

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
STATE OF NEW HAMPSHIRE,)	
)	CIVIL ACTION
Plaintiff-Intervenor,)	
)	NO. 09-cv-283-PB
CONSERVATION LAW FOUNDATION,)	
)	
Plaintiff-Intervenor)	
)	
v.)	
)	
CITY OF PORTSMOUTH, NEW HAMPSHIRE,)	
)	
Defendant.)	
)	

CONSENT DECREE SECOND MODIFICATION

WHEREAS, Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint in this action alleging that Defendant, the City of Portsmouth, New Hampshire ("City") violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1301(a);

WHEREAS, Plaintiff-Intervenor, the State of New Hampshire ("State"), filed a Complaint-in-Intervention alleging that the City violated the New Hampshire Water Pollution and Waste Disposal Act, NH RSA 485-A ("New Hampshire Act");

WHEREAS, the United States Complaint and State Complaint-in-Intervention allege that the City is violating its April 10, 2007 National Pollutant Discharge Elimination System ("NPDES") permit effluent limitations for discharges from the City's Peirce Island Wastewater

Treatment Facility ("Peirce Island WWTF") and permit conditions applicable to discharges from overflow points in the City's combined wastewater collection system;

WHEREAS, the April 10, 2007 NPDES permit does not contain monitoring or effluent limits for total nitrogen;

WHEREAS, the Court entered the Consent Decree ("Consent Decree") in this matter on September 24, 2009, requiring combined sewer overflow ("CSO") mitigation and achieving secondary treatment limits in accordance with the schedule set forth in the WWTF Work Plan to be submitted to EPA by September 1, 2010;

WHEREAS, the Court granted the motion by Conservation Law Foundation, Inc. ("CLF") to intervene as a plaintiff on October 9, 2012;

WHEREAS, the original Consent Decree was modified by agreement of the United States, State, and City, and approved by Order of this Court on February 15, 2013 ("First Modification");

WHEREAS, the First Modification required the City to complete construction of the secondary treatment facilities by March 1, 2017 and achieve compliance with treatment limits in its NPDES permit by May 1, 2017;

WHEREAS, all parties agree that the City will not complete construction of secondary treatment facilities or achieve compliance with treatment limits by the dates set forth in the First Modification;

WHEREAS, the United States, State, City, and CLF (collectively, the "Parties") participated in settlement negotiations related to City's anticipated failure to complete construction of the Peirce Island WWTF and achieve secondary treatment by the dates set forth in the First Modification, and have agreed to the terms of this Consent Decree Second

Modification (“Second Modification”) that sets forth a revised construction and compliance schedule, mitigation measures related to the failure to comply with the First Modification, and related provisions;

WHEREAS, unless explicitly revised by the terms of this Second Modification, all provisions of the Consent Decree and First Modification, shall remain in effect; and

WHEREAS, the Parties agree, and the Court by entering this Second Modification finds, that this Second Modification is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed that:

I. JURISDICTION

1. The Court has jurisdiction over the subject matter of this action and over the Parties to this Second Modification pursuant to Paragraphs 1 and 65 of the Consent Decree.
2. Pursuant to Paragraph 66 of the Consent Decree material modifications of the Consent Decree may be made by written agreement of the Parties, and shall be effective only upon approval of the Court.

II. OBJECTIVES

3. It is the express purpose of the Parties entering this Second Modification to: effectuate the City’s compliance with the CWA, 33 U.S.C. § 1251, *et seq.*; set forth an expeditious, reasonable, and binding schedule for achieving secondary treatment at the Peirce Island WWTF; and establish mitigation requirements related to City’s failure to achieve secondary treatment in accordance with the schedule set forth in the First Modification.
4. To this end, it is the further objective of the Parties that: the City substantially complete construction of the Biologically Aerated Filters (“BAF”) and all facilities necessary to allow startup by December 1, 2019; and the City achieve compliance with all NPDES permit limits

contained in the permit dated April 10, 2007, or any subsequently issued NPDES permit that is final and in effect after any appeals, by April 1, 2020.

III. MODIFICATION OF EXISTING PROVISIONS

5. Milestones and Schedules. Paragraph 1 of Appendix B.1 to the Consent Decree is hereby modified by revising paragraphs 5 k. through m. of the First Modification, which are hereby replaced with the following:

a. By July 1, 2016, the City shall execute a contract to construct a secondary treatment facilities with a capacity of 6.13 million gallons per day ("MGD") average, and 9.06 MGD maximum day flow (not including recycle flows), including BAF, and issue a Notice to Proceed on such construction.

b. By December 1, 2016, the City shall submit two additional construction milestones to EPA for approval based upon the detailed schedule to be provided to the City by the City's selected contractor. The City shall provide EPA with a copy of its contractor's detailed schedule along with its recommended milestones. Each such milestone shall be the completion of a substantial critical path activity, and neither can be substantial completion of BAF construction. By the dates set forth in each EPA approved milestone, the City shall complete all related construction work to achieve the applicable substantial critical path activity.

c. By December 1, 2019, the City shall substantially complete construction of the secondary treatment facilities, including the BAF, and all facilities necessary to allow startup.

d. By April 1, 2020, the City shall achieve compliance with NPDES permit limits contained in the permit dated April 10, 2007, or any subsequently issued NPDES permit that is final and in effect after any appeals.

6. Reporting. Paragraph 20.a. to the Consent Decree is hereby replaced with the following:

a. Monthly Reports on Compliance. Within 30 days after the end of each month, the City shall submit a written report to EPA, the State, and CLF for the preceding month that shall include a description or reporting of the following:

- i) status of required construction, including major work items completed in the preceding month;
- ii) projected work items to be undertaken in the next month;
- iii) project percent complete based on payments to contractor for work completed;
- iv) project percent complete based on time elapsed;

- v) status of all required permit applications;
- vi) status of Consent Decree milestones including identifying any problems encountered or anticipated, together with the proposed or implemented solutions; and
- vii) the monthly average discharge concentrations of total nitrogen for the preceding month, as required in Paragraph 8.b.ii of the Second Modification.

The Consent Decree, First Modification, and Second Modification along with such Monthly Reports on Compliance shall be posted on the City's internet site, and maintained accessible to the public online until termination of the Consent Decree. In addition to the submission of Reports on Compliance, the Parties will participate in quarterly meetings or conference calls, if scheduled by EPA, to review the City's compliance with the terms of the Consent Decree.

IV. ADDITIONAL PROVISIONS

7. Schedule Recovery Program. If the City fails to achieve any of the construction milestones by the dates set forth in or determined in accordance with Section III (Modification of Existing Provisions), the City shall use its contractual remedies, including without limitation, Part 2.01.F (Recovery Schedule) of Section 01311 (Construction Progress Schedules) of the City's contract for construction of the project, to maintain schedule compliance. At the discretion of the City, the schedule recovery program may include the application of extended shifts, second shifts, work on weekends, extra labor, or other atypical construction efforts and measures to return the project to schedule and meet required milestones. However, if implementing extended shifts, second shifts, work on weekends, or/and extra labor is the only means capable of achieving compliance, the schedule recovery program shall employ one or more of these methods.
8. Mitigation. The City agrees to implement the following initiatives as mitigation for the continued discharges of biochemical oxygen demand ("BOD₅") and total suspended solids ("TSS") resulting from the delayed implementation of secondary treatment.

a. Interim Enhanced Primary Treatment. The City shall engage a qualified engineer to perform an optimization study on the primary clarifiers for the chemically enhanced primary treatment system. The study work plan shall be submitted to the State and CLF for review, and to EPA for review and approval, within 60 days following Court approval of this Second Modification. The study shall be completed according to the work plan and the results shall be submitted to the State and CLF for review, and to EPA for review and approval. The review and approval process shall be in accordance with Paragraphs 14 through 19 of the Consent Decree. If clarifier performance for TSS can be improved by at least 10%, the City shall implement the recommendations of the approved study report within 90 days of EPA's approval and continue such implementation until the secondary treatment is operational. The percentage improvement shall be based upon the reduction in primary effluent average TSS concentration during testing of clarifier performance both with currently utilized chemical dosages and types, and with alternate/enhanced chemical addition, under as similar as possible operational conditions. If the approved study report finds that an increase of at least 10% cannot be achieved, the City will not be required to implement a chemical dosage optimization plan.

b. Nitrogen Removal.

i. For the five year period commencing June 1, 2020, the City shall operate the upgraded Peirce Island WWTF to achieve: (a) a seasonal average total nitrogen effluent concentration level no greater than 8 mg/l from May 1st through October 31st of each year; and (b) a monthly average total nitrogen effluent concentration level no greater than 8 mg/l from June 1st through October 31st of each year. This seasonal and monthly standard shall be referred to as the "8 mg/l TN Effluent Level."

ii. During this period, the City shall monitor and report to EPA, the State, and CLF in its Monthly Reports on Compliance the monthly average discharge

concentrations of total nitrogen for each month of each year. Such monitoring shall be conducted a minimum of twice per week using 24-hour composite samples.

iii. In the event an NPDES permit containing a total nitrogen effluent limit becomes final and takes effect that sets forth a total nitrogen effluent limit that is equal to or more stringent than the 8mg/l TN Effluent Level, the 8 mg/l TN Effluent Level and nitrogen monitoring requirements set forth in this Second Modification shall terminate.

iv. In the event an NPDES permit containing a total nitrogen effluent limit becomes final and takes effect that sets forth a total nitrogen effluent limit that is less stringent than the 8 mg/l TN Effluent Level, the City shall achieve the 8 mg/l TN Effluent Level and monitor as set forth in this Second Modification until June 1, 2025.

v. Nothing herein shall prevent any Party from appealing any part of any future NPDES permit.

vi. CLF reserves its rights to advocate lower total nitrogen limits in future NPDES permit processes.

c. Stormwater Project. The City shall commit funding in the amount of \$500,000 to implement a green infrastructure project(s) using innovative low-impact development approaches to significantly reduce stormwater pollution from one or more existing sites in the City of Portsmouth. The City agrees to coordinate with the other Parties in identifying site(s) and project(s), with an emphasis on retrofitting sites with significant impervious cover and associated pollutant loads, and in developing an overall design. Planning and coordination efforts for the project(s) shall commence no later than 90 days after Court approval of this Second Modification. The project shall be completed no later than three years after Court approval of this Second Modification.

d. Sagamore Avenue Sewer Extension Project. The City shall implement, at an estimated project cost of \$2.5 million, a sewer extension project to provide public sewer service to approximately 83 existing parcels adjacent to or near Sagamore Avenue, as depicted in the February 2011 Wright-Pierce Fig. 2 titled "Town [sic.] of Portsmouth, New Hampshire Sagamore Ave South Sewer Extension Study, Low Pressure Sewer," with the intent to improve water quality in Sagamore Creek. Planning, design and other pre-construction activities for the project shall be completed prior to substantial completion of the Peirce Island WWTF upgrade project. Construction of the sewer extension project shall begin no later than June 30, 2020 and shall be substantially completed on or before June 30, 2022.

e. Water Quality and Ecosystem Health Project. The City shall provide funding in the amount of \$500,000 to support activities that advance the Great Bay 2020 vision as described in Great Bay 2020: A Five-Year Vision for Collective Investment, Action, and a Healthy Watershed dated July 27, 2015. Such activities will be identified and selected collectively by the entities currently comprising the Great Bay 2020 Steering Committee (Piscataqua Region Estuaries Partnership, Great Bay National Estuarine Research Reserve, New Hampshire Department of Environmental Services, The Nature Conservancy, and CLF) with input and concurrence of the City and may include, but not be limited to, restoration, public outreach and education, science and monitoring, strategic land protections, and other projects and activities that advance efforts to improve water quality and/or ecosystem health in the Great Bay estuary with direct or indirect benefits for Portsmouth. Funding shall be provided in five annual installments of \$100,000, paid to an agreed upon fiscal agent and/or, by agreement by the Great Bay 2020 Steering Committee and the City, directly to implementing entities. The first payment shall be made no later than 60 days following Court approval of this Consent Decree Second

Modification, with subsequent annual payments occurring no later than the anniversary date of the prior year's payment due date. The first payment shall be directed in part, or in whole if necessary, to (1) the development and implementation of a water quality sampling plan for Sagamore Creek following QA/QC protocols, and including the participation of the City, the Great Bay-Piscataqua Waterkeeper, and New Hampshire Department of Environmental Services, with public engagement where appropriate, and (2) a regional symposium to educate and engage the public in sustainable lawn care / landscaping practices that reduce water pollution. The City's staff's participation shall not be counted as an offset or match toward the above-stated funding commitment, nor shall the City be reimbursed or otherwise compensated from such funds.

IV. STIPULATED PENALTIES

9. The City shall be liable to the United States and the State for stipulated penalties for failing to complete any requirement of this Second Modification by the dates specified herein.

Such stipulated penalties shall accrue per violation per day as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1 st through 14 th Day
\$750	15 th through 30 th Day
\$1,000	31 st and beyond

10. Stipulated penalties shall be paid in accordance with Section VI of the Consent Decree.

V. PUBLIC PARTICIPATION

11. This Second Modification shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. Section 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Second Modification disclose facts or considerations indicating that the Second Modification is

inappropriate, improper, or inadequate. The City consents to entry of this Second Modification without further notice and agrees not to withdraw from or oppose entry of this Second Modification by the Court or to challenge any provision of the Second Modification, unless the United States has notified the City in writing that it no longer supports entry of this Second Modification.

VI. EFFECTIVE DATE

12. The Effective Date of this Second Modification shall be the date upon which this Second Modification is entered by the Court or a motion to enter the Second Modification is granted, whichever occurs first, as recorded on the Court's docket.

Dated and entered this 28th day of September, 2016.

/s/ Paul Barbadoro
UNITED STATES DISTRICT JUDGE
District of New Hampshire
Paul Barbadoro

FOR PLAINTIFF THE UNITED STATES OF AMERICA

Respectfully submitted,



JOHN T. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
Washington, D.C. 20530

Date: _____

4/1/16



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FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION I

Date: 03/21/2016

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FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Date: 3.28.16



MARK POLLINS

Director

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FOR PLAINTIFF-INTERVENOR THE STATE OF NEW HAMPSHIRE

**State of New Hampshire
Department of Environmental Services**

By its attorney,

**JOSEPH A. FOSTER
New Hampshire Attorney General**

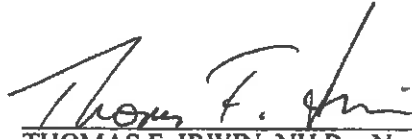
Date: 3/15/16



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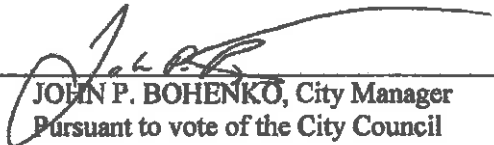
FOR PLAINTIFF-INTERVENOR CONSERVATION LAW FOUNDATION

Date: 3/15/16



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FOR THE DEFENDANT, THE CITY OF PORTSMOUTH, NEW HAMPSHIRE

By: 
JOHN P. BOHENKO, City Manager
Pursuant to vote of the City Council

Of March 14, 2016

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: March 16, 2016


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