UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Civil Action No. 1:12-cv-24400-FAM

UNITED STATES OF AMERICA et al.,

Plaintiffs,

v.

MIAMI-DADE COUNTY, FLORIDA,

Defendant.

UNITED STATES OF AMERICA'S, STATE OF FLORIDA'S AND STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S SUPPLEMENTAL COMMENTS ON CONSENT DECREE

On March 7, 2014, the Court issued a Notice on Proposed Consent Decree ("Notice"), suggesting two possible additions to the Consent Decree that would enhance the Court's confidence in compliance: (1) the appointment of a Special Master to oversee the repairs that are required and that the funding for them does not get diverted to other non-environmental projects that the County may deem more important; and (2) an increase in the stipulated penalties the County would be required to pay for failing to make the required repairs. (*See* Doc. No. 140.) All of the other objections submitted in the public comment process were rejected by the Court as not sufficient to overcome the presumption in favor of approval of the proposed Consent Decree.

The United States of America ("United States"), State of Florida ("Florida") and State of Florida Department of Environmental Protection ("FDEP) (together, "Plaintiffs") have taken into consideration the Court's suggestions, and respectfully submit these supplemental comments in favor of entering the proposed Consent Decree along with two proposed orders. Specifically,

Plaintiffs have reached an agreement with Miami-Dade County ("Miami-Dade") to **double** the stipulated penalties provided in Section X (Stipulated Penalties), Subparagraphs 42(a)-(c), to provide heftier penalties for sanitary sewer overflows ("SSOs"), failure to meet project deadlines, and failure to timely submit deliverables. A proposed Order modifying these provisions is attached hereto.

To ensure that the Court is apprised that the required repairs to Miami-Dade's wastewater collection and transmission system ("WCTS") and three wastewater treatment plants ("WWTPs") proceed as scheduled, and that the funding necessary for these projects does not get diverted to other non-environmental projects, Plaintiffs also have reached an agreement with Miami-Dade to heightened reporting requirements with submissions to the Court in lieu of a Special Master. Plaintiffs believe that these heightened reporting requirements, which have been implemented successfully in other cases such as *United States and State of Georgia v. the City of Atlanta, Georgia*, No. 1:98-CV-1956-TWT (N.D. Ga.), would accomplish the same goals the Court sought to accomplish through the appointment of a Special Master, while avoiding the delay and expense associated with a Special Master. A separate proposed Order detailing these reporting provisions is attached hereto. This proposed Order is intended to operate as a stand-alone order, separate from the Consent Decree, and will require the additional reporting to the Court discussed herein.

A. A Special Master is Not Necessary under the Circumstances.

1. This Case is Not Complex, and Defendant is Not Recalcitrant.

Plaintiffs recognize that there are circumstances in which the appointment of a Special Master is appropriate, but this is not one of those circumstances. Pursuant to Fed. R. Civ. P. 53(a)(1)(C), the Court may appoint a Special Master to "address . . . posttrial matters that cannot

be effectively and timely addressed by an available district judge or magistrate judge of the district." The notes to Fed. R. Civ. P. 53 on "Post-Trial Masters" state that it is appropriate to appoint a Special Master "when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent." Fed. R. Civ. P. 53, advisory comm. nn. (2003 amend.). *See also Local 28 of Sheet Metal Workers' Intern. Ass'n v. EEOC*, 478 U.S. 421, 481-82 (1986) (appointing an administrator in light of the difficulties in monitoring compliance and petitioners' history of resistance to compliance); *S. Agency Co. v. LaSalle Cas. Co.*, 393 F.2d 907, 914-15 (8th Cir. 1968) (referred "difficult accounting problems" to a Special Master). Referral of a matter to a Special Master "should be very sparingly used by district judges." *N.Y. Susquehanna & W. R.R. Co. v. Follmer*, 254 F.2d 510, 511 (3d Cir. 1958) (citing *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 258 (1957)). *See also Sierra Club v. Clifford*, 257 F.3d 444, 446-47 (5th Cir. 2001) ("reference to a Master shall be the exception and not the rule"); *Bartlett-Collins Co. v. Surinam Nav. Co.*, 381 F.2d 546, (10th Cir. 1967) (same); *In re Irving-Austin Bldg. Corp.*, 100 F.2d 574, 577 (7th Cir. 1938) (same); Fed. R. Civ. P. 53, 2003 Amendment notes ("appointment of a master must be the exception and not the rule").

Here, although the Consent Decree is lengthy and requires a considerable amount of injunctive relief, the Consent Decree is not complex, and is readily susceptible of this Court's oversight. The injunctive relief projects, along with clear deadlines for completing the work, are described in detail in Appendix D to the Consent Decree. The other work requirements in the Consent Decree are straightforward and not of such a complex nature that would require a Special Master. Furthermore, as reflected in the Declaration of Brad Ammons in support of Plaintiffs' Motion to Enter Consent Decree (Doc. No. 87-1), Miami-Dade County has not been resistant or recalcitrant with regard to complying with the First Partial Consent Decree and

Second and Final Consent Decree that this Court entered against Miami-Dade in 1994 and 1995 in Case No. 1:93-cv-01109-FAM (hereafter "Previous Consent Decrees"). To the contrary, Mr. Ammons points out that, as of this date, Miami-Dade has completed all of the requirements of the Previous Consent Decrees in a timely manner. *See, e.g.*, Doc. No. 87-1, ¶¶ 7, 8, 24.

In *United States v. S. Fla. Water Mgmt. Dist.*, No. 88-1886-CIV-MORENO, the Court appointed a Special Master to oversee enforcement of the case. The case involved several competing interests, recalcitrant parties, and complex issues such as the allowable nutrient limits for phosphorous. Litigation has been intensive and court filings copious, with more than 2,400 docket entries to date. The current case is not comparable. In this case, there is a proposed Consent Decree signed by both Plaintiffs and Defendant Miami-Dade (together, the "Parties"). The Parties are in agreement as to the tasks which need to be undertaken to bring Miami-Dade into compliance with the Clean Water Act ("CWA") and the applicable National Pollutant Discharge Elimination System ("NPDES") permits. Those tasks are set forth clearly and discretely in Paragraphs 18 and 19 of the Consent Decree and require the development by a specific date, and ongoing implementation of capacity, management, operation and maintenance ("CMOM") programs. In addition, those tasks include specific capital improvement projects set forth in Appendix D to the proposed Consent Decree, wherein both start and end dates are specified for each of these projects. Oversight measures will be straightforward and effective, and will not involve the endless objections and hearings seen in the *S. Fla. Water Mgmt. Dist.* case.

2. Plaintiffs Can Provide the Necessary Oversight in Lieu of a Special Master.

Plaintiffs appreciate the Court's expressed desire to ensure full compliance with the requirements of the Consent Decree. As the Court noted as well, Plaintiffs seek to protect public health and the environment. To achieve that goal, both the Environmental Protection Agency ("EPA") and FDEP will scrutinize Miami-Dade's performance of all the Consent Decree requirements and deadlines. It should be noted that Miami-Dade has already committed to providing funding for FDEP to provide oversight of Miami-Dade's compliance with the Consent Decree. Paragraph 76 of the Consent Decree requires that Miami-Dade provide $55,000 annually to FDEP for the explicit purpose of monitoring compliance with the Consent Decree.

Plaintiffs agree with the Court that it is of utmost importance that the CMOM programs are developed and the projects are completed according to the schedules prescribed in the Consent Decree. Plaintiffs further agree with the Court that adequate funding is critical to achieving these goals. However, Plaintiffs believe that there are better and more efficient mechanisms than the appointment of a Special Master to provide the assurance the Court desires in seeing that the Consent Decree is fully and timely implemented. The Parties anticipate that a Special Master would provide periodic status reports to the Court advising the Court of the work that is being performed, compliance or noncompliance with the specific requirements of the Consent Decree and any problems or anticipated problems with respect to the Consent Decree. Plaintiffs submit that the Parties can readily serve the same function and provide the same information as a Special Master without adding the delay, the additional layer of oversight, and the inherent expense associated with the appointment of a Special Master.

In *United States and State of Georgia v. the City of Atlanta, Georgia*, No. 1:98-CV-1956-TWT (N.D. Ga.), a CWA case similar to this one, at the hearing on the motion to enter the consent decree, the court ordered the parties to submit periodic status reports to the court. Accordingly, pursuant to the court's order, the plaintiffs, United States and Georgia, prepared a status report every six months. That status report was provided to Atlanta for review and then filed with the court. Atlanta was allowed to submit its own status report within fifteen days of the filing of the plaintiffs' status report. In the status reports, the parties informed the court of what has transpired since the last status report and what work is expected to be performed before the next status report is due, and alert the court to any anticipated issues, problems or disputes. On occasion, the court has conducted status hearings in addition to the status reports, and the parties have also provided additional status reports with respect to issues that arose between status reports about which the parties believed the court should be made aware. Copies of several status reports submitted to the court by the plaintiffs and Atlanta are attached hereto as Exhibit A.

Plaintiffs would be pleased to provide this Court with similar status reports on a quarterly or semi-annual basis, and any additional information the Court wishes. The process established by the District Court in the *City of Atlanta* case has proven effective in keeping the court fully advised of compliance with the consent decree, as well as with issues encountered by the parties. Plaintiffs have attached hereto a proposed order requiring the United States and Miami-Dade to submit periodic status reports, informing the Court of the progress being made on each of the Consent Decree requirements, and any noncompliance with those requirements, disputes and anticipated issues. In the event the Court believes a status hearing requiring the appearance of the Parties would be beneficial to the Court, the Parties would be pleased to appear before the Court to address its concerns.

In the Court's March 7, 2014 Notice, the Court expressed concern about the diversion of funds necessary to complete the required repairs to Miami-Dade's WCTS and three WWTPs for use in non-environmental projects, and suggested that a Special Master could ensure that such diversions do not occur. Because of Miami-Dade's past incidents of diverting funds, Plaintiffs were similarly cognizant of that possibility. Accordingly, Plaintiffs included Paragraph 19(j) (Financial Analysis Program) in the Consent Decree.[1] Paragraph 19(j) requires that there be sufficient funds to perform the work required by the Consent Decree. It further requires that Miami-Dade provide thirty days notice if it intends to divert sewer revenue to another matter. Most importantly, in the event Miami-Dade provides notice that it intends to divert funds from the collection of sewer fees, Miami-Dade is required to certify that it has sufficient funds to perform the work required by the Consent Decree. To keep the Court fully apprised, Miami-Dade agrees to concurrently inform the Court of the intended transfer as well.[2]

Plaintiffs submit that the Parties can more promptly provide information to the Court regarding compliance with the Consent Decree than a Special Master, and more promptly provide the Court with notice that the provisions of Paragraph 19(j) have been triggered. By requiring the Parties to report on these matters to a Special Master, who would then report to this Court, an extra step is added which delays the information from reaching the Court. Plaintiffs' proposal for having the Parties report directly to the Court without inserting this middle layer will enhance reporting efficiency while also avoiding the expense associated with employing a Special Master.

[1] This provision was absent from the two Previous Consent Decrees that this Court entered in 1994 and 1995.
[2] On March 18, 2014, the Miami-Dade Board of County Commissioners approved a resolution establishing a County policy committing to stop all transfers of sewer funds "for any purpose not related to the management, operation, or maintenance of the Sewer System or to any capital improvement needs of the Sewer System" other than the exceptions permitted in Paragraph 19(j) of the Consent Decree.

In short, Plaintiffs do not believe that the appointment of a Special Master is necessary to assist the Court to ensure that Miami-Dade complies with the Consent Decree. In fact, Plaintiffs believe that the Parties are better positioned to provide detailed information to the Court regarding the County's compliance with the requirements of the Consent Decree, along with information regarding noncompliance or other issues. Additionally, as shown below, the significant increase in the amount of stipulated penalties further acts as a deterrent against noncompliance, which further militates against appointing a Special Master. EPA Region 4 has negotiated and overseen the enforcement of more than 10 municipal CWA consent decrees, none of which required a Special Master. *See, e.g., City of Atlanta*, No. 1:98-CV-1956-TWT; *United States v. City of Memphis*, No. 2:10-cv-02083-SHM-dkv (W.D. Tenn.); *United States v. City of Jackson*, No. 3:12-cv-00790-TSL-JMR (S.D. Miss.); *United States v. City of Chattanooga*, No. 1:12-cv-00245 (E.D. Tenn.); *United States v. DeKalb Cnty.*, No. 1:10-cv-04039-WSD (N.D. Ga.); *United States v. Knoxville Utilities Board*, Nos. 3:03-cv-497, 3:04-cv-568 (E.D. Tenn.); *United States v. Louisville & Jefferson Cnty. Metro. Sewer Dist.*, No. 3:05-cv-00236-CRS (W.D. Ky.); *United States v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 3-07-1056 (M.D. Tenn.); *United States v. Board of Water & Sewer Comm'rs of the City of Mobile*, Nos. 02-0058-CB-S, 99-0647-CB-S (S.D. Ala.); *United States v. Jefferson Cnty.*, Nos. 2:94-cv-02947-JFG, 2:93-cv-02492-JFG-PWG. Nationwide, EPA has negotiated and overseen the enforcement of more than 100 municipal consent decrees without the need for a Special Master. *See, e.g., United States v. City of Seattle*, No. 2:13-cv-678 (W.D. Wash.); *United States v. King County*, No. 2:13-cv-677 (W.D. Wash.); *United States v. City of Los Angeles*, Nos. 01-191-RSWL, 98-9039-RSWL, *United States v. Cty. & Cnty. of Honolulu*, No. 94-00765 DAE-KSC, *United States v. City of Toledo*, No. 9:91cv7646; *United States v. City of San Diego*, Nos. 03-cv-1349K (POR), 01-cv-

0550B (POR) (S.D. Cal.); *United States v. Metro. St. Louis Sewer Dist.*, No. 4:07-cv-1120 (CEJ) (E.D. Mo.); *United States v. Sewerage & Water Board of New Orleans*, No. 93-3212 (E.D. La.); *Anacostia Watershed Soc. v. D.C. Water & Sewer Auth.*, Nos. 1:00cv00183-TFH/1:02-0251-TFH.[3] Should the Court at any time in the future determine that additional information or oversight is necessary, Plaintiffs are amenable to addressing whatever concerns the Court may have at that time.

B. Stipulated Penalties

The United States believed that the stipulated penalties provided in this Consent Decree were sufficient to compel compliance, particularly since the Plaintiffs have reserved their rights to seek the statutory maximum penalty for violations of the CWA deemed to be egregious. *See* Paragraph 48 and Section XV (Effect of Settlement/Reservation of Rights) of the Consent Decree. In addition, if Miami-Dade fails to comply with the Consent Decree, the Court retains its authority to hold Miami-Dade in contempt and/or impose monetary sanctions pursuant to 18 U.S.C. § 401, and Fed. R. Civ. P. 70. It should be noted that Miami-Dade has an excellent track record in complying with the Previous Consent Decrees. Nevertheless, understanding the Court's concerns, Plaintiffs agree that increasing the stipulated penalties for non-compliance would serve to better ensure compliance with the Consent Decree. Accordingly, the Plaintiffs have reached an agreement with Miami-Dade to **double** the amount of stipulated penalties for failure to comply with the requirements of the Consent Decree, including SSOs, failure to meet project deadlines and failure to timely submit deliverables. To this end, the Parties have provided a proposed revision to Section X (Stipulated Penalties), Subparagraphs 42(a)-(c), to double all stipulated penalties provided therein. Attached hereto is a proposed order incorporating this new

[3] The United States can provide the Court with references to these Consent Decrees upon request.

agreement, which the Parties intend to replace and supersede Subparagraphs 42(a)-(c) of the proposed Consent Decree lodged with this Court on June 6, 2013.

CONCLUSION

Plaintiffs United States, Florida and FDEP appreciate the Court's attention to the proposed Consent Decree and expressed desire that it can ensure that Miami-Dade complies with proposed Consent Decree provisions. To address the Court's suggestions, plaintiffs have reached an agreement with Miami-Dade (1) to provide periodic status reports to the Court to inform the Court of the progress being made on each of the Consent Decree requirements, any noncompliance of those requirements, disputes and any other issues the Court deems important; (2) to provide notice to the Court in the event that Miami-Dade notifies the Parties of its intent to divert sewer revenue to another matter; and (3) to double the amount of stipulated penalties provided for (i) SSOs, (ii) failure to meet project deadlines, and (iii) failure to timely submit deliverables. A proposed Order setting forth the aforementioned reporting requirements is attached hereto as a stand-alone order. A second proposed Order modifying Subparagraphs 42(a)-(c) of the proposed Consent Decree to double the amount of stipulated penalties is also attached hereto. Accordingly, Plaintiffs respectfully request that the Court enter the Consent Decree and the two Orders accompanying this comment.

DATED: March 21, 2014

Respectfully submitted,

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*Jonathan G. Glogau and Kirk S. White have reviewed this document and have authorized Rachael Amy Kamons to electronically sign this document of each of their behalf.