Developments in Clean Water Law

What’s the Real State of the Law?

HRSD Consent Decree Negotiations
HRSD

- Regional wastewater treatment agency
- Serve 17 localities in southeastern Virginia
- 1.6 million people – 450,000 accounts
- Average daily flow 150 MGD
- Only 500 miles of interceptor pipelines
  - 450 miles pressure pipe – large diameter
- No combined sewers
- Few basements – Reduces available storage
- 15 SSOs in 2008 with total of 23,000 gallons lost (less than can be stored in my basement)
- No in-house counsel
HRSD SSO Enforcement History

• 2005 EPA notifies region of pending enforcement action on SSOs
• August 2007 EPA issues Administrative Order to HRSD
• September 2007 SWCB approves Special Order by Consent between VA, HRSD and 13 satellite localities
• February 2008 Consent Decree negotiations begin with EPA/DOJ and VA DEQ
• September 2009 HRSD signs Consent Decree – EPA lodges prior to end of FY

308 letters sprinkled in at various times to HRSD and to satellites
Keys to Negotiation Position

• State order in place with satellites to develop RWWMP
• Great permit compliance record – 70-year history, multiple POTWs
• Good SSO record – robust regional reporting history with automated record process
• No interest in SSO issue from regional NGO community – focus was/is on real WQ issues
• Apolitical governance structure
Why Negotiate?

- EPA and DOJ were persistent/insistent
- Outcome in court always an unknown
- Cheaper(?) than litigation
  - Possible to negotiate CD that is less burdensome
  - Turned off 308s
- Regional partners believed negotiations were in their best interest
Guiding Principles

- Consistent with SWCB Special Order by Consent
- No fixed end date for implementing plan
- Regional Wet Weather Management Plan designed around a level of service – not elimination
- Eliminate needless and time consuming 308 information requests
“we do not accept any of the listed preconditions to negotiations.”

Excerpt from DOJ ENRD letter dated January 16, 2008
Positive Negotiation Factors

- Remained in compliance with state order – work in progress on data collection and plan development
- Transparent to satellites – Joint Defense Agreement to allow sharing of information
- Nimble negotiation team – outside counsel, lead technical consultant, lead internal technical expert and GM
- Governing body regularly briefed – delegated authority to get deal done within broad parameters
- NGOs kept up to date on issue (not specifics)
Negotiation Highlights

“many, if not all, of the municipalities that we negotiated with in wet weather cases have expressed similar concerns. Nonetheless, we have entered into mutually acceptable agreements with a number of SSO and CSO municipalities in the past 10 years. …Accordingly, any consent decree that the United States enters into on behalf of EPA will have a fixed end date.”

Excerpt from DOJ ENRD letter dated January 16, 2008
Negotiation Highlights

“...With respect to an end-date in the consent decree, we maintain that an end-date is necessary. ...(we) will agree that HRSD implement its obligations under the RWWMP ‘as soon as practicable but no later than December 2028.”

Excerpt from DOJ ENRD letter dated June 12, 2009
Results of Negotiations

- No fixed end date – Decree requires plan development and implement according to approved schedule
- MOM stipulated limited – Stipulations only applicable to 6 key elements with performance standards identified in CD
- Interim system improvements – Limited to 33 projects already in CIP
- Civil penalty below EPA guidelines
Results of Negotiations

- No fixed end date – Decree requires plan development and implement according to approved schedule

- MOM stipps limited – Stipps only applicable to 6 key elements with performance standards identified in CD

- Interim system improvements – Limited to 33 projects already in CIP

- Civil penalty below EPA guidelines
Negotiation Highlights

- Gravity Sewer Cleaning 26,400 LF/Year
- Gravity Sewer Inspection 39,600 LF/Year
- Non-invasive FM Inspection 2,400 LF/Year (Limited to pipes within 500 of drinking water supply reservoir)
- PM Air Release Valves 1,550/Year
- Annual PM on Pump Stations 81/Year
- Annual PM on Generators 55/Year (Limited to stationary permanent generators)
Results of Negotiations

- No fixed end date – Decree requires plan development and implement according to approved schedule
- MOM stipulated limited – Stipends only applicable to 6 key elements with performance standards identified in CD
  - Interim system improvements – Limited to 33 projects already in CIP
  - Civil penalty below EPA guidelines
Negotiation Highlights

“other sanitary utilities in the Region 3 area have paid significant penalties based on the EPA settlement penalty policy for municipalities, pursuant to which HRSD should pay in excess of $2 million. ... Nonetheless, if and only if HRSD agrees to the end date of 2028, we are prepared to recommend a settlement for a figure under $1 million.”

Excerpt from DOJ ENRD letter dated June 12, 2009
**Negotiation Highlights**

- 50 months of SSOs
- Population: 1.6 million

---

**Table B Penalty $2-4 Million**

- **50 months of SSOs**
- **Population: 1.6 million**
Results of Negotiations

- No fixed end date – Decree requires plan development and implement according to approved schedule
- MOM stip limited – Stips only applicable to 6 key elements with performance standards identified in CD
- Interim system improvements – Limited to 33 projects already in CIP
  - Civil penalty below EPA guidelines - $900,000
Challenges Ahead

• Flow monitoring – Extensive metering network with tight data quality requirements
• Condition assessment – Majority of system is large diameter pressure pipe that cannot be taken out of service (easily)
• Coordination with satellites – 13 localities to keep on track with complex data gathering and analysis
• Level of service negotiations
• Implementation negotiations
Take Aways

• Enforcement is not related to WQ benefits — good SSO record is not enough to eliminate federal enforcement action

• “Fix the roof when the sun is shining.” Pre-emptive action with state and satellites can strengthen negotiation position

• Strong technical expertise is helpful at the table
“Moreover, let me caution you not to ask for further tweaks and titches. As the AUSA in this case said today, “pigs get fat and hogs get slaughtered.”
Pigs get fat; hogs get slaughtered