

United States v. Metropolitan District Commission

Decided Jul 23, 2021

Civil Action 83-1614-RGS

07-23-2021

UNITED STATES OF AMERICA v.
METROPOLITAN DISTRICT COMMISSION, et
al. CONSERVATION LAW FOUNDATION OF
NEW ENGLAND, INC. v. METROPOLITAN
DISTRICT COMMISSION

RICHARD G. STEARNS UNITED STATES
DISTRICT JUDGE

SCHEDULE SEVEN COMPLIANCE ORDER NUMBER 249

RICHARD G. STEARNS UNITED STATES
DISTRICT JUDGE

On June 25, 2021, the Massachusetts Water Resources Authority (MWRA) filed its Biannual Compliance and Progress Report (the 249th such report over the course of this decades-old litigation). With the Report, the MWRA filed a copy of the Semiannual CSO (Combined Sewer Overflow) Discharge Report No. 6, July 1, 2020 - December 31, 2020, which issued on April 30, 2021. The Conservation Law Foundation and the United States have offered no comments on the Report.

There were no scheduled activities during the past six-month period on the court's Schedule 7.

As the court noted in its previous Report, the performance assessment (the last of the contemplated Milestones) has proven an invaluable tool in assessing both the strengths and shortcomings of the implementation of the Long-Term Combined Sewer Control Plan (LTCP). On

July 19, 2019, acting on a joint motion of the MWRA, the United States Environmental Protection Agency (EPA), and the Massachusetts Department of Environmental Protection (DEP), the court approved an agreement extending the performance assessment completion date one year to December 31, 2021.^[1] The extension allowed time for the MWRA, among other tasks, to conduct receiving water quality modelings distinguishing the environmental impacts of CSO sources from non-CSO sources on the affected waters.^[2] In its July 16, 2020 Compliance Order, the court observed that the data gathered since the modeling improvements had been of particular assistance in identifying regulators and outfalls where CSO activity was exceeding the desired levels. Nonetheless, because the process was ongoing, and the data to that point were inconclusive, the court was unable to then make any definitive evaluation.

[1] As part of the Agreement, the EPA and the DEP granted the MWRA's request to extend existing water quality variances affecting the Lower Charles River/Charles River Basin and Alewife Brook/Upper Mystic River to August 31, 2024.

[2] In its current Report, the MWRA appropriately notes that the court mistakenly identified this aspect of the parties' agreement as based on a recalibration of the MWRA's hydraulic assessment model in its January 3, 2021 Compliance Order. See June 25, 2021 Report at 12 n.2.

In its June 25 Report, the MWRA concludes that it can now make an informed assessment of those outfalls that it expects to be in full compliance with LTCP targets by the current December 31, 2021 deadline;^[3] those that can be brought into compliance by the date that the current variances expire (August 31, 2024); and those that, barring some unexpected technical breakthrough, will not meet the LTCP activation or volume goals, and for which the costs of achieving 100% compliance may not be justified by the resulting benefit.^[4]

[3] As previously noted, the original Milestone anticipated a final performance assessment completion date of December 31, 2020.

[4] The MWRA's tentative conclusion did not come as a surprise as a preliminary forecast of the assessment data had been presented to the court at the status conference held with the parties on April 2, 2021.

Within the first and largest category are the 70 outfalls that will be in full compliance with the LTCP by the December 31, 2021 performance assessment deadline. Of those, 35 of the 70 have been closed permanently. Five of the remaining outfalls are along the beaches in South Boston. The superior performance of the CSO storage tunnel gives assurance that the goal of preventing CSO discharges up to the 25-year storm standard has been or will be achieved at these sites.

The second category consists of six outfalls that are currently out of compliance but that, with additional improvements, can be brought to the desired performance standard. The six in the order they appear in Table 1-5 of Semiannual CSO Report No. 6 are: (1) SOM007A/MWR205A on the Upper Mystic River; (2) MWR205 on the Mystic River; (3) BOS014 on Chelsea Creek; (4) CHE008 on Chelsea Creek; (5) BOS009 on the Upper Inner Harbor; and (6) BOS003 on the Lower Inner Harbor. See Dkt #1889-1 at 17-18. The remedial measures to be undertaken with respect to these six outlets include: (1) the installation of a second interceptor connection to

regulate CSO overflows (MWR205 and SOM700A/MWR205A); (2) MWRA financial assistance to the Boston Water & Sewer Commission in the amount of approximately \$2.2 million (approved by the MWRA Board of Directors on April 14, 2021) to permit upgrades of outfalls BOS003, BOS009, and BOS014; and (3) an enlargement of the interceptor connection at CHE008 from the present diameter of 30 inches to 48 inches. These measures the MWRA is confident will bring these six outlets into full compliance by the end of 2024 at the very latest. *See* Table 3-3.

The third category consists of the ten outfalls for which full compliance will not be achieved by the variance expiration date of August 31, 2024, or the proposed new Milestone date, December 21, 2024. These include outfall MWR201 at the College Farm Facility, four outfalls on the Charles River, MWR 018, 019, 020, and CAM 005 (clustered on the Lower Charles), SOM001A at Alewife Brook, BOS017 in Charlestown at the Mystic/Chelsea Confluence, and three outfalls on the Fort Point Channel, BOS062, 065, and 070. *See* Table 3-4. As for these ten, any conclusive determination would be premature. As stated in the most recent Report,

[f]or these 10 outfalls, the Authority, in coordination with the CSO communities, continues to evaluate hydraulic conditions contributing to the higher CSO discharges, and identify and model CSO reduction alternatives. Based on the results to date, the Authority is currently focusing its evaluations on the types of measures identified for each outfall in Exhibit C (Table 1-6 in Semiannual Progress Report No. 6). The Authority will present its further progress with these evaluations in Semiannual Progress Report No. 7, due October 31, 2021.

Report at 9-10. Consequently, the court will defer judgment with respect to these ten outfalls until a more complete picture can be assembled.

The court understands that among the options under consideration by the parties is a request to the court to extend the December 2021 Milestone to August 31, 2024, or possibly December 31, 2024. Whether the extension request would involve the LTCP as a whole or only the sixteen “problem” outfalls appears an open question. The MWRA reports that it will continue discussions with the EPA, the DEP and the CLF, and intends to bring the interested watershed associations to the table as well.^[5] The goal is to reach an agreement so that the parties can, by September 2021, jointly “advise the court of a framework to bring the case to successful completion.” Report at 3. The court would welcome any such proposal from the parties and the interested watershed groups.

[5] In this regard, the court received a letter on July 19, 2021, submitted on behalf of the Charles River Watershed Association and the Mystic River Watershed Association welcoming the MWRA's invitation to join the discussions.

Turning to other topics, the MWRA reports continued progress with the capital improvements undertaken by the CSO communities. Among them are the BWSC's construction of the first of five sewer separation projects in South Boston, the City of Somerville's ongoing construction of a new storm drain at Union Square, the City of Cambridge's planning of new sewage separation projects, and the City of Chelsea's implementation of the first phase of its Citywide Sewer Separation Master Plan. The MWRA has determined that these projects will provide tangible benefits to the regulation of CSO overflows in the Fort Point Channel, at the Prison Point CSO Facility, the Cottage Farm CSO Facility, and at the three Chelsea outfalls.

The MWRA also reports on valuable lessons being learned from the deployment of the calibrated receiving water models for the Lower Charles River and the Alewife Brook/Upper Mystic River measuring the impact of CSOs and other discharges on water quality. The most significant results show that stormwater and upstream flows entering the variance waters are the two largest sources of *E. coli* and *Enterococcus* in the Typical Rainfall Year. Also of interest is the contrast between receiving water model runs that incorporate all CSO and non-CSO and those that measure CSO only.^[6] These runs show that in a Typical Year the Charles River met compliance criteria 48% of the time, the Alewife Brook 39% of the time, and the Upper Mystic River 45% of the time. By comparison, the CSO only results show the Charles River in compliance 99.6% of the time, the Alewife Brook 98.6% of the time, and the Upper Mystic River 95.8% of the time.^[7]

[6] A separate receiving water model run testing the impact of stormwater and CSO bacterial contributions confirmed the significant role stormwater plays as a contributor of elevated bacteria counts. The initial model run results were submitted in draft form to the EPA and DEP, as well as to the community watershed associations, on May 5, 2021, for review and comment. A finalized Water Quality Assessment Report is expected to be issued by September of 2021.

[7] These findings are of particular importance given the jurisdictional and regulatory obstacles faced in any attempt to regulate stormwater runoffs originating from private property.

The MWRA calls attention to the comparison presented in Semiannual Report No. 6 of measured CSO activations and/or volumes with the predictions of the hydraulic model for all storms during the period July 1, 2020, to December 31, 2020. As a coda, the MWRA notes

that the current first-quarter 2021 model predicts a system-wide total CSO discharge of 421 million gallons during the coming year, an 88% reduction from the 3.3 billion gallons of discharges in 1988.

Finally, the MWRA reports that it is in compliance with all conditions of the five-year CSO variances issued by DEP on August 30, 2019, for the Lower Charles River/Charles Basin and the Alewife Brook/Upper Mystic River. In addition to the receiving water quality modeling. The conditions include the establishment of a web based CSO discharge alert system, the installation of informational signage at public access locations along the affected waters, and the evaluation of four separate system optimization proposals affecting the Alewife Brook Pump Station, the Alewife Brook outfalls, the Somerville Marginal CSO Facility, the Cottage Farm CSO Facility, and the Charles River outfalls. The MWRA, over the next three years, expects to remediate the six noncompliant outfalls that it believes can be brought into compliance before the variances expire. It also undertakes to continue the investigation of positive improvements at the remaining ten “problem” outfalls “to develop a framework and path to bring this case to a successful conclusion.” Report at 22. As of this

writing, these are works in progress and contingent, to a degree, on the court's future directives.^[8]

[8] Among other issues to be resolved is the answer to the question posed by the MWRA on page 8 of its December 21, 2020 Report; “whether further investments in CSO mitigation will result in meaningful water quality improvements, or whether emphasizing non-CSO contributions of pollution would be more cost effective and impactful to water quality.”

ORDER

The court looks forward to receiving in September the report on the parties' recommendations with respect to the extension of the final December 31, 2021 Milestone and believes that a status conference at that time would be beneficial. Consistent with the court's revised Scheduling Order, the MWRA will submit Compliance Report No. 250 on or before December 23, 2021.

SO ORDERED. *See* Dkt # 1891. *See Conservation Law Found., Inc. v. U.S. Env'tl. Prot. Agency*, 223 F.Supp.3d 124 (D. Mass. 2017), *aff'd*, 881 F.3d 24 (1st Cir. 2018).