



**Don't Let EPA Stip It To You**  
Unavoidable Overflows, Stips and  
Force Majeure  
NACWA Law Seminar  
November 2011

- HRSD provides wastewater treatment services to southeastern Virginia
  - Independent political subdivision of Virginia
    - Created by Virginia General Assembly in response to public referendum in 1940
    - Governor appointed board
    - Regional entity – independent rate setting authority
    - Retail bill 450,000 accounts – source of all revenue
  - Serve 1.6 million people – 17 different cities and counties
  - 9 “large” WTPs – 249 MGD aggregate capacity

- SSO Consent Decree entered in February 2010
  - \$900,000 civil penalty
  - No SEP
  - \$140 million “Interim System Improvements”
    - 33 CIP projects
    - 8 years to complete
  - Regional Wet Weather Management Plan with implementation schedule to be submitted for agency approval by November 2013
    - No fixed end date for implementation of RWWMP

- Significant effort went into negotiating technical elements of CD
  - Plan requirements
  - Schedules
  - Etc
- Good lawyering put focus on language in:
  - Stipulated Penalties
  - Force Majeure
  - Dispute Resolution

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## Stipulated Penalties

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- Consent Decrees typically include stipulated penalties (stips)
  - Covers non-compliance during term of CD (i.e., “failing to perform satisfactorily any obligation required by the terms of this Decree”)
  - May include a schedule per day of non-compliance or by volume for SSOs

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## Stipulated Penalties

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- As negotiated in our CD, HRSD agreed to pay stipends for “Sanitary Sewer Discharges” defined as SSOs which reach surface waters as well as prohibited bypasses from our plants.

<u>Volume (gals)</u>	<u>Penalty</u>
< 100	\$100
100 – 2,499	\$750
2,500 – 9,999	\$1,250
10,000 – 99,999	\$4,700
100,000 – 999,999	\$10,000
≥ 1,000,000	\$15,000

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## Stipulated Penalties

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- From a POTW perspective, a Decree should make stips discretionary – only payable upon written demand
- Agency can use discretion before making demand
  - Specific language to this included in CD

*“Either Plaintiff in the unreviewable exercise of its discretion may reduce or waive stipulated penalties otherwise due it under this Consent Decree”*

- Provision needs to be strong
  - Apply to things you fail to do adequately and/or on-time (not limited to delays)
  - Require notice to the agencies within a reasonable time period – no shorter than 14 days after becoming aware of issue
    - Limit notice to only events that may **delay** the performance of any obligation under the CD
  - Require demonstration that event was beyond control despite doing everything reasonable to avoid the problem/event/non-compliance
  - You have burden of proof



- Examples
  - Hurricane or other “named” storm event
  - Intense rain event (exceeds LOS or existing capacity)
  - Flood
  - Snow storm
  - Contractor bankruptcy
  - Strike
  - Equipment Failure
    - Infrastructure properly maintained (documented)
    - Within useful life?

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## Dispute Resolution

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- Informal
  - Requires written notice
  - 20 day period to complete negotiation
  - Plaintiff position binding unless elevated
- Formal
  - Written statement of position within 60 days of conclusion of informal
  - Plaintiff position provided within 60 days and binding unless elevated

- Judicial Review
  - Motion must be filed within 30 days of receipt of statement of position from Formal Process
  - HRSD shall bear the burden of demonstrating by a preponderance of the evidence that the position complies with the requirements of the CD and fulfills its objectives and goals

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## What is in Dispute?

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- Sep 30, 2010 - HRSD receives demand letter for stipulated penalties for 13 SSDs that occurred March – April 2010
- HRSD argues all stips but reluctantly agrees to pay for 2.
  - Overflow during maintenance event
  - Overflow during pipe repair when vacuum truck left work site to dump
- EPA drops demand for 1 – pipe break due to settlement of storm line above HRSD line

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## What is in Dispute?

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- 7 overflows – all on same date
  - 6 capacity related
  - 1 equipment failure – hole in emergency pump connection
- 3 overflows due to equipment failure
  - Electrical component failure at PS
  - Internal corrosion of DI pipe – 4” hole in top of pipe
  - Failure of an air vent riser pipe – below grade

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## Size Doesn't Matter

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- Total volume 201,891 gallons
- Stipulated penalty demand \$34,550
- For HRSD this is a principle based dispute
  - Dollars are not large – now
  - Sets stage for all future overflows over the life of this Decree – 20 years +
- For EPA this is battling a precedent setting decision – they have a great deal riding on the outcome of this dispute

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## HRSD's Position - Wet Weather SSDs

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- Wet weather SSDs were beyond our control
  - Does not really matter what return frequency was
  - HRSD entered decree to resolve system capacity issues thus any rainfall event that results in SSDs is beyond our system capacity
  - Existing system was fully operational at the time of the SSDs
- System performed well at all other times – wet weather SSDs were only ones in March-June time frame
- Because weather is beyond our control, HRSD believes these to be force majeure events

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## Agencies' Position - Wet Weather SSDs

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- Although they initially argued FM in initial dispute resolution in judicial review they are now making the case that FM does not apply to “normal” rain events
- The agencies go on to hedge their bets by arguing “even if FM applied” that the rain event of March 29 was too small to be considered a FM event



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## Agencies' Position - Wet Weather SSDs

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- In rare cases EPA has specifically excluded routine rain events from FM
  - *US v Alshabkhoun*, 277 F.3d930, 933 (7<sup>th</sup> Cir. 2002) defined Force Majeure event to exclude “normal precipitation or climate events.”
  - City of Newport Rhode Island contains a similar provision in draft decree that was noticed in August
- We would not have agreed to such language
  - They obviously knew how to exclude
  - They did not in our CD

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## HRSD's Position – Equipment Failures

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- Equipment failures/pipe breaks are not preventable
  - Despite PM program mechanical and electrical equipment components fail from time to time
  - Replacement of infrastructure solely due to age is an unnecessary waste of limited resources to deal with real environmental issues
- Rapid response, containment and repair procedures are in place to minimize public health threat and potential environmental damage

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## Status of Judicial Review

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- Case is pending in Eastern District of Virginia
  - Affectionately known as the “Rocket Docket”
- Pace has slowed due to retirement of judge that entered decree
- Waiting on decision from new Federal Judge
  - Investiture held October 27, 2011
- Decision expected soon

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## Takeaways

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- Focus on force majeure language
  - Notice requirements – 14 days+ and limit to only events that may impact schedule
  - Scope of coverage – do not agree to limitations
- With each SSO report explain at time of report why SSO was beyond your control
- Don't let EPA stip it to you for events beyond your control
- Stay tuned for HRSD decision – may set precedent you can use