

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF LOUISIANA  
NEW ORLEANS DIVISION

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
)  
)  
LEAGUE OF WOMEN VOTERS OF NEW )  
ORLEANS, et al. )  
Plaintiff-Intervenors, )  
v. )  
)  
SEWERAGE AND WATER BOARD OF )  
NEW ORLEANS, and the )  
CITY OF NEW ORLEANS, )  
)  
Defendants, )  
)  
STATE OF LOUISIANA, )  
)  
Defendant. )

CIVIL ACTION NO. 93-3212

Section "S"

Mag. 1

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF  
MODIFIED CONSENT DECREE

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Plaintiff, the United States, on behalf of the Environmental Protection Agency (“EPA”), submits this memorandum in support of Plaintiff’s Motion for Entry of Modified Consent Decree. The proposed Modified Consent Decree (“Modified Decree”) was lodged with the Court on January 27, 2010, and Notice of the Modified Decree was published in the Federal Register on February 4, 2010. 75 Fed. Reg. 5807 (Feb. 4, 2010). No public comments were received on the Modified Decree.

## I. BACKGROUND

### A. The Original Consent Decree

The original Consent Decree, entered in June 1998, settled a very heavily litigated lawsuit filed in 1993, which alleged numerous violations of the Clean Water Act including effluent exceedances at the East Bank Wastewater Treatment Plant (“treatment plant”) and unauthorized discharges from what is known as the East Bank Collection System (“collection system”). Between 1995 and 1998, there allegedly were numerous instances in which raw, untreated sewage from the collection system was discharged into waters of the United States, including the City of New Orleans’ storm drainage canal system leading to Lake Pontchartrain and the Mississippi River. Many of the alleged discharges were overflows from manholes in the streets of New Orleans caused by blockages in the gravity sewer lines, and others allegedly were caused by force main breaks and sewer pump station failures.<sup>1</sup> The original Consent Decree also settled several alleged Clean Air Act violations, including failure to comply with sewage

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<sup>1</sup> Most of New Orleans’ sewage collection system and storm drainage system was constructed more than 60 years ago. The City is located six feet below sea level and the surrounding water bodies can be ten to twenty feet higher than the ground surface. The area often receives a large volume of rainfall in a very short period of time. Prior to the remediation work being conducted under the 1998 Consent Decree, the heavy rainfall entered into the sewage collection system through countless inflow points, which caused rapid increases in wastewater flows during and after storm events and caused the capacity of the collection system to be overcharged. When the capacity was exceeded, the sewage allegedly flowed from defects in the collection system onto City streets and into the drainage system that discharged into Lake Pontchartrain and the Mississippi River.

incinerator requirements under the New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants.

After several years of litigation, and an unsuccessful mediation, the parties entered into settlement discussions, culminating in the 1998 Decree. That original Decree established a comprehensive remedial action program for the renovation of the Sewerage and Water Board's ("Board's") collection system, which is on-going and estimated to cost a total of around \$400 million. To effectuate that program, the Board divided up its service area into nine "basins" or geographic areas and prioritized those basins, for future remediation purposes, on a "worst first" basis. Generally, the program includes a one-year period to study and evaluate each basin, submittal of a Remedial Measures Action Plan ("RMAP") for each basin for approval by EPA, and construction and installation of the remedial measures in accordance with the RMAP. Although remediation of each of the nine basins is on a separate schedule, the final completion date for all basins under the original Decree was December 2010. Also, under the original Decree, the Board established a Sewer Overflow Action Plan to develop actions to respond to -- and mitigate the impacts of -- unauthorized discharges, and a Preventive Maintenance Plan to develop a schedule for regular inspection, remedial measures and cleaning of its sewer lines and pump stations. In addition, the original Decree provided that, as an on-going matter, the Board was to address and resolve all issues related to the capacity of the pump stations, force main and treatment plant.<sup>2</sup>

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<sup>2</sup> With regard to the Clean Air Act portion of the settlement, the original Decree required the Board to comply with the EPA-approved Operations and Maintenance Plan for the fluidized bed incinerator. Also, the Board paid a total civil penalty under the original Decree of \$1.5 million. Moreover, under the original Decree, the Board conducted a Supplemental Environmental Project ("SEP") at a cost of \$2 million, to create wetlands and a vegetative upland buffer in an area of Lake Pontchartrain. The work conducted under the SEP went far towards making a portion of the Lake swimmable and fishable, and towards re-opening a historic, formerly black beachfront area known as Lincoln Beach.

Until Hurricane Katrina hit in August 2005, the Board had been in compliance with every aspect of the original Decree. Four out of the nine basins were completely remedied in accordance with the requirements of the Consent Decree and approved by EPA. The devastating effects of the hurricane in the New Orleans and surrounding areas are well-known. In addition to wiping out whole sections of the City, the hurricane caused extensive damage to the treatment plant, collection system and pump stations, as well as to the remedial work that had been conducted on the four completed basins. The Board requested, and the United States granted, force majeure protection for upcoming remedial action deadlines under the Decree. Essentially, most obligations under the Consent Decree were put on hold for approximately two years.

In the meantime, EPA Region 6 worked closely with the Board, including stationing EPA technical experts on the ground for nearly a year, to assist in the repair and restart of the treatment plant and in the restoration of sewage services to the citizens of New Orleans. EPA also worked closely with the Federal Emergency Management Agency (“FEMA”) to support the Board’s efforts to obtain FEMA funding for repairs to the treatment plant, pump stations and collection system. As a result of the Board’s dedicated efforts, with EPA’s assistance, the treatment plant and collection system, albeit still badly damaged, became operational again, and sewage services were restored. Near the end of 2007 the parties re-initiated settlement discussions with the aim of establishing new remedial deadlines under the Decree, to ensure that the remediation work continued despite the challenges posed by the impacts of the hurricane.

B. The Modified Consent Decree

For approximately two years the parties conducted good-faith, albeit sometimes spirited, negotiations that culminated in the proposed Modified Decree. In many respects the Modified Decree maintains the same basic structure as the original 1998 Decree, except that provisions

describing items that are already completed and approved (such as the SEP) are altered to reflect such completion. The linchpin of the Modified Decree is the set of new schedules for completing the remediation on the remaining basins of the collection system as well as repairing the pump stations and other parts of the collection system that were damaged by Hurricane Katrina. The provisions in which significant modifications are made, such as extended deadlines, as well as provisions containing completely new requirements, are described below.

1. Schedule of extended deadlines for remedial basin work

As discussed above, in accordance with the schedule established under the original Decree, remedial work on five basins (MidCity, Ninth Ward, Carrolton, New Orleans East and South Shore) had not been completed -- and in one case, had not been started -- prior to the onset of Hurricane Katrina. The hurricane perforce made continued work on those five basins impossible. Under the Modified Decree, the deadlines for completing remedial work on those basins were extended four or more years, depending on the complexity of the basin and the extent of the damage. In any event, the final completion date for all remedial work under the Modified Decree is July 31, 2015. See Paragraph 40 of the Modified Decree. As under the original Decree, the extended deadlines, including deadlines for "beginning" and "end" of construction as well as other milestone deadlines, are subject to stipulated penalties.

2. Schedule for repairs of Katrina-related damage to the collection system

The Board owns and maintains 66 pump stations in its service area, all of which were damaged or destroyed by Hurricane Katrina. The original Decree did not specifically address remedial action for any of those pump stations. The Modified Consent Decree nevertheless establishes a schedule for repair of each and every pump station, with deadlines that vary depending on the location of the pump station and extent of the damage. See Paragraph 18.

Most pump stations will be repaired by no later than mid-2011. Deadlines for repairs of such pump stations are subject to stipulated penalties.

Following completion of repairs for each pump station, the Board agrees under the Modified Decree to conduct an Emergency Sewer System Assessment (“ESSA”) to identify Katrina-related damages in the portion of the collection system served by such pump station. See Paragraph 37. The Modified Decree requires the Board to complete all ESSAs and repair all Katrina-related damages identified in the ESSAs by no later than July 31, 2015, the final deadline for completion of all remedial work. The Modified Decree contemplates that, in the five basins in which the remedial work under the original Decree was not completed prior to the onset of Hurricane Katrina, repairs of Katrina-related damages will be part and parcel of the remedial work undertaken in those five basins in accordance with the extended schedules under the Modified Decree. With regard to the four basins in which the remedial work under the original Decree was already completed and approved prior to Hurricane Katrina (i.e., Lakeview, Central Business District, Gentilly and Uptown), the Modified Decree similarly requires the Board to complete repairs of Katrina-related damages prior to the final completion deadline of July 31, 2015. See Paragraph 42. The Board has represented to the Government that it is already making substantial progress in this regard, and anticipates that the repairs to the four “completed” basins will be completed before the 2015 deadline.

### 3. Capacity provisions

As noted above, the original Decree required the Board to address and resolve all issues dealing with the capacity needs of its pump stations, force mains and treatment plant. After Hurricane Katrina struck, the Board lost more than half of its service population as citizens departed to other parts of the country. Although some of the population is beginning to return,



the Board does not anticipate in the foreseeable future that the population will expand to anything close to the level before the storm. Therefore, the Modified Decree removes the original Decree's obligations with regard to addressing capacity issues and substitutes several provisions that take into account the current realities. Specifically, while acknowledging that there are no capacity issues that the Board needs to address at this time, the Modified Decree requires that the Board report on any population changes and revised population projections as part of its annual reporting requirements. If at any time prior to July 2015 the Board or EPA determines that the data indicate the need for greater capacity, the Board, EPA and the Plaintiff-Intervenors will consult on measures to be taken, and the Board will provide a plan and appropriate schedule for implementation of such measures to EPA.

4. Other provisions not in original Decree

The Modified Decree contains several provisions not found in the original Decree, which address matters of concern following the impacts of Hurricane Katrina. For example, the Modified Decree requires the Board to evaluate the force mains from Pump Station A and Pump Station D to the East Bank Plant to determine the current reliability of such force mains, and report such findings to EPA. If, after consultation, EPA and/or the Board determine that additional measures are necessary to ensure reliability of the force mains, the Board will submit to EPA a plan and appropriate schedule for implementation of such measures. See Paragraph 43.<sup>3</sup> In addition, the Modified Decree requires the Board to submit to EPA a schedule for the design, construction and implementation of auxiliary on-site generating capacity for the East Bank Plant, to provide dependable electrical services during a catastrophic event. See Paragraph 44. Also, like the original Decree, the Modified Decree requires the Board to submit a Modified

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<sup>3</sup> The Board submitted its completed reliability study to EPA on January 28, 2010, and requested that EPA provide its comments on the study to the Board by March 26, 2010.

Preventive Maintenance Plan to describe the type and frequency of inspection, cleaning and preventive maintenance activities that the Board intends to conduct. See Paragraph 26.<sup>4</sup> Finally, the Modified Decree requires the Board to submit a report on the progress of construction of facilities to protect the treatment plant from a one-hundred year flood. See Paragraph 57(d).

## II. ARGUMENT

### A. Standard for Approving Consent Decrees

In reviewing a proposed consent decree, the reviewing court must ascertain “only that the settlement is fair, adequate, and reasonable.” United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)). Protection of the public interest is the key consideration in assessing whether a decree is fair, adequate and reasonable. United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1435 (6th Cir. 1991). Also, if the suit seeks to enforce a statute, the decree must be consistent with the public objectives sought to be attained by Congress. City of Miami, 664 F.2d at 441 (citing Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7<sup>th</sup> Cir. 1980)).

“The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy.” City of Miami, 664 F.2d at 441 n.13 (quoting Metropolitan Housing Development Corp., 616 F.2d at 1014). “In the absence of fraud or collusion, the trial court ‘should be hesitant to substitute its own judgment for that of counsel.’” Ruiz v. McKaskle, 724 F.2d 1149, 1152 (5th Cir. 1984) (citing Cotton v. Hinton, 559 F.2d at 1330 ). See also Akzo Coatings, 949 F.2d at 1435 (reviewing court “may

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<sup>4</sup> The Board has already submitted to EPA an approved Modified Sewer Overflow Action Plan, which is intended to minimize, through technically sound response techniques, the impact of any unauthorized discharges on the environment. See Paragraph 31.

not substitute [its] own judgment for that of the parties to the decree”); Cotton v. Hinton, 559 F.2d at 1331-2 (5<sup>th</sup> Cir. 1977) (“we are not free to delete, modify or substitute certain provisions of the settlement; [t]he settlement must stand or fall as a whole”).

Finally, “[p]ublic policy strongly encourages the settlement of cases.” Ho v. Martin Marietta Corp., 845 F.2d 545, 547 n.2 (5<sup>th</sup> Cir. 1988) (citing Bass v. Phoenix Seadrill/78 Ltd., 749 F.2d 1154, 1164 (5<sup>th</sup> Cir. 1985)). Settlements of lawsuits by agreement have always been favored, as “an amicable compromise provides the more speedy and reasonable remedy for the dispute.” United States v. City of Miami, 614 F.2d 1322, 1334-5 (5<sup>th</sup> Cir. 1980), *aff’d*, 664 F.2d 435 (1981) (en banc) (quoting Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6<sup>th</sup> Cir. 1976)). The presumption in favor of settlement “is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field.” Akzo Coatings, 949 F.2d at 1436 (citing United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1<sup>st</sup> Cir. 1990)). The presence of the Justice Department in a suit “allows the court to ‘safely assume that the interests of all affected have been considered.’” Williams v. City of New Orleans, 729 F.2d 1554, 1560 (5<sup>th</sup> Cir. 1984) (quoting United States v. City of Miami, 614 F.2d at 1332).

B. The Modified Consent Decree is Fair, Adequate and Reasonable, Consistent with the Objectives of the Clean Water Act and Protects the Public Interest

The Modified Decree, like the original Consent Decree, was negotiated in good faith and is unquestionably fair. United States v. Cannons Engineering Corp., 899 F.2d 79, 87 (“Given that the decrees were negotiated at arm’s length among experienced counsel...and that the agency operated in good faith, the finding of procedural fairness is eminently supportable”). Representatives of the Plaintiff and the Defendants, including their respective counsel and engineers, negotiated each term of this modified agreement over the course of several years, and

there is no suggestion from anyone that the Modified Decree was negotiated in anything less than the utmost good faith.

Moreover, the Modified Decree, like the original Consent Decree, is unquestionably reasonable and adequate. In essence, the Modified Decree establishes a new schedule for the completion of the remediation for the five geographic basins that were not fully remedied prior to the onset of Hurricane Katrina. In this manner, the Modified Decree continues the successful injunctive relief program established under the original Decree, to ensure that the Board completes the upgrades and repairs to its collection system so as to ensure compliance with the Clean Water Act. The Modified Decree also renews the Preventive Maintenance Plan, which assures that the Board is performing regular inspection and cleaning of its sewer lines and pump stations, and the Sewage Overflow Action Plan, which assures that the Board promptly responds to, and mitigates the impacts of, unauthorized discharges when they occur.

Furthermore, the Modified Decree establishes a new program for the remediation of the damages to the collection system caused by Hurricane Katrina. As described above, the Modified Decree sets an enforceable schedule for the repair of all 66 pump stations and for the performance of ESSAs to identify Katrina-related damage in those portions of the collection system served by the pump stations. The Modified Decree requires the Board to complete all pump station repairs, perform all ESSAs and repair all Katrina-related damages identified in the ESSAs by no later than July 31, 2015, a mere five years later than the deadline identified in the original Decree for the completion of all nine basin repairs. Thus, the Decree establishes an aggressive but reasonable enforcement scheme to assure that the devastating effects of the hurricane do not prevent the Board from completing the remedial work already begun under the original Decree and to assure current and future compliance with the Clean Water Act.

Moreover, the Modified Decree improves upon the original Decree by addressing concerns related to mitigating the impacts of a possible future storm. For example, the Modified Decree requires the Board to evaluate the force mains from Pump Station A and Pump Station D to the East Bank Plant to determine the current reliability of such force mains, to assure, among other things, that they will operate sufficiently in the event of another storm like Katrina. Also, the Modified Decree requires the Board to submit to EPA a schedule for the design, construction and implementation of auxiliary on-site generating capacity for the East Bank Plant, to provide dependable electrical services during another catastrophic event. Similarly, the Modified Decree requires the Board to submit a report on the progress of construction of facilities to protect the treatment plant from a one-hundred year flood.<sup>5</sup> In all of these ways the Modified Consent Decree is valuable as it provides for useful measures to minimize the impacts of a future devastating storm on the collection system and treatment plant.

The Modified Decree is consistent with the objectives of the Clean Water Act and protects the public interest. The stated objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). The Modified Decree continues the comprehensive program established in the original Decree of remediating the Board's collection system and establishes new aggressive programs for repairing Katrina-related damages to the collection system, with the goal of preventing unauthorized discharges to Lake Pontchartrain, the Mississippi River and the City's storm drainage canal system. These programs further the statutory objective of restoring and maintaining the nation's waterways, as the Clean Water Act contemplates, and go a long way to protect the public interest. Further, the several measures provided for in the Modified Decree to minimize the impacts of future devastating storms help to protect the lives and safety of the

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<sup>5</sup> The Board has already completed the preliminary design for such facilities.

citizens of New Orleans. Thus, as the key consideration in assessing whether a decree is fair, adequate and reasonable is protection of the public interest, Akzo Coatings, 949 F.2d at 1435, the Modified Consent Decree meets the standard for approval and should be entered by the Court.

### III. CONCLUSION

For the reasons described above, the United States respectfully requests that the Court grant the Plaintiff's Motion for Entry of the Modified Consent Decree, approve and sign the Modified Consent Decree and enter the Modified Decree as a final judgment in this action.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of March, 2010, I electronically filed the foregoing Plaintiff's Motion for Entry of Modified Consent Decree and Memorandum in Support of Plaintiff's Motion for Entry of Modified Consent Decree with the Clerk of Court using the CM/ECF systems, which will send notification of such filing to the following counsel for Defendants and Plaintiff-Intervenors:

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