

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.)	
)	<u>CONSENT DECREE</u>
)	
HAMPTON ROADS SANITATION)	
DISTRICT,)	
)	
Defendant.)	
_____)	

FOURTH 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, most recently with the entry of a Third Amended Consent Decree by the Court on August 25, 2014 (“Consent Decree”);

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

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 requirements flowing from the Chesapeake Bay Total Maximum Daily Load ("Bay TMDL") to substantially reduce nutrient and sediment discharges to the Chesapeake Bay watershed;

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 (1) elimination of up to 90% of HRSD's direct discharges of nutrients and other pollutants of concern to the Chesapeake Bay; (2) the opportunity to offset costly nutrient and sediment reduction requirements allocated by the Bay TMDL to municipal separate storm sewers systems ("MS4") operated by Localities in the Hampton Roads region; (3) mitigation of local land subsidence in the Virginia coastal plain; (4) mitigation of recurrent flooding in the Tidewater area; and (5) increasing resilience to deal with climate change.

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, Plaintiffs United States of America and the Commonwealth of Virginia agree that if such permits are received and the ARP is implemented, HRSD's ARP has the potential to bring about significant environmental benefits.

WHEREAS, on August 1, 2016, as required by Section XI.B, HRSD provided to Plaintiffs an Alternatives Analysis Report in which it preliminarily proposes going forward to prioritize expenditures on the ARP and perform the work required by the Consent Decree in this matter after construction of the ARP is completed. HRSD states that it has already implemented approximately \$650 million toward ensuring wet weather capacity in the region. The schedule for future work proposed by HRSD is based on the service area's ability to finance and pay for the measures required by the Consent Decree as well as the ARP.

WHEREAS, the Parties agree that in order for Plaintiffs independently to review, verify, and evaluate HRSD's proposed sequencing and schedule, HRSD will need to provide certain financial and technical information and cooperate in assisting Plaintiffs' consultants in understanding HRSD and the Localities' financing.

WHEREAS, HRSD has not yet fully responded to EPA's October 5, 2016 Request for Information, issued pursuant to Section 308 of the CWA, 33 U.S.C. §1318.

WHEREAS, HRSD is developing an Integrated Plan that comprises measures that involve other CWA programs, including MS4 regulation, TMDL limits to be

imposed on the HRSD's Sewage Treatment Plants, and potentially Chesapeake Bay credit trading programs, in addition to the injection well permitting process currently underway under the Safe Drinking Water Act's Underground Injection Control program.

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.

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

1. Paragraph 8 is hereby amended by inserting the following definitions in alphabetical order at the appropriate locations.

"Aquifer Replenishment Program" or "ARP" shall mean HRSD's proposed program 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. HRSD identifies the program as the Sustainable Water Initiative for Tomorrow or SWIFT and it is described in Section 2 of the Alternatives Analysis Report submitted by HRSD to Plaintiffs on August 1, 2016 in accordance with Section XI.B of this Consent Decree, and shall include any subsequent revisions to the project.

"Integrated Plan" or "IP" shall mean HRSD's plan integrating its obligations under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, in accordance with EPA's Integrated

Municipal Stormwater and Wastewater Planning Approach Framework, issued on June 5, 2012.

“Financial Capability Assessment” or “FCA” shall mean a financial analysis using the methodology in EPA’s Financial Capability Assessment Framework, issued on November 24, 2014, and EPA’s Combined Sewer Overflows – Guidance for Financial Capability Assessment and Schedule Development (FCA Guidance) (EPA 832-B-97-004), issued in February, 1997.

Schedule Adjustments for Aquifer Replenishment Program and related measures:

2. Paragraph 48 currently says, “The anticipated general format of the RWWMP is set forth in Appendix 6 as a guideline for its development.” Paragraph 48 is amended to add the following sentence: “HRSD may reference or attach as an Appendix relevant portions of its Integrated Plan as necessary to explain the sequencing or schedules in the RWWMP.”

3. Paragraph 50 (Schedule) currently provides criteria for prioritizing projects within the RWWMP. A new Paragraph 50.b shall be inserted to follow current Paragraph 50.a and shall provide: “The schedule in the RWWMP also shall accommodate expenditures on and revenues resulting from the ARP and related measures in the Integrated Plan to be implemented by HRSD in order to (i) facilitate compliance with other requirements of the CWA applicable to HRSD and/or its member Localities; (ii) provide important water quality benefits for the Chesapeake Bay and other waters in the region; and/or (iii) ameliorate other regional human health or environmental issues; *provided that* (a) HRSD demonstrates that greater human health or environmental benefits

will be obtained through implementation of some or all of the projects in the ARP before completion of all of the RWWMP Collection System projects; and (b) HRSD also provides an implementation schedule for both the ARP and the RWWMP that is as expeditious as possible as determined through an acceptable Financial Capability Assessment and good engineering practice.”

4. A new Paragraph 50.c shall follow new Paragraph 50.b and provide: “In the event that HRSD makes the foregoing demonstrations, HRSD shall identify and list high priority projects in the RWWMP that will be implemented concurrently with the selected projects in the ARP. HRSD shall provide justification in the RWWMP for the selection of the high priority RWWMP projects and for the deferral of the remaining RWWMP work. HRSD also shall provide in the RWWMP a provision that accelerates expenditures on the RWWMP consistent with an updated Financial Capability Assessment (FCA) in the event that HRSD for any reason delays, decides not to pursue or otherwise abandons the implementation of the ARP. In such an event, HRSD shall identify an alternative accelerated schedule for the remaining RWWMP work that is as expeditious as possible.

5. Current Paragraph 50.b provides that “HRSD shall provide in the RWWMP that all work and actions allocated to HRSD be completed as expeditiously as possible.” That Paragraph 50.b is now renumbered to be paragraph 50.d, and is amended to state, “HRSD shall provide in the RWWMP that all work and actions required by the Consent Decree be completed as expeditiously as possible, except to the extent that HRSD makes the demonstration in Paragraph 50.b., i.e. (a) HRSD

demonstrates that greater human health or environmental benefits will be obtained through implementation of some or all of the projects in the ARP before completion of all of the RWWMP Collection System projects; and (b) HRSD also provides an implementation schedule for both the ARP and the RWWMP that is as expeditious as possible as determined through an acceptable FCA and good engineering practice. HRSD may supplement the FCA with any additional information which it believes is relevant to an understanding of HRSD's and the Region's financial capability, to the extent contemplated by the FCA."

Provision of Financial Information:

6. A new Paragraph 53.a shall be added to Section XI.D (Coordination with Plaintiffs During RWWMP Development) which shall provide: "HRSD shall provide the financial, technical and other information requested in EPA's October 5, 2016 Section 308 Request (or as otherwise agreed to by EPA in writing after discussions with HRSD) as soon as possible but in any event no later than February 15, 2017. HRSD shall cooperate with all reasonable requests to assist Plaintiffs to understand the data and calculations employed in HRSD's FCA or other financial analysis and for Plaintiffs to perform an independent FCA. The Parties further recognize that certain data and financial information related to the Localities will be necessary to perform the FCA. HRSD will provide to Plaintiffs data and financial information related to the Localities that is already in its custody and possession and further shall coordinate with Plaintiffs to obtain any additional data from the Localities as may be necessary for the independent FCA."

Future Amendment of Consent Decree for RWWMP.

7. Section XI.F. Paragraph 58 (Implementation of the RWWMP) provides that “Upon its approval by Plaintiffs, the RWWMP, including its associated milestones and schedules, shall be incorporated by reference into, and enforceable as part of, this Consent Decree. The Parties in their discretion may amend this Consent Decree to add the requirements and obligations applicable to HRSD in lieu of incorporation by reference.” That provision is stricken and replaced with the following provision: “Upon 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.”

FOR PLAINTIFF UNITED STATES OF AMERICA



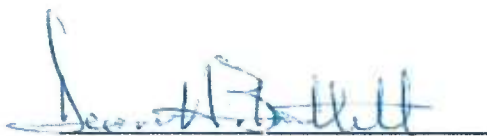
NATHANIEL DOUGLAS
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
Washington, D.C.



NANCY FLICKINGER
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
Tel: 202-514-5258
Email: nancy.flickinger@gmail.com



MARY B. COE
Regional Counsel
U.S. Environmental Protection Agency
Region 3
1650 Arch Street
Philadelphia, PA 19103



DEANE H. BARTLETT
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 3
1650 Arch Street
Philadelphia, PA 19103

FOR PLAINTIFF UNITED STATES OF AMERICA:



MARK POLLINS

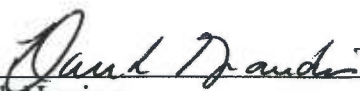
Director, Water Enforcement Division
Office of Enforcement and Compliance Assistance
United States Environmental Protection Agency



LOURDES BUFILL

Attorney
Water Enforcement Division
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

FOR PLAINTIFF COMMONWEALTH OF VIRGINIA



Mark Herring
Attorney General of Virginia

John W. Daniel, II
Deputy Attorney General

Donald D. Anderson
Senior Assistant Attorney General

David C. Grandis (VSB. No. 47746)
Assistant Attorney General

Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
(804) 225-2741 – telephone
(804) 786-2650 - facsimile
dgrandis@oag.state.va.us

FOR DEFENDANT HAMPTON ROADS SANITATION DISTRICT:



EDWARD G. HENIFIN
General Manager
Hampton Roads Sanitation District
P.O. Box 5911
Virginia Beach, VA 23471



F. PAUL CALAMITA, Esquire (VSB # 34136)
AquaLaw
6 South 5th Street
Richmond, VA 23219
(804) 716-9021, ext. 201
(804) 716-9022 (fax)
Paul@AquaLaw.com