

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA, and)	
)	
COMMONWEALTH OF)	
VIRGINIA)	
Plaintiffs,)	
)	
)	Civil Action No. 2:09-cv-481
v.)	
)	CONSENT DECREE
)	
HAMPTON ROADS SANITATION)	
DISTRICT,)	
)	
Defendant.)	

FIFTH AMENDMENT TO CONSENT DECREE

WHEREAS, the Court entered an Amended Consent Decree in the above-captioned matter on February 23, 2010, which has subsequently been amended, including with the entry of a Fourth Amended Consent Decree by the Court on February 21, 2017 (“Consent Decree”);

WHEREAS, this Fifth Amendment to the Consent Decree furthers the objective of the Clean Water Act (“CWA” or “Act”) to minimize or eliminate the discharge of pollutants to navigable waters by requiring that the Hampton Roads Sanitation District (“HRSD”) implement measures toward ensuring that the Regional Sanitary Sewer System and HRSD’s Sewage Treatment Plants (“STPs”) have Adequate Capacity to convey and treat wet weather sewer flows within the Hampton Roads region;

WHEREAS, HRSD will take affirmative measures in furtherance of Paragraph 7 of the Consent Decree (Objectives), including working in consultation with the named localities to achieve the goal of eliminating all Sanitary Sewer Overflows (“SSOs”) from the HRSD SS System, and all capacity-related SSOs from the Regional SS System and Prohibited Bypasses;

WHEREAS, in addition to the wet weather capacity-related measures required by the Consent Decree, HRSD has numerous other regional environmental obligations and initiatives which also further the CWA’s objective of protecting the region’s waters from pollution, including reductions to achieve the Chesapeake Bay Total Maximum Daily Load (“Bay TMDL”) to substantially reduce nutrient and sediment discharges to the Chesapeake Bay;

WHEREAS, HRSD presently is developing, pursuant to the EPA Integrated Municipal Stormwater and Wastewater Planning Approach Framework (“Integrated Planning Framework” or “IPF”), an Aquifer Replenishment Program (“ARP”) which involves the use of advanced treatment processes to purify wastewater to drinking water standards so that it may be pumped into the Potomac aquifer, the primary source of groundwater throughout eastern Virginia, rather than be discharged to Virginia rivers flowing into the Chesapeake Bay;

WHEREAS, HRSD contends that, if fully implemented, its ARP is expected to have numerous environmental benefits, including among others: (1) elimination of up to 90 percent of HRSD’s direct discharges of nutrients and other pollutants of concern to the Chesapeake Bay by 2030; and (2) increasing resilience to deal with climate change;

WHEREAS, HRSD credibly contends (1) that taking water out of the ground in eastern Virginia at the current rate has led to land subsidence which makes the region more vulnerable to rising sea levels and the associated impacts; (2) that overuse of the aquifer causes about 25 percent of the sinking of land in parts of eastern Virginia; and (3) that replenishing the Potomac aquifer with HRSD's ARP can help slow or even reverse the subsidence resulting from groundwater withdrawal;

WHEREAS, the injection wells that will be utilized for the ARP must receive EPA permits under the Safe Drinking Water Act's Underground Injection Control program and undergo other regulatory and technical reviews;

WHEREAS, an Integrated Plan is a plan that identifies efficiencies from separate wastewater and storm water programs to prioritize capital investments and achieve EPA's human health and water quality objectives but neither that Plan nor this Decree relieves HRSD of its continuing legal obligation to address SSOs;

WHEREAS, HRSD has developed an Integrated Plan, pursuant to the EPA IPF, that comprises measures that involve other CWA programs, including the Municipal Separate Storm Sewer System (MS4) program and TMDLs relevant to HRSD's Sewage Treatment Plants, in addition to the injection well permitting process under the Safe Drinking Water Act's Underground Injection Control program, as well as the ARP—and thereby also prioritizing work intended to counter risks of sea-level rise and inundation ahead of additional SSO-related work required by the Clean Water Act;

WHEREAS, the Parties recognize that the Court does not have jurisdiction over many aspects of the ARP and HRSD's Integrated Plan, but that the schedule for the work

to be performed under the Consent Decree is expected to prioritize environmentally beneficial projects, as set forth below, which may potentially include some or all of the projects enumerated in the ARP;

WHEREAS, HRSD submitted its Regional Wet Weather Management Plan (“RWWMP”) timely on or about October 1, 2017, together with HRSD’s Integrated Planning Framework submission;

WHEREAS, since then the Parties have exchanged information, Plaintiffs have commented on the RWWMP, and HRSD has responded to their comments;

WHEREAS, the Parties have agreed upon a phased approach for the RWWMP, to be implemented concurrently with the ARP, to reduce baseline modeled SSOs by volume by 69 percent for the 5-year peak flow recurrence event;

WHEREAS, in Phase I, HRSD will implement, by 2030, a series of six (6) high-priority projects that HRSD’s modeling shows will reduce baseline modeled SSOs by volume by 47 percent for the 5-year peak flow recurrence event, and in Phase II, HRSD will implement by 2040 a series of nine (9) additional high-priority projects that HRSD’s modeling shows will reduce baseline modeled SSOs by volume by an additional 22 percent for the 5-year peak flow recurrence event;

WHEREAS, HRSD thereafter will perform post-construction monitoring and assessment to evaluate the effectiveness of Phases I and II of the RWWMP;

WHEREAS, the Parties also wish to resolve Plaintiffs’ civil claims for stipulated penalties for HRSD’s reported SSOs through 2019;

WHEREAS, all terms of the Consent Decree, as previously amended, and not modified by this Fifth Amendment to the Consent Decree remain in effect, including Paragraph 155;

NOW, THEREFORE, for good cause shown, the Consent Decree is hereby modified as follows:

Revisions related to approval and implementation of the RWWMP:

1. Section XI, Sub-Section E, is currently entitled, “Review and Approval of the RWWMP and Reservation of Claims as to the Localities.” The title is amended to delete the words “and Approval.”

2. Section XI, Sub-section F, currently is entitled, “Implementation of the RWWMP.” The title is amended to add in the word “Approval and” before “Implementation.”

3. Paragraph 58 currently provides, “[u]pon approval by Plaintiffs of the RWWMP, the Parties shall amend the Consent Decree to incorporate the approved RWWMP, or its milestones and schedules as determined pursuant to new Paragraph 50 above. The RWWMP amendment shall constitute a material modification subject to public comment and Court approval.” Paragraph 58 is amended to provide that, “Plaintiffs have reviewed and preliminarily approved the RWWMP, except as subject to public comment as required in Section XXXI. Upon entry of this Fifth Amendment to the Consent Decree, EPA and VADEQ approve HRSD’s RWWMP. The RWWMP is attached as Appendix 8. HRSD shall post the approved RWWMP at www.HRSD.com

through the date of termination of this Consent Decree. The approved RWWMP in its entirety is incorporated by reference into, and enforceable as part of, this Consent Decree.

4. Paragraph 59 currently reads, “As set forth in Section XVIII (Submissions for Agency Approvals), HRSD shall implement the approved RWWMP that pertains to work or actions that HRSD must perform according to the schedule and other requirements in the approved RWWMP.” Paragraph 59 is amended to provide as follows:

59. HRSD shall implement the projects in the approved RWWMP that HRSD has determined will result in at least a 69 percent reduction in baseline modeled SSO volumes for the 5-year peak flow recurrence event by 2040, as follows:

a. HRSD shall implement Phase I projects to reduce SSOs by 47 percent in baseline modeled SSO volumes for the 5-year peak flow recurrence event. HRSD shall complete the Phase I projects identified in the approved RWWMP in accordance with the schedule therein but no later than December 31, 2030.

b. HRSD shall implement Phase II projects to reduce SSOs by an additional 22 percent in baseline modeled SSO volumes for the 5-year peak flow recurrence event. HRSD shall complete the Phase II projects identified in the approved RWWMP in accordance with the schedule therein but no later than December 31, 2040.

c. HRSD shall provide Plaintiffs with written certification of the completion of each Phase I and Phase II project and/or project group, in the Semi-Annual and Annual Reports required in Section XVII.

d. Adaptive Management Check In Point. During the first quarter of calendar year 2030, unless an alternate date is mutually agreed, the Parties shall meet concerning Phase I and Phase II progress. At that time, HRSD may propose, under adaptive management principles, alternate projects or scenarios that will still satisfy the requirement to attain at least a 69 percent reduction or better in baseline modeled SSOs by volume for the 5-year peak flow recurrence event by 2040. HRSD shall submit such request for alternate projects or scenarios in accordance with Section XXIX (Modification) and shall provide a narrative explanation and justification supported by appropriate model results documentation and data, to show that the proposed alternate set of projects will attain at least a 69 percent

reduction in SSO volumes for the 5-year peak flow recurrence event, or better.

e. The Parties may agree in writing to modifications to the Phase I and II Projects (consistent with subparagraph 50.d above) as well as the interim schedules for such projects, but any change in the final end date of December 31, 2030 for Phase I, or December 31, 2040 for Phase II, will require Court approval. In the event HRSD delays, decides not to pursue, or abandons the ARP, HRSD shall identify an alternative accelerated schedule for the remaining RWWMP work that is as expeditious as possible, as described in Paragraph 50.c, as added in the Fourth Amendment.

Revisions related to post-constructing monitoring and assessment.

5. Paragraph 81 currently provides that, “HRSD, in consultation with the Localities, shall conduct a Performance Assessment of the work performed pursuant to Section XI (Regional Wet Weather Management Plan) to determine the effectiveness of the evaluation and corrective action work performed.” The words “Upon completion of Phase II of the RWWMP” shall be inserted at the beginning of that sentence.

6. Paragraph 82 currently provides that, “HRSD shall submit for Plaintiffs’ approval pursuant to Section XVIII a plan for the Performance Assessment as part of the RWWMP. The Performance Assessment may be phased as appropriate to evaluate phases of the work as it is completed.” A new Paragraph 82.a shall be added which shall state: “No later than December 31, 2039, HRSD shall submit for Plaintiffs’ approval pursuant to Section XVIII an updated detailed plan for the Performance Assessment (Phase II Performance Assessment), which shall contain the elements in Paragraph 83.”

7. Paragraph 83 enumerates the analyses and data that the RWWMP Performance Assessment in new Paragraph 82.a. must include. The amended Paragraph 83 shall read in full as follows:

83. The Performance Assessment shall, at a minimum,
 - a. Evaluate the number and causes of SSOs that occur on an annual basis in the HRSD SS System;
 - b. Evaluate the number and causes of Prohibited Bypasses, capacity-related Bypasses, overloading, and unauthorized discharges that occur on an annual basis in the STPs;
 - c. In consultation with the Localities, evaluate the number and causes of wet weather/capacity-related SSOs that occur on an annual basis in the Regional SS System;
 - d. Quantify the percent reduction in baseline modeled SSO volumes for the 5-year peak flow recurrence event and analyze whether Phase I and II attained the 69 percent reduction or greater in baseline modeled SSO volumes for the 5-year peak flow recurrence event.
 - e. Evaluate and discuss any other parameters relevant to assessment of the work performed under the RWWMP.

8. Paragraph 85 currently provides that “HRSD shall submit a Performance Assessment Report summarizing the Performance Assessment or phases thereof to Plaintiffs as it is completed, pursuant to Section XVIII (Submissions for Agency Approval.) In the event of any dispute concerning the Performance Assessment, the provisions of Section XXII (Dispute Resolution) shall apply.” The first sentence is amended to add at the beginning a deadline as follows: “No later than March 31, 2043,…”

9. Paragraph 86 currently provides that, “In the event that the Performance Assessment Report shows that the work performed in accordance with the RWWMP did not result in Adequate Capacity for the selected Level of Service, and other performance standards set forth in the RWWMP, then HRSD shall submit to the Plaintiffs a proposed course of action and proposed schedule pursuant to Section XVIII (Submissions for

Agency Approval) and shall modify its Regional Wet Weather Management Plan to attain Adequate Capacity. In the event of any dispute as to the appropriate course of action, the provisions of Section XXII (Dispute Resolution) shall apply.” The first sentence is amended to delete “result in Adequate Capacity for the selected Level of Service, and other performance standards set forth in the RWWMP,” and revised to state instead “attain a 69 percent or greater reduction in SSOs by volume from baseline modeled SSO volumes for the 5-year peak flow recurrence event.” That sentence is further amended to delete the subsequent reference to “Adequate Capacity,” and revised to state instead “attain a 69 percent or greater reduction in baseline modeled SSOs by volume for the 5-year peak flow recurrence event.” The amended Paragraph 86 shall read in full as follows:

“In the event that the Performance Assessment Report shows that the work performed in accordance with the RWWMP did not attain a 69 percent or greater reduction in baseline modeled SSOs by volume for the 5-year peak flow recurrence event, then HRSD shall submit to the Plaintiffs a proposed course of action and proposed schedule pursuant to Section XVIII (Submissions for Agency Approval) and shall modify its Regional Wet Weather Management Plan to attain a 69 percent or greater reduction in baseline modeled SSOs by volume for the 5-year peak flow recurrence event. In the event of any dispute as to the appropriate course of action, the provisions of Section XXII (Dispute Resolution) shall apply.”

Release for Stipulated Penalties.

10. Defendant HRSD will pay \$68,350 for stipulated penalties arising from SSOs from January 1, 2018 through December 31, 2019. That payment resolves Plaintiffs’ civil claims for stipulated penalties for SSOs reported by HRSD through that date. Payment shall be made in accordance with the provisions of Section XX (Stipulated Penalties).

Reporting.

11. Section XVII (Reporting), Paragraph 87, which enumerates information to be included in Annual Reports, is amended to add a new subparagraph 87.j. to require that Annual Reports include “Documentation of progress for the ARP and the Phase I and Phase II projects identified in Appendices 9 and 10 and under Section XI. F. Verification shall be provided by a professional engineer for completion of each individual Phase I and Phase II Project Group and each total Phase I and Phase II Project.”

12. Section XVII (Reporting), Paragraph 88, which enumerates information to be included in Semi-Annual Reports, is similarly amended to add a new subparagraph 88.h. to require that Annual Reports include “Documentation of progress for the ARP and the Phase I and Phase II projects identified in Appendices 9 and 10 and under Section XI. F. HRSD shall provide verification by a professional engineer that the project was completed satisfactorily for each individual Phase I and Phase II Project Group and each total Phase I and Phase II Project that was completed during the reporting period.”

13. Paragraph 90 currently provides that “HRSD shall provide quarterly briefings of the Plaintiffs as set forth in Section XI (Regional Wet Weather Management Plan) from the date of lodging of this Consent Decree through submission of the RWWMP to Plaintiffs pursuant to Section XVIII (Submission for Agency Approval) for any calendar quarter in which the Annual or Six-Month Reports are not due (i.e., on February 1 and August 1 of each year). These briefings may either be telephonic or face to face meetings held in the Tidewater Region of Virginia and Plaintiffs shall decide how they will participate in each quarterly briefing. Plaintiffs reserve the right to request a

written report after the quarterly briefings, which HRSD shall provide within 30 days from the date of the Plaintiffs' request." A new Paragraph 90.a shall be added which shall state: "HRSD will submit quarterly SSO reports to VADEQ and EPA, in which HRSD will identify all SSOs, SSDs, Prohibited Bypasses, or unauthorized discharges from the HRSD SS System or the HRSD STPs. HRSD will identify those SSOs, SSDs, Prohibited Bypasses, or unauthorized discharges for which it asserts a claim of *force majeure*. If HRSD asserts a *force majeure* claim, it shall document the basis for such claim in the quarterly SSO reports. It will pay the associated undisputed stipulated penalties for all SSOs, SSDs, Prohibited Bypasses, or unauthorized discharges for which it did not assert a claim of *force majeure* within 90 days of the close of each calendar quarter. In addition, HRSD will submit all of HRSD's post-storm synopsis reports for rain events during the quarterly reporting period to VADEQ and EPA as part of the quarterly reports for rain events that satisfy HRSD's current criteria for publishing a post-storm analysis, i.e.: (a.) one or more rain gauge sites meet a two-year or greater rainfall recurrence interval and at least 50% of sites in any treatment plant service area receive one inch of rainfall or greater; (b.) a rain gauge meets a five-year or greater rainfall recurrence interval; or (c.) a weather-related SSO occurs.

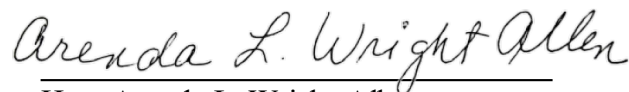
14. Section XXX (Termination), Paragraph 170, is amended to delete the fourth element, "thereafter maintain continuous satisfactory compliance with this Consent Decree for a period of twelve months," and the elements are renumbered accordingly.

Revised Paragraph 170 shall read as follows:

After HRSD has (1) completed the requirements of Section V through XVI (Compliance Requirements), (2) completed the Performance Assessment, (3)

fulfilled the requirements of Section XVI (Performance Assessment), (4) complied with all other requirements of this Consent Decree, and (5) paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, HRSD may serve upon the United States and the State a Request for Termination, stating that HRSD has satisfied those requirements, together with all necessary supporting documentation.

IT IS SO ORDERED.



Hon. Arenda L. Wright Allen
United States District Judge

DATED: February 8, 2022

Norfolk, Virginia

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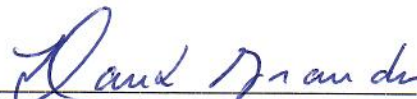
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