UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:12-cv-24400-FAM
	)	
MIAMI-DADE COUNTY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' REPLY TO BISCAYNE BAY WATERKEEPER'S AND JUDI KOSLEN'S OPPOSITION TO THE MOTION TO ENTER THE CONSENT DECREE

INTRODUCTION

Plaintiff, United States of America ("United States"), the State of Florida and the State of Florida Department of Environmental Protection, pursuant to Local Rule 7.1(c), hereby submit this Reply Memorandum in Support of their Motion to Enter the Consent Decree and to Biscayne Bay Waterkeeper's ("BBWK") and Judi Koslen's Opposition to the Motion to Enter. BBWK and Judi Koslen (hereafter "BBWK") oppose entry of the Consent Decree (hereafter "CD"), making six arguments to support their opposition. The Plaintiffs clarify the appropriate standard of review to be applied in this case and responds to each of the six arguments below.

STANDARD OF REVIEW

BBWK inappropriately relies upon collective bargaining, Sherman Act, patent and attorney's fee cases in support of its proffered standard of review. In doing so, BBWK ignores the legions of cases that set forth the now well accepted standard of review for entry of a consent decree in an environmental case where the Department of Justice has negotiated a settlement on behalf of the Environmental Protection Agency ("EPA"). The Plaintiffs will not repeat that standard here but instead refer to their Memorandum in Support of Entry of the CD and the cases cited therein. Section II. B, p. 5-7 (Doc. No. 87).

BBWK cites two environmental cases that addressed the standard of review for entry of a consent decree. In one of those cases, United States v. Lexington-Fayette Urban County Government, 591 F.3d 484 (6th Cir. 2010), the district court denied entry of the consent decree because it deemed the $425,000 civil penalty for violations of the Clean Water Act ("CWA") "too high." Id. at 488. The Sixth Circuit held that the appropriate consent decree approval criteria are whether the decree is "fair, adequate, and reasonable, as well as consistent with the public interest." Id. at 489. The court said it was not obvious the penalty was unfair and one of the most important considerations is whether the decree is likely to be effective in cleansing the environment. Id. The case was remanded. Id. at 491. Indeed, after remand and upon consideration of the Sixth Circuit's opinion, on January 13, 2011, the district court entered the original consent decree that had been lodged by the United States on behalf of EPA.

The other environmental case that BBWK relies upon is distinguishable from our case and, in fact, it supports entry of this CD. In United States v. City of Akron, Case No. 5:09CV272, 2013 WL 999909, at *1 (N.D. Ohio Mar. 13, 2013), the court denied the motion to enter the consent decree due to concerns over the length of time allowed for implementation of a long-term control plan ("LTCP"). The court retained an expert to review the consent decree and the 16 year schedule for completing the LTCP. The expert concluded that the schedule was reasonable. The court entered the consent decree. See No. 5:09CV272, 2014 WL 202708 (N.D. Ohio Jan. 17, 2014). A copy of the expert's report is attached. Here, all the work will be completed in fifteen years, with the majority of the work to be completed in the first five years. See p. 10 of the United States' Memorandum in Support of Entry of the CD (Doc. No. 87). Accordingly, the standard of review suggested in BBWK's brief has no application here.

ARGUMENT

1. BBWK's Climate Change Arguments Are Not Relevant to the Issue Before the Court.

BBWK's arguments about climate change do not warrant rejection of the CD. The CD addresses on-going violations in Miami-Dade County's (hereafter "County") sewer system and sewage treatment facilities. Those violations pose an immediate threat to public health and the environment. The injunctive relief required by the CD was developed to address those violations.

The United States agrees the County should consider future impacts due to climate change, and we deem it appropriate that the County has said it will address climate change as it moves forward. However, there is no legal basis for the Court to reject the CD before it and require the Parties to renegotiate a new decree that expressly references effects of climate change. There is no evidence that changes in local hydrologic conditions attributable to changes in the climate will render the required work unnecessary. Nor is there evidence that any of the violations addressed by the CD have been or are in any way connected to changes in the climate. The CD is reasonable, fair, consistent with the objectives of the CWA and in the public interest, it is inapposite that the CD contain the provisions proffered by BBWK.

Moreover, in the event that a changing climate or any other event or circumstances suggests the need for future revisions, the CD and CWA provide sufficient tools for the parties to make those changes. See Declaration of Brad Ammons in support of United States' Motion to Enter (Doc. No. 87-1) (hereafter "Ammons First Decl."), ¶ 80. If the County does not agree that changes are necessary and refuses to perform the requested work, the United States and State of Florida can come back to the Court to seek the needed relief. In short, BBWK's climate change concerns do not warrant rejection of the CD.

In United States & Illinois v. Metro. Water Reclamation Dist. (MWRD) of Greater Chicago, No. 11-C-8859, 2014 WL 64655 (N. D. Ill. 2014), the intervenor pointed to studies anticipating more rain in the Chicago area and argued that MWRD cannot show that the injunctive relief will prevent overflows in the future. In entering the consent decree over the

intervenor's objections, the court acknowledged that the intervenor's point was valid, but noted that, because MWRD cannot predict future weather patterns or the size of every future rainstorm, one cannot know with certainty how the injunctive relief will perform until it is finished. Id. at 13-14. That is also true here. What we do know is that the (1) injunctive relief required by the CD is both appropriate and necessary to address the ongoing violations occurring in the County's sewer system and treatment works, and (2) the CD is sufficiently flexible to allow for modifications in the future if they are needed due to changed circumstances.

As previously noted, BBWK has not cited any legal authority which mandates that the climate change concerns they have raised be specified in the CD. The only "support" BBWK cited with respect to their climate-related opposition to the CD was a Federal Appropriations Act of 2013 which was passed by Congress to provide financial and other relief to Northeastern communities affected by Hurricane Sandy. BBWK argues that the Consent Decree violates federal and EPA policies, but as the Court said in the City of Chicago case, interoffice memoranda are not statutes and lack the force of law. See 2014 WL 64655, at *13. The court further stated it would not judge the consent decree by whether it complies with an EPA memorandum. See Id. Here, there is no federal law or regulation that BBWK has identified that requires that the CD be rejected. Simply because EPA policy encourages collaborative action with respect to climate change does not compel this Court to find that the CD is contrary to law, policy and the public interest.

2. BBWK's Arguments Regarding Operation and Maintenance Reflect a Misunderstanding of the Operation and Maintenance Requirements.

BBWK's concerns about the CD requirements with respect to operation and maintenance ("O & M") are misguided. BBWK argues that the O & M provisions are inadequate because they do not impose a deadline for correction of violations resulting from improper O & M. The practice of proper O & M is an ongoing process. As a result, it is the implementation of all the O

& M plans that is of critical importance and the County will be required to implement the multiple O & M plans as long as it owns and operates the system. Thus, the correct deadline for imposing O & M requirements is the date for getting these plans in place, which the CD clearly provides, so that proper O & M can then be continuously implemented. CD, Section VI.

The O & M requirements in the CD are extensive and will enable the County to achieve compliance with the CWA and its permits. BBWK ignores the fact that the two earlier consent decrees dealt with specific capacity issues and other immediate O & M issues that were plaguing the County's sewer system at that time. See Declaration of Brad Ammons attached hereto (hereafter "Ammons Second Decl."), ¶¶ 7, 17-22.

As Mr. Ammons explains, EPA Region 4 has developed more expansive and stringent O & M provisions for consent decree requirements since the first two consent decrees were negotiated and entered by the Court. This CD requires the County to continue implementation of MOM programs that have improved the County's sewer system, in addition to more expansive and stringent O & M provisions developed by EPA. See Ammons Second Decl., ¶¶ 19-21.

3. The Schedules in the CD Do Not Need to be Modified.

BBWK's criticism of the schedule for fixing the Biscayne Bay Force Main is based on the County's hope to complete the project sooner than the schedule set forth in the CD. The CD requires that the project be completed April 8, 2017. However, since the CD was negotiated and the County's work on the project commenced, the County has indicated that the project may be completed by the end of 2015. Ammons Decl. **Para**. 18. The County should not be penalized for efforts to complete work ahead of schedule. Furthermore, it is not uncommon for schedules for complex engineering projects or even routine construction projects to be changed. Ammons Second Decl., ¶ 25. The CD should not be rejected simply because the County is attempting to complete a project ahead of the schedule.

4. The CD's Financial Plan is Adequate.

BBWK's arguments about the County's diversion of funds from the wastewater treatment system ignores the fact that the Consent Decree ensures that the County has adequate funding to perform the required work. The Consent Decree contains provisions that "ensure that [the County] can effectively establish and track the sufficiency of funds for operation and maintenance, capital projects financing, and debt service coverage associated with the Sewer System, including, without limitation, the continued implementation of the Work pursuant to this [CD]." See Section VI. (Compliance Requirements) 19.j (Financial Analysis Program). In addition, this new Financial Analysis Program will require the County to also track and report any transfer or use of funds obtained from the collection of sewer rates for any purpose not related to the management, operation and maintenance of the sewer system or to any capital improvement needs of the sewer system. Thus, the CD enables the Plaintiffs to make sure that adequate funding is available for compliance and that no diversion will occur. In light of the existing protections found in the Decree, BBWK's request for a "panel of experts" or a "Special Master" and "public reporting board" to help determine and control expenditures on sewer projects and to presumably operate along with the County Government, BBWK Brief p. 19, is completely unnecessary, unwarranted and overly burdensome.

5. The Penalty is Appropriate.

BBWK claims that the civil penalty and Supplemental Environmental Project ("SEP") in the proposed CD violate EPA policy and will not deter future violations of the CWA. The United States disagrees. As stated in Brad Ammons' Declarations, Mr. Ammons calculated the bottom-line settlement civil penalty in this case using the National Municipal Litigation Consideration ("NMLC"), outlined on pp. 19-20 of the *Interim Clean Water Act Settlement*

Penalty Policy and information provided by Miami-Dade. See Copy of the Settlement Penalty Policy: http://www2.epa.gov/sites/production/files/documents/cwapol.pdf

This March 1, 1995 Settlement Penalty Policy has four expressed goals: (1) penalties should deter noncompliance, (2) penalties should ensure a level playing field, (3) penalties should be generally consistent across the country, and (4) penalties should be based on a logical calculation methodology. See p. 3 of the Policy cite above. As confirmed by Mr. Ammons' Declarations, the penalty set forth in the proposed CD is consistent with this Settlement Penalty Policy and thus furthers the stated goals of the Policy. Indeed, BBWK's civil penalty of a "minimum" of $6,025,000 to $8,895,000 that should be imposed, BBWK Brief p. 25, would be inconsistent with EPA's Settlement Policy that applies here.

As also explained by Mr. Ammons in his Second Declaration, this Settlement Penalty Policy establishes an alternative approach to determine penalties against municipalities, the NMLC, which was used in this case and is based on past settlements and on an evaluation of four key factors: the service population of the municipality, the duration of the violations, the environmental impact of the violations, and economic benefit. Ammons Second Decl., **Para**. 28. BBWK's attempts to calculate a penalty using alternative approaches are not relevant. Further, BBWK's attempt to calculate a penalty under the NMLC using an estimate of the total population of Miami-Dade County is inaccurate. The NMLC uses the figure for the total "service population" of the defendant – not the total population in the area. As explained in Mr. Ammons' Second Decl., the vast majority of the total population of Miami-Dade County is either serviced for wastewater services by municipal entities other than Miami-Dade County or is not connected to the public sewer system. Ammons Second Decl., **Para**. 29. In addition, the very nature of the economic benefit factor within the NMLC represents a significant reduction to actual economic benefit that a municipal defendant may have realized. For example, the

maximum penalty provided for a municipality's economic benefit greater than $25 million for raw sewage discharges is $636,000 (See Table A of the NMLC). BBWK's assertion that a municipal penalty settlement is deficient if it includes amounts significantly below the municipality's actual economic benefit is thus not consistent with EPA Policy.

BBWK also asserts that the SEP is inconsistent with EPA policy. Again, the United States disagrees. The NMLC specifically provides for up to a 40% reduction in the penalty for performance of a SEP. BBWK asserts that the SEP in the proposed consent decree is not consistent with EPA policy because the septic tank replacement SEP lacks a "nexus" to the underlying violation. The United States disagrees. EPA's *Supplemental Environmental Projects Policy* was issued May 1, 1998. See http://www2.epa.gov/sites/production/files/documents/fnlsup-hermn-mem.pdf. The primary purpose of this policy is to encourage and obtain environmental and public health protection and improvements that may not otherwise have occurred without the settlement incentives provided by the policy. One of the requirements of the SEP Policy is that the project must have adequate "nexus." Nexus is the relationship between the violation and the proposed project. This relationship exists if (1) the project is designed to reduce the likelihood that similar violations will occur, (2) the project reduces the adverse impact to public health or environment to which the violation at issue contributes, or (3) the project reduces the overall risk to public health or the environment potentially affected by the violation at issue. Nexus can be established if the primary impact of the project is at the site where the alleged violation occurred or at a different site in the same immediate geographic area. SEPs may have sufficient nexus even if the SEP addresses a different pollutant in a different medium. BBWK asserts that no nexus exists because "[t]here are and were no violations in the case for groundwater pollution by septic tanks." BBWK misreads or too narrowly applies the nexus requirement in the SEP Policy. For nexus to be established, there does not need to be an alleged violation associated with septic

tanks. There is sufficient nexus if the SEP is designed to reduce the impact or risk from pollution that may occur from these septic tanks to the water quality of the area that has been impacted by the overflows of raw sewage from Miami-Dade County's sewer system.

Finally, as stated in Mr. Ammons' First Declaration, the civil penalty and SEP in this case are consistent with other civil penalties and/or SEPs against other municipalities, specifically, United States v. Board of Water & Sewer Comm'rs of Mobile, Ala. Consent Decree; United States et al. v. Memphis, Tenn. Consent Decree; and United States v. Jackson, Miss. Consent Decree. Ammons First Decl., ¶ 47.

Many of the cases cited by BBWK are inapposite because they involve private entities. Furthermore, some of the cases cited by BBWK were litigated, not settled, and the court – not the parties – determined the amount of the penalty.

6. Ocean Outfall is Not Relevant to this CD

BBWK attempts to use its Administrative Procedure Act ("APA") claim against EPA – i.e., the allegation that EPA is unreasonably delaying a decision on the County's application to renew its National Pollutant Discharge Elimination System ("NPDES") permit for the Central District Wastewater Treatment Plant – as grounds to reject the proposed CD. The argument is misplaced.

The Court lacks subject-matter jurisdiction over BBWK's claim, as explained in EPA's pending motion to dismiss (Doc. No. 68). Only the Eleventh Circuit – not this Court – may review a claim that EPA has unreasonably delayed the reissuance (or denial) of the NPDES permit at issue because only the Eleventh Circuit – not this Court – may review a challenge to the ultimate reissuance (or denial) of such permit. This conclusion follows from the CWA's judicial review provision, 33 U.S.C. § 1369(b)(1), and the rule of protective jurisdiction set forth in the All Writs Act, 28 U.S.C. § 1651(a). See In re Sierra Club, No. 12-1860, 2013 WL

1955877, at *1 (1st Cir. May 8, 2013); George Kabeller, Inc. v. Busey, 999 F.2d 1417, 1421-22 (11th Cir. 1993); Telecomms. Research & Action Ctr. v. Fed. Commc'ns Comm'n, 750 F.2d 70, 74-79 (D.C. Cir. 1984).

Regardless, nothing in the proposed CD affects EPA's discretion in rendering a final decision on the County's NPDES permit application, and nothing in the proposed CD affects any right BBWK may have to challenge EPA's final decision once it is made. See, e.g., Manasota-88, Inc. v. Thomas, 799 F.2d 687, 688 n.1, 694 (11th Cir. 1986) (reviewing a challenge to EPA's reissuance of an NPDES permit, noting that "NPDES permits contain terms and conditions to implement various requirements of the CWA," including "effluent limitations on the type and amount of effluent that can be discharged").

Additionally, BBWK is incorrect in its assertions that the County must cease the use of ocean outfalls entirely by 2025, under the Ocean Outfall Legislation "OOL").. Nor does the OOL require the County to reuse 60% of its wastewater outfall by 2025. In fact, the OOL allows utilities to continue to discharge peak flows up to 5% of the utilities' annual baseline flows through ocean outfalls, and the OOL further allows utilities to comply with the 60% reuse provision from their entire service areas or by contract with another utility with Miami-Dade, Broward or Palm Beach Counties rather than strictly from ocean outfalls. See Fla. Stat. § 403.086(9)(c), (d).

CONCLUSION

As the Court in the Greater Chicago case said, "a consent decree, in order to be entered, need not be perfect. It must be reasonable." 2014 WL 64655, at *12. The Parties reached a fair settlement that is protective of public health and the environment. The CD before the Court is reasonable, fair, consistent with the objective of the CWA and in the public interest. The concerns expressed by the intervenor do not warrant denial of the Plaintiffs' Motion to Enter.

Respectfully submitted,

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