemed necessary and prescribe their duties.

ARTICLE V
Chair

Section 1. The Chair shall preside at all meetings of the members of the Board when present, at which meetings the Chair shall have a right to vote, and shall perform all the duties commonly incident to the office, and such other duties as these By-Laws of the Board shall designate. The Chair shall also be responsible for the business affairs of the DWSD. The Chair may sign any deeds, mortgages, bonds, contracts or other documents that the Board has authorized to be executed.

Section 2. As of the date of adoption of these Amended By-Laws, the Department is under the jurisdiction of the United States District Court for the Eastern District of Michigan, Case No. 77-77100, United States v City of Detroit *et al.* Pursuant to the Order dated November 4, 2011 and to facilitate prompt implementation of the Order, until the Plan of Action referenced in the Order has been fully implemented, or until the case has been dismissed, the Board member that was elected by the Board to serve on the court-ordered “Root Cause Committee” shall serve as interim Chair of the Board.

ARTICLE VI Vice Chair

Section 1. In the absence or disability of the Chair, or in the event of his/her inability to act, the Vice Chair shall perform all the duties of the Chair. He/She may have such other duties as designated in these By-Laws.

ARTICLE VII Staffing

Section 1. The staffing of the Board shall be as the Board shall prescribe. The Board shall have up to three staff members who may be retained on an as-needed basis. One staff member shall be an attorney, one shall have expertise in finance and one shall have expertise in engineering, water operations or wastewater operations. The Board may appoint additional staff members. Appointment of Board staff members shall require five votes of the Board members.

Section 2. The Director may reallocate such Board resources (duties and responsibilities) when, in his or her opinion, a critical need exists, but should he/she do so, he/she shall provide a full report citing the reasons and the steps taken at the next meeting of the Board.

Section 3. The Director shall be the administrative head of all activities of the Department under the policy guidance and governance of the Board and shall have such other duties as the Commissioners may from time to time prescribe. He/She shall keep the Board fully informed at all times as to the status of Department activities.

ARTICLE VIII Board Secretary

Section 1. The Board shall appoint a Board Secretary assigned to the Director.

Section 2. The Secretary shall prepare and distribute the Board package and meeting agenda.

Section 3. The Secretary shall be present at all meetings of the Board and shall keep an accurate record of the minutes of the proceedings of such meetings. The records shall be open at all reasonable times to the inspection of any Commissioner.

Section 4. The Secretary shall see that all notices are duly given in accordance with the provisions of the By-Laws and/or as required by law.

Section 5. The Board Secretary shall call the roll at each Board meeting and record the names of the Commissioners absent from the meeting.

Section 6. The Secretary shall, at the request of any absent member, enter upon the records of any special meeting the approval or disapproval of such member on any action taken at such meeting.

Section 7. In the absence of the Board Secretary at any meeting, a Secretary pro tem may be assigned, who shall record the proceedings of such meeting.

Section 8. The Board Secretary shall keep a record of the registered address of each Board member.

Section 9. The Board Secretary shall perform such other duties and have such other powers as shall be prescribed by the Board, these By-Laws or by law.

ARTICLE IX Duties of Commissioners

Section 1. The Commissioners shall prepare for Board discussions by reviewing the materials sent out prior to the meeting.

Section 2. The Commissioners shall be the governing body of the utility.

Section 3. The Commissioners shall attend and participate in the Board meetings.

Section 4. The Commissioners shall support Departmental events through personal attendance.

Section 5. The Commissioners shall represent the Department and its programs in the constituent communities in accordance with Board policies.

ARTICLE X Meetings

Section 1. The Board shall hold meetings regularly, and shall designate a time and place for such meetings. It shall adopt its own rules of procedure and shall keep records of its proceedings. All records of meetings of the Board shall be public in accordance with the Michigan Public Act No. 267 of 1976.

Section 2. The annual meeting of the Board for the election of officers of the Board and the transaction of other business shall be held during the month of June at the principal office of the Board in Detroit, Michigan, or at such other place and time as the Board may determine. In the event the annual meeting is not held, a special meeting in lieu of the annual meeting may be called in the same manner as provided for special meetings of the Board.

Section 3. Regular meetings of the Board shall be held at its principal office in Detroit, Michigan, or at such other place and time as the Board may determine.

Section 4. Special meetings of the Board and any change in the date of a regular meeting may be called for by the President or any four Commissioners by giving notice of the time and place of such meeting and the object for which it is called, in the manner provided by these By-Laws, the Charter of the City of Detroit and the Open Meetings Act for giving notice of Board meetings.

Section 5. Notice of all meetings of the Board, other than regular meetings, shall be sent by the Board Secretary, or other person authorized to give the same by these By-Laws, by mail or by hand to each Commissioner at his or her registered address, at least three calendar days prior to the date of the meeting. An affidavit of such mailing or delivery made by the Secretary or other duly authorized person, with a copy of the notice attached, shall be sufficient proof of such notice.

Section 6. At any meeting of the Board, four or more members of the Board present shall constitute a quorum for the transaction of business. A less number may adjourn any meeting from time to time and the meeting may be held as adjourned without notice.

Section 7. When a quorum is present, a majority of the Commissioners present at such meeting shall decide any question brought before such meeting, unless otherwise provided by law or by these By-Laws.

Section 8. Five votes shall be required to approve rates, the capital improvement program and contracts for Board staff members.

Section 9. Notwithstanding the notice requirements, the Board may meet in emergency session as permitted under Michigan Public Act No. 267 of 1976.

Section 10. The Board may hold closed or executive sessions pursuant to the provisions of Michigan Public Act No. 267 of 1976.

ARTICLE XI Committees

Section 1. The Board shall appoint such committees as it may deem expedient for the purposes of conducting Board business.

ARTICLE XII
Records and Reports

Section 1. Prior to the filing with the municipal officers of the detailed annual report, and as much more often as the Board may prescribe, there shall be made a full and detailed examination of the financial affairs of the Department and the methods employed in conducting its business affairs, and for this purpose the Commissioners shall meet annually with the city's auditor, who shall make a full and detailed examination of the books, vouchers, and other papers relating to the financial affairs of the Department, as well as the method employed by the Department in conducting its business affairs.

Section 2. The Auditor's report shall be incorporated in the annual report filed by the Board with the municipal officers and shall be printed for distribution to any interested person.

Section 3. The Auditor's report shall be incorporated in the annual report filed by the Board with the City of Detroit.

ARTICLE XIII
Conflicts of Interest

Section 1. The provisions of this Section shall be consistent with the provisions of the Detroit City Code.

Article XIV
Amendments

Section 1. These By-Laws may be amended or repealed at any meeting of the Board by a vote of at least four Commissioners, provided that in the notice of such a meeting a notice of such intended alteration, amendment or repeal be given.

Section 2. No such amendment or repeal shall be passed until it has been read at two separate meetings of the Board.

Section 3. No amendment to these By-Laws may alter the number of Commissioners, through an increase or decrease, as such number is provided by City Charter.

Article XV
Governance

Section 1. The Board shall be governed by the Charter of the City of Detroit (subject to the Order dated November 4, 2011 referenced in Article XVIII of these By-Laws), applicable laws, these By-Laws and any such rules that are developed by the Board. The rules of Parliamentary procedure comprised in the then current version of 'Robert's Rules of Order Newly Revised', by Henry M. Robert III, shall also govern the Board in all cases where the rules of the Board of Water Commissioners are not applicable.

Article XVI
Indemnification

Section 1. The Department shall indemnify and save harmless any person who may serve or who has served at any time as a member of the Board or as an officer or administrator of the utility, or which Commissioner, officer or administrator is or was serving as a director, officer, commissioner, employee, partner, fiduciary or agent of another corporation, partnership, joint venture, trust, pension, employee benefit plan or other entity, and the respective heirs, executors, administrators, and assigns of said person against any and all expense (including but not limited to attorneys' fees, amounts paid upon judgments, and amounts paid in settlement before or after any litigation is commenced) actually and necessarily incurred by said person in connection with the defense or settlement of any claim, action, suit or proceeding in which said person is made a part or is threatened to become a party or which may be asserted against said person, by reason of serving in such capacity, if said person acted in good faith, and in a manner reasonably believed to be in, or not opposed to, the best interest of the City of Detroit, and with respect to any criminal action or proceeding, had no reasonable cause to believe such conduct to be unlawful. An officer or administrator shall include only those persons who have been appointed by the Mayor, the Board, or individually appointed to positions by the Director and approved by the Board. Said indemnification shall be in addition to any other rights to which the person indemnified may be entitled under any law, statute, agreement or otherwise.

ARTICLE XVII
Public Participation at Board Meetings

Section 1. There shall be a public comment period at each meeting of the Board. The public comment period shall be at the start of the meeting unless the Board designates another time.

Section 2. During the public comment period any person attending the meeting may address the Board on any matter within the Board's jurisdiction. Speakers shall not address matters not related to the Department.

Section 3. Speakers shall identify themselves to the Board. Each speaker shall be limited to three minutes, unless the Chair permits a longer statement.

Section 4. Speakers shall not make personal attacks on other persons. The Chair may stop speakers from making personal attacks and may terminate such attacks.

Section 5. The Board may order the expulsion from the meeting of a person who is disruptive or commits a breach of the peace.

Section 6. Any person may submit a written statement in addition to or in place of a verbal statement.

Section 7. If a group or organization wishes to make a statement, the Chair may request that the group or organization designate a spokesperson to speak on behalf of the group or organization.

ARTICLE XVIII Federal Court Orders

Section 1. The Department is currently under the jurisdiction of the United States District Court for the Eastern District of Michigan, Case No. 77-77100, United States v City of Detroit *et al.* The Court entered a Stipulated Order dated February 11, 2011 and an Order dated April 29, 2011, which affect the governance of the Department. The Court entered an Order dated November 4, 2011, which affects the authority granted to the Board and the pertinent parts of which are set forth in Sections 2 through 6 below. The orders referenced in this Section 1 are attached as exhibits and are incorporated by reference into these By-Laws.

Section 2. The Board shall have sole authority for setting and approving wholesale water and sewerage rates. The Board shall have authority to set and approve retail water and sewerage rates, subject to the approval of the City Council.

Section 3. In addition to all powers currently vested in the Department pursuant to the City of Detroit Charter, City Ordinances, State Law, and these By-Laws, the Department, acting through its Director upon authorization by the Board, shall have final authority to approve the following types of documents without any further approvals from other departments, boards, agencies, or offices of the City of Detroit: legal settlements and claims paid by the Department; collective bargaining agreements for employees of the Department; terms and conditions of employment for employees of the Department; the budget for the Department, subject to approval of rates as set forth in Section 2 above; wage scales for Department employees, subject to City Council's veto rights as set forth in the Order dated November 4, 2011; and those procurements not covered by the Board's and the City Council's approval outlined in the Procurement Policy dated November 2, 2011 and adopted by the Court in its Order dated November 4, 2011.

Section 4. The recruitment of a Director shall require the establishment of a Director search committee that shall include representation from the Mayor's office, a member of the Board selected by the Board and who is not a resident of Detroit, and a member of the City Council appointed by its President. The process for appointing a Director shall remain as stated in Article I of these By-Laws. The removal of the Director shall require either five votes by the Board, or a two-thirds vote of the City Council and the approval of the Mayor.

Section 5. The Board's approval shall be sought for the following types of procurements: personal services contracts that exceed \$50,000.00; goods or commodities contracts that exceed \$100,000.00; professional services contracts that exceed \$250,000.00; construction contracts that exceed \$500,000.00; and the sale of land or equipment contracts that exceed \$500,000.00, pursuant to a written appraisal from a licensed appraiser. Procurement and award of contracts shall be governed by the Detroit Water and Sewerage Department Procurement Policy that is incorporated into the Federal Court's Order of November 4, 2011, which is attached and incorporated into these By-Laws.

Section 6. The Board shall review all bid protests and shall do so in an expeditious manner. The Board shall vote to either accept or reject the bid protest within fourteen days of the date upon which the protest was filed.

Adopted by the Board of Water Commissioners on April 23, 1997.

Amended by the Board of Water Commissioners on May 18, 2010 with the addition of Article XVII.

Amended by the Board of Water Commissioners on July 27, 2011 with amendments to Article III, Sections 1, 4 and 5; Article VII, Sections 1 and 2; Article X, Sections 5, 8, 9 and 10; and the addition of Article XVIII.

Amended by the Board of Water Commissioners on January 25, 2012 with amendments to Article I, Section 1; Article V, Section 2; Article XV, Section 1; and Article XVIII, Sections 1 through 6.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, et al.,

Case No. 77-71100

Defendants.

_____ /

STIPULATED ORDER

F I L E D
FEB 11 2011
CLERK'S OFFICE
DETROIT

The City of Detroit, Wayne County, Oakland County and Macomb County stipulate and agree:

Whereas, Sec. 7-1501 of the Detroit City Charter provides that the Mayor appoints a seven member Board of Water Commissioners, at least four of whom must be Detroit residents; and

Whereas, the Board has a membership of four Detroit residents, one resident of Wayne County, one resident of Oakland County and one resident of Macomb County; and

Whereas, the Charter provides that the Board of Water Commissioners shall appoint a director of the Detroit Water and Sewerage Department (DWSD), oversee all operations and management of DWSD and procurement of goods and services, and set rates for water and sewer service; and

Whereas, the Parties agree that DWSD's ability to comply with environmental laws and its NPDES Permit will be enhanced by the Board's exercise of its powers and authority to the fullest extent of the law; and

Whereas, the Parties have worked together to collaboratively resolve certain concerns regarding the past management, operations and oversight of DWSD.

1 of 4
sbc

It is stipulated and agreed between Detroit, Wayne County, Oakland County and Macomb County that:

The Mayor of Detroit will appoint three commissioners, one each nominated by the Wayne County Executive, the Oakland County Water Resources Commissioner and the Macomb County Public Works Commissioner. The parties agree to file briefs on the issue of whether the members of the Board of Water Commissioners will serve at the pleasure of the Mayor or whether they should only be removed for cause.

All seven members of the Board of Water Commissioners must have at least seven years of experience in a regulated industry, a utility, engineering, finance or law. However, notwithstanding the foregoing and to provide continuity, it is expressly ordered that no more than two (2) current members may remain on the Board of Water Commissioners and all other members shall be newly appointed.

Members of the Board of Water Commissioners will be compensated at a rate of \$10,000.00 per year and \$250 per meeting, not to exceed \$20,000.00 per year in total. This compensation may, in the future, be adjusted by the Board, with the consent of the Mayor and Wayne County Executive, the Oakland County Water Resources Commissioner and the Macomb County Public Works Commissioner.

The Board of Water Commissioners will have three staff. One shall be an attorney, one shall have expertise in finance, and one shall have technical expertise (engineering or water or wastewater operations). The By-Laws shall provide that five votes are required for approval of Board staff members.

The Board of Water Commissioners By-Laws will be amended to require five votes of seven to approve rates and a five-year capital improvement plan.

The Mayor shall appoint a Board of Water Commissioners as described above before April 1, 2011.

Oakland County's Motion For Appointment Of Interim Regional Management Committee shall be withdrawn without prejudice.

Within six months of the date of this Order, any party may file a motion with the Court to demonstrate that the Detroit Water and Sewerage Department is in substantial compliance with its NPDES Permit and the consent judgments of this Court. If the Court is satisfied that substantial compliance has been achieved, it shall dismiss this lawsuit.

If any provision of this Stipulated Order is held to be void or unenforceable, the remaining provisions shall remain valid and shall be construed in such a manner as to achieve their original purposes in full compliance with applicable laws.

2 of 4



IT IS SO ORDERED.

SFC

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

Dated: February 11, 2011

BY OUR SIGNATURES APPEARING BELOW, WE HEREBY
STIPULATE TO THE ENTRY OF THIS STIPULATED ORDER THIS 11TH
DAY OF FEBRUARY, 2011.

CITY OF DETROIT

By: *Race Beard*

Its: *Mayor*

Robert C. Walter

Robert C. Walter (P30524)
City of Detroit Law Department
Attorneys for City of Detroit

Robert J. Franzinger

Mark D. Jacobs (P41878)
Robert J. Franzinger (P25539)
DYKEMA GOSSETT PLLC
Attorneys for City of Detroit

COUNTY OF OAKLAND

By: *J.P. McMillan*

Its: *WATER RESOURCES COMMISSIONER*

Rodger D. Young

Rodger D. Young (P22652)
Jaye Quadrozzi (P74646)
Young & Susser, P.C.
Attorneys for County of Oakland

3 of 4
3 *SFC*

COUNTY OF MACOMB

By: Anthony V. Marrao

Its: Public Works Commission

R. S. Hupp

R. Craig Hupp (P36254)
BODMAN
Attorneys for County of Macomb

COUNTY OF WAYNE

By: Robert A. Juano

Its: Wayne County CEO

Layonda Jackson

Layonda Jackson (P54982)
Assistant Corporation Counsel
Attorney for County of Wayne

4 of 4

Sfc

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
APR 29 2011
CLERK'S OFFICE
DETROIT

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.

ORDER

On February 11, 2011, various parties in this action signed a Stipulated Order. (Docket Entry No. 2334). That Stipulated Order contains various provisions relating to the Board of Water Commissioners, including that “The Mayor of Detroit will appoint three commissioners, one each nominated by the Wayne County Executive, the Oakland County Water Resources Commissioner and the Macomb County Public Works Commissioner.” (*Id.* at 2). Because all parties did not agree as to whether the members of the Board of Water Commissioners should serve at the pleasure of the Mayor or whether they should only be removed for cause,¹ the Stipulated Order states that the “parties agree to file briefs on the issue of whether the members of the Board of Water Commissioners will serve at the pleasure of the Mayor or whether they should only be removed for cause.” (*Id.*).

Following the entry of the Stipulated Order, this Court ordered “that each party that

¹At the time the Stipulated Order was executed, the City of Detroit was the only party that did not wish the Stipulated Order to include a just-cause provision.

signed the Stipulated Order may file a brief of no more than 12 pages in support of its position on the above issue no later than April 25, 2011. Each party may file a brief of no more than 6 pages in response to any other party's opening brief no later than May 23, 2011." (Docket Entry No. 2341).

On April 25, 2011, Oakland County and the City of Detroit filed briefs stating their respective positions. Notably, the City of Detroit now contends that "members of the Board should only be removed for cause" (*see* Docket Entry No. 2348, City's Br., at 1) and that the City of Detroit may lawfully agree to such a just-cause provision. As such, all parties now agree that, under the parties' Stipulated Order, the members of the Board of Water Commissioners shall only be removed for cause.

Accordingly, there is no need for any further briefing and IT IS ORDERED that, pursuant to the parties' Stipulated Order, and the parties' post-order briefs (Docket Entry Nos. 2347 and 2348), the members of the Board of Water Commissioners shall be removed only for cause.

IT IS SO ORDERED.

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

Dated: April 29, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on April 29, 2011, by electronic and/or ordinary mail.

S/Jennifer Hernandez
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Honorable Sean F. Cox

City of Detroit, *et al.*,

Case No. 77-71100

Defendants.

ORDER

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

As set forth in this Court’s September 9, 2010 Opinion & Order (Docket Entry No. 2397):

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

(*Id.* at 1).

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

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

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

As explained in detail in this Court’s September 9, 2010 Opinion & Order, this Court denied that motion. In doing so, this Court noted that *after* executing the ACO on July 8, 2011, the DWSD self-reported serious violations of its NPDES permit to the DEQ. Thus, the City had not established that the DWSD has achieved even short-term compliance with the ACO and the Clean Water Act. In addition, this Court concluded that the extensive record in this case establishes that, unless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to compliance, sustained compliance with the Clean Water Act and the ACO will simply not occur. This Court further explained:

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

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

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

(*Id.* at 2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

shall include those revised employee classifications.

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

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

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

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

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.

S/Sean F. Cox

Sean F. Cox

United States District Judge

Dated: November 4, 2011

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

S/Jennifer Hernandez

Case Manager

November 2, 2011

Hand Delivered

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

Re: DWSD Root Cause Committee

Dear Mr. Ottenwess:

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

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




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



James G. Fausone
DWSD
Board of Water Commissioners



Charles Pugh, President
Detroit City Council



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

COMMITTEE'S PLAN OF ACTION

November 2, 2011

I. PREAMBLE

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

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

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

- Human Resources
- Procurement
- Law
- Finance
- Rates

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

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

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

II. GOVERNANCE

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

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

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

A. OPERATIONS

(1) Divisional Structure within DWSD Administration

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

(2) Procurement Policy for DWSD

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

(3) Immediate needs for Human Resources

(a) Employees Covered by Collective Bargaining Agreements

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

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

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

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

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

The problem areas that were identified and require solutions are:

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

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

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

(b) DWSD Executive Management Team

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

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

B. RATES

(1) Approval Authority

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

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

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

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

(2) Additional Considerations

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

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

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

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

C. ADMINISTRATIVE - APPROVAL AUTHORITY

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

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

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

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

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

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

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

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

- a. Five (5) votes by the Board of Water Commissioners; or
- b. A two-thirds (2/3) vote of the Detroit City Council and the approval of the Mayor.

The Detroit City Council, as the legislative branch of the City of Detroit, recognizes the need to increase accountability for performance within DWSD in order to achieve long-term compliance with the Clean Water Act. As a result, the role of the Detroit City Council in approving actions of DWSD will be more targeted to broader policy issues. Specifically, the Detroit City Council will retain authority to approve the following items, subject to ratification by the Mayor:

- DWSD Rate approval as outlined in the Rate Section, above,
- Approval of the final City of Detroit Budget, which shall incorporate the DWSD enterprise fund budget as an attachment. However, there shall not be a need for DWSD to appear for a budget hearing as the components of the budget are approved within the Rate approval vote that has already taken place prior to the budget approval.
- Salary ranges for City employees are contained within a document commonly known as the “white book.” With respect to non-represented employees of DWSD, the rates shall be deemed approved by the Detroit City Council if they are not rejected by a majority vote of the Detroit City Council within 30 days of their being presented to the Council.

In addition to the specific approval authority cited above, the Detroit City Council will continue to serve an important role in monitoring the overall performance of the Detroit Water and Sewerage Department. The Director of DWSD shall provide the City Council with copies of its quarterly MDEQ reports on the status of its implementation of the compliance program as required by Section 3.10 of the ACO and shall be required to make appearances before the Detroit City Council no less than semi-annually to explain efforts to remain in compliance with the ACO. The monitoring role shall include requesting reports on environmental compliance, scheduling meetings with the DWSD Director and DWSD staff, and reviewing DWSD’s compliance with the court orders.

III. Legal Barriers

One of the key areas of concern throughout the Court’s oversight of DWSD’s non-compliance with the Clean Water Act is the existing City of Detroit procurement process. While this Committee does not have the time needed to perform an exhaustive review of the existing procurement process and to make specific recommendations to modify that system, it is clear that the current process has failed DWSD. In order to achieve long-term compliance, this committee agrees that DWSD will need to be relieved of the requirement to fully comply with the existing provisions of the City of Detroit’s Procurement Ordinance. As a by-product of this decision, it is also clear that DWSD cannot be expected to fully comply with the Charter provisions related to Privatization (Charter Section 6-307).

While we agree that DWSD should be free from the language of those laws outlined

above, as currently written, we do believe that several of the key concepts must still control the operations of DWSD's procurement process. That discussion will occur under the Procurement Section of this report.

There are two provisions of the Detroit City Charter that speak to the approval authorities for the sale of property of DWSD. After considerable discussion in the Committee on DWSD's need to find better ways to operate in an efficient and effective manner and adapt the system to meet the needs of the current customer base as opposed to the capacity that the system was originally designed to support, the Committee felt that there was a need to seek relief from Charter Sections Charter 7-1504 and Charter 4-112. The Committee suggests that the sale of property by DWSD shall be overseen by the Detroit City Council as provided by the procurement policy. Therefore, the Committee suggests that the sale of property within DWSD should be solely governed by the provisions of the proposed procurement policy attached to this Plan.


IV. TRANSITIONAL PLAN

In order to assist DWSD in obtaining the administrative support services that it needs to insure accountability in order to achieve long-term compliance, it is agreed that DWSD will be free to seek its own new staff in filling the newly created administrative positions within DWSD's Administrative Division with respect to HR, Finance, Law, and Procurement. Existing staff within City of Detroit Departments of Finance, Budget, Human Resources and Labor Relations, and Law that support the activities of DWSD will be addressed through the City of Detroit's traditional process for addressing staffing reduction or bumping decisions, consistent with this order.

Finally, the Committee recognizes that we may need the assistance of professional labor and bond attorneys to help us navigate the transitional issues associated with Collective Bargaining Agreements and existing and/or future Bond transactions within the context of the Governance and Approval recommended changes outlined above. It is our intent to vest the Director of DWSD with the exclusive authority to sign CBAs on behalf of DWSD for its employees and to negotiate the terms and conditions of employment for DWSD employees. Equally, it is our intent to support all existing bond commitments that have been made by the City of Detroit as well as to avoid impairing DWSD's ability to issue future bonds to support our Capital Expenditure needs.

At the end of this process, we would recommend that the Court's final order instruct the Board of Water Commissioners to amend their By-laws to make them consistent with this Plan as we have outlined.

We the undersigned, hereby submit this Plan, as presented, to the Special Master upon our recommendation that the Court accept this proposal.



Chris Brown
Chief Operating Officer
Mayor's Office



James Fausone
Board Member
Board of Water Commissioners



Gary Brown
President Pro Tem,
Detroit City Council



Charles Pugh
President
Detroit City Council

Attachment

Detroit Water and Sewerage Department Procurement Policy

November 2, 2011

(1) General Policy Statement

The Detroit Water and Sewerage Department (“DWSD”) shall procure all goods and services through the use of competitive bidding as outlined in this policy, unless an express exception is provided to that general rule. The DWSD Director shall take all necessary measures to ensure this policy is adhered to.

(2) Types of Competitive Bidding

In the procurement of goods or commodities, DWSD shall only use an Invitation for Bids in which the price factor shall be the only factor considered in the award of a contract. An Invitation for Bids shall not be due any sooner than 14 calendar days from the date of issuance.

In the procurement of professional services, DWSD shall use a Request for Proposals. A Request for Proposals shall not be due any sooner than 21 calendar days from the date of issuance.

In the procurement of construction services, the Department is free to determine the type of competitive bidding and the time frame for response that is appropriate for the complexity of the project.

(3) Minimum Qualifications for Response

DWSD shall provide within each competitive solicitation the minimum qualifications needed to submit a responsible and acceptable response. These minimum qualifications may include, among others, insurance requirements, compliance with the Ethics code, Section 2-6-91 *et seq* of the Detroit City Code, disclosure statements, certificates of good standing with the State of Michigan, etc.

(4) Exceptions to Competitive Bidding

While the general rule is that all procurements by DWSD shall be done pursuant to competitive bidding, there is a need for narrow exceptions to this general rule that will promote efficiency of operations and assist with insuring long-term compliance. The exceptions are as follows:

(A) Emergency Procurements

The DWSD Director, without prior approval of the Board of Water Commissioners (“BOWC”) or Detroit City Council, may make, or authorize others to make, an emergency procurement when public exigencies require the immediate delivery of articles or performance of services or when there exists a threat to public health, welfare or safety or to prevent an imminent violation of a required environmental permit or

Administrative Consent Order under emergency conditions where prior approval would be impossible or impracticable under the circumstances; provided that:

(i) Emergency procurement shall be made with such competition as is practicable under the circumstances; and

(ii) The DWSD Director or other person he or she authorizes to make emergency procurement shall, within one (1) week of the procurement, notify the Board of Water Commissioners and the Detroit City Council in writing of the procurement and the basis for the emergency and for the selection of the particular contractor. The DWSD Director shall submit the procurement contract for any necessary approval within four (4) weeks of the procurement.

(B) Sole Source Procurements

Competitive bidding is not required when the DWSD Purchasing staff certifies that only one (1) source of supply is available.

(C) Small Purchases

(i) *General.* Any contract not exceeding \$25,000.00 may be made in accordance with the small purchase procedures authorized in this section. Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section.

(a) When a dollar limit is specified upon the authority delegated by this subsection, it shall be construed to apply to the cumulative amount of contracts awarded to a specific business for a kind of supplies, service or construction within the same fiscal year. DWSD shall requisition and solicit procurements in amounts which are based upon their reasonable and foreseeable needs and storage capacities, and upon other relevant factors, such as, economies of scale in purchasing, shipping and handling; or the shelf-life, useful life, or seasonal availability of a product. Contracts shall not be divided into smaller parts to circumvent the need for Board of Water Commissioners or Detroit City Council approval.

(b) Separate contracts may however be used if:

(1) There is a need to document expenditures as against various restricted funding sources; or

(2) It is not economically practical to store a one-year supply of a given commodity, because of shelf-life, or storage costs and capacities; or

(3) Product price often changes, and more often than not in a downward trend; or

(4) Different users have significant differences in the timing of their needs for a service or product; or

(5) The initial or continuing need for a product or service is not readily foreseeable so as to enable consolidated purchasing; or

(6) The cost of coordinating consolidated purchasing will exceed any savings which are likely to be generated; or

(7) To promote greater utilization of small businesses.

(ii) *Small purchases over \$5,000.00 but not exceeding \$25,000.00.* Insofar as it is practical, solicitations of verbal or written quotes from a minimum of three qualified sources of supply shall be made and documentation of the quotes recorded on or attached to the purchase requisition. Reasonable best efforts shall be made to solicit bids from Detroit Based Businesses. The award shall be made to the lowest responsive/responsible source. Monthly, the Board of Water Commissioners shall be provided a list of purchases, vendors and amounts which fall into this category.

(iii) *Small purchases under \$5,000.00.* Any purchase not exceeding \$5,000.00 may be accomplished without securing competitive quotations if the prices are considered to be fair and reasonable. Competitive quotations need only be taken when the DWSD Director suspects the price may not be fair and reasonable, e.g., comparison to previous price paid, personal knowledge of the price range of the item involved. The maximum amount for purchases that may be achieved by using this method of procurement is \$5,000.00. Every effort should be made to distribute such purchases equitably among qualified suppliers.

(iv) *Protest rights.* The provisions of Section 7 shall not apply to contracts awarded under the procedures set forth in this subsection.

(v) *Evaluation Credits for Small Purchases.* Evaluation credits under Section 5 shall not be considered for small purchases under \$25,000.00.

(D) Cooperative Purchases

The DWSD Director may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of supplies, services, or construction services with one or more public procurement units in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi-party contracts between public procurement

units. Examples of such cooperative purchasing is State of Michigan contracts, General Services Administration (GSA) contracts, supplies and/or services procured from another governmental agency, and U.S. Communities.

(i) *Sale, acquisition or use of supplies.* The DWSD Director may sell to, acquire from, or use any supplies belonging to another public procurement unit independent of the requirements of the general bidding requirements of this policy.

(ii) *Cooperative use of supplies or services.* The DWSD Director may enter into an agreement, independent of the general bidding requirements of this policy, with any public procurement unit for the cooperative use of supplies or services under the terms agreed upon between the parties.

(iii) *Joint use of facilities/equipment.* The purchasing director may enter into agreements for the common use or lease of warehousing facilities, capital equipment, and other facilities with another public procurement unit under the terms agreed upon between the parties

(iv) *Cooperative Purchase Agreements.* In the event that the DWSD Director determines that it is advantageous to take advantage of a Cooperative Purchase Agreement for the procurement of goods from a vendor that is neither a Detroit Based Business nor a Detroit Resident Business, the DWSD Director shall provide an opportunity for Detroit Based Businesses or Detroit Resident Businesses to submit a bid that is equal to or less than the cost of the Cooperative Purchase price.

(E) Personal Services Contracts

Competitive bidding is not required for personal services contracts. A personal services contract is one that furnishes labor, time, or effort by an individual not required to deliver specific end product, other than reports which are merely incidental to required performance. This term does not include employment agreements or collective bargaining agreements.

(5) Price Equalization Credits

(A) Price Equalization Credit Categories shall be:

(i) Detroit Based Business

(ii) Detroit Resident Business

(iii) Joint Venture

(iv) Mentor Venture**(v) Customer Based Business**

In order to claim entitlement to a credit pursuant to this section, the vendor must submit proper documentation of their entitlement to the credit at the time that the vendor responds to the competitive solicitation. Failure to provide documentation at the time of the bid submission shall negate any application of the equalization credits to the evaluation of that bid.

(B) Price Equalization Credits

	Contracts Up to \$1 million	Contracts ≥\$1 million
Detroit Based Business	2%	1%
Detroit Resident Business	2%	1%
Joint Venture	1%	0.5%
Mentor Venture	1%	0.5%
Customer Based Business	1%	0.5%

(C) Use of Price Equalization Credits

In evaluating the bids of competing vendors, the Price Equalization Credits contained within this policy can be used to reduce the relative cost of the price component of any bids provided by vendors responding to a Request for Proposals or a competitive solicitation related to construction services. The relative reduction in price shall be in accordance with the percentages outlined above in Section B.

A potential vendor is entitled to use multiple credits in their bid in accordance with the chart contained in subsection (B) above provided that:

- (i) a potential vendor cannot claim both a **Joint Venture** and a **Mentor Venture**;
and
- (ii) a potential vendor cannot claim to be both a **Customer Based Business** and a **Detroit Based Business**.

Price Equalization Credits will not be utilized in the award of contracts pursuant to an Invitation for Bids for the procurement of goods or where prohibited by applicable law. Federal law prohibits such equalization credits on projects utilizing federal funds.

(6) Approval of Contracts

(A) Approval by the Director of DWSD

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

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

(B) Approval by the Board of Water Commissioners

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

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

(C) Approval by the Detroit City Council

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

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

(iii) Professional Services contracts that exceed \$2,000,000;

(iv) Construction contracts that exceed \$5,000,000; and

(v) Sale of land or equipment contracts that exceed \$2,500,000, pursuant to a written appraisal from a licensed appraiser.

(7) Bid Protests and Appeals

(A) A potential vendor who is not recommended for award of a contract after participating in DWSD's competitive solicitation process may protest the award of the contract by filing a written notice of protest with the Board of Water Commissioners within seven (7) days of the notice of award. The written notice shall reference the solicitation number and the basis for the protest.

(B) Upon receiving a bid protest, the DWSD Director shall immediately halt the processing of the relevant contract award until the protest has been resolved.

(C) The Bid Protest shall be reviewed by the staff of the Board of Water Commissioners in an expeditious manner. The Board of Water Commissioners shall vote to either accept or reject the bid protest within fourteen (14) days of the date upon which the protest was filed. If the Board of Water Commissioners accepts the bid protest, the DWSD Director shall act in accordance with the Board of Water Commissioners findings. If the Board of Water Commissioners rejects the Bid Protest, the Director of DWSD shall notify the protestor of that decision and their opportunity to appeal to the Detroit City Council.

(D) A potential vendor may appeal a denial of their bid protest to the Detroit City Council. To be valid, the appeal must be filed with the Detroit City Clerk within seven (7) days of receipt of the denial of their bid protest. The Detroit City Council, acting through its Committee on Public Health and Safety, shall decide whether to accept or reject the appeal within ten (10) days of receipt of the Appeal.

(8) Definitions

Procurement - A written agreement for the purchase or sale of goods, services, land and fixtures attendant to the land.

Detroit Based Business – A business which pays city income taxes on the business's net profits and pays city property taxes on a plant or office and equipment which are ordinarily required for the furnishing of the goods or the performance of the services required by the contract and referred to in the application for certification as a Detroit-based business, or other real or personal property in the city equivalent in value to such

plant or office and equipment for not less than one (1) taxable year immediately prior to the date of the application for certification as a Detroit-based business, which shall comply with the following requirements:

- (1) Provide verification that the firm has the physical resources including, but not limited to, inventory, equipment, vehicles, etc., as well as the ability to provide the services indicated in its application for certification at the city location; and
- (2) Provide verification of the ability of the business to carry out the service or repair the product to be sold to the city at the city site; and
- (3) Provide references, licenses, or other means of verification acceptable to the city that the services the firm offers to the city has been provided at the city site for at least one (1) year prior to the date of application; and
- (4) Provide verification that the business has or can procure an adequate number of employees based at its city site to perform services indicated in the application

Detroit Resident Business - means any business which employs a minimum of four (4) employees at least fifty-one (51) percent of which are city residents.

Joint Venture - means a joint venture of separate firms, one of which is a DBB, or DRB which has been created to perform a specific contract, and is evidenced by a written agreement which provides at a minimum that the DBB or DRB:

- (1) Is substantially included in all phases of the contract, including, but not limited to, bidding and staffing; and
- (2) Provides at least fifty-one (51) percent of the total performance, responsibility, and project management of a specific job; and
- (3) Receives at least fifty-one (51) percent of the total remuneration from a specific contract; and
- (4) Shares in profits and losses.

Mentor Venture - means a joint venture of separate firms, one of which is a D-BB, D-BSB, D-RB or D-BMBC, which has been created to perform a specific contract, and is evidenced by a written agreement which provides at a minimum that the D-BB, D-BSB, D-RB or D-BMBC:

- (1) Is substantially included in all phases of the contract including, but not limited to bidding and staffing; and
- (2) Provides at least thirty (30) percent of the total performance, responsibility and project management of a specific job; and
- (3) Receives at least thirty (30) percent of the total remuneration from a specific contract; and
- (4) Shares in profits and losses.

Customer Based Business – A business that is headquartered and operating in the region and that receives water or wastewater services from DWSD.

	IFB - Good and Commodities (No. Days)	RFP - Professional Services (No. Days)
<u>General Requirements Time</u>		
Solicitation Preparation and Advertisement	14	20
Days to Respond from Date of Issuance of Solicitation*	14	21
Scoring Responses and Issuing Notice of Award	3	7
Negotiating Final Documents	14	14
Total General	45	62
<u>Approval Time</u>		
Board of Water Commissioners Approval	30	30
Detroit City Council Approval	7	7
Total Approval Time	37	37
<u>Protest Time</u>		
Days to File Protest with BWC*	7	7
BWC Decision on Protest*	14	14
Appeal Adverse Decision to DCC*	7	7
DCC Decision on Appeal*	10	10
Total Protest Time	38	38
<u>POSSIBLE TIMING</u>		
General, No Approval, No Protest	45	62
General, BWC Approval Required, No Protest	75	92
General, DCC Approval Required, No Protest	82	99
General, No Approval, Protest	83	100
General, BWC Approval Required, Protest	113	130
General, DCC Approval Required, Protest	120	137

Notes:

1. Items marked with * are those with time requirements defined by the policy
2. Actual times for protested contracts may be shorter if some of the approvals are made to overlap
3. Approval time for DCC is added to BWC because it is assumed that DCC will only review contracts already approved by BWC