



# 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**

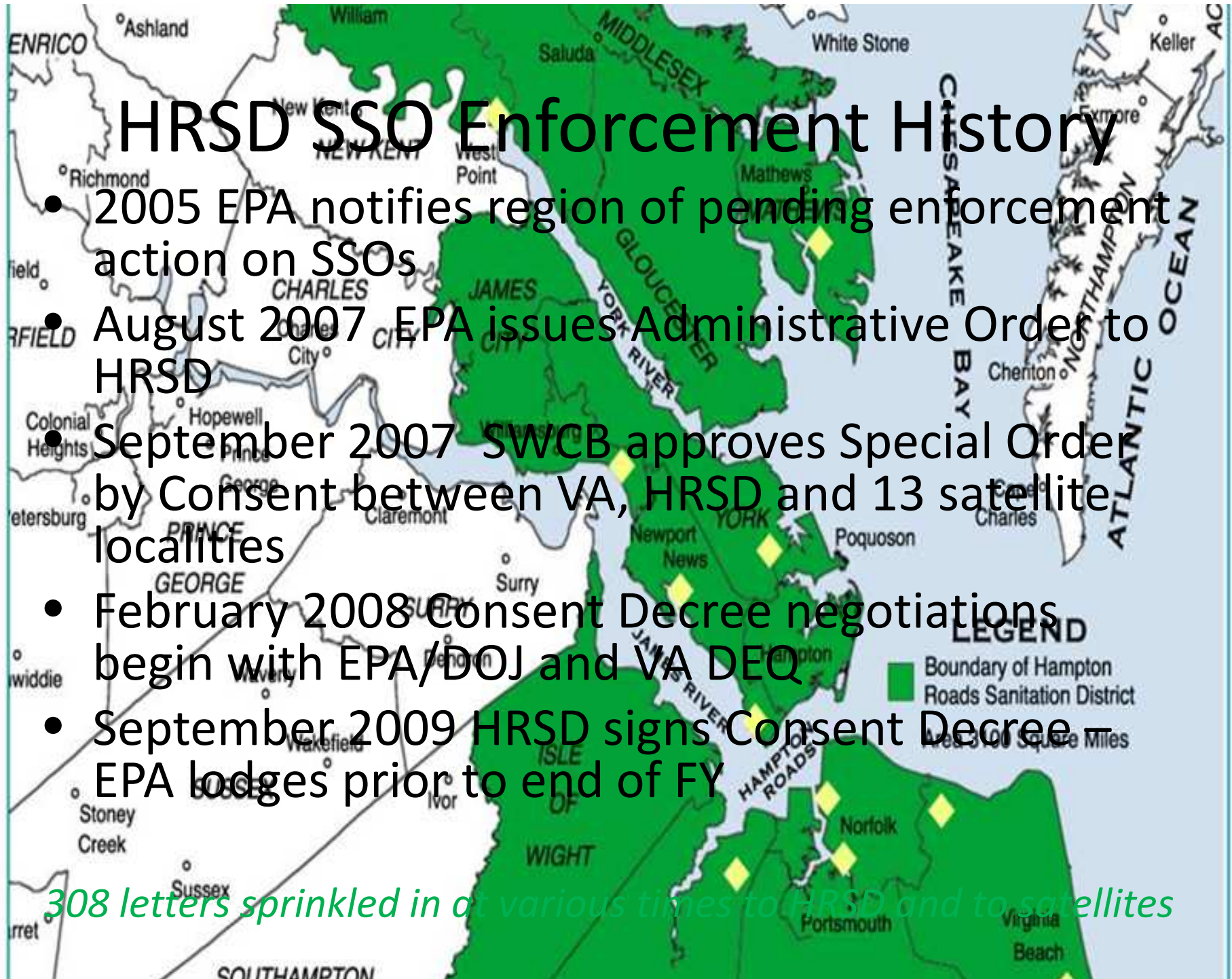
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# HRSD SSO Enforcement History

- 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

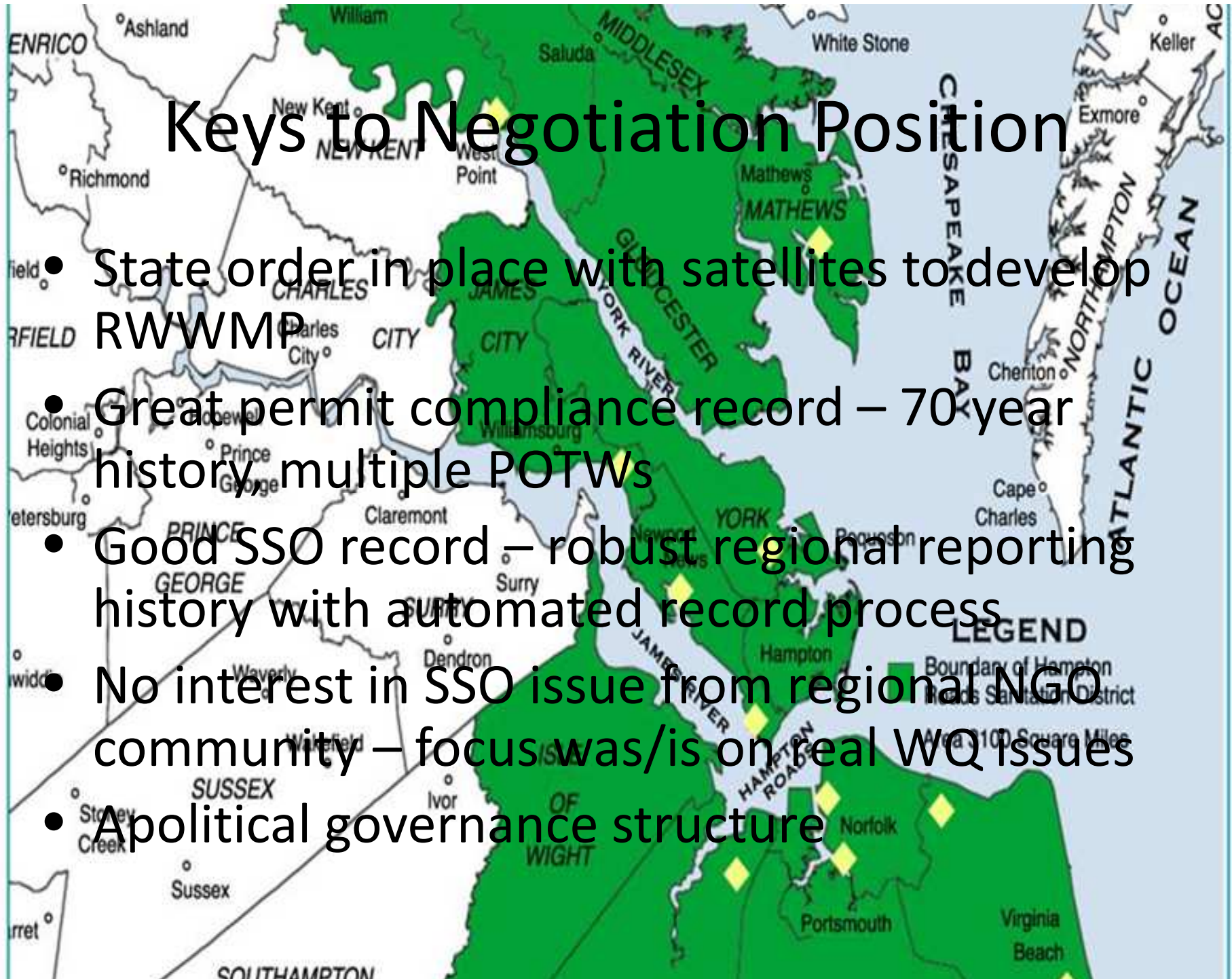
*308 letters sprinkled in at various times to HRSD and to satellites*





# Keys to Negotiation Position

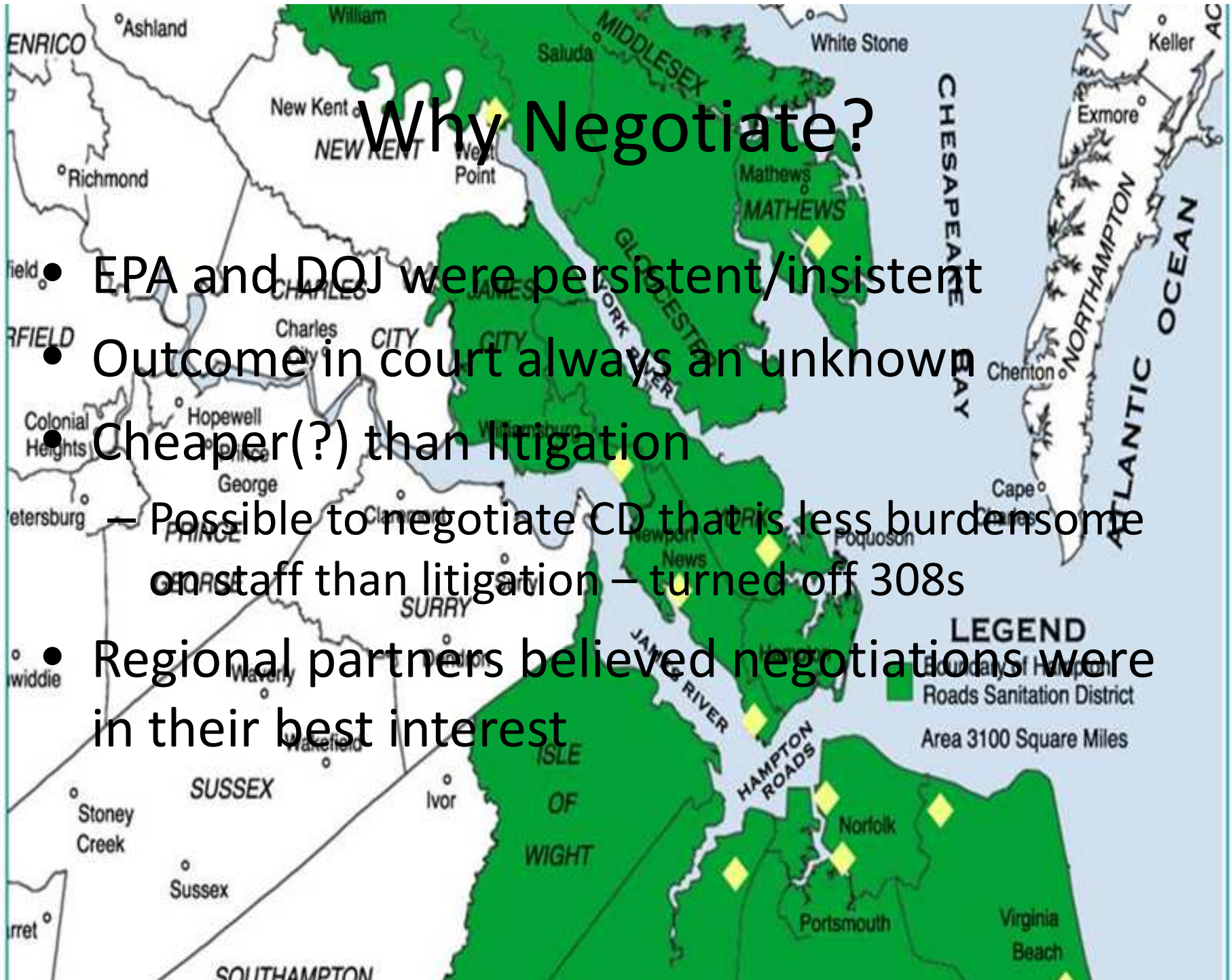
- State order in place with satellites to develop RWWMP
- Great permit compliance record – 70 year history, multiple POTWs
- Good SSO record – robust regional reporting history with automated record process
- No interest in SSO issue from regional NGO community – focus was/is on real WQ issues
- Apolitical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





# Why Negotiate?

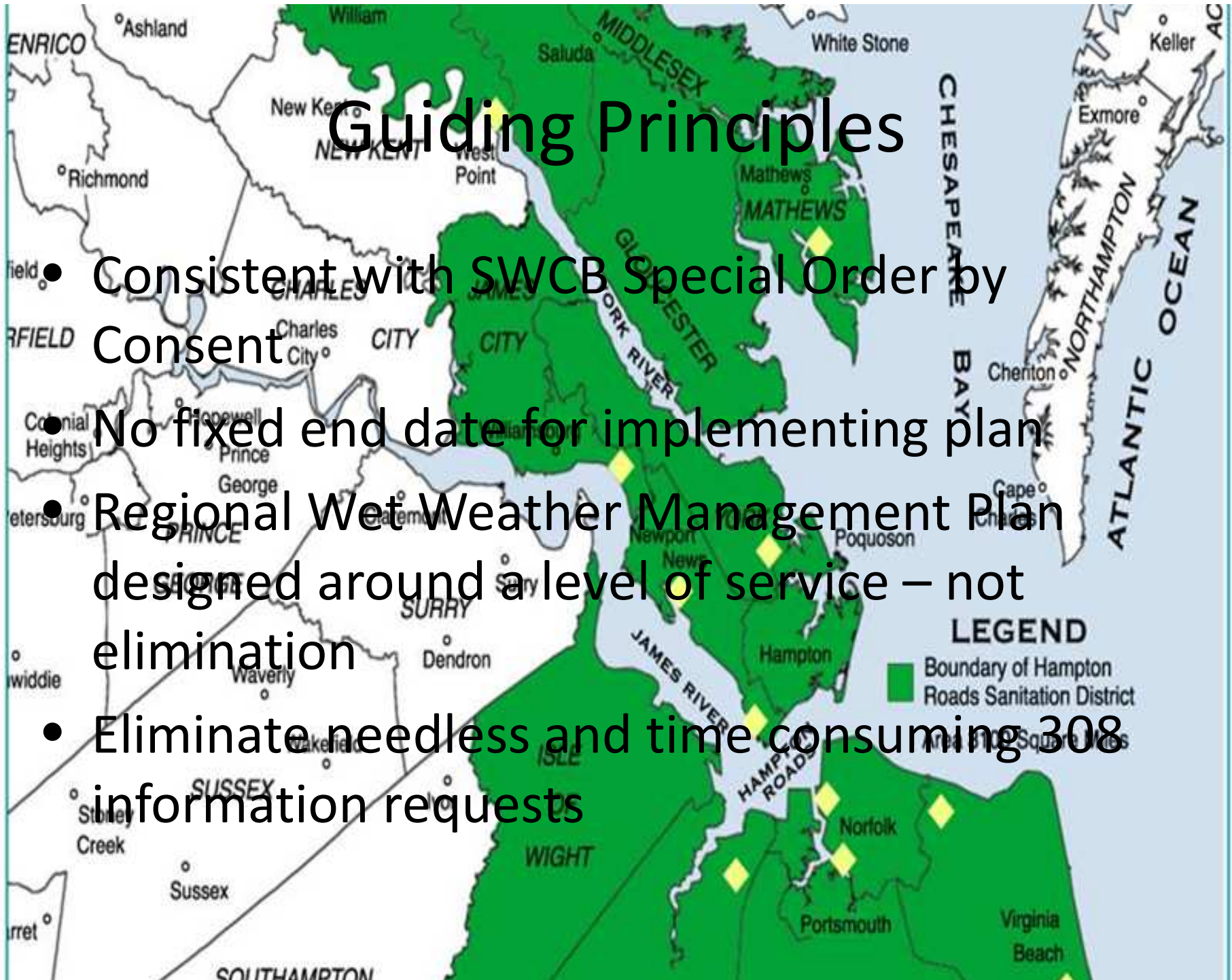
- EPA and DOJ were persistent/insistent
- Outcome in court always an unknown
- Cheaper(?) than litigation
  - Possible to negotiate CD that is less burdensome on staff than litigation – turned off 308s
- Regional partners believed negotiations were in their best interest





# 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





# Negotiation Highlights

***"we do not accept any of the listed preconditions to negotiations."***

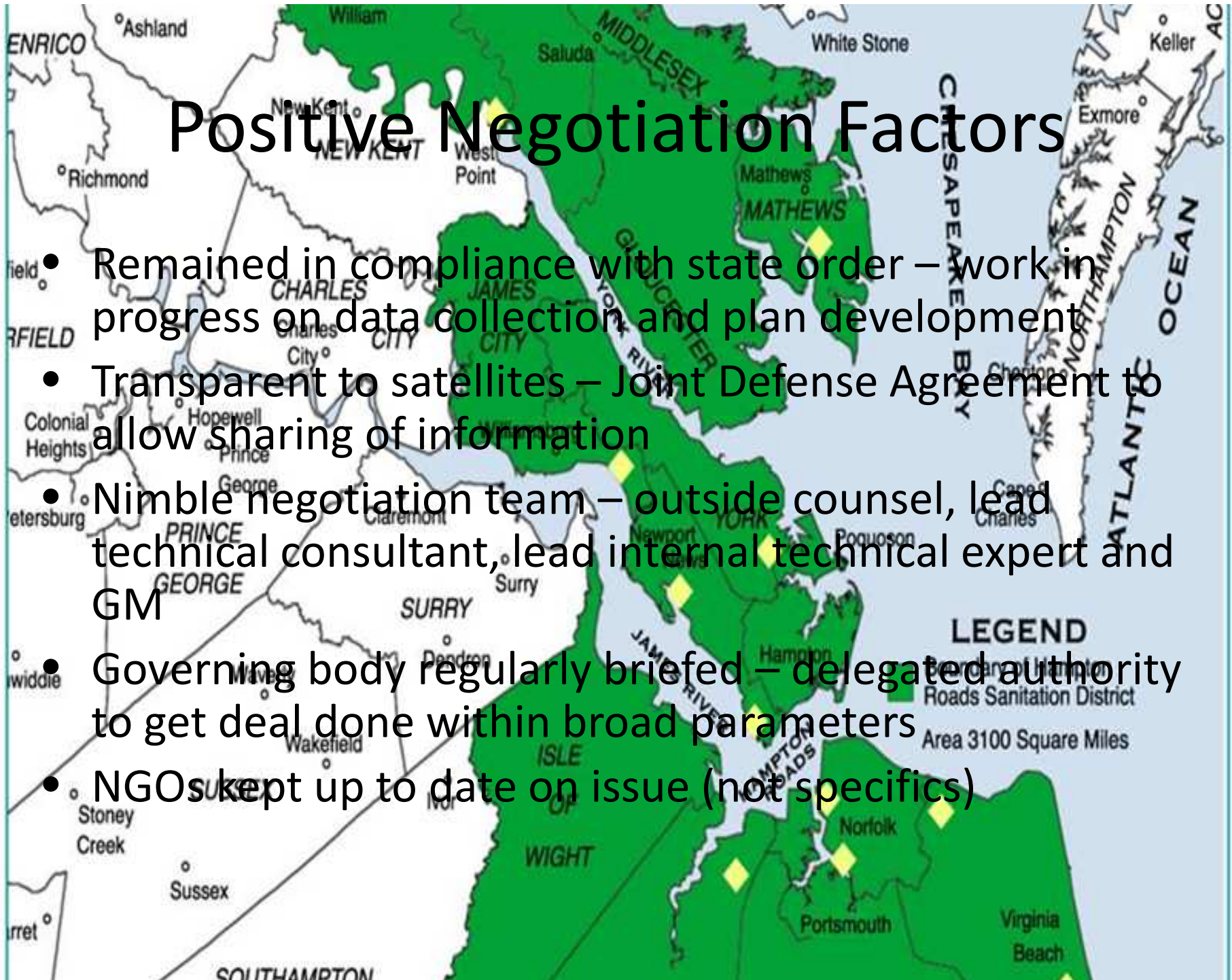
Excerpt from DOJ ENRD letter dated January 16, 2008





# 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)



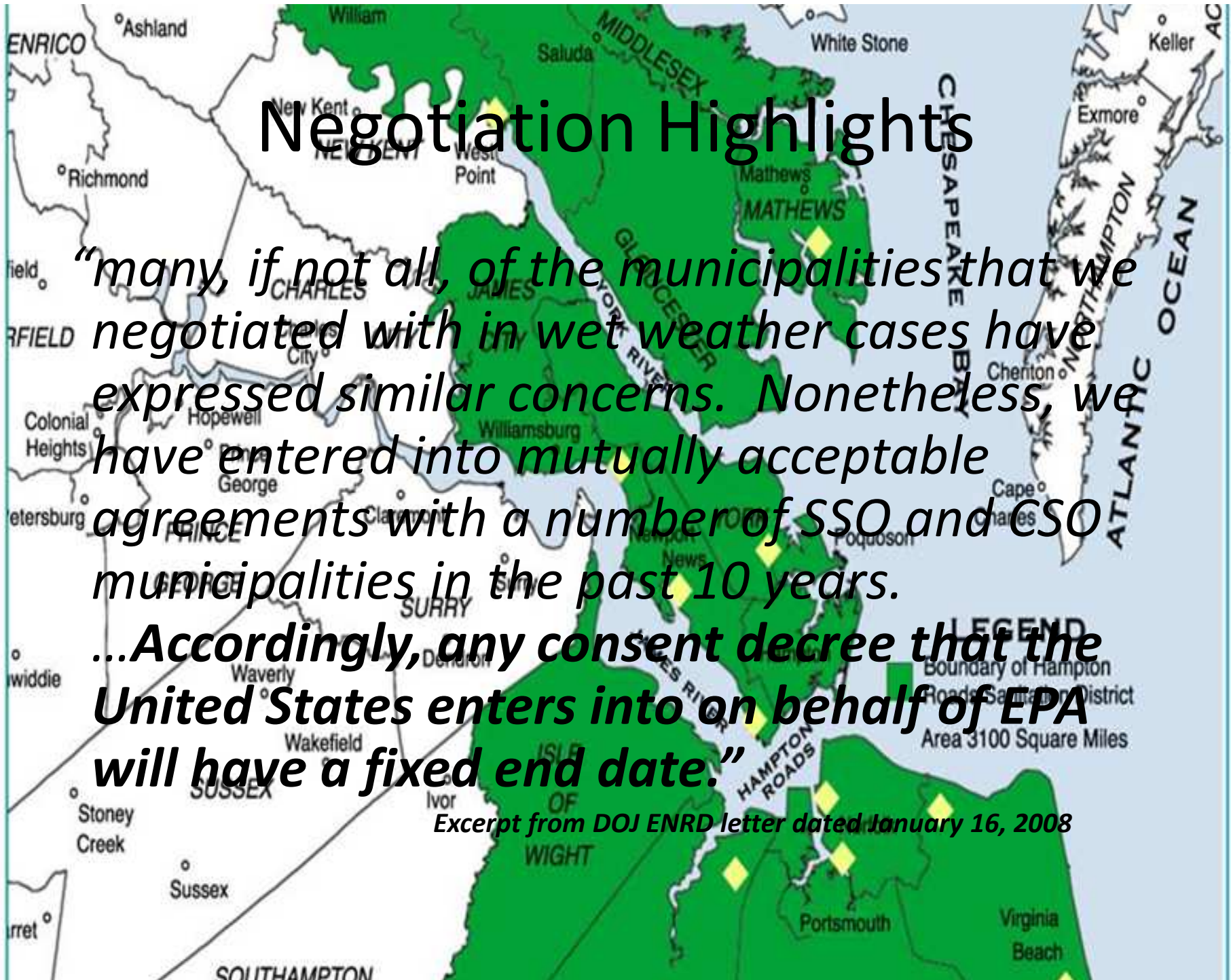


# Negotiation Highlights

*"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*

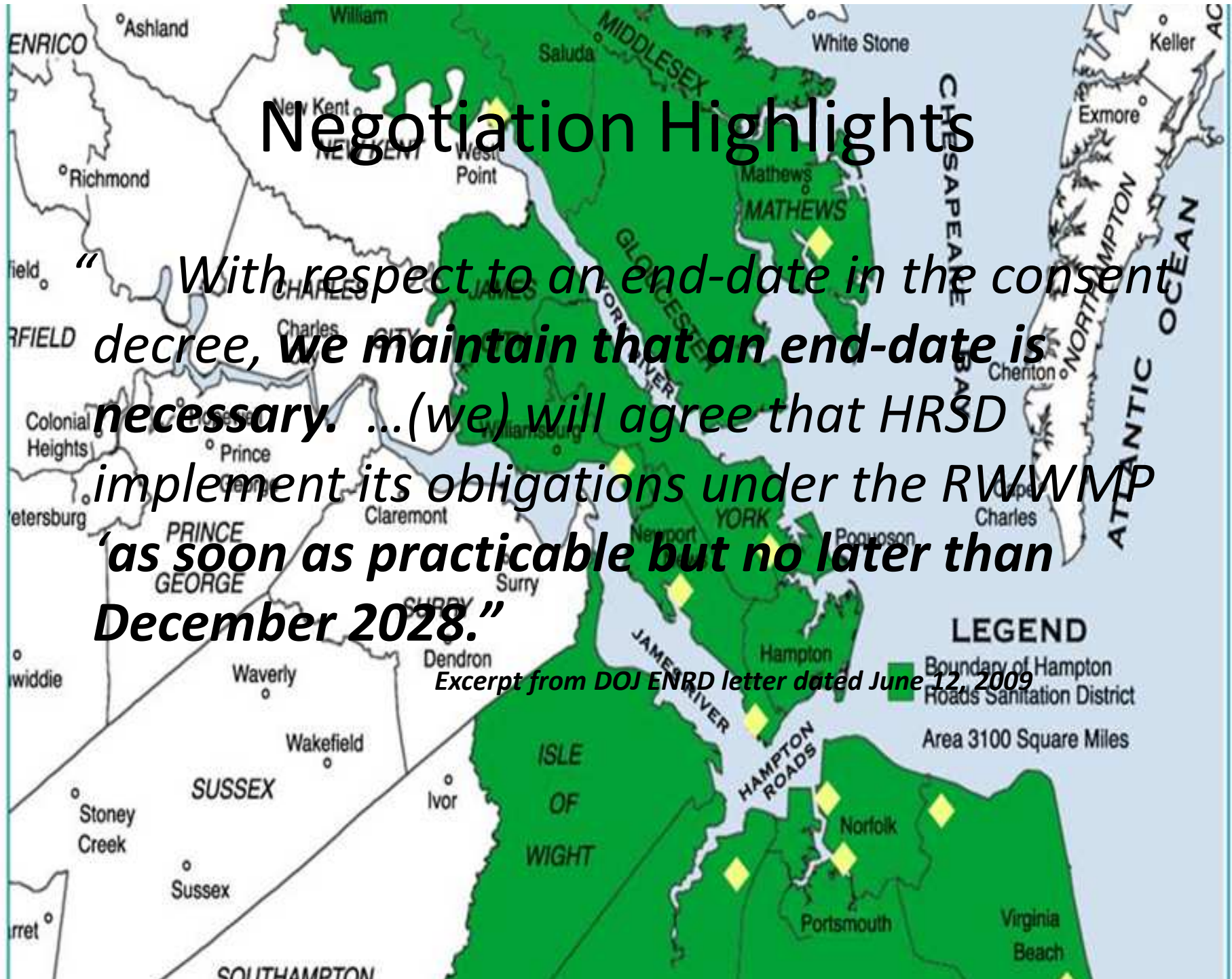




# Negotiation Highlights

*"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.'"*

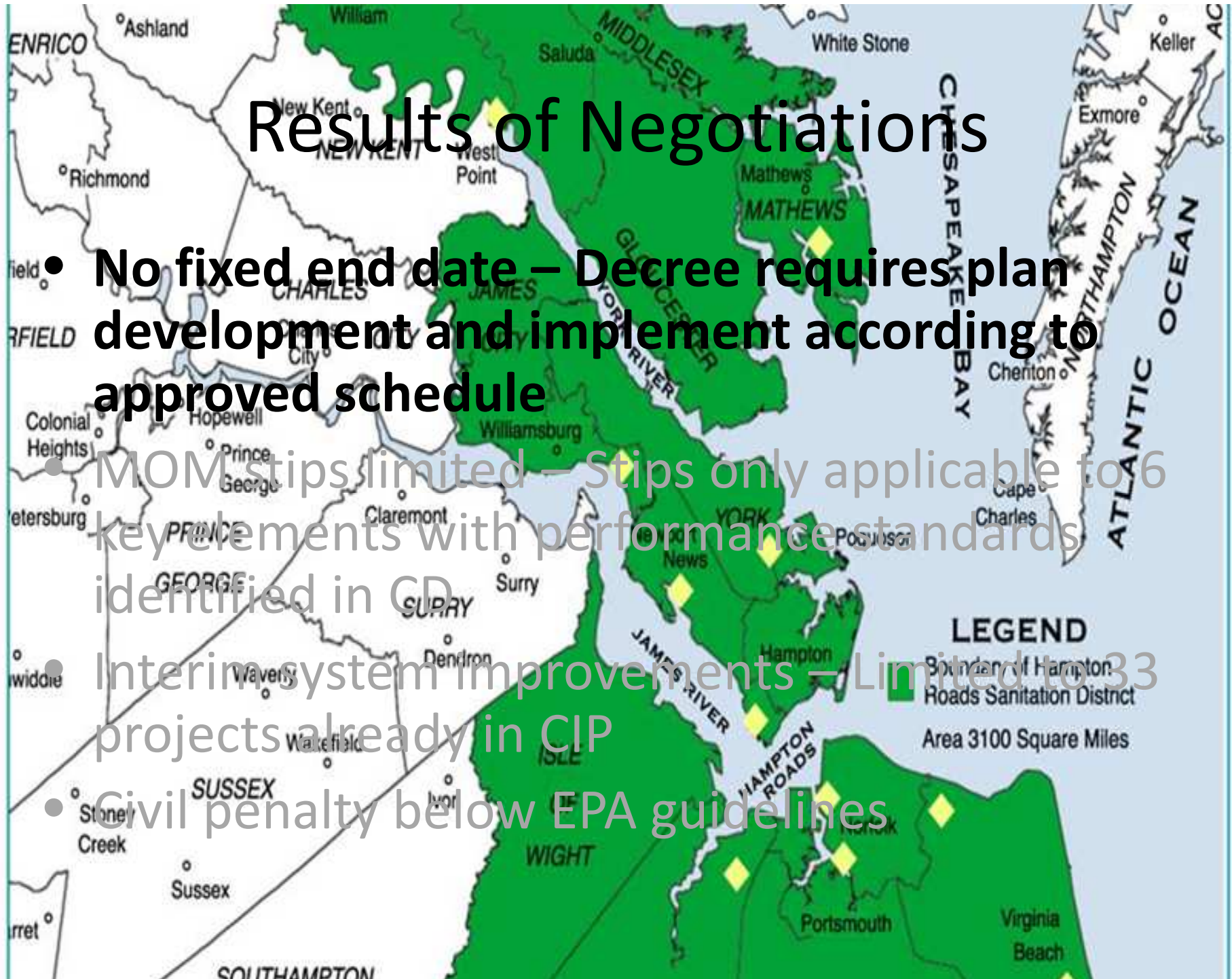
*Excerpt from DOJ ENRD letter dated June 12, 2009*





# Results of Negotiations

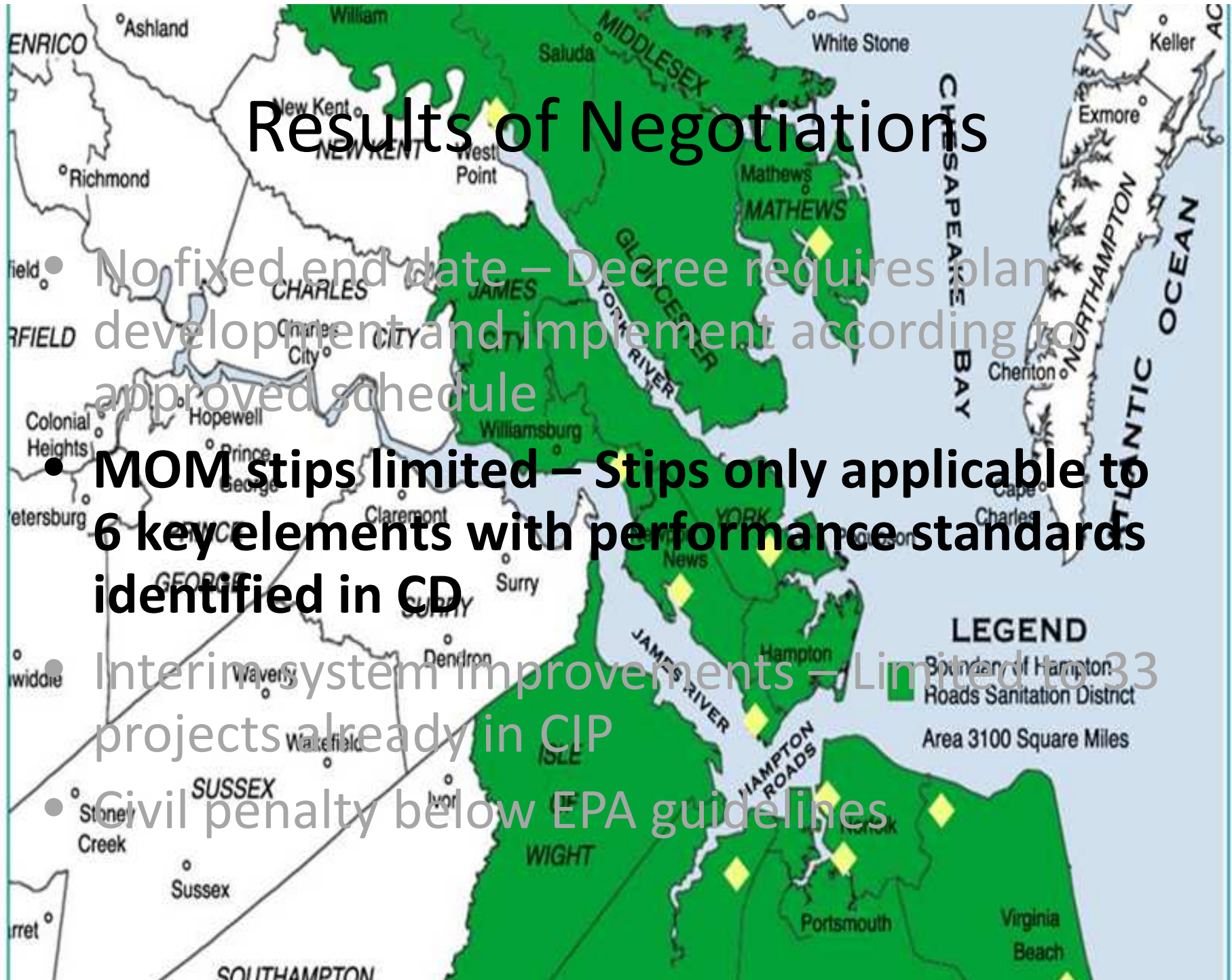
- No fixed end date – Decree requires plan development and implement according to approved schedule
- MOM stipulations limited – Stips only applicable to 6 key elements with performance standards identified in CD
- Interim system improvements – Limited to 33 projects already in CIP
- Civil penalty below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





# Results of Negotiations

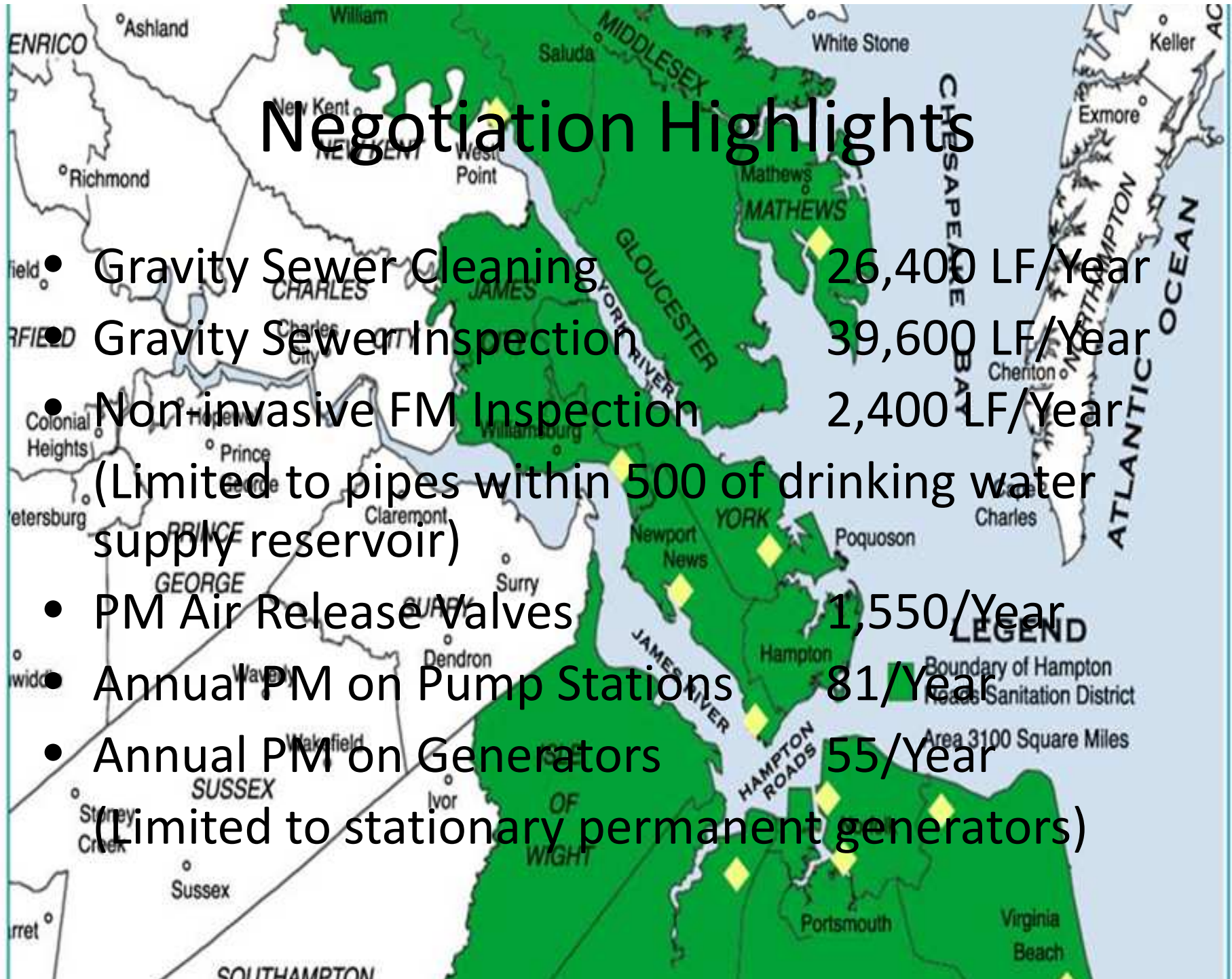
- No fixed end date – Decree requires plan development and implement according to approved schedule
- **MOM stip is limited – Stips only applicable to 6 key elements with performance standards identified in CD**
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# Negotiation Highlights

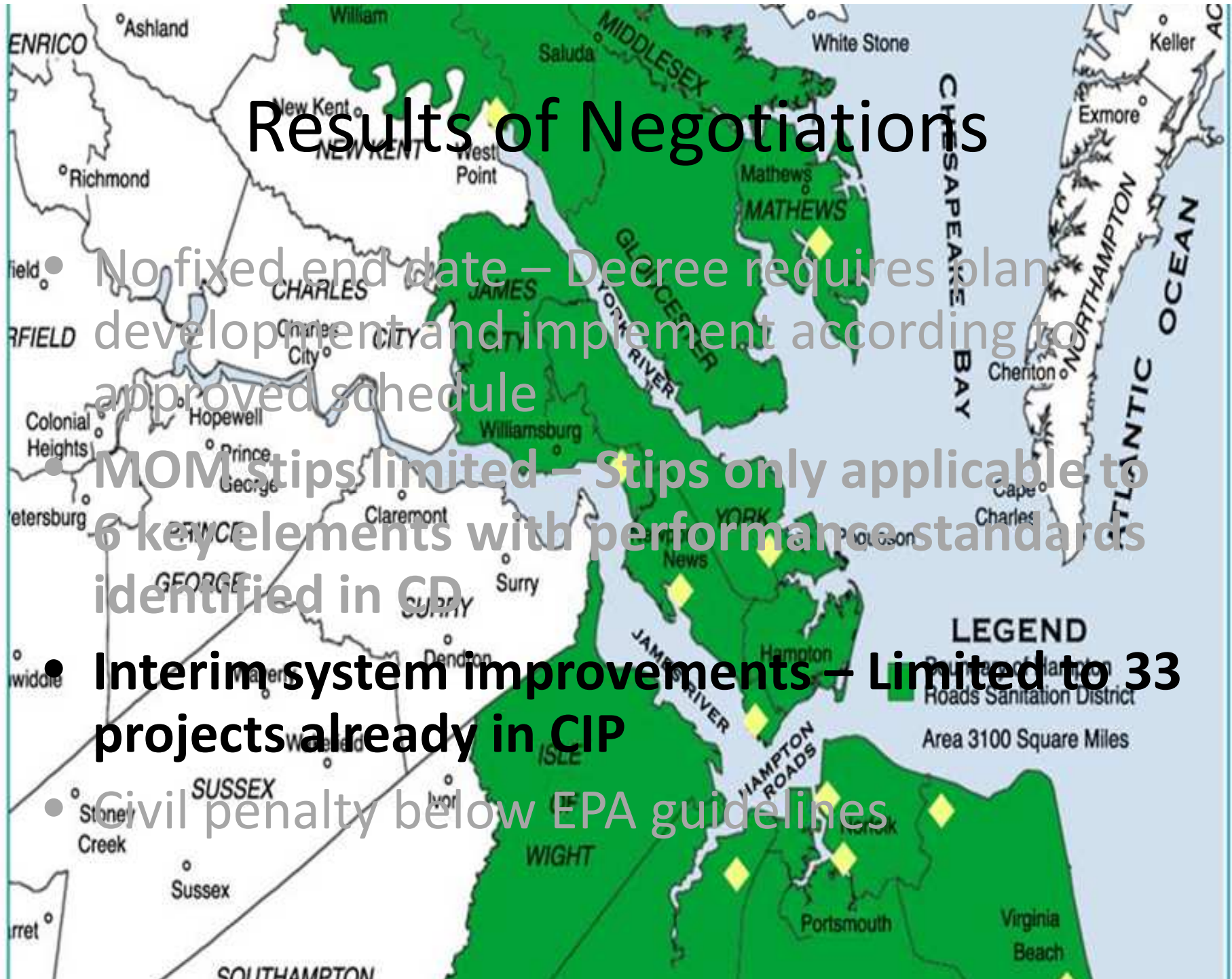
- Gravity Sewer Cleaning 26,400 LF/Year
- Gravity Sewer Inspection 39,600 LF/Year
- Non-invasive FM Inspection 2,400 LF/Year  
(Limited to pipes within 500 of drinking water supply reservoir)
- PM Air Release Valves 1,550/Year
- Annual PM on Pump Stations 81/Year
- Annual PM on Generators 55/Year  
(Limited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





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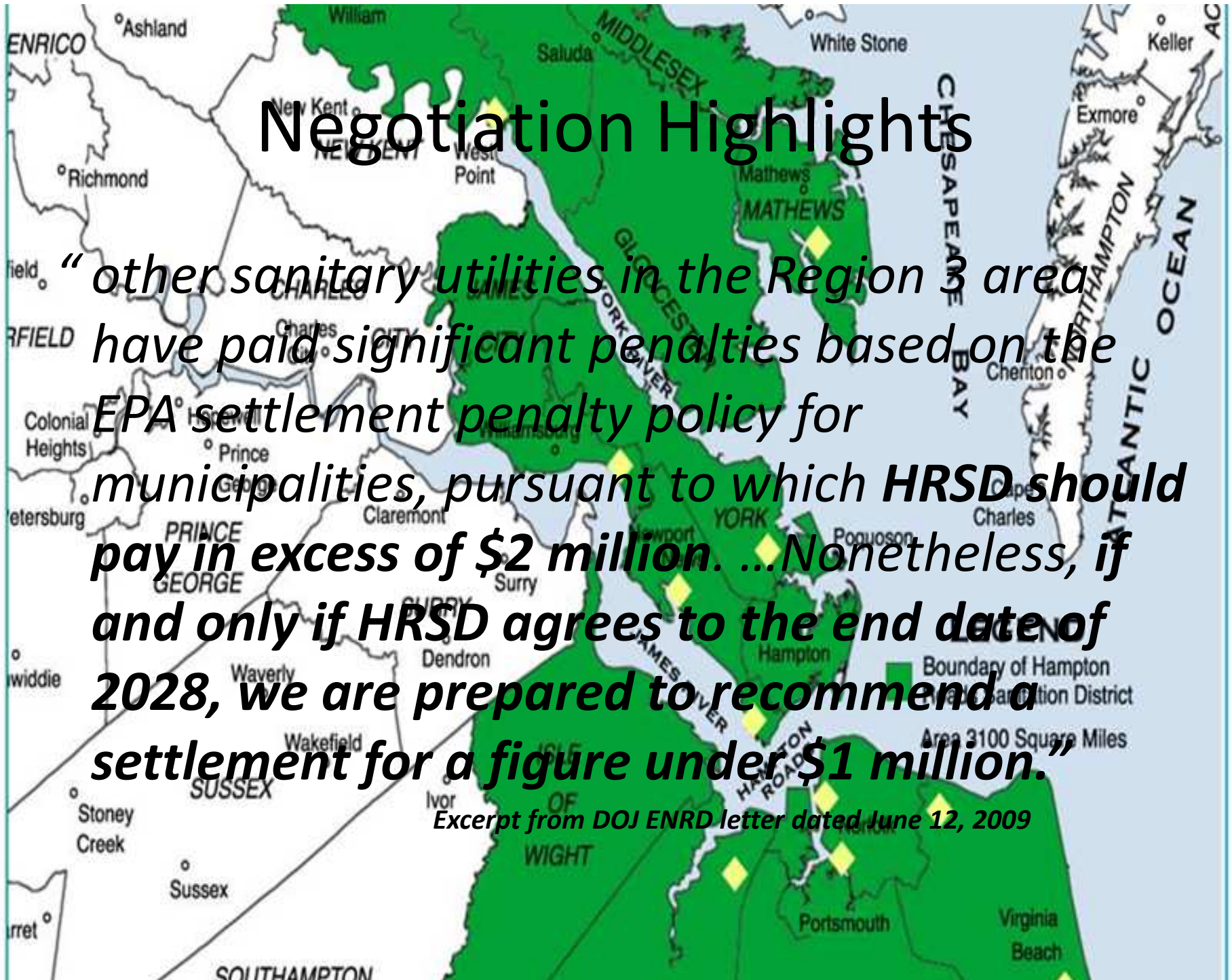




# Negotiation Highlights

*“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

Interior CWA Settlement Penalty Policy – March 1, 1995

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NATIONAL MUNICIPAL LITIGATION CONSIDERATION – TABLE B

SERVICE POPULATION	MONTHS OF VIOLATION FACTOR IN THOUSANDS OF DOLLARS											
	1 to 6	7 to 12	13 to 18	19 to 24	25 to 30	31 to 36	37 to 42	43 to 48	49 to 54	55 to 60	61 to 66	66 >
100 to 5,000	0 to 0.6	0 to 1.8	0.1 to 3	0.1 to 4.2	0.1 to 5.4	0.1 to 6.6	0.2 to 7.8	0.2 to 9	0.2 to 11	0.2 to 11.4	0.3 to 12.6	0.3 to 14
5,001 to 25,000	0.6 to 3	1.8 to 9	3 to 15	4.2 to 21	5.4 to 27	6.6 to 33	7.8 to 39	9 to 45	11 to 55	11.4 to 57	12.6 to 63	14 to 70
25,001 to 50,000	3 to 6	9 to 18	15 to 30	21 to 42	27 to 54	33 to 66	39 to 78	45 to 90	55 to 110	57 to 114	63 to 126	70 to 140
50,001 to 100,000	6 to 12	18 to 36	30 to 60	42 to 84	54 to 108	66 to 132	78 to 156	90 to 180	110 to 220	114 to 228	126 to 252	140 to 280
100,001 to 250,000	12 to 30	36 to 90	60 to 150	84 to 210	108 to 270	132 to 330	156 to 390	180 to 450	220 to 550	228 to 570	252 to 630	280 to 700
250,001 to 500,000	30 to 60	90 to 180	150 to 300	210 to 420	270 to 540	330 to 660	390 to 780	450 to 900	550 to 1,100	570 to 1,140	630 to 1,260	700 to 1,400
500,001 to 1,000,000	60 to 120	180 to 360	300 to 600	420 to 840	540 to 1,080	660 to 1,320	780 to 1,560	900 to 1,800	1,100 to 2,200	1,140 to 2,280	1,260 to 2,520	1,400 to 2,800
1,000,001 to 2,000,000	120 to 240	360 to 720	600 to 1,200	840 to 1,680	1,080 to 2,160	1,320 to 2,640	1,560 to 3,120	1,800 to 3,600	2,200 to 4,400	2,280 to 4,560	2,520 to 5,040	2,800 to 5,600
2,000,001 to 3,000,000	240 to 360	720 to 1,080	1,200 to 1,800	1,680 to 2,520	2,160 to 3,240	2,640 to 3,960	3,120 to 4,680	3,600 to 5,400	4,400 to 6,120	4,560 to 6,840	5,040 to 7,560	5,600 to 8,400

Table B Penalty

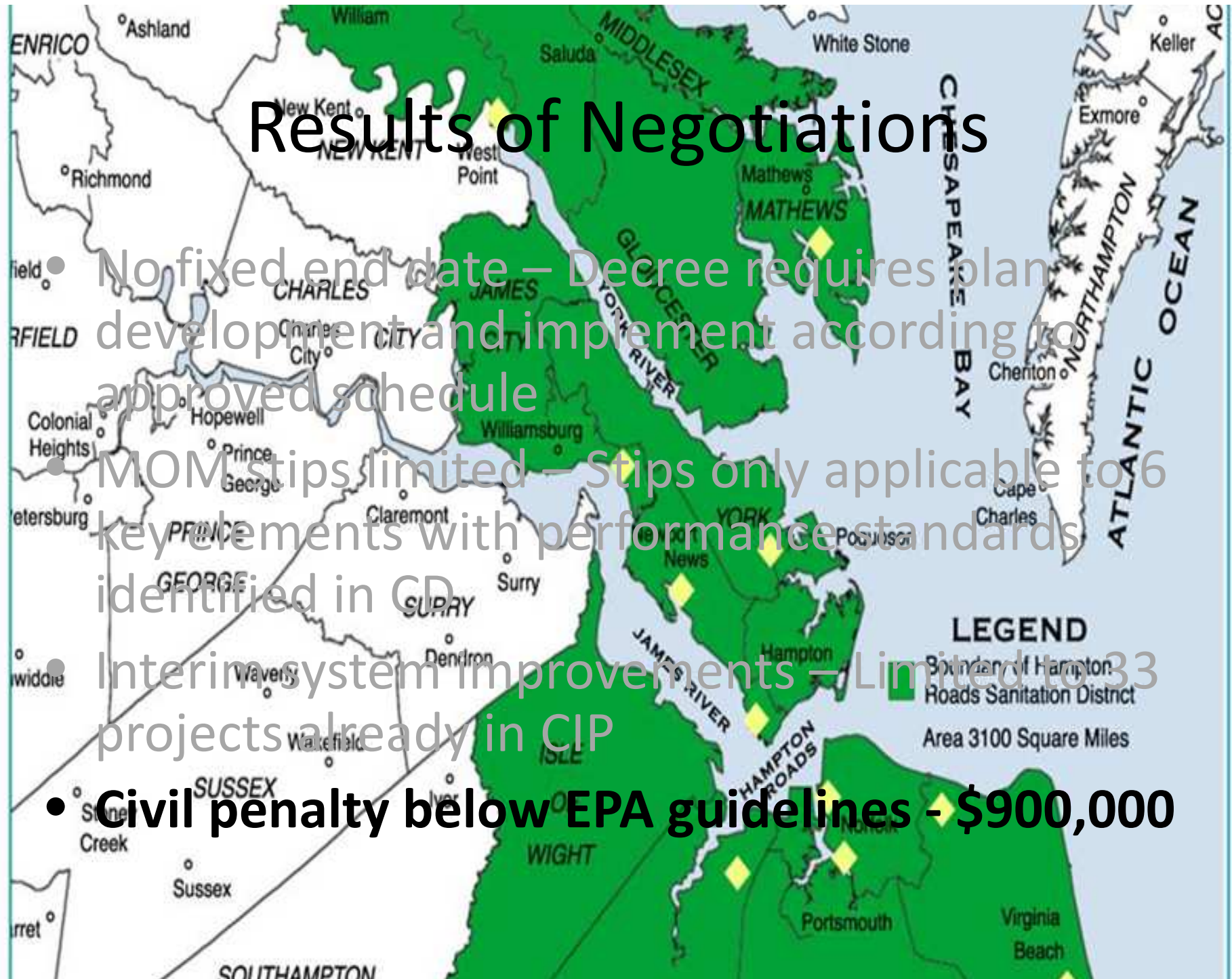
\$24 Million

- 50 months of SSOs
- Population 1.6 million



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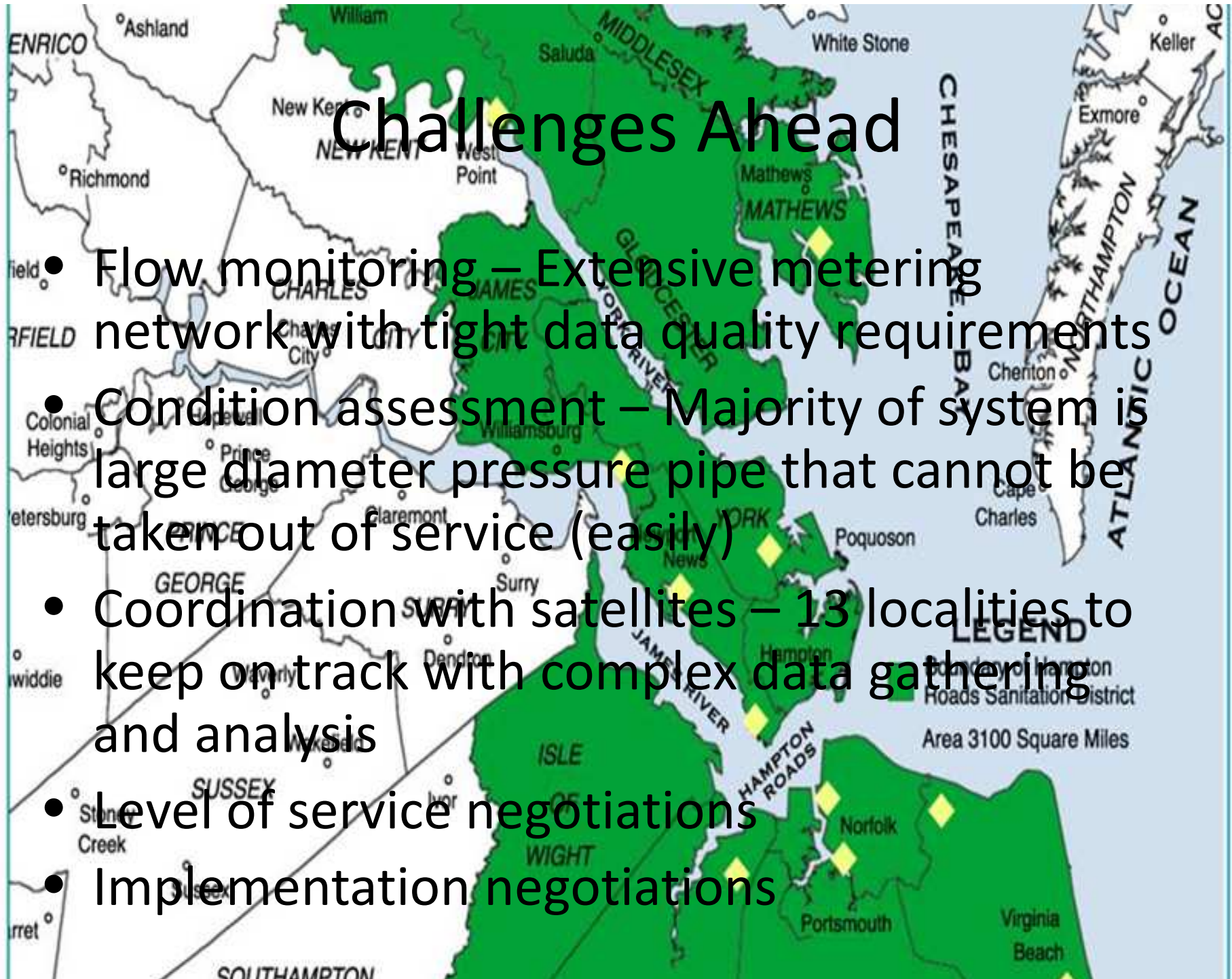
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- **Civil penalty below EPA guidelines - \$900,000**





# Challenges Ahead

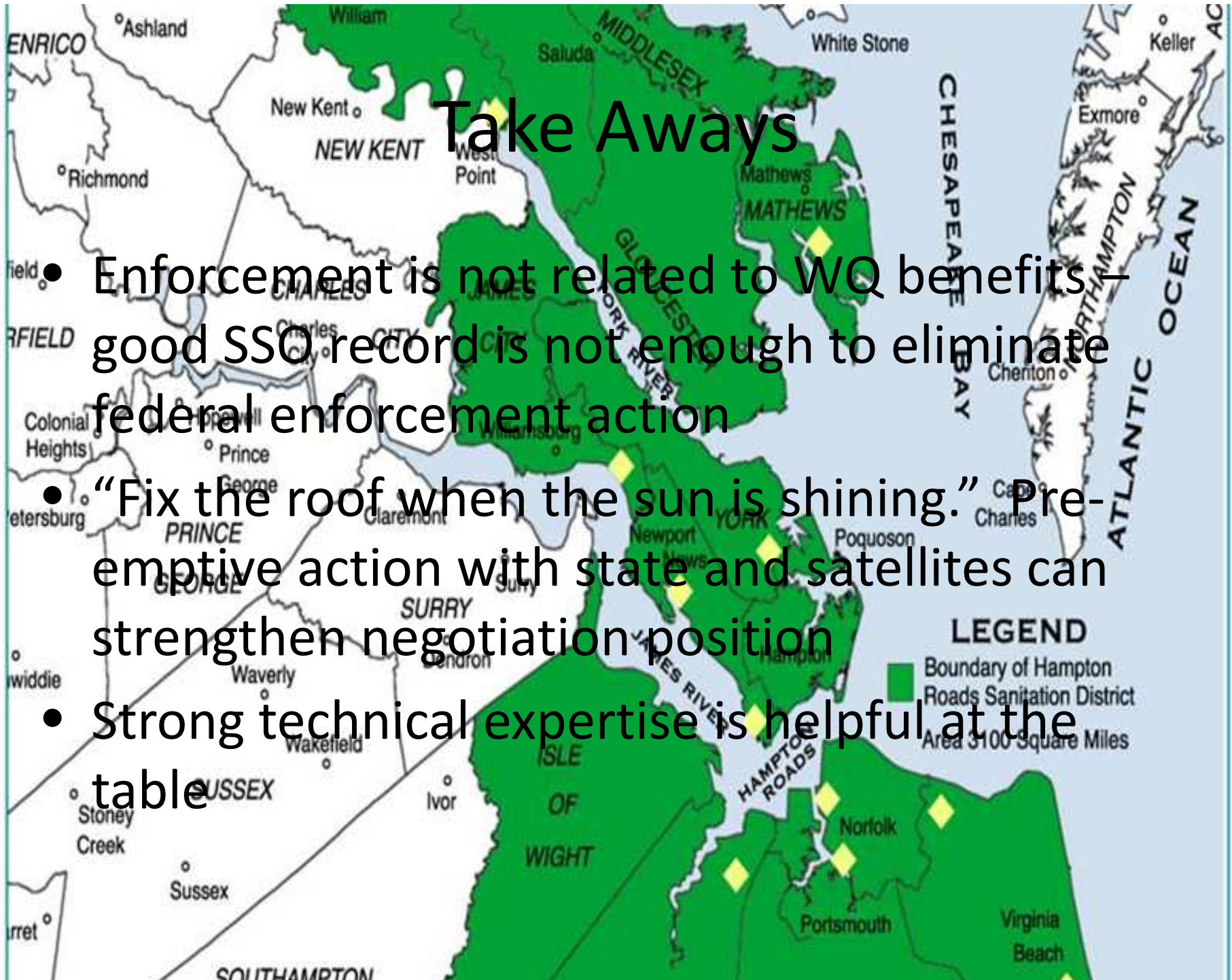
- Flow monitoring – Extensive metering network with tight data quality requirements
- Condition assessment – Majority of system is large diameter pressure pipe that cannot be taken out of service (easily)
- Coordination with satellites – 13 localities to keep on track with complex data gathering and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

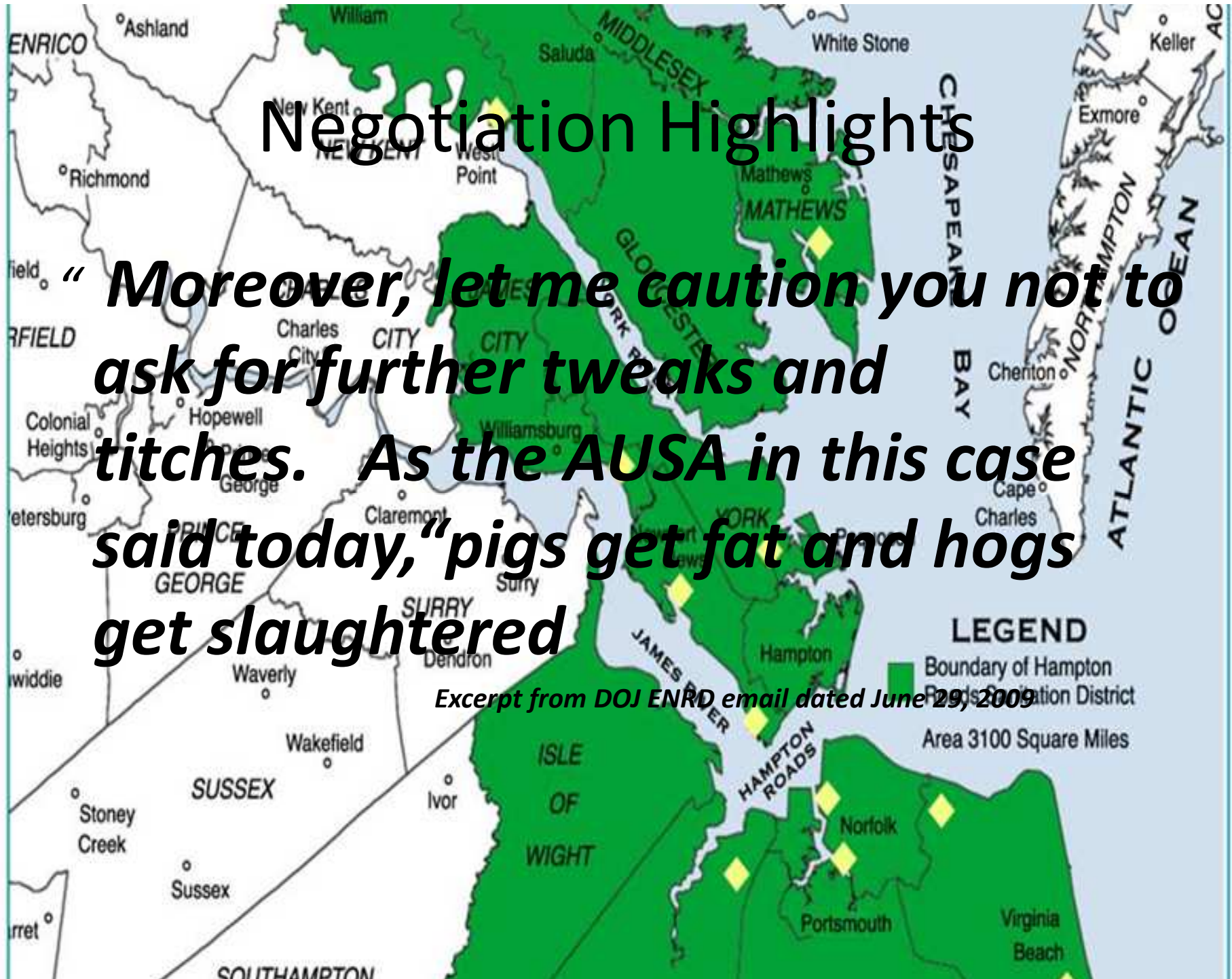




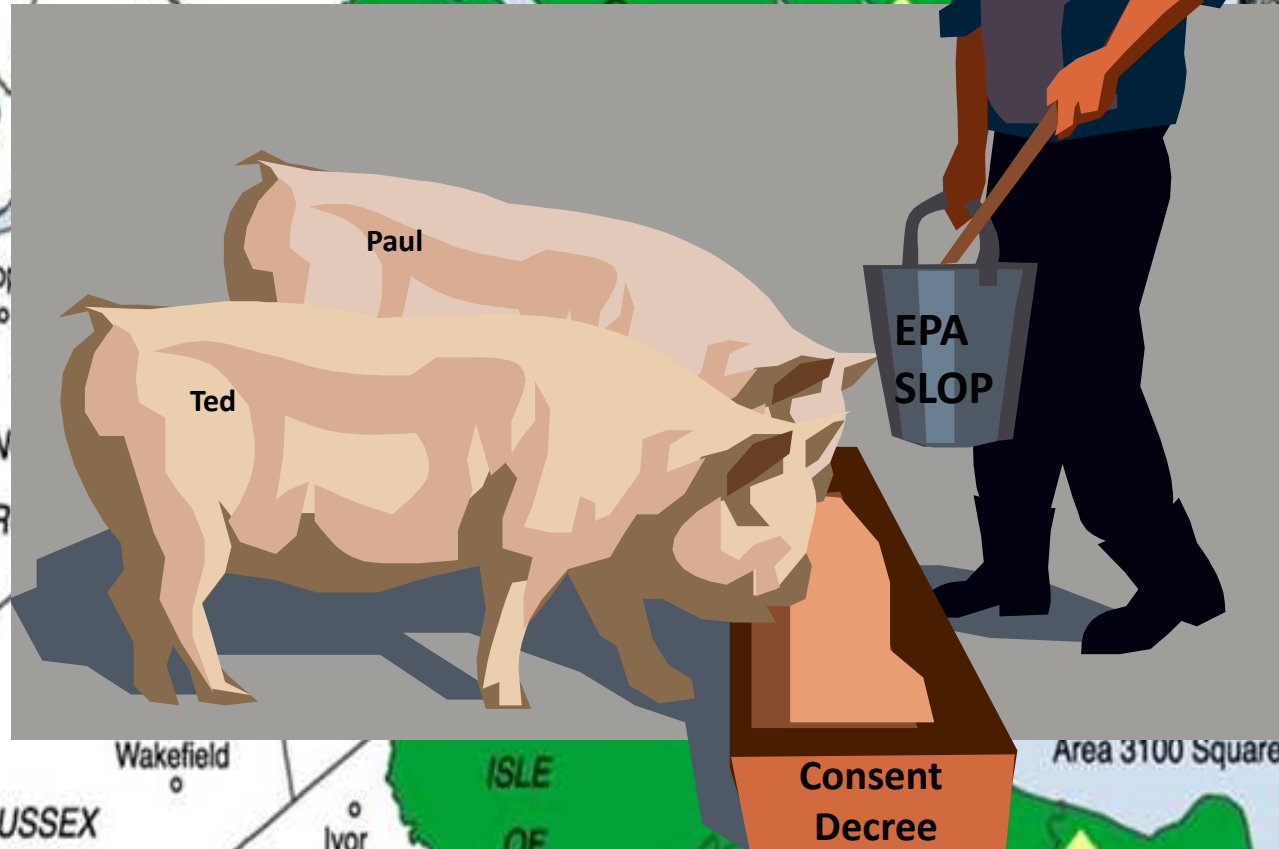
# Negotiation Highlights

***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"***

*Excerpt from DOJ ENRD email dated June 29, 2009*







**Pigs get fat; hogs get slaughtered**