

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA,

Plaintiff,

v.

METROPOLITAN DISTRICT COMMISSION,
et al.,

Defendants.

.....

CONSERVATION LAW FOUNDATION OF
NEW ENGLAND, INC.,

Plaintiff,

v.

METROPOLITAN DISTRICT COMMISSION,

Defendants .

.....

MWRA BIANNUAL COMPLIANCE AND
PROGRESS REPORT AS OF JUNE 15, 2016

The Massachusetts Water Resources Authority (the "Authority") submits the following biannual compliance report for the period from December 16, 2015 to June 15, 2016 and supplementary compliance information in accordance with the Court's order of December 23, 1985 and subsequent orders of the Court.

CIVIL ACTION
No. 85-0489-RGS

CIVIL ACTION
No. 83-1614-RGS

I. Schedule Seven.

Schedule Seven activity for the month of March 2016 on the Court's Schedule Seven, certified by Frederick A. Laskey, Executive Director of the Authority, is attached hereto as "Exhibit A."

A. Activities Completed.

1. Annual Combined Sewer Overflow Report.

The Authority submitted its 2015 annual combined sewer overflow ("CSO") progress report on March 15, 2016, in compliance with Schedule Seven. As requested by the Court on February 22, 2016, the Authority's Executive Director, Frederick A. Laskey, formally presented the report to the Court at a special hearing held on March 18, 2016.

2. Completion of CSO Project Construction.

With the cooperation of the Boston Water and Sewer Commission and the City of Cambridge, the Authority attained substantial completion of the Reserved Channel sewer separation and CAM004 sewer separation projects in December 2015, in compliance with Schedule Seven. The Authority filed its related schedule activity certifications with the annual CSO report on March 15, 2016. These were the last two project construction milestones in the Authority's approved long-term CSO control plan and Schedule Seven.

B. Progress Report.

1. Combined Sewer Overflow Program.

a. CSO Water Quality Standards Variances.

On March 22, 2016, the Authority met with the Massachusetts Department of Environmental Protection (“DEP”) and the United States Environmental Protection Agency (“EPA”) to discuss the planned variance extensions and their relationship to the three-year CSO post-construction monitoring program and performance assessment that Schedule Seven requires the Authority to commence by January 2018 and complete by December 2020. Following the meeting, the Authority sent EPA and DEP a letter outlining its proposal for the sequencing of remaining variance extensions and the separate court-ordered CSO performance assessment. The Authority noted in the letter its expectation that the results of the performance assessment in December 2020 will contribute to the information that can support DEP’s water quality standards determinations sometime thereafter. In this letter, the Authority also proposed modifications to its current multi-year water quality monitoring program for the Charles River and the Alewife Brook/Upper Mystic River – water quality sampling and evaluation that is required as a condition of the variances – with the goal of enhancing the value of the data in supporting DEP’s long-term CSO and water quality standards decisions and related EPA approvals.

On April 15, 2016, the Authority sent letters to DEP requesting that DEP extend the water quality standards variances for CSO discharges to the Lower Charles River/Charles Basin and the Alewife Brook/Upper Mystic River by three years to 2019. DEP originally issued the variances in 1998 and 1999, respectively, and has extended the variances several times with the current variances set to expire this year. DEP has scheduled a July 27, 2016 public hearing on the requested variance extensions.

The Authority's request for extension of the variances to 2019 is in accordance with DEP's correspondence of March 13, 2006, and the EPA's correspondence of March 14, 2006, which respectively reported DEP's and EPA's determinations that information supporting their March 2006 approvals of the Authority's long-term CSO control plan (the "LTCP") also satisfied the requirements for a variance from water quality standards for CSO discharges to the Lower Charles River/Charles Basin and the Alewife Brook/Upper Mystic River through 2020. As part of those determinations, DEP and EPA agreed that DEP would issue – and EPA would approve – five consecutive variance extensions of no more than three years duration each, through 2020. DEP and EPA also agreed that the variance would be consistent with and limited to the requirements in the Authority's LTCP. Accordingly, the Authority expects that DEP will issue and EPA will approve variance extensions for CSO discharges to the Lower Charles River/Charles Basin and the Alewife Brook/Upper Mystic River through 2020. The Authority understands that DEP plans to make long-term water quality standards determinations, along with associated decisions

on long-term level of CSO control for these water segments, following the submittal of the results of the Authority's LTCP performance assessment in December 2020.

b. CSO Post-Construction Monitoring.

The Authority commenced and will continue to conduct preliminary activities that support its development of a scope for the three-year CSO post-construction monitoring program and performance assessment, which is scheduled to commence in January 2018 in accordance with Schedule Seven.

c. EPA's Mystic River Watershed Report Card for 2015.

On May 31, 2016, EPA issued its report card grades for water quality in the Mystic River and its tributaries based on sampling data collected in a three-year rolling period including 2015. EPA, in cooperation with the Mystic River Watershed Association ("MyRWA"), issued separate grades for each of 14 water segments in the Mystic River Watershed with the goal of providing the public a more accurate assessment of local water quality conditions, which as the report's grades indicate vary considerably.

Similar to past years, the 2015 grades are based on a rolling average of three years of data – through 2015 for the current report – and the percentage of days that bacteria levels met state water quality standards for boating and swimming. The data are provided from fifteen representative sampling sites monitored by MyRWA's Mystic Monitoring Network and 19 additional sites

monitored by the Authority. The Authority also assists MyRWA by performing most of the laboratory testing of its water quality samples.

The 2015 grades show improvement in water quality generally across the watershed, with the exception of a few water segments with continuing poor water quality. The Mystic River and the Chelsea Creek, both affected by direct CSO discharges, received the grade of "A-" (85% to 90% compliance). Alewife Brook received the grade of "D" (45% to 50% compliance). Most of the benefit of the CSO projects for the Alewife Brook accrued after completion of the CAM004 sewer separation project at the end of 2015. Also, the Authority's past modeling of water quality in Alewife Brook showed a predominant impact from stormwater discharges and violations of water quality standards even in dry weather, as supported by recent water quality monitoring and suggesting non-CSO bacteria sources. The EPA report card showed poorest water quality with a grade of "F" (less than 40% compliance) in Winn Brook, which is upstream of Alewife Brook, and in Island End River, which is tributary to the tidal reach of the Mystic River. There are no direct CSO discharges to these two water segments.

d. Deer Island Cross Harbor Cable.

The Authority wishes to bring to the Court's attention a matter which may reach the U.S. District Court for the District of Massachusetts in the next several months. That matter has a distant relationship to Orders issued by the Court (Mazzone, J.) dated in May 1989 (Schedule Two) which established October 1990 as the deadline for the Authority's obtaining a suitable power

supply to Deer Island to allow for the construction of the wastewater facility improvements and permit the operation of those facilities once the improvements were in place. While the Authority has used the “cross-harbor cable” built by NSTAR and its subsidiary Harbor Electric Energy Company, as owner of the cable, (“HEEC”) since 1990, a dispute has existed among NSTAR/HEEC, the Army Corps of Engineers (“ACoE”) and the Authority since approximately 2003 as to whether HEEC successfully complied with the depth requirements contained in the ACoE permit issued under the Rivers and Harbors Act of 1899. NSTAR and HEEC assert that the placement of the cable in early 1990 by HEEC and its contractors was adversely affected by ledge beneath the harbor sediments, which ledge impacted the depth to which the cable could be placed at least along an approximate 1,200’ stretch of the cable’s alignment. ACoE discovered the non-compliant depth issue as a result of its eventual receipt of as-built plans which revealed the depth shortfall. The lack of compliance with the ACoE permit has become problematic as the present depth of the cable may have the potential to be impacted by a major dredging project (Boston Harbor Deep Draft Navigational Improvement Project) slated for Boston’s Inner Harbor that will be proceeding in the foreseeable future. The Project is intended to be more than “maintenance” dredging as it will substantially deepen the shipping channels of Boston’s Inner Harbor to accommodate a new generation of deep draft vessels, which vessels currently are unable to safely navigate through existing channels at their current depths.

ACoE has expressed to NSTAR, HEEC and the Authority, all permittees under the original 1989 permit, that it needs to address directly the issue of non-compliance with the first permit. ACoE has proposed that it “lodge” a complaint with the U.S. District Court and at the same time file a settlement Stipulation, the terms of which have been agreed to in principle by all parties, which will, *inter alia*, (i) identify the parties responsible for the cable protection work and for future maintenance dredging, (ii) provide for stipulated penalties for failure to timely perform the work, (iii) provide for indemnification of ACoE if the cable is damaged, and (iv) leave the original permit in place so as to allow ACoE to take steps, as necessary, to enforce the permit’s depth requirements should that become necessary in the future.

As the cable is critical to the Authority’s continued compliance with the Clean Water Act and with the Authority’s NPDES permit issued thereunder, the Authority is reporting on these developments to the Court. The last update to the Court regarding this matter was contained in the Authority’s quarterly report dated June 15, 2005. While the Authority is not seeking any action by the Court, the Authority does believe that the expected filing of the Rivers and Harbors Act Complaint and Stipulation by ACoE could be said to be related to the existing Boston Harbor case as the May 1989 Orders of this Court directly required that the Authority arrange for a power supply capable of furnishing power to both build and operate the Authority’s Deer Island wastewater treatment facilities.

Finally, there is currently pending in the Suffolk Superior Court (2015-CV-03323BLS2) a civil action commenced by the Authority in November 2015 which seeks, *inter alia*, the entry of a declaratory judgment that the terms of a 1990 Interconnection Agreement among the Authority, NSTAR and HEEC require that NSTAR and HEEC (and not the Authority) are alone responsible for the cable protection costs (estimated in the range of \$10 - \$20 million) as the Authority played no role in the design, construction or placement of the cable. The provisions of the Stipulation agreed to by the parties take no position on that dispute and leave the ultimate decision on liability in the hands of the state Superior Court.

Respectfully submitted,

/s/ Jonathan M. Ettinger
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this document, which was filed via the Court's ECF system, will be sent electronically by the ECF system to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 15, 2016.

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Dated: June 15, 2016