

Attachment 1

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANACOSTIA WATERSHED SOCIETY, et al.)	
Plaintiffs)	Civ. Action No. 1:00CV00183TFH
)	
v.)	
)	
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, et al.)	
)	
and)	
)	
THE UNITED STATES)	
Plaintiff)	
)	
v.)	
)	
DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY)	Civ. Action No. 1:02-02511 (TFH)
)	
and)	
)	
THE DISTRICT OF COLUMBIA,)	
)	
)	
Defendants.)	

MOTION TO ENTER CONSENT DECREE

The United States respectfully moves to enter this second consent decree ("Consent Decree") lodged in the above-captioned consolidated actions on December 16, 2004. The consent decree is uncontested: the only comments received during the public comment period were from the Citizen Plaintiffs in this case, who supported prompt entry of the Consent Decree. Accordingly, for the reasons set forth in its Memorandum in Support of this Motion, the United States respectfully requests that the Court approve and enter the Consent Decree.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF
MOTION TO ENTER CONSENT DECREE**

The United States respectfully moves to enter this second consent decree ("Consent Decree") lodged in the above-captioned actions, which are consolidated, on December 16, 2004. This Consent Decree is the final piece in the settlement process, resolving all of the United States' outstanding claims in this action. It brings to an end the five years of litigation and negotiation over discharges of untreated sewage, floatables, and other pollutants from the combined sewer in the District of Columbia, and sets forth a long-term framework under which

the United States, the District of Columbia, and the District of Columbia Water and Sewer Authority ("WASA") will operate during WASA's implementation of its Long Term Control Plan ("Plan" or "LTCP").¹

Notice of the Consent Decree was published in the Federal Register on January 5, 2005, see 70 Fed. Reg. 917-918, and a 30-day public comment period followed. The United States only received one comment, from the Citizen Plaintiffs in this action, which supported entry of the Consent Decree. The United States accordingly moves for entry of the Consent Decree, which is fair, reasonable, and in the public interest.

The consent decree obligates WASA to put in place the CSO controls that it selected in its LTCP, pursuant to a binding, 20-year schedule. These controls include construction of new pump stations on the Anacostia and Potomac Rivers, and construction of massive underground tunnels to hold up to 193 million gallons of wastewater and stormwater during rainstorms and wet weather events. WASA projects the cost of the controls to be \$1.265 billion in year 2001 dollars. WASA's modeling indicates that the LTCP controls will reduce CSO discharges from the existing roughly 2.5 billion gallons per average annual year, to 138 million gallons per average annual year. Consent Decree, Attachment 1 (Long Term Control Plan), Table ES-3, pg. ES-12.

The United States respectfully requests expeditious entry of this uncontested Consent Decree. The parties agree that work to achieve the long-term reductions in CSO discharges into the Anacostia and Potomac Rivers and Rock Creek should no longer be delayed.

¹ The decree is signed by the United States, the District of Columbia, and the District of Columbia Water and Sewer Authority ("WASA"). Citizen Plaintiffs are not signatories.

WASA, the District of Columbia, and the United States consciously eliminated contested or controversial issues from the judicial litigation, by stipulation or by transferring them to the administrative permitting function, so that the consent decree and settlement could be completed. Accordingly, the proposed Consent Decree reflects a straightforward and uncontested settlement which the Court can enter promptly.

I. Legal Standard of Review of Settlements:

The standard of review of a consent decree under the Clean Water Act and to which the government is a party is whether the settlement is fair, reasonable, and consistent with public policy. Because the parties and the general public benefit from the conservation of resources resulting from voluntary settlements, courts favor civil settlements. Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983). The policy of favoring consent decrees has particular force where a "government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990).

"The function of the reviewing court is not to substitute its judgment for that of the parties to the decree, but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy." United States v District of Columbia, 933 F. Supp. 42, 46-47 (D.D.C. 1996)(Judge Hogan), and citations therein. Accord, In re First Databank Antitrust Litigation, 205 F.R.D. 408, 411 (D.D.C. 2002)(in class action, court approving a settlement "must decide whether it is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are better served if litigation is resolved by the settlement rather than pursued"); Thomas v Albright, 139 F.3d 227, 231 (D.C.

Cir. 1998) (in class action, district court must find settlement is fair, adequate and reasonable and is not the product of collusion between the parties).

II. Procedural History:

This case involves discharges from WASA's combined sewer into the Anacostia and Potomac Rivers and into Rock Creek. The combined sewer in the District of Columbia captures both wastewater and stormwater and serves approximately one-third of the District. The combined sewer conveys its contents to the Blue Plains Treatment Plant for treatment when capacity allows, but it has 59 permitted outfalls that discharge untreated sewage and other pollutants into local rivers when the capacity of the sewer is exceeded.

In February, 2000, a number of environmental groups ("Citizen Plaintiffs"²) filed suit against WASA, alleging that its combined sewer overflows ("CSOs") violated the Clean Water Act. Settlement negotiations continued for several years but were not successful. In December, 2002, the United States on behalf of the Environmental Protection Agency also filed suit, asserting three claims.³

² These plaintiffs consist of the Anacostia Watershed Society, a local environmental group devoted to improving the Anacostia River, Friends of the Earth, the Sierra Club, the Kingman Park Civic Association, the American Canoe Association, and an individual plaintiff.

³ Two of the United States' claims were similar to those brought by the Citizen Plaintiffs. First, the United States alleged that WASA was discharging from its combined sewer in violation of the water quality standards of the District of Columbia. Second, it alleged that WASA had failed to implement the Nine Minimum Controls that were required by its NPDES permit and by the 1994 EPA CSO Policy, 59 Fed. Reg. 18688 (April 19, 1994). The Nine Minimum Controls typically are measures that enhance public notification of CSO events and bring the existing system up to its full functioning and capacity. In general, they can be implemented relatively expeditiously and not all of them require extensive capital expenditures. In addition, the United States alleged that WASA had failed to properly operate and maintain its combined sewer system. The complaint sought civil penalties and injunctive relief.

The United States also sued the District of Columbia ("District") as a defendant. Section 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), mandates that the state be joined when the defendant is a municipality, and the Act defines the District as a state. See, 33 U.S.C. § 1362(3). It also sued the District pursuant to Fed. R. Civ. P. 19 as an interested party who should be joined if feasible. The United States' case was consolidated with the Citizen Plaintiff's action.

The parties, although at first unable to complete a global settlement, attempted to narrow the issues to be litigated. First, after the United States filed the complaint, WASA expressed interest in signing a partial consent decree to resolve certain claims, which all the parties signed and the Court entered in October, 2003. That partial consent decree resolved the United States' second claim, alleging WASA's failure to implement the Nine Minimum Controls, and the Citizen Plaintiffs' similar claim. It required implementation of specific measures to satisfy the requirement in WASA's permit and the 1994 EPA CSO Policy that WASA implement the Nine Minimum Controls. It also obligated WASA to pay a civil penalty of \$250,000; to design and construct a Supplemental Environmental Project worth \$1.7 million; and to fund \$300,000 of citizen projects known as "green roofs" that would be performed by the Chesapeake Bay Foundation.

In April, 2004, the Court set trial for July 18, 2005, with interim deadlines for fact discovery, expert reports and discovery, and for briefing of certain legal issues. Active litigation commenced.

The parties nonetheless continued to narrow the issues for trial. The Court entered a stipulation in April, 2004, pursuant to which WASA agreed not to contest its liability,

and the United States agreed not to pursue its claim for additional civil penalties, among other things. Stipulation, Docket No. 66. In a proposed order entered by the Court, the parties agreed that issues related to the District's water quality standards and the interpretation of Section 402(q) of the Act, 33 U.S.C. § 1342(q), would be removed from the litigation, and addressed in EPA's permitting process. September 22, 2004, Agreed Revised Case Scheduling Order, Docket No. 88.

The United States and the Citizen Plaintiffs did not contest the CSO controls that WASA selected in its LTCP, so the scope and nature of the injunctive relief was not at issue. Thus, the main issue to be resolved at trial in the consolidated actions would be the length of the schedule for implementation of the selected controls. The District of Columbia, WASA, and the United States ultimately resolved that issue through negotiations, and the resulting agreement is set forth in the Consent Decree.

III. The Settlement and Consent Decree:

The Consent Decree contains a relatively straightforward agreement on a construction schedule. Many of the legal and procedural provisions are similar to those contained in the October, 2003, Partial Consent Decree previously entered by the Court and are standard terms in federal Clean Water Act settlements. A few aspects of the settlement are summarized below.

A. WASA's Long Term Control Plan:

In August, 2002, WASA submitted to EPA a final LTCP. See, Consent Decree Attachment 1. A major component of the Plan is the construction of underground tunnels to hold the contents of the combined sewer during wet weather, and construction of pumps to

gradually bring the sewage, wastewater, and stormwater from the tunnels back into the combined sewer for conveyance to the treatment plant for treatment, as capacity allows. The tunnels will hold a total of 193 million gallons once constructed. The LTCP also provides for some limited separation of the combined sewer into separate sanitary and stormwater sewers in specific areas within the District of Columbia. When the tunnels are constructed, WASA will close off a number of CSO Outfalls, in areas near boathouses, along the Georgetown waterfront, and other areas. Other LTCP elements include low-impact development retrofit; regulator improvements; and improvements to the excess flow treatment facilities at the Blue Plains treatment plant. See Consent Decree Attachment 1 (LTCP), Section 13 (Recommended Control Plan).

The United States, with the assistance of outside litigation experts and in-house engineering experts at EPA, has reviewed the selected controls and finds them reasonable. Other municipalities have used underground storage tunnels to address their CSO discharges and so there is experience with and acceptance of the technology.

Once the selected controls are constructed and operating, WASA projects significant reductions in the volume and frequency of CSO overflows. An area of particular concern is the Anacostia River, which receives the brunt of the CSO discharges but is least able to absorb the pollutants associated with them due to its small volume, sluggish current, and the tidal effect, which bottles the pollution up in the Anacostia for extended periods. WASA projects that its system of tunnels and other controls will reduce CSO discharges to the Anacostia from 75 times per average annual year to 2 times per year, and the volume from 1,485 million gallons per average annual year to 54 million.

Since EPA, not a state permitting agency, issues the NPDES permit for WASA,

the permit defines what limits WASA will need to meet upon completion of the LTCP.⁴ The Consent Decree cannot terminate without a showing from WASA that it has achieved and maintained compliance with the applicable effluent limitations in its permit. See, Section XXVI (Termination), ¶ 108(b).

B. The Schedule:

The Consent Decree simply lists the various projects selected in WASA's Recommended Control Plan, Section 13 of the LTCP, and sets forth two interim deadlines and a final deadline for each project. These deadlines are subject to stipulated penalties if WASA fails to meet them.

WASA is required to complete the upgrades to the Blue Plains Treatment Plant so that it can better handle excess, or wet weather, flows, in eleven years. In recognition of the sensitivity of the Anacostia River, the first segment of the Anacostia system of tunnels is required to be completed and put into operation in thirteen years. The decree requires that all other projects, including the balance of the Anacostia tunnel system, a tunnel in Piney Branch and Rock Creek, and the Potomac system of tunnels, be completed in 20 years.

In the decree, WASA stipulates that the 20 year schedule for implementation of the selected controls is "feasible and equitable, based on current information, assumptions and financial and other projections." Section VII, ¶ 33. The schedule contained in the Consent Decree assumes no federal funding for the CSO controls. In the event WASA obtains federal funding sufficient to accelerate the schedule, it is allowed to do so under the Consent Decree

⁴ The parties correctly anticipated that the limits or standards that the selected controls must meet might be appealed or challenged, at least in part. Therefore the limits are found in the permit, so that the consent decree could be entered without challenge.

without making any changes to its terms. The twenty year schedule is at the outer limits of what EPA can approve but is appropriate here and avoids the additional delay of litigation and the appeals process.

C. Modification:

Section VII sets forth the provisions related to modification of the Consent Decree, and provides, inter alia, that “the schedule and/or the Selected CSO Controls in Section VI may be modified based on a significant change in the information currently available to WASA or WASA’S current assumptions or projections, whether or not such a change is anticipated, that renders the Consent Decree no longer feasible and equitable.” Consent Decree, Section VII, ¶ 34. The Decree also sets forth the procedural requirements for material modifications of the Selected Controls or the schedule in Section XXII, which is similar to the modification section in the Partial Consent Decree. The Consent Decree requires WASA to continue its implementation of the selected controls – i.e., the work required under the Decree – during the pendency of any modification request, unless the parties otherwise agree. Consent Decree, Section VII, ¶ 34.

V. The Settlement is Fair, Reasonable, and Consistent with the Clean Water Act:

The Consent Decree satisfies the legal standard, is not contested, and should be entered expeditiously. First, the settlement is fair. Fairness consists of both procedural and substantive fairness. Procedural fairness concerns the negotiations process, i.e., whether it was open and at arms-length. United States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1051 (N.D. Ind. 2001) (citing Cannons, 899 F.2d at 86). To determine whether a proposed settlement is substantively fair, courts look to factors such as the strengths of the plaintiff’s case versus the

amount of the settlement offer, the likely complexity, length and expense of litigation, the amount of opposition to the settlement, the opinion of competent counsel, the stage of the proceeding, and the amount of discovery undertaken. Great Neck Capital Appreciation Inv. Partnership v. Pricewaterhouse Coopers, 212 F.R.D. 400, 409 (E.D. Wis. 2002); BP Exploration, supra, 167 F. Supp. 2d at 1051-52.

The docket in this matter clearly shows that the parties had adverse interests that they were litigating vigorously. Negotiations were at arms-length. EPA and WASA are very sophisticated stakeholders in matters involving the CSO Policy. WASA was represented by an outside firm with expertise in representing municipal defendants in similar Clean Water Act cases. The District had its own regulatory and financial interests, as well as plans to develop the Anacostia Waterfront, and was represented by experienced counsel from the Office of the Attorney General for the District of Columbia. Indeed, the involvement of high level officials from the District in the final round of negotiations over the fall was critical to the successful completion of the negotiations.

Moreover, the outcome is substantively fair. The financial burden on the residents of the District argued for a longer schedule. The public health, environmental and aesthetic problems resulting from the frequent discharges of untreated sewage and other pollutants near boathouses and public parks argued for a shorter schedule, as did the District's plans for development (including construction of a \$400 million baseball stadium) along the Anacostia waterfront. The governments were able to balance the competing interests appropriately and fulfill their governmental responsibilities. The issues were all vetted during the litigation and negotiations, resulting in the 20-year schedule and provisions for modification

of the decree described above.

The settlement is reasonable. Although the 20 year schedule for implementation of the selected controls in the LTCP seems long, it is more palatable when one considers the project costs of nearly \$1.4 billion in today's dollars, which is assumed in the settlement to be funded solely by WASA. The schedule is feasible and equitable for WASA to meet, barring significant difficulties during its implementation.

The only comment received was from the Citizen Plaintiffs in this consolidated action. (Attached as Exhibit 1 to this Motion). The comment expressed support for entry of the decree. Citizens would prefer a shorter schedule than the 20 year schedule contained in the Decree, but stated that the priority is to get the implementation process started to address this major environmental problem. They conclude that "the proposed consent decree is a major step forward" and they support entry at the earliest possible date. The United States agrees with the comments of the Citizen Plaintiffs.

Finally, the settlement as a whole is lawful and advances the goals of the Clean Water Act and EPA's CSO Policy, because it promises to reduce a long-standing environmental and public health problem: if the tunnels perform as WASA represents, the discharges of untreated sewage, the debris politely known as "floatables," and other pollutants will be dramatically reduced. A consensus exists among the parties to this litigation that the Consent Decree should be entered. Therefore, prompt entry by the Court is appropriate.

CONCLUSION

The United States respectfully requests that the Court approve and enter the consent decree by signing on the signature block provided at page 54.

Respectfully submitted,

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