

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 85-0489-RGS

UNITED STATES OF AMERICA,

Plaintiff,

v.

METROPOLITAN DISTRICT COMMISSION, et al.,

Defendants.

CIVIL ACTION NO. 83-1614-RGS

CONSERVATION LAW FOUNDATION OF NEW ENGLAND, INC.,

Plaintiff,

v.

METROPOLITAN DISTRICT COMMISSION,

Defendant.

SCHEDULE SIX COMPLIANCE ORDER NUMBER 199

May 8, 2006

STEARNS, D.J.

This is the one hundred and ninety-ninth Compliance Order that has issued in this litigation. On March 15, 2006, the Massachusetts Water Resources Authority (MWRA) filed its Quarterly Compliance and Progress Report (Quarterly Report). Neither the Conservation Law Foundation (CLF), nor the United States have filed responses. I accept the MWRA's Quarterly Report and make the following findings.

I. Schedule Six

There were no activities listed on Schedule Six during the previous quarter.

A. Progress Report

1. Combined Sewer Overflow Program

(a) Long-Term CSO Control Plan

The MWRA reports that after several years of intensive negotiations, it has reached an agreement with the United States and the Massachusetts Department of Environmental Protection (DEP) with regard to a long-term plan (Long-Term Plan or Plan) to control the levels of Combined Sewer Overflow (CSO) impacting the Charles River, Alewife Brook/Upper Mystic River, and East Boston. On March 15, 2006, the MWRA and the United States filed a Joint Motion to Amend Schedule Six to add milestones (and modify certain existing milestones) to accelerate improvements of water quality in the Boston Harbor and its tributaries.¹ The Plan calls for all necessary construction projects to be completed by 2013. The MWRA is expected to demonstrate by the year 2020 that it has achieved full compliance with the Plan objectives.

The MWRA reports that the estimated cost of taking the Plan to completion is \$855 million. In addition to the enhancements to water quality, the agreement reached by the MWRA and the United States will provide a 15-year period of stability for the MWRA's CSO obligations and will allow the MWRA a greater measure of predictability in budgeting its capital program and scheduling any necessary rate increases. A summary of the Plan follows.

¹The specific milestone amendments are set out in the body of the Joint Motion.

(i) Charles River

The Long-Term Plan is expected to achieve a significant reduction in discharges from the Cottage Farm facility. The Plan calls for activation of an existing, but currently unused 54-inch sewer pipe running beneath the Charles River to divert overflows from the Cottage Farm facility to the Ward Street Headworks in Brookline (and ultimately to Deer Island). In addition, sewer separation will occur in the Brookline tributary and the Bullfinch Triangle area near North Station and Haymarket Square, while a gate control system will optimize the transfer of flow from the South Charles Relief Sewer to the Charles River Valley Sewer (which flows directly to the Ward Street Headworks).

The MWRA will conduct an evaluation to determine whether the allocation of flow can be improved through low-cost interconnections between other key interceptors hydraulically related to the Cottage Farm facility and upstream untreated outfalls. Finally, if feasible, the MWRA will fund construction of connections to remove storm-water from a 15-acre area in Boston adjacent to Brookline that is presently processed by the Boston Water and Sewer Commission (BWSC), but then diverted back into the primary drainage system.

In 1988, more than 1.7 billion gallons of CSOs were discharged into the Charles River. The Long-Term Plan is expected to reduce CSO discharges into the Charles to 7.8 million gallons in a typical year, of which 6.3 million gallons will be treated at Cottage Farm. The MWRA notes that this represents a reduction in rain CSO discharges of 99.6 percent. At the recommended control levels, CSO discharges will impact Class B water

quality standards less than one percent of the time. The cost of the CSO control plan for the Charles River is approximately \$75 million.

(ii) Alewife Brook/ Upper Mystic River

Between 1998 and 2000, the MWRA and the City of Cambridge completed various projects that have reduced annual discharges into Alewife Brook from an average of 63 activations totaling 50 million gallons per year to 25 discharges totaling 34 million gallons. The Plan aims to reduce the number of annual CSO discharges to no more than 7, with a total volume of 7.3 million gallons, representing an overall reduction in CSO discharges of 85 percent.

The Plan contemplates upgrades to the Somerville-Marginal CSO treatment facility that will permit the closing of seven outfalls in Somerville and two outfalls in Cambridge. In addition, the Plan calls for construction of a new outfall and detention basin to manage the separated stormwater flows from CAM004. As noted in recent Compliance Orders, projected expenditures for this control plan have escalated to \$100 million, and the MWRA continues to negotiate with the City of Cambridge regarding the sharing of the costs.

(iii) East Boston

As noted in previous Compliance Orders, the original long-term CSO control plan for East Boston was suspended after the MWRA concluded that the cost of the plan was double what was anticipated and appeared to fall short of the desired level of CSO control. A reassessment completed in 2003 concluded that the original plan, although expensive, was nonetheless cost-effective. The MWRA and the United States seek in their Joint Motion to adjust the milestones to permit implementation of the original project plan.

The Plan involves installation of a new sewer interceptor along Condor, East Eagle, and Border Streets using microtunneling methods. In addition, interceptors in upstream areas will be replaced using pipe bursting methods. The East Boston outfalls currently contribute 41 million gallons of overflows to Boston's Upper Inner Harbor, the Lower Inner Harbor, and Chelsea Creek as a combined result of 31 activations in a typical year. The project is expected to reduce the aggregate overflow volume to approximately 8.6 million gallons and to limit the number of yearly activations to 6 or less. The cost for this component of the Plan will be approximately \$72 million.

(iv) Prison Point

The Prison Point CSO facility discharges treated CSOs to the Upper Inner Harbor. In 1997 the MWRA estimated that the facility would discharge an average 228 million gallons of overflows as the result of 25 activations during an average year. However, based on more accurate modeling, the MWRA now predicts that the Prison Point facility will discharge 335 million gallons annually in as many as 30 activations. The MWRA and the United States seek to add milestones to Schedule Six that will require the MWRA to identify and implement operating procedures at Prison Point that will minimize discharges from that facility without increasing untreated overflows elsewhere.

(v) Water Quality Variances

Although the Plan provides for a significant reduction in CSO discharges, episodic overflows are bound to occur in the Charles River and Alewife Brook/Upper Mystic River. These overflows have the potential of violating the water quality standards of the Clean Water Act. DEP has agreed to issue to the MWRA, and the United States Environmental

Protection Agency (EPA) has agreed to approve, 5 consecutive variances of up to three years' duration each of the mandated water quality standards for the Charles River and Alewife Brook/Upper Mystic River. The variances will be granted through the year 2020, and will require the MWRA to comply with the CSO milestones and levels of control referenced in Schedule Six as amended. Each variance will also be subject to public hearing and comment.

(vi) Changes to the 1987 Stipulation of Liability

The MWRA and the United States have agreed to withdraw their Stipulation on Responsibility and Legal Liability for Combined Sewer Overflows, entered on February 27, 1987, and replace it with a Second Stipulation should the court approve the Long-Term Plan. The Second Stipulation clarifies which documents comprise the Plan, specifies the ownership of the CSO outfalls, and requires the MWRA to implement the control measures required by Schedule Six.

The most significant difference between the Stipulations relates to the extent of the MWRA's liability for CSO outfalls owned by the member communities of Boston, Cambridge, Chelsea, and Somerville. All of these cities have outfalls connected to the MWRA's system. Pursuant to the 1987 Stipulation, the MWRA was charged with the "legal liability to undertake such future corrective action as is necessary to meet the CSO control requirements of . . . [the Clean Water Act]" with respect to all outfalls, whether owned by the MWRA or the four municipalities.

In contrast, the Second Stipulation narrows the MWRA's liability for the municipally-owned outfalls. The MWRA remains obligated to undertake "such corrective action as may

be necessary to implement the CSO control requirements set forth in Schedule Six . . . and to meet the levels of CSO control [described in the Long-Term Plan],” with regard to all outfalls. However, pursuant to the Second Stipulation, the MWRA is no longer responsible for future corrective actions that may be necessary to comply with the Clean Water Act with respect to any of the municipal outfalls. Rather, the MWRA “accepts legal liability to undertake such future corrective action as may be necessary to meet the CSO control requirements of the Clean Water Act” only with respect to those CSO outfalls that it directly owns and operates.

(b) North Dorchester Bay and Reserved Channel Consolidation Conduits and CSO Facility

The MWRA has completed 100-percent design plans and contract specifications for the North Dorchester Bay storage tunnel and related facilities. In addition, it continues to acquire the permits and easements necessary to complete the project, including Article 97 legislation. This project is progressing in accordance with Schedule Six.

Substantial progress has been made on the Pleasure Bay storm drain improvements, a project which is currently ahead of schedule. All of the old storm drain outfalls have been removed from Pleasure Bay Beach, while most of the new storm drains and catch basins planned along Day Boulevard have been installed. The MWRA expects that these improvements will be completed by May of 2006, in time for the start of the swim season.

(c) Cambridge Sewer Separation

There are no developments to report with respect to the City of Cambridge’s

application for the wetland permits needed for the proposed implementation of Contract 12. As noted in the previous Compliance Order, the Commonwealth's Division of Administrative Law Appeals has scheduled hearing dates on the application for May 31, and June 1, 7, and 8, 2006.

(d) Union Park Detention and Treatment Facility

The MWRA reports that the construction of the Union Park facility is now 90-percent complete. The MWRA is still evaluating the contractor's request for an additional extension of time from September 23, 2006, until December 31, 2006, to complete the work. The additional time is requested for storm event testing prior to the demolition of the existing facility.

(e) Annual CSO Progress Report

The MWRA has also submitted its Annual CSO Progress Report (Annual Report) for the year 2005. The Annual Report provides a comprehensive summary of progress made in the design and construction of CSO control projects. Significantly, the level of progress on CSO design and construction in 2005 exceeded that of any previous year. The MWRA spent a record amount of \$52 million on CSO control, \$45 million of which was dedicated to the construction of the Union Park facility, the BOS019 conduit, the Pleasure Bay storm drain improvements, and sewer separation projects for South Dorchester Bay, Stony Brook, and Fort Point Channel.

II. Comments

The CLF assents to the Joint Motion to Amend Schedule Six and notes that the

Long-Term Plan will result in significant improvements in water quality. However, it is concerned with the EPA's approval of extended water quality variances through the year 2020. While recognizing that the prospective approval of the variances by EPA is critical to achieving agreement on the Plan, CLF emphasizes the importance of continued public participation in the implementation of the Plan.

On April 6, 2006, the City of Cambridge filed an amicus curiae brief in response to the Joint Motion. The City notes that it has worked cooperatively with the MWRA in the cleanup of the Charles River and Alewife Brook. In its brief, the City seeks four "clarifications" of the Long-Term Plan, the most significant of which would revise the Second Stipulation by requiring the MWRA to retain responsibility for City-owned outfalls over and above that assumed by the MWRA under the Long-Term Plan. While the parties² to the agreement are sympathetic to the City's concerns, they point out that they involve hypothetical issues that are not expected by the parties to arise as the Plan is implemented, and are therefore (at least for the time being) nonjusticiable. They also take the position that the adoption by the court of the clarifications (the fourth in particular) will likely cause the agreement to collapse.

III. Conclusions

On April 27, 2006, the court held a hearing on the Joint Motion. Presentations were made by the parties and other interested persons, including the City of Cambridge. At the conclusion of the hearing, the court allowed the motion, with the following comments.

THE COURT: I am grateful to have the printed version of Mr.

²The City is not a party to the agreement.

Laskey's presentation. My wish, and my expectation, is that Judge Mazzone, at least in spirit, has been able to hear what Mr. Laskey said and showed us; he being the true father and guiding presence in bringing this effort to fruition. What the parties have achieved is in the cooperative spirit that the Court has encouraged; whether embodied by Judge Mazzone at the beginning, or, if Mr. Henderson's prediction proves to be true, at the end by me or whoever my successor might be.

With this agreement in place, we are taking a giant stepped towards what I think Mr. Laskey may have even understated in terms of its significance as a model of environmental remediation. I believe that this is one of the most successful modern public works projects ever undertaken.

I listened very carefully to what Mr. Anderson has had to say here and in the amicus brief he filed on behalf of the City of Cambridge. I think the City deserves the praise that the parties acknowledge for its cooperation and participation in achieving the significant progress we have made to date. I am, however, inclined to agree with Mr. Henderson that the concerns that the City now expresses are essentially of a hypothetical and contingent nature. And in addressing the concerns the City raises, the best assurance I can give is that the Court intends to remain involved, as I believe it is required to do, in the supervisory oversight of the implementation of this Plan and all other aspects of the cleanup effort. I further assure the City that the doors of the court will be open to entertain any legitimate concern that may, in fact, materialize; but I am at present satisfied with the assurances that the parties have given that there will be no difficulties of the kind that could possibly be imagined as this Plan is implemented.

Having come this far, I do not intend, as I know Judge Mazzone would not have done, to do anything that would upset what I recognize is the delicate agreement reflected in the Motion to Amend Schedule Six. I am, therefore, going to allow the motion as presented to the Court without modification and endorse it with the congratulations of the Court for what I think is, again, an accomplishment that I know Judge Mazzone would be so proud of. This is what he wanted, and following in his footsteps, it is what I have tried, apparently successfully, to urge the parties to achieve.

Congratulations. The motion is allowed.

ORDER

The parties are ordered to report to the court as scheduled.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE