

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (“Agreement”) is entered into on this ___ day of February, 2014, by and among the Hampton Roads Sanitation District (“HRSD”); and the cities of Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg; the Town of Smithfield; and the counties of Gloucester, Isle of Wight, and York; and the James City Service Authority (each a “Locality” and collectively, the “Localities”).

WHEREAS, HRSD provides wastewater transmission and treatment services for the Localities;

WHEREAS, the Localities individually own and operate sanitary sewer collection systems, which collect sewage within their individual jurisdictional boundaries and deliver it to the HRSD sewer system for conveyance and treatment;

WHEREAS, to address regional wet weather sewer capacity requirements, on February 23, 2010, HRSD, the Virginia Department of Environmental Quality and the United States Environmental Protection Agency entered into a Federal Consent Decree;

WHEREAS, the Federal Consent Decree requires, among other things, that HRSD work in consultation with the Localities to develop a Regional Wet Weather Management Plan (“RWWMP”) that will ensure adequate wet weather sewer capacity in HRSD’s portion of the regional sewer system;

WHEREAS, on June 25, 2012, HRSD, the Localities (excluding Norfolk), and the Commonwealth of Virginia executed an Amendment to the September 26, 2007 Special Order By Consent that requires the Localities (excluding Norfolk) and HRSD to, among other things, develop a RWWMP identical to the plan called for in the Federal Consent Decree;

WHEREAS, on March 17, 2005, HRSD, Norfolk and the Commonwealth of Virginia executed a second phase to the December 17, 2001 Special Order by Consent (collectively, the “Norfolk/HRSD Consent Orders”) that required HRSD and Norfolk, to among other things, address wet weather issues in the City of Norfolk with a Long Term Control Plan requiring a minimum annual investment in sewer infrastructure;

WHEREAS, pursuant to the Norfolk/HRSD Consent Orders, the City of Norfolk has made significant financial investments of over \$100 million, though additional capacity-related investments in the Norfolk sewer system are expected as part of further implementation of the Norfolk/HRSD Consent Order (the “Norfolk/HRSD Consent Order Capacity Projects”);

WHEREAS, substantial additional wet weather capacity-related investments in the Norfolk sewer system will still be required to achieve the regional wet weather management capacity requirements in the approved RWWMP (the “Norfolk System RWWMP Projects”);

WHEREAS, during the ongoing planning for the RWWMP, HRSD and the Localities conducted a study to determine if HRSD ownership of the Localities' sewer systems would provide significant capital and operational cost savings to the region's ratepayers under the RWWMP;

WHEREAS, the regional study was completed in the summer of 2013 and estimated that HRSD ownership of the regional sewers could potentially save the overall region's ratepayers more than one billion dollars over a 30-year period in capital and operation/maintenance costs as compared to a scenario where HRSD and the Localities independently seek to address wet weather capacity needs, although the amount of savings varied significantly among the Localities;

WHEREAS, full regionalization of the Localities' sewer systems is unlikely at this time for a variety of reasons;

WHEREAS, a significant portion of the estimated savings from full regionalization can still be obtained for the benefit of the region's ratepayers if HRSD agrees to take sole responsibility for financing and implementing the approved RWWMP across the entire regional sewer system; and

WHEREAS, if HRSD assumes sole responsibility for funding and implementing the approved RWWMP, HRSD will have to raise its regional rates in order to fund the cost of the approved RWWMP, and each Locality which is a party hereto acknowledges that such rate increases will be necessary in order to achieve the more affordable and cost-effective RWWMP (which each Locality will have the opportunity to provide input into and to challenge if it believes the RWWMP is not an affordable and cost-effective approach);

NOW, THEREFORE, in consideration of the premises, mutual covenants and obligations contained herein, HRSD and the Localities do hereby enter into this Agreement for the purpose of defining the roles, responsibilities, and obligations of HRSD and the Localities for the development, financing, and implementation of the RWWMP and the assurance of adequate wet weather sewer capacity in the Regional Sanitary Sewer System in the future.

A. DEFINITIONS

“2007 MOA” means the Memorandum of Agreement dated June 28, 2007, by and among HRSD; the cities of Chesapeake, Hampton, Newport News, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg; the Town of Smithfield; the counties of Gloucester, Isle of Wight, and York; and the James City Service Authority.

“Board” means the State Water Control Board, a permanent citizens body of the Commonwealth of Virginia as described in Virginia Code §§ 62.1-44.7 and 10.1-1184.

“DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Virginia Code §10.1-1183.

“EPA” means the United States Environmental Protection Agency.

“Federal Consent Decree” means the Amended Consent Decree filed in the United States District Court for the Eastern District of Virginia on February 23, 2010 (Civil Action No. 2:09cv-481), and any subsequent amendments thereto.

“Party” or “Parties” means one or more signatories to this Agreement.

“Regional Sanitary Sewer System” means the collective sanitary sewer systems owned and operated by HRSD and the Localities, including gravity sewer lines, manholes, pump stations, lift stations, pressure reducing stations, force mains, wastewater treatment plants, and all associated appurtenances.

“Special Order By Consent” means the special order by consent dated September 26, 2007, and any subsequent amendments thereto, by and among the Board and HRSD; the cities of Chesapeake, Hampton, Newport News, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg; the Town of Smithfield; the counties of Gloucester, Isle of Wight, and York; and the James City Service Authority.

“Significant Defect” means a physical condition in the sanitary sewer system owned or operated by a Locality, including: (i) existing or imminent structural failures, cave-ins, and similar defects and (ii) significant sources of inflow and infiltration (including but not limited to missing and/or damaged public clean-outs, missing manhole inserts, direct storm water connections, and unsealed manhole pipe penetrations).

“Warranties” means any warranties and/or rights under bonds or similar instruments securing or assuring the quality, adequacy or timeliness of the design, materials, installation or construction of any improvements conveyed by HRSD to a Locality as contemplated in this Agreement.

B. ROLES AND RESPONSIBILITIES

1. HRSD agrees to:

a. In consultation with the Localities develop a reasonably affordable and cost-effective RWWMP, including the Norfolk System RWWMP Projects, in accordance with this Agreement and Paragraph 10 of the Federal Consent Decree, to achieve the wet weather capacity requirements of the Federal Consent Decree for the affected portions of the Regional Sanitary Sewer System including the Norfolk sewer system;

b. Implement the approved RWWMP in accordance with the approved RWWMP long-term schedule;

c. Design and construct all RWWMP projects in accordance with HRSD Standards and Preferences, the applicable portions of the Hampton Roads Planning District

Commission Regional Construction Standards, and Locality preferences, policies, or guidelines with respect to operation and maintenance issues where such preferences, policies, or guidelines have been established and are broadly applied by the Locality;

d. Fully fund implementation of the RWWMP regardless of asset ownership through a regional HRSD rate applied equally across all HRSD accounts in the Localities;

e. Upon full implementation of the applicable RWWMP facilities for each HRSD treatment plant service area and the successful completion of the Post-RWWMP Performance Assessment for that service area, HRSD shall be responsible for ensuring and maintaining adequate wet weather capacity for those portions of the Regional Sanitary Sewer System in that service area, whether owned or operated by HRSD or a Locality, up to the applicable capacity level defined in the approved RWWMP;

f. Maintain a flow monitoring program in accordance with the Federal Consent Decree;

g. Investigate, in cooperation with affected Localities, any sanitary sewer overflow where system capacity is reasonably suspected of being a contributing cause or the sole cause of such overflow to determine the actual cause or causes (in support of such inquiry, HRSD shall make available to Localities in a timely manner, upon request, any potentially relevant information it may have) and the appropriate response;

h. Provide to the applicable Locality complete copies of record drawings of improvements constructed by HRSD within that Locality pursuant to the RWWMP within thirty (30) days of completion or amendment of such drawings;

i. Convey to each Locality improvements which HRSD may install or construct pursuant to the approved RWWMP, for addition or modification to the Locality's sewer system;

j. Negotiate and obtain customary commercial Warranties for pavement and other project improvements in Locality systems and enforce such Warranties during warranty periods as necessary, provided that following such warranty period, any assets conveyed to a Locality are the sole responsibility of such Locality;

k. Make available to the Localities information HRSD uses in the development and implementation of the RWWMP and any other relevant information HRSD may have;

l. Comply with applicable Locality ordinances and other laws and regulations in the planning, design, and implementation of the RWWMP;

m. Assume regulatory liability for wet weather overflows occurring upon completion of the RWWMP implementation(including the Post RWWMP Implementation

Performance Assessment) and which are determined to result from lack of adequate capacity as defined in the RWWMP for such sanitary sewer overflows;

n. Reimburse, to the extent permitted by law, any Locality for reasonable claims paid to any third-party resulting from wet weather overflows occurring upon completion of the RWWMP implementation (including the Post RWWMP Implementation Performance Assessment) and which are determined to result from lack of adequate capacity as defined in the RWWMP for such sanitary sewer overflows, provided that HRSD retains the right to assert governmental immunity as allowed by law if HRSD determines a claim is unreasonable or due to causes beyond HRSD's control;

o. Provide staff and/or consultant resources to coordinate development and implementation of the approved RWWMP as it applies to each Locality in accordance with the approved RWWMP schedule;

p. Issue in a timely manner and in accordance with established processes any approvals, and timely execute any documents, necessary for implementation by a Locality of improvements or management, operations or maintenance measures as required by the RWWMP or contemplated by the Special Order by Consent, and not unreasonably withhold, condition or delay such approvals or execution of documents;

q. Support the modification of the Special Order by Consent between DEQ, HRSD and the Localities consistent with the changes to the Federal Consent Decree;

r. Consult with the Localities as necessary to facilitate the timely implementation of the approved RWWMP; and

s. Cooperate with Localities when requested to incorporate other locally funded infrastructure improvements as part of any RWWMP project, provided that HRSD can do so consistent with the approved RWWMP schedule and HRSD's project-related costs do not increase by more than ten percent (10%) (a Locality may pay any amount of additional HRSD cost above the 10% threshold in order to satisfy this condition).

2. Each Locality agrees to:

a. Maintain and operate Locality-owned collection system assets and any improvements constructed by HRSD in Locality-owned assets as part of the RWWMP. This obligation shall be performed in accordance with any approved Management, Operations, and Maintenance program and industry accepted practices relating to sewer inspection, Sewer System Evaluation Survey work and repair of Significant Defects (not scheduled to be addressed by the RWWMP within a reasonable period of time but excluding those for which HRSD is responsible under Section B.1.j above);

b. Provide full access to data, information and Locality-owned assets necessary for timely and cost-effective development of the RWWMP. This includes, but is not

limited to, flow monitoring data, calibrated hydrologic models, long-term simulations, SSES data and results, Rehabilitation Plans and Preliminary Capacity Assessments including hydraulic models and related calculations;

c. Maintain and calibrate the existing locality-owned flow monitoring equipment (previously required by the Regional Technical Standards) and provide data at regular intervals in a mutually acceptable form, throughout the development of the RWWMP;

d. Provide staff and/or consultant resources to coordinate development and implementation of the approved RWWMP as it applies to each Locality in accordance with the approved RWWMP schedule, subject to appropriation, provided that in the event adequate resources are not appropriated, HRSD shall be relieved of its obligations under Section B.1.a with respect to consultation with the Localities and Section B.1.q of this Agreement;

e. Timely issue any Locality administrative permits in accordance with established processes and, subject to applicable law, timely execute any documents, as necessary for implementation of RWWMP-related improvements in that Locality, and not unreasonably withhold, condition or delay such permits or execution of documents;

f. Accommodate reasonable contractor requests for standard work hours and maintenance of traffic in accordance with existing Locality policies during implementation of RWWMP improvements within the Locality;

g. Support the modification of the September 26, 2007 Special Order by Consent, as amended, between DEQ, HRSD and the Localities consistent with the changes to the Federal Consent Decree;

h. Upon HRSD's request, provide a written letter of support for a modification of HRSD's Federal Consent Decree to establish HRSD's responsibilities consistent with this Agreement;

i. Cooperate with HRSD and the other Localities as necessary to facilitate the timely implementation of the approved RWWMP; and

j. Provide timely notice of and investigate, in cooperation with HRSD, all capacity-related sanitary sewer overflows.

C. REMEDIES AND RESERVATIONS OF RIGHTS

1. If any Party shall fail to perform or observe any of the material terms, conditions, or provisions of this Agreement applicable to it, and said failure is not rectified or cured within thirty (30) days after receipt of written notice thereof from another Party, then the defaulting Party shall be deemed in breach of this Agreement; provided, however, that no Party shall have a right to issue a notice of default pursuant to this Section C.1 until the dispute resolution procedures set forth in Section C.2 below have been exhausted. The Parties agree that, in the

event of a material breach of this Agreement, a non-defaulting Party, which is or would be harmed by the breach, may seek injunctive relief or specific performance of the defaulting Party's obligations without the requirement to post a bond. The Parties acknowledge that each Party's performance of its material obligations is valuable and unique and that, for purposes of allowing the non-defaulting Party to seek injunctive relief, the failure of a Party to perform its material obligations hereunder may result in irreparable injury to the other Parties. Nothing in this Agreement shall be deemed to modify, alter, or otherwise affect such other rights and remedies as may be available to the Parties under applicable law or equity.

2. If any dispute arises with respect to the alleged failure of any Party to perform or observe any of the material terms, conditions, or provisions of this Agreement applicable to it, as a condition precedent to instituting a formal action in a court with competent jurisdiction, the parties shall first attempt to resolve the dispute through the dispute resolution procedures contained in this Section C.2. A Party may initiate the dispute resolution procedures of this Section C.2 by providing to the other Parties to the dispute written notice of the existence and nature of the dispute. Within thirty (30) days of such notice, the Parties to the dispute shall meet and attempt in good faith to resolve the dispute. Upon the request of any Party to the dispute, the Parties to the dispute shall participate in non-binding mediation. The mediator shall be selected by mutual agreement of the Parties to the dispute, and the cost of the mediator shall be shared equally by those Parties engaged in the mediation. If the dispute cannot be resolved within sixty (60) days after receipt of written notice of the dispute or any reasonable extension as may be mutually agreed upon by the Parties, then any Party to the dispute may elect to end dispute resolution by providing written notice of such election to the other Parties to the dispute, in which case the dispute resolution procedures shall be deemed to have been exhausted. The dispute resolution procedures may also be deemed exhausted by written agreement of all the Parties to the dispute.

3. Nothing herein shall be construed as or otherwise constitute a waiver or release by any Party of any right, power, immunity, or standing of that Party that may exist pursuant to applicable law or regulation, including, without limitation, such right or standing to appeal or seek review of any case decision or other reviewable determination of the Board, DEQ, EPA, a Court having jurisdiction over the dispute, or any other agency or governmental body related to the matters addressed in this Agreement, the Federal Consent Decree, or the Special Order By Consent.

D. MISCELLANEOUS

1. Amendments to Agreement. Amendments to this Agreement must be in writing and signed by all the Parties.

2. Entire Agreement. This Agreement contains the entire agreement among the Parties with respect to the subject matter hereof and supersedes all prior agreements, written or oral, with respect thereto, including the 2007 MOA.

3. Severability. If any provision of this Agreement is found to be unenforceable, the

remainder of this Agreement shall remain in full force and effect.

4. Authority. The Parties represent that they have the authority to enter into this Agreement and that the individuals signing this Agreement on their behalf have the requisite power and authority to bind the Parties to its terms and conditions. This Agreement shall apply to, and be binding upon the Parties, their elected officials, officers, agents, employees, successors, and assigns.

5. Reservation. Except as expressly provided herein, nothing in this Agreement shall be construed to limit or otherwise affect the authority, rights, or responsibilities of the Parties.

6. Notices and Written Communications. All notices and written communication pursuant to this Agreement shall be submitted to the recipients listed in Attachment A. A Party may change its designated notice recipient by so informing all other Parties in writing.

7. Effective Date. This Agreement shall be effective and binding upon its execution by all Parties and shall continue in effect until terminated in accordance with Section D.11.

8. Governing Law. This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Virginia, without regard to the conflict of laws and rules thereof.

9. Force Majeure. No Party shall be responsible for its failure to fulfill an obligation pursuant to this Agreement to the extent that such failure is due to acts of God; strikes; war or terrorism; the actions of a third party; the actions of another Party; lockouts; or other events not reasonably within the control of the Party claiming force majeure. A Party experiencing a force majeure event that prevents fulfillment of a material obligation hereunder shall (a) give the other Parties prompt written notice describing the particulars of the event; (b) suspend performance only to the extent and for the duration that is reasonably required by the force majeure event; (c) use reasonable efforts to overcome or mitigate the effects of such occurrence; and (d) promptly resume performance of the affected obligation if and when such Party is able to do so.

10. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument.

11. Termination. This Agreement shall terminate (a) if the Motion to Amend the Federal Consent Decree contemplated herein is either not filed with the Court by May 31, 2014 or is filed but denied by the Court; (b) if the Federal Consent Decree is not amended as contemplated herein by August 31, 2014; (c) if the State Special Order by Consent is not, by December 31, 2014, either (1) rescinded in its entirety or (2) amended to relieve the Localities of any obligation to develop, fund, and implement the Regional Wet Weather Management Plan; or (d) upon the written agreement of all Parties. If this Agreement is terminated for any reason,

except upon the agreement of HRSD, then HRSD reserves the right to assert a force majeure under the Federal Consent Decree.

12. Not for Benefit of Third Parties. This Agreement and each and every provision hereof is for the exclusive benefit of the Parties and not for the benefit of any third party.

13. Binding Effect. This Agreement shall inure to the benefit of the Parties and shall, to the maximum extent permitted by law, be binding on the Parties and their successors and assigns.

[REST OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized officials as of the dates next to their respective signatures as shown below.

**(ELECTRONIC SIGNATURES OF ALL PARTIES TO THE AGREEMENT
WILL BE CONSOLIDATED ON THIS PAGE IN THE FINAL DOCUMENT)**

LIST OF SIGNATORIES

CITY OF CHESAPEAKE

GLOUCESTER COUNTY

CITY OF HAMPTON

ISLE OF WIGHT COUNTY

JAMES CITY COUNTY

CITY OF NEWPORT NEWS

CITY OF NORFOLK

CITY OF POQUOSON

CITY OF PORTSMOUTH

CITY OF SUFFOLK

CITY OF VIRGINIA BEACH

CITY OF WILLIAMSBURG

YORK COUNTY

TOWN OF SMITHFIELD

HAMPTON ROADS SANITATION DISTRICT

This listing of participants is followed by the signature page to be completed by each party.

IN WITNESS WHEREOF, the Party has caused this Agreement to be executed by their duly authorized officials as shown below.

By: Mary B. Bunting
Mary B. Bunting, City Manager

Date: 2/18/2014

Locality: City of Hampton

Date: 2/19/14

Attest: Katherine K. Glass
Katherine K. Glass
Clerk of Council

CITY OF HAMPTON
OFFICE OF THE CITY ATTORNEY
Approved as to legal form and sufficiency
Date: 02.18.2014
[Signature]
Attorney

IN WITNESS WHEREOF, the Party has caused this Agreement to be executed by their duly authorized officials as shown below.

By: _____

Date: _____

Locality: _____

Date: _____

Attest: _____

ATTACHMENT A

List of Individuals to Receive Notices Pursuant to Paragraph D.6:

[List Notice Parties]

