

SETTLEMENT AGREEMENT

Chesapeake Bay Foundation and James River Association v. County of Henrico

THIS SETTLEMENT AGREEMENT is executed this 15th day of September, 2022 (“Effective Date”), by and among Chesapeake Bay Foundation, Inc. and James River Association (“Plaintiffs”) and County of Henrico (“Henrico”) (each a “Party” and collectively the “Parties”).

WHEREAS, on August 11, 2021, Plaintiffs sent Henrico a Notice of Intent to Sue (“NOI”) related to operations at the Henrico County Water Reclamation Facility located at 9101 WRVA Road in Henrico, Virginia (“Facility”) and associated wastewater collection system (“Collection System”) under the federal Clean Water Act (“CWA”);

WHEREAS, on August 25, 2021, Henrico executed a Consent Order developed by the Virginia Department of Environmental Quality (“DEQ”) related to operations of the Facility and the Collection System under the CWA and State Water Control Law and the Facility’s VPDES Permit;

WHEREAS, on December 6, 2021, Plaintiffs filed a Complaint in the United States District Court for the Eastern District of Virginia (the “Litigation”) for alleged violations identified in the NOI;

WHEREAS, on December 15, 2021, DEQ, with the approval of the State Water Control Board, countersigned the Consent Order executed by Henrico on August 25, 2021 and issued the final order to Henrico (“Consent Order”);

WHEREAS, the Parties have engaged in settlement discussions in good faith to negotiate the terms of this enforceable Settlement Agreement; and

WHEREAS, the Parties acknowledge that this Settlement Agreement is an effort to resolve the Litigation efficiently and to avoid costs of litigation, and the Parties do not intend for this Settlement Agreement to operate as admissions or a waiver of any claims or defenses in the Litigation or any other judicial or administrative proceeding.

NOW, THEREFORE, in consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties hereby agree as follows:

1. Notice of Settlement. Within five (5) calendar days of the Effective Date, the Parties will jointly file a notice of settlement with the Court and move to stay the Litigation through December 31, 2022 (the “Stay”).
2. Consent Order Modification Request. As soon as possible but no later than fifteen (15) calendar days after the Effective Date, the Parties will jointly request DEQ to amend the Consent Order in the manner provided in Attachment A, which consists of agreed enhancements to the Consent Order on the following items:
 - a. Facilities Plan Update.
 - b. Sewer Inspection Program.

- c. Problem Sewer Cleaning Program.
- d. Private I/I Reduction Program Development Evaluation.
- e. Enhanced SSO Notification.
- f. Wastewater Reclamation Facility Filter Project (Phase I) Scope Clarification.

In the event DEQ declines to modify the Consent Order in accordance with Attachment A, the Parties shall meet to discuss the status of Litigation and expiration of the Stay no later than December 31, 2022, and the other provisions of this Settlement Agreement shall have no force and effect.

- 3. Additional Agreed Actions. Henrico agrees to perform the following additional actions.
 - a. Progress Reporting and Coordination. Henrico agrees to:
 - i. Provide Plaintiffs with simultaneous copies of its submittals to DEQ under the Consent Order and this Settlement Agreement.
 - ii. Provide Plaintiffs with semi-annual reporting (January 1 and July 1) on implementation of all Consent Order projects, obligations under this Settlement Agreement, SSO events, and the status of implementation of the selected additional environmental project under paragraph 3.b.
 - iii. Participate in a semi-annual meeting with Plaintiffs upon request following submittal of the subparagraph 3.a.ii. reporting, which may include at Plaintiffs' option a Facility tour and briefing regarding Facility and Collection System progress and performance. Plaintiffs may propose additional topics fifteen (15) days in advance for discussion at the semi-annual meeting.
 - b. Environmental Project. Henrico shall implement a mutually agreeable environmental project benefitting residents of Henrico County in the amount of One Million Dollars (\$1,000,000). The Parties shall meet and confer to discuss candidate projects. Henrico shall suggest at least one project that meets the requirements of this provision, and any other Party may suggest additional projects for consideration. The selected project shall be fundable through Henrico's utility enterprise fund and shall not conflict with any applicable legal restrictions on use of such funds including any applicable bond covenants. The Parties agree to work in good faith to reach agreement in writing on the selection of the project in satisfaction of this provision by July 1, 2023, or, if the Parties agree to extend the period for selection, to any mutually agreeable later date. The environmental project shall be completed by July 1, 2029, or, if the Parties agree, by any mutually agreeable later date.
 - c. Plaintiffs' Fees and Costs. Henrico agrees to pay Three Hundred Sixty Thousand Dollars (\$360,000) toward Plaintiffs' attorneys' fees, expert witness, and other litigation costs in this Litigation ("Plaintiffs' Litigation Costs"), within thirty (30) days of the later of the effective date of a Consent Order modification by DEQ in accordance

with Attachment A or receipt of an invoice summarizing Plaintiffs' Litigation Costs. Except as provided in this paragraph, Henrico shall have no responsibility for any other Litigation Costs or any other expenses of Plaintiffs incurred in connection with the Litigation and this Settlement Agreement.

4. Effect of Settlement and Reservation of Rights.

- a. Plaintiffs agree to move to dismiss the Litigation with prejudice on the basis of this settlement within five (5) business days of the effective date of a Consent Order modification by DEQ in accordance with Attachment A.
- b. Plaintiffs and the Environmental Integrity Project agree to release and waive any and all claims for civil penalties and injunctive relief related to:
 - i. violations of the specific VPDES permit limits alleged in the Complaint that may occur from the date the Complaint was filed through the in-service date of the WRF Filter Project (Phase I) facilities but not later than December 15, 2027; and
 - ii. any SSOs that may occur from the date the Complaint was filed through the date of termination of this Settlement Agreement.
- c. This release and waiver shall survive termination of this Settlement Agreement.
- d. The Parties reserve all legal and equitable remedies available to enforce the terms of this Settlement Agreement.
- e. Nothing in this Settlement Agreement shall restrict or control the Parties' comments, litigation, or any other activity related to the Facility or Collection System, other than as expressly identified herein.
- f. The Parties agree that because the modifications to the Consent Order will act to resolve the Litigation, the Consent Order is a consent order issued by a state with respect to an effluent standard or limitation under 33 U.S.C. § 1365(a)(1)(B).

5. Term. This Settlement Agreement shall be in effect from the Effective Date and shall terminate on July 1, 2029.

6. Force Majeure and Excusable Delays. Henrico shall perform all requirements under this Settlement Agreement in the manner and within the time limits established herein, unless performance is delayed or prevented by "Force Majeure" or "Excusable Delays," which are defined for purposes of this Settlement Agreement as events or circumstances arising from causes not reasonably foreseeable and beyond the control of Henrico, or any entity

controlled by Henrico or Henrico's contractors, which delay or prevent performance of any obligation under this Settlement Agreement despite due diligence and best efforts to fulfill the obligation.

- a. Events and circumstances beyond the control of Henrico may include, without limitation, earthquake, flood, hurricane, or other act of God, war, strike or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part.
- b. Such events and circumstances do not include normal inclement weather, financial inability to complete the work, increased cost of performance, changes in Henrico's economic circumstances, or the failure to obtain federal, State, or local permits, authorizations and approvals unless Henrico has made timely and complete application for such permits, authorizations, and approvals.
- c. Henrico shall notify Plaintiffs in writing within ten (10) business days after becoming aware of an event or circumstance that constitutes Force Majeure or Excusable Delay that Henrico believes may prevent or delay performance of an obligation under this Settlement Agreement. Henrico's notification shall describe in detail the cause of the delay, the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Henrico to prevent or minimize the delay, and a timetable by which those measures will be implemented. Henrico shall adopt all reasonable measures to avoid or minimize any such delay. Henrico shall include in the notification a request to extend the deadline associated with any obligation under this Settlement Agreement whose performance may be prevented or delayed by unforeseeable events or circumstances beyond Henrico's reasonable control.
- d. Failure by Henrico to comply with the notice requirements set forth in the preceding paragraph constitutes a waiver of Henrico's right to request an extension of the applicable deadline associated with an obligation to be performed under this Settlement Agreement.
- e. If the circumstance, event, or anticipated event that has caused or will cause the delay constitutes a Force Majeure or Excusable Delay as defined herein, the time for performance shall be extended by an appropriate period substantially equal to the necessary delay.

7. Miscellaneous Provisions.

- a. No Third-Party Beneficiaries. This Settlement Agreement is solely for the benefit of the Parties hereto and their permitted successors and assigns and shall not confer any rights or benefits on any other person or entity.
- b. No Assignment. No Party may transfer or assign this Settlement Agreement, or its rights or obligations hereunder, without the prior written consent of the other Parties, which may be withheld in the sole discretion of each other Party.

- c. Governing Law; Venue; Severability. This Settlement Agreement is a Virginia contract that shall be construed in accordance with and governed for all purposes by the laws of the Commonwealth of Virginia. All questions with respect to any of its provisions shall be instituted, maintained, and contested in a court of competent jurisdiction in the Commonwealth of Virginia. If any word or provision of this Settlement Agreement as applied to any Party or to any circumstance is adjudged by a court to be invalid or unenforceable, the same shall in no way affect any other circumstance or the validity or enforceability of any other word or provision.
- d. Entire Agreement; Amendments. This Settlement Agreement contains the entire agreement between the Parties as to its subject matter and supersedes all previous written and oral negotiations, commitments, proposals and writings. No amendments may be made to this Settlement Agreement except by a writing signed by the Parties.
- e. Dispute Resolution. In the event of a disagreement between the Parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied Party shall provide the other Party with written notice of the dispute and a request for negotiations. The Parties shall meet and confer in order to attempt to resolve the dispute within thirty (30) days of the written notice, or such time thereafter as is mutually agreed. If the Parties are unable to resolve the dispute within sixty (60) days of such meeting, the disputing Party shall have the right to seek judicial enforcement of the terms of this agreement.
- f. Counterparts; Signatures; Copies. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. A scanned or other electronic signature may substitute for and have the same legal effect as an original signature. Any copy of this executed Settlement Agreement made by photocopy, scanner or other imaging technology shall be considered an original for all purposes.

This Settlement Agreement is agreed to by each of the undersigned effective on the date first written above.

[SIGNATURES BEGIN ON FOLLOWING PAGE]

SIGNATURE PAGE OF SETTLEMENT AGREEMENT
Chesapeake Bay Foundation and James River Association v. County of Henrico

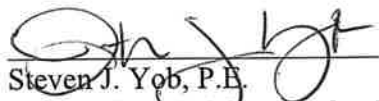
COUNTY OF HENRICO, VIRGINIA

By:




John A. Vithoukias
County Manager

RECOMMENDED FOR APPROVAL:



Steven J. Yob, P.E.
Deputy County Manager for Community Operations

APPROVED AS TO FORM:

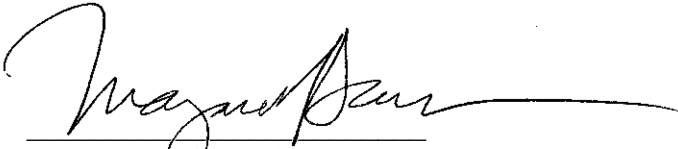


Andrew R. Newby
County Attorney

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SIGNATURE PAGE OF SETTLEMENT AGREEMENT
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CHESAPEAKE BAY FOUNDATION, INC.

By: 
Margaret L. (Peggy) Sanner
Virginia Executive Director

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

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JAMES RIVER ASSOCIATION

By: 
Bill Street
President and Chief Executive Officer

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ENVIRONMENTAL INTEGRITY PROJECT

By: 
Jennifer Duggan
Deputy Director

[END OF SIGNATURES]

ATTACHMENT A

1. APPENDIX B: HENRICO COUNTY SSO REPAIR AND MAINTENANCE SCHEDULE, AND STATEMENT OF WORK

DEQ Consent Order Appendix B shall be amended to add the following requirements:

ACTION OR PROGRAM	NEAREST RECEIVING STREAM	COMPLETION	REQUIREMENTS
Facilities Plan Update	Various	July 1, 2025	<ul style="list-style-type: none"> a. Assemble extensive current/recent flow monitoring data in County's possession b. Update hydraulic model to include current/recent flow monitoring data and antecedent wet soil conditions c. Calibrate the hydraulic model and verify its results d. Conduct updated capacity analysis and wet weather I/I analysis to identify sewer basins with excessive I/I e. Conduct a hydraulic capacity analysis for 1-year, 2-year, 5-year (4.25"), and 10-year, 24-hour storm scenarios for all plan years f. Identify locations of hydraulic capacity limitations resulting in potential SSOs and hydraulic bottlenecks under those scenarios g. Complete plan considering results of I/I analysis and identified capacity limitations and providing an explanation of flow monitoring locations and manner of utilization h. Submit plan to DEQ by July 1, 2025
Sewer Inspection Program	Various	First Annual Report Due: July 1, 2023	<ul style="list-style-type: none"> a. Operate CCTV inspection program b. Prioritize CCTV inspections (including manhole inspections) considering I/I analysis c. Define criteria for rehabilitation and reinspection d. Use CCTV results and criteria to annually prioritize CIP/Rehab and Problem Sewer Cleaning Program e. Use smoke testing where DPU lacks information to identify sufficient corrections for excessive I/I f. Submit annual report on Sewer Inspection Program implementation to DEQ by July 1

Problem Sewer Cleaning Program	Various	First Annual Report Due: July 1, 2023	<ul style="list-style-type: none"> a. Operate a Problem Sewer Cleaning Program b. Define criteria for including pipes and setting/adjusting cleaning schedule c. Define criteria for prioritizing CIP/Rehab based on Problem Sewer Cleaning Program results d. Submit annual report on Problem Sewer Cleaning Program implementation to DEQ by July 1
Private I/I Reduction Program Development Evaluation	Various	July 1, 2025	<ul style="list-style-type: none"> a. Prepare a report that evaluates the potential development and implementation of a Private I/I Reduction Program for identifying and reducing private sources of RDII and defective private laterals that are sources of infiltration, debris, or roots that enter the Collection System, taking into account alternative RDII reduction opportunities in the Collection System, cost-benefit, feasibility, and other reasonable utility management considerations. At a minimum, this review shall include an evaluation of (i) a point-of-sale inspection and certification ordinance, (ii) smoke testing to identify private I&I sources, and (iii) the identification and correction of defective private laterals and illegal connections to the Collection System. b. Submit report to DEQ by July 1, 2025
Enhanced SSO Notification	Various	July 1, 2023	<ul style="list-style-type: none"> a. Provide web-based map of active and recent SSO events occurring within the past 48 hours, to include date and time discovered; estimated duration and whether the event is ongoing; estimated volume/amount; location (using common street names and addresses where available); and waterbody/waterbodies affected or potentially affected b. Update map daily with new information c. Use door hangers with link to web-based map or signage case-by-case at SSO location where considered appropriate by responding DPU field crews d. Use bill inserts to announce new program (to be printed in English, Spanish, and space permitting, Vietnamese)

2. APPENDIX C: HENRICO COUNTY WRF UPGRADE SCHEDULE AND STATEMENT OF WORK

DEQ Consent Order Appendix C shall be amended as follows:

h) Filter Project (Phase I) Renew filters by constructing new filters with 75 mgd average and 150 mgd peak capacity and placing into service upon completion no later than December 15, 2027.