

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,

and

COMMONWEALTH OF
PENNSYLVANIA DEPARTMENT
OF ENVIRONMENTAL
PROTECTION

Plaintiffs,

and

LOWER SUSQUEHANNA
RIVERKEEPER ASSOCIATION

Plaintiff-Intervenor-
Applicant,

v.

CAPITAL REGION WATER,

and

THE CITY OF HARRISBURG, PA

Defendants.

Civil Action No. 1:15-cv-00291-CCC

(Judge Christopher C. Conner)

COMPLAINT IN INTERVENTION

Plaintiff-Intervenor Lower Susquehanna Riverkeeper Association (“LSRA”)

sets forth the following allegations for its Complaint in Intervention:

NATURE OF THE ACTION

1. Plaintiff-Intervenor LSRA files this Complaint in Intervention in accordance with Federal Rule of Civil Procedure 24(a)(1) and (a)(2) seeking injunctive relief and penalties for ongoing violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, Pennsylvania’s Clean Streams Law, Pa. Laws. 1987, *as amended*, 35 Pa. Cons. Stat. §§ 691.1–691.1001, the rules and regulations promulgated pursuant to those statutes, the associated National Pollutant Discharge Elimination System (“NPDES”) permits issued by the Commonwealth of Pennsylvania Department of Environmental Protection (“DEP”), and the partial consent decree entered into in 2015 among United States of America and DEP (collectively, “Plaintiffs”) against Capital Region Water (“CRW”) and the City of Harrisburg, Pennsylvania (“Harrisburg”) (collectively, “Defendants”) caused by Defendants’ sewage-related discharges into waters of the United States and the Commonwealth of Pennsylvania—the Susquehanna River and its tributaries—from the Advanced Wastewater Treatment Facility (“AWTF”) and sewage systems for the City of Harrisburg, Pennsylvania.

2. The underlying suit in this matter is an enforcement action brought by Plaintiffs against Defendants alleging a number of violations of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, Clean Streams Law, Pa. Laws. 1987, *as amended*, 35 Pa. Cons. Stat. §§ 691.1–691.1001, and rules and regulations promulgated

pursuant to those statutes, arising from the AWTF, combined sewer system, and separate storm sewer system.

3. Plaintiffs and Defendants (collectively, “Parties”) lodged a partial consent decree (“Partial CD”) on February 10, 2015, ECF No. 4, which was entered by this Court on August 24, 2015, ECF No. 11.

4. The Parties admitted in the Partial CD that the document did not include measures sufficient to resolve the legal violations caused by CRW’s sewage releases and practices. *See* Partial CD at 4.

5. In 2020, Plaintiff-Intervenor LSRA met twice with DEP to discuss its concerns over the prolonged and continuous discharges of illicit untreated sewage from the Harrisburg sewage system into the Susquehanna River and Paxton Creek. LSRA requested these meetings over concerns of ongoing sewage overflows, after finding that water samples it collected from these waterways downstream of sewer outfalls had high levels of *E. coli* bacteria levels, and after having sent a letter to Pennsylvania Governor Wolf and DEP in February 2020 that described CRW’s violations and outlined changes necessary to curb these discharges of untreated sewage and bring Harrisburg’s sewer systems into compliance with environmental laws.

6. Despite the lapse of six years since the Partial CD was entered, the Parties have failed to abate the Clean Water Act and Clean Streams Law violations

alleged in the 2015 Complaint. In fact, the Parties have failed to maintain a sufficient nine minimum controls (“NMC”) plan and have failed to produce a sufficient long-term control plan (“LTCP”) required by the Partial CD that would work towards abating these underlying violations, as evidenced by public records obtained by LSRA in October 2020 and December 2020 through Right To Know Law (“RTKL”), 25 Pa. Stat. Ann. § 67.101 *et seq.*, and Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, request responses.

7. These same public records show that the Parties have also failed to make meaningful progress toward a final consent decree to ultimately resolve these violations. Every day that these illicit sewage discharges and other violations continue poses risks to public health and the environment and threatens the interests of LSRA and its members.

8. While the consent decree process languishes, CRW’s violations of the Clean Water Act, the Clean Streams Law, and the Partial CD continue to mount. Defendants continue to cause sewage pollution issues, including sewage overflows.

9. Each year, CRW has released, and continues to release, hundreds of millions, or even sometimes well over a billion, gallons of untreated sewage and stormwater into waters of the Commonwealth. This pollution threatens public health and safety and degrades water quality. These continuing sewage overflows

and other pollution incidents violate the Clean Water Act, the Clean Streams Law, CRW's NPDES Permits, and the Partial CD.

10. These ongoing violations confirm that the conditions and the enforcement of the Partial CD have failed, and continue to fail, to assure compliance with the Clean Water Act, the Clean Streams Law, or the NPDES Permits.

11. LSRA seeks to intervene in this suit for purposes of addressing CRW's ongoing and significant discharges of untreated sewage and pollutants in excess of permitted limits into waters of the Commonwealth in violation of the requirements of the Clean Water Act and Clean Streams Law and the resulting threats to human health and the environment from such violations. LSRA seeks to intervene because, despite CRW's proposed plans that would expend hundreds of millions of dollars over the course of decades, the Parties have failed to maintain a NMC plan and obtain a LTCP or a consent decree that would achieve compliance with these environmental laws or result in sufficient reductions in the releases of raw fecal matter and other pollutants into the Susquehanna River and its tributaries.

JURISDICTION AND VENUE

12. This Court has jurisdiction over the subject matter of this action pursuant to 33 U.S.C. § 1365, and 28 U.S.C. § 1331. This Court also has supplemental jurisdiction over the Commonwealth law claims asserted by DEP

pursuant to 28 U.S.C. § 1367 because the Commonwealth claims are so related to the federal claims as to form part of the same case or controversy.

13. This Court also has retained jurisdiction over this case “until termination of this Consent Decree for all Defendants, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree . . . or effectuating or enforcing compliance with the terms of this Decree.” Partial CD ¶ 98.

14. Venue is proper in the Middle District of Pennsylvania pursuant to 33 U.S.C. § 1364(c) because it is the judicial district in which Defendants are located and where the source of the alleged violations is located, in which the alleged violations occurred, and because the Partial CD was entered in this Court.

PARTIES

15. Plaintiff-Intervenor LSRA is a 501(c)(3) nonprofit watershed association dedicated to improving and protecting the ecological integrity of the Susquehanna Watershed and the Chesapeake Bay by identifying sources of pollution and enforcing environmental laws. Decl. of Ted Evgeniadis (“Evgeniadis Decl.”) ¶¶ 3, 5 (attached as Exhibit A). LSRA was specifically formed to support the activities of the Lower Susquehanna Riverkeeper. *Id.* ¶ 3. LSRA and the Riverkeeper actively educate the public on current issues, work with decision-makers to emphasize the economic and social benefits of protecting our watershed,

and, when necessary, enforce laws protecting communities and natural resources of the Lower Susquehanna Watershed. *Id.* ¶ 2.

16. LSRA's members are comprised of local residents, fishermen, bird watchers, business owners, and other users of the Lower Susquehanna River and its tributaries. *Id.* ¶ 6. These members have been injured and continue to be injured by CRW's pollution that violates environmental laws, as described herein, as these violations threaten members' use and enjoyment of the Lower Susquehanna River and its tributaries. *Id.* ¶¶ 8, 11–13.

17. LSRA is both a "person" and a "citizen" within the meaning of the Clean Water Act, 33 U.S.C. § 1362(5), § 1365(g).

18. LSRA has authority to intervene as a matter of right in this lawsuit under 33 U.S.C. § 1365(b)(1)(B).

19. Plaintiffs in the underlying action are the United States of America and DEP.

20. Plaintiffs brought the underlying lawsuit under 33 U.S.C. § 1319 and 35 P.S. § 691.601. Compl. ¶¶ 1, 2, ECF No. 1 ("2015 Complaint").

21. Defendants in the underlying action are the City of Harrisburg and CRW and are described in Plaintiffs' 2015 Complaint. 2015 Compl. ¶¶ 7–11. Each Defendant is a "municipality" as defined by Clean Water Act § 1362(4) and a "person" as defined by Clean Water Act § 1362(5).

22. Defendants can be sued under the citizen suit provisions of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

STANDING

23. Members of LSRA live, work, and/or recreate within and around the City of Harrisburg and have been adversely affected by Defendants' past and CRW's continued untreated sewage discharges. Evgeniadis Decl. ¶¶ 8–13; Decl. of Ilyse Kazar ("Kazar Decl.") ¶¶ 5–8 (attached as Exhibit B); Decl. of Rod Bates ("Bates Decl.") ¶¶ 4–5, 8–10 (attached as Exhibit C). LSRA's members have observed floating fecal matter and other evidence of untreated sewage discharges in waters of the Commonwealth, which have negatively impacted their use and enjoyment of the Susquehanna River and its tributaries and the surrounding watershed. Kazar Decl. ¶ 5; Bates Decl. ¶ 7. LSRA's members have avoided using and enjoying the Susquehanna River and its tributaries due to their concerns regarding foul odors, repugnant sights, and potential negative health impacts from contact with or proximity to untreated sewage in the waterways. Kazar Decl. ¶¶ 6–8; Bates Decl. ¶¶ 7–9.

24. The interests that LSRA seeks to protect are germane to its organizational purposes. Evgeniadis Decl. ¶¶ 8, 11.

25. Neither the claims asserted nor the relief requested requires the participation of the individual members of LSRA in this action.

26. LSRA has standing to bring this proposed complaint in intervention. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181–84 (2000).

LEGAL BACKGROUND

A. Clean Water Act

27. The Clean Water Act was enacted in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). In furtherance of that goal, the Clean Water Act prohibits any person from discharging any pollutant unless in compliance with certain requirements, including the NPDES permit issued under the Act. 33 U.S.C. §§ 1311(a), 1365(a)(1), 1342.

28. The term “discharge of pollutants” is defined in the Clean Water Act to mean “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12).

29. The term “pollutant” includes “sewage, garbage, sewage sludge . . . biological materials . . . and . . . municipal . . . waste discharged into water.” *Id.* § 1362(6).

30. “[P]erson’ means” a “municipality . . . or political subdivision of a State.” *Id.* § 1362(5).

31. “[M]unicipality’ means a city . . . association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage” *Id.* § 1362(4).

32. “The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” *Id.* § 1362(14).

33. “[N]avigable waters’ means the waters of the United States” *Id.* § 1362(7).

34. Citizens are entitled to bring suit against “any person . . . alleged to be in violation” of an “effluent standard or limitation” established under the Clean Water Act, which includes “a permit or condition of a permit” *Id.* §§ 1365(a)(1)(A), 1365(f). Citizens may also intervene “as a matter of right” in an action by the EPA or DEP in a court of the United States to require compliance with a Clean Water Act standard, limitation, or order. *Id.* § 1365(b)(1)(B).

35. Any person who discharges any pollutant without authorization by a NPDES permit violates the Clean Water Act, 33 U.S.C § 1311(a), and can be subject to a civil penalty of up to \$56,460 per day for each violation where the violation occurred on or after November 2, 2015 and for which penalties are

assessed on or after December 23, 2020. Civil Monetary Penalty Inflation Adjustment, 85 Fed. Reg. 83,818, 83,820 (Dec. 23, 2020) (to be codified at 40 C.F.R. § 19); 40 C.F.R. § 19.4 tbls.1, 2; 33 U.S.C. §§ 1311(a), 1319(d), 1365(a) (authorizing suits and authorizing a district court to “apply any appropriate civil penalties under § 1319(d)”).

B. Federal Regulation of Sewage Overflows

36. Unpermitted sewage system overflows constitute violations of the Clean Water Act as they are discharges of raw, untreated sewage from the sewer system without a permit. *See* 33 U.S.C. § 1311(a).

37. In addition, the Clean Water Act requires that “[e]ach permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow [(“CSO”)] Control Policy signed by [EPA] on April 11, 1994” 33 U.S.C. § 1342(q)(1); 59 Fed. Reg. 18,688 (May 19, 1994) (“CSO Policy”).

38. The CSO Policy requires permittees with CSOs to immediately implement NMCs, which are technology-based actions designed to reduce CSOs and their effects on receiving water quality, and to develop LTCPs that will ultimately bring the permittee into compliance with the Clean Water Act. 2015 Compl. ¶ 26; CSO Policy, 59 Fed. Reg. at 18,691.

C. Clean Streams Law

39. Pennsylvania’s Clean Streams Law authorizes citizen suits and—similarly to the Clean Water Act—intervention as of right to any person “if the department has commenced and is diligently prosecuting a civil action in a court of the United States . . . to require compliance with this act or any rule, regulation, order or permit issued pursuant to this act . . . in any such action.” 35 Pa. Cons. Stat. § 691.601(c), (e).

40. The discharge of sewage “into any of the waters of the Commonwealth” is prohibited under the Clean Streams Law unless authorized by a permit or otherwise in accordance with the rules and regulations of DEP. *Id.* §§ 691.201, 691.202.

41. The Clean Streams Law further states that it is “unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or licenses of the department, to cause air or water pollution, or to hinder, obstruct, prevent or interfere with the department or its personnel in the performance of any duty hereunder or to violate the provisions of 18 Pa. C.S. Section 4903 (relating to false swearing) or 4904 (relating to unsworn falsifications to authorities).” *Id.* § 691.611.

42. Any person who violates the Clean Streams Law, or a permit or regulation pursuant thereto, including by discharging, placing, or otherwise allowing the flow of industrial waste or other pollution to groundwater without authorization, can be subject to a civil penalty of up to \$10,000 per violation per day. *Id.* §§ 691.602(a), 691.605.

FACTUAL ALLEGATIONS

A. CRW's Discharges

43. Full background regarding the history of Harrisburg's combined sewer system and separate storm sewer system and general allegations can be found in Paragraphs 41–68 of Plaintiffs' 2015 Complaint. Those paragraphs of the 2015 Complaint are hereby incorporated by reference.

44. According to the 2015 Complaint, 90 percent of the sewer system of the City of Harrisburg is a “combined sewer system,” meaning that both stormwater runoff and sanitary and industrial wastewater are collected and transported together through the same conveyances,” with the remaining 10 percent of the system being a separate storm sewer system that collects and conveys sanitary sewage and stormwater in separate conveyances (collectively, “Harrisburg’s sewer system”). 2015 Compl. ¶ 41. Presently, CRW’s website provides that 60 percent of Harrisburg’s sewer system is the combined sewer system, indicating that the rest (40 percent) is the separate storm sewer system. *See*

CRW, Combined Sewer System (last accessed Mar. 25, 2021), *accessible at* <https://capitalregionwater.com/the-problem/combined-sewer-system/>.

45. The “effluent discharge limitations for Outfall 001 at the AWTF contained in the NPDES permits have been calculated based on a capacity to treat at least 37.7 million gallons of wastewater per day at the AWTF,” and that “[d]uring certain rainfall events, the volume of wastewater entering the Combined Sewer System exceeds the hydraulic capacity of the sewers and/or the treatment facility. In those circumstances, the Conveyance and Collection Systems will discharge untreated combined sewage from certain designated outfalls, known as combined sewer outfalls.” 2015 Compl. ¶¶ 49, 50.

46. “When combined sewage discharges from a combined sewer outfall into a receiving water body, the event is known as a combined sewer overflow (“CSO”),” *Id.* ¶ 51, whereas CSOs “that occur without an accompanying precipitation event or snowmelt” is known as a “dry weather overflow” or “dry weather CSO.” *Id.* ¶ 71. Any spill or release of wastewater from or caused by the separate sanitary sewer system is known as a sanitary sewer overflow (“SSO”). Partial CD ¶ 8(pp).

47. The sewer outfalls from which Defendants discharged and CRW currently discharges are “point sources,” 33 U.S.C. § 1362(14), and are subject to NPDES permit requirements under EPA’s CSO policy. 2015 Compl. ¶¶ 52–53.

48. The CSOs and SSOs the Defendants discharged, and CRW continues to discharge, from Harrisburg's sewer system's outfalls contain raw sewage. *Id.* ¶¶ 54, 125.

49. “The combined sewer outfalls in Harrisburg, and Outfall 001 at the AWTF, discharge to the Susquehanna River or Paxton Creek.” *Id.* ¶ 55. The separate storm sewer system outfalls discharge to the Susquehanna River, Paxton Creek, or Spring Creek. *Id.* ¶ 58. “The Susquehanna River is a ‘water of the United States’ within the meanings of Section 502(7) of the [Clean Water Act], 33 U.S.C. § 1362(7), and the federal regulations implementing the [Act] at 40 C.F.R. § 122.2.” *Id.* ¶ 55. Paxton Creek and Spring Creek are perennial tributaries of the Susquehanna River. *Id.* ¶¶ 55, 58. The Susquehanna River, Paxton Creek, and Spring Creek are all impaired by pathogens for recreational uses. DEP, Integrated Water Quality Report 2018 (last accessed Mar. 30, 2021), *available at* https://gis.dep.pa.gov/integrated_report_viewer/index.html. In addition, for aquatic life uses, the Susquehanna River is impaired by pH; Paxton Creek is impaired by biological oxygen demand, dissolved oxygen, total suspended solids, and siltation; and Spring Creek is impaired by nutrients and siltation. *Id.*

B. NPDES Permit

50. DEP reissued NPDES Permit No. PA 0027197 to CRW on December 4, 2009 with an effective date of January 1, 2010, and an expiration date of

December 31, 2014 (“2010 NPDES Permit”). 2015 Compl. ¶¶ 64–66. The permit has been administratively continued and the terms therein remain applicable until DEP takes action on CRW’s renewal application.¹ 25 Pa. Code § 92a.7. The permit authorizes CRW to operate the AWTF and to discharge from Outfall 001 at the AWTF to Paxton Creek and the Susquehanna River in accordance with the requirements and conditions set forth in the permit. The permit also identifies and authorizes wastewater discharges from 59 combined sewer outfalls after wet-weather events, and discharges “composed entirely of stormwater” from various stormwater outfalls, to Paxton Creek and the Susquehanna River in accordance with the requirements and conditions of the permit. *Id.*; 2010 NPDES Permit at 6–8, 22.

51. At all times relevant herein, CRW’s NPDES Permit has authorized the discharge of pollutants only from specified point sources (identified in the permit as one or more numbered “outfalls”) to specified waters of the United States and/or the Commonwealth, subject to limitations and conditions set forth in the NPDES Permit.

52. Dry weather overflows are prohibited under the NPDES Permit. 2010 Permit at 6; Partial CD ¶ 33. SSOs are also prohibited under the NPDES Permit

¹ CRW submitted a renewal application in July 2014, but DEP has failed to finalize a new permit since that time. DEP, “Authorization Search Details, Permit Number PA0027197,” eFacts (last accessed Jan. 13, 2021) *available at* <https://www.ahs.dep.pa.gov/eFACTSWeb/>.

and are not otherwise permitted or authorized under the Clean Water Act or Clean Streams Law. 2010 Permit at 22; Partial CD ¶ 27.

C. 2015 Complaint Claims

53. On February 10, 2015, Plaintiffs filed suit against Defendants in this Court, alleging, among other things, that Defendants discharged, and that Capital Region Water continues to discharge, pollutants into the waters of the United States in violation of 33 U.S.C. § 1311(a), from at least 59 constructed combined sewer outfalls and from various discharge points within the separate storm sewer system; and that Defendants violated conditions established in the NPDES permits issued to Capital Region Water by DEP, as authorized by EPA under 33 U.S.C. § 1342(b). 2015 Compl. ¶¶ 1, 125.

54. The 2015 Complaint includes seven claims, summarized below:

- i. Dry weather CSOs into waters of the United States in violation of the 2010 NPDES Permit (and 2003 NPDES Permit), the Clean Water Act, and the Clean Streams Law;
- ii. Discharges in violation of effluent limit limitations from Outfall 001 in the 2010 NPDES Permit (and 2003 NPDES Permit) in violation of the 2010 NPDES Permit, the Clean Water Act, and the Clean Streams Law;
- iii. Failure to implement the NMCs for CSOs, in violation of the 2010 NPDES Permit, the Clean Water Act, and the Clean Streams Law;

- iv. Failure to implement Municipal Separate Sanitary Sewer System— known as “MS4”— Minimum Control Measures and operation of the MS4 without a NPDES Permit, in violation of the MS4 General Permit and DEP’s Stormwater Protocol, the Clean Water Act, and the Clean Streams Law;
- v. Failure to develop a LTCP as required by EPA’s CSO Policy to minimize or prevent CSOs, in violation of the 2010 NPDES Permit, the Clean Water Act, and Clean Streams Law;
- vi. Failure to comply with the NPDES Permit for AWTF nutrient upgrades by failing to meet all permit deadlines relating to biological nutrient removal, in violation of the 2010 NPDES Permit, the Clean Water Act, and the Clean Streams Law; and
- vii. Discharge of SSOs containing untreated sewage and wastewater from point sources in the separate sanitary sewer system that were not authorized by a NPDES Permit, in violation of the Clean Water Act and the Clean Streams Law. 2015 Compl. ¶¶ 69–128.

55. The remedies sought in the 2015 Complaint were injunctive relief, civil penalties under the Clean Water Act and the Clean Streams Law, fees and costs, and other relief as appropriate. *Id.* ¶ 83.

D. The 2015 Partial Consent Decree

56. The Parties lodged the Partial CD with this Court on February 10, 2015—the same day that Plaintiffs filed the Complaint. The Parties moved to enter the Partial CD on May 22, 2015. Mot. to Enter Partial Consent Decree (May 22, 2015), ECF No. 8. The Court entered the Partial CD on August 24, 2015. Order (Aug. 24, 2015), ECF No 11.

57. The Partial CD expressly states that it did not resolve the legal claims in the 2015 Complaint. More specifically, the Parties “expressly acknowledge[d] and agree[d] that this Consent Decree is a partial consent decree that does not resolve any claims the Plaintiffs have for injunctive relief for CRW’s alleged failure to implement an LTCP meeting the requirements of the CSO Policy and Clean Water Act or civil penalties for CRW’s violations of the Clean Water Act or Clean Streams Law as alleged in the Complaint, and that this Consent Decree does not resolve any claims Plaintiffs may have for penalties or injunctive relief for violations not alleged in the Complaint filed simultaneously with this Consent Decree, and that the Parties reserve all claims and defenses that they may have concerning all these matters.” Partial CD at 4.

58. SSOs and dry weather CSOs, which constituted unauthorized discharges under the NPDES Permit, are also expressly prohibited by the Partial CD. *Id.* ¶¶ 11(d), 27.

59. The Partial CD did not assess any civil penalties under either the Clean Water Act or Clean Streams Law against CRW, and instead, deferred such action “until such time as Plaintiffs have approved CRW’s updated LTCP”, and a final consent decree has been negotiated to implement the updated LTCP “pursuant to Paragraph 26 of this Consent Decree.” *Id.* at 57, ¶ 51.

60. The Partial CD requires “CRW to submit a number of deliverables to be reviewed, commented on, and, in some instances, approved by EPA, in consultation with PADEP, and then implemented.” Joint Status Report at 2 (Feb. 16, 2018), ECF No. 18. Within six months of lodging, the Partial CD required CRW to submit to Plaintiffs for review and approval a NMC Plan that, among other things, identifies and includes an implementation schedule for actions necessary to achieve compliance with EPA’s CSO Policy. Partial CD ¶ 11. CRW then must, on at least an annual basis, evaluate the efficacy of the measures implemented under the NMC Plan and, for the first five years following the initial submission of the NMC, submit to Plaintiffs for review and approval a proposed revised NMC Plan that includes an implementation schedule of any additional actions necessary to comply with the NMCs. *Id.* ¶ 12.

61. As a major deliverable, the Partial CD required CRW to submit a LTCP for the combined sewer system by April 1, 2018 that conforms to the

requirements of EPA’s 1994 CSO Policy and EPA’s September 1995 Guidance for Long-Term Control Plans. *Id.* ¶ 14.

62. This court retained “jurisdiction over this case until termination of this [Partial] Consent Decree for all Defendants, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XII (Dispute Resolution) and XIX (Modification), or effectuating or enforcing compliance with the terms of this Decree.” *Id.* ¶ 98.

E. Developments Following the 2015 Partial Consent Decree

63. Almost six years have passed since the Court entered the Partial CD.

64. According to the Parties’ most recent Joint Status Report, filed on February 16, 2018, the “[p]arties contemplate that there will be a second round of negotiations, hopefully resulting in a final Consent Decree for implementation of the LTCP and payment of a civil penalty” to resolve the rest of the claims alleged in the Complaint. Joint Status Report at 3. At the time, CRW’s NMC Plan and that year’s annual update were approved by Plaintiffs.

65. In consideration of the Parties’ statements that “the parties continue to satisfy deliverable requirements under the partial consent decree and intend to continue to proceed . . . with the ultimate objective of achieving a final consent decree[,]” the Court administratively closed the case on March 6, 2018 “for

statistical purposes only,” retaining jurisdiction over subsequent proceedings.

Order (March 6, 2018), ECF No. 23.

LSRA Investigation

66. LSRA has had several communications with DEP and EPA and meetings with DEP and the Office of Pennsylvania Governor Thomas Wolf since 2019 regarding LSRA’s concerns about CRW’s ongoing CSOs, the inadequacy of the Partial CD to resolve pollution concerns, and the failure of the parties to negotiate and enter with this Court a final consent decree that would address the legal violations.

67. On August 22, 2019, the Environmental Integrity Project (“EIP”), in collaboration with and using data from sampling conducted by LSRA, released a report detailing evidence of chronic sewage overflows and pollution into the Susquehanna River due to CSOs from CRW’s sewer systems, and the failure of the Partial CD to hold CRW accountable, require compliance with the Clean Water Act and the Clean Streams Law, or impose any penalties for noncompliance. EIP, “Sewage Overflows in Pennsylvania’s Capital: Harrisburg’s Chronic Releases of Sewage Mixed with Stormwater Are An Example of PA’s Failure to Address Water Quality” (Aug. 22, 2019) (attached as Exhibit D), *available at* <https://environmentalintegrity.org/wp-content/uploads/2019/08/PA-Sewage-Report-Final.pdf> [hereinafter “Sewage Overflows Report”].

68. The Sewage Overflows Report detailed that the City of Harrisburg released almost 1.4 billion gallons of mixed sewage and stormwater into the Susquehanna River in 2018. Sewage Overflows Report at 1.

69. The Sewage Overflows Report further documented that sampling conducted by LSRA “in the summer of 2019 found *E. coli* bacteria levels along the city’s waterfront averaging almost three times higher than would be safe for swimming or water-contact recreation.” *Id.* It detailed that “[o]f the 60 water samples analyzed from June 15 to July 31, 2019, almost half (29) violated health standards. Seven samples showed *E. coli* levels more than 10 times safe levels, including on City Island Park beach, and along the riverwalk just downstream from outfalls leading from the Governor’s Residence and the Capitol Office Complex.” *Id.*

70. The Sewage Overflows Report also included facts from CRW’s reports indicating that the CRW’s sewer system was responsible for at least 62 dry weather overflow incidents from combined sewage and stormwater lines between 2015 and 2018, including 28 in 2018, 7 in 2017, 23 in 2016, and 4 in 2015. *Id.* at 8.

71. The Sewage Overflows Report also included that CRW had reported overflows from the sanitary sewer lines in the part of the city that has separate sewage and stormwater lines. *Id.* In this category, the agency reported 69 illegal

SSOs from sewer pipes during this time period, including 18 in 2018, 10 in 2017, 13 in 2016, and 28 in 2015. *Id.*

72. The Sewage Overflows Report also stated that of the 131 illegal sewage incidents described in Paragraphs 70–71, *supra*, only 26 (or about 20 percent) had resulted in penalties from the state or federal agencies. *Id.*

73. The Sewage Overflows Report also identified the Partial CD’s many deficiencies and CRW’s proposed LTCP. For instance, the Partial CD “does not require [CRW] to conduct any bacterial water quality monitoring along the city’s waterfront in the Susquehanna River in the future.” *Id.* at 18.

74. The Sewage Overflows Report also stated that although the Partial CD requires CRW to “provide the public with information concerning CSO discharge occurrences and their impacts on water quality in the Receiving Water(s) (e.g., website notifications within 24 hours of the event, public service announcements on radio and/or television, newspaper public notifications),” CRW admitted that it had not been sending out press releases, posting on social media, nor posting in its website to announce sewage overflows. *Id.* Instead, CRW suggested that residents could call an information line to get tape recorded messages regarding overflows, or sign up for email or text alerts. *Id.*

75. Copies of the Sewage Overflows Report were sent to the Governor’s office on October 1, 2019.

76. Copies of the Sewage Overflows Report were sent to DEP on August 22, 2019, February 27, 2020 and April 27, 2020.

77. On October 4, 2019, LSRA met with representatives from Governor Wolf's office to discuss the findings of the Sewage Overflows Report, including the evidence of pollution in the report, and to discuss the failure of the Partial CD to abate CSOs and the need for a stronger final consent decree that required compliance with the Clean Water Act and the Clean Streams Law.

78. On February 27, 2020, a letter was sent to Governor Wolf and DEP along with the Sewage Overflows Report detailing the deficiencies in the Partial CD and suggesting improvements to be made to the consent decree. Letter from Lisa Hallowell, Senior Attorney, EIP to Gov. Thomas Wolf and Maria Bebenek, Clean Water Program Manager, Southcentral Regional Office, DEP, Re: Recommendations for a Final Consent Decree to Reduce Discharges of Untreated Sewage from the City of Harrisburg's Wastewater System (Feb. 27, 2020) (attached as Exhibit E).

79. On April 27, 2020, LSRA met with DEP to discuss the same and the progress toward a final consent decree. EPA was invited to the meeting but did not attend.

80. On September 18, 2020, a FOIA request and a RTKL Request were submitted to EPA and DEP, respectively, each of which requested "[r]ecords

related to the status, progress, and/or target date(s) for completion of a new, modified and/or final consent decree,” and records relating to meetings regarding the same. FOIA Request from Lisa Hallowell, Senior Attorney, EIP to EPA (Sept. 18, 2020) & RTKL Request from Lisa Hallowell, Senior Attorney, EIP to PADEP (Sept. 18, 2020) (attached as Exhibit F).

81. DEP provided responsive documents on October 22, 2020 and EPA provided responsive documents on December 10, 2020 (“RTKL and FOIA Documents”). RTKL Final Response Letter from DEP to Lisa Hallowell, Senior Attorney, EIP (Oct. 22, 2020) & FOIA Final Response Letter from EPA to Lisa Hallowell, Senior Attorney, EIP (Dec. 10, 2020) (attached as Exhibit G).

82. The RTKL and FOIA Documents reveal CRW’s continued lack of compliance with the Clean Water Act, the Clean Streams Law, the requirements of the Partial CD, and the Parties’ continued failure to abate and resolve CRW’s ongoing violations and make progress on an approved LTCP or final consent decree, which are detailed in the following subsection.

Parties’ Lack of Progress

83. The RTKL and FOIA Documents show that CRW violated the Clean Water Act, Clean Streams Law, CRW’s NPDES permits, and the Partial CD requirements many times in recent years. These include at least 19 violations of the prohibition in Paragraph 33.a of the Partial CD against dry weather overflows

between May 10, 2018 and August 6, 2019 and 6 violations of the prohibition in Paragraph 27 of the Partial CD against sanitary sewer overflows. Letter from Karen Melvin, Director, Enforcement & Compliance Assurance Division, EPA to Charlotte Katzenmoyer, CRW, Re: Demand for Stipulated Penalties (Nov. 26, 2019) (attached as Exhibit H).

84. These CSOs and SSOs from the Harrisburg sewer system outfalls are violations of the Clean Water Act, Clean Streams Law, CRW's NPDES Permits, and the Partial CD.

85. The RTKL and FOIA Documents also show that CRW's most recent update to its NMC Plan has failed to comply with EPA's CSO Policy. *See* Letter from Stacie Pratt, EPA, to David Stewart, CRW, Re: U.S. and PADEP v. Capital Region Water and City of Harrisburg, Civil Action No. 1:15-cv-00291-WWC, at 1 (Mar. 5, 2020) (attached as Exhibit I) (in which EPA "identif[ies] where the NMCP does not comply with" EPA's 1995 Guidance for Nine Minimum Controls."). For instance, the "most significant shortfall that EPA observed in the NMCP is the lack of Solids and Floatable Controls on the combined sewer outfalls," as "[f]loatables/solids capture is not optional but required under the US EPA 1994 Combined Sewer Overflow Policy." *Id.*

86. CRW's ongoing failure to implement NMCs that meet the requirements of EPA's CSO Policy is a continuing violation of the Clean Water Act, Clean Streams Law, and CRW's NPDES Permit.

87. Although the Partial CD required CRW to submit for review and approval a revised and updated LTCP by April 1, 2018, CRW has failed to submit a LTCP that meets applicable requirements and has yet to obtain approval from EPA and DEP three years after the Partial CD required CRW to submit the plan for approval. Partial CD ¶ 14. In fact, EPA stated in 2020 that "[a]fter two years of very little progress, the LTCP still does not meet the requirements specified in the [Partial CD], and despite the lengthy discussions and analyses undertaken by the parties, CRW still seems to be struggling with the concept of the LTCP plan." Letter from Stacie Pratt, Chief, NPDES Section, Enforcement and Compliance Assurance Division, EPA, to Charlotte Katzenmoyer, Chief Executive Officer, CRW, Re: U.S. and PADEP v. Capital Region Water and City of Harrisburg Civil Action No. 1:15-cv-00291-WWC, at 1 (Apr. 27, 2020) (attached as Exhibit J).

88. The RTKL and FOIA Documents includes correspondence among the Parties in which CRW admits and the Plaintiffs acknowledge that the proposed LTCP would not achieve compliance with the Clean Water Act. According to EPA, "[m]easures proposed to occur between years 10 and 20 would result in only a one percent additional increase in CSO capture. This is unacceptable. CRW is

proposing a Plan that focuses on system rehabilitation with only a limited amount of CSO control measures. Under the proposed LTCP, several CSOs appear likely to remain active 30 to 50 or even more times per typical year, which cannot possibly result in the achievement of WQS.” Letter from David Stewart, CRW, to EPA and DEP, Re: Civil Action No. 1:15-cv-00291-WWC: City Beautiful H2O Program Plan – Response to EPA Comments, at 4 (Nov. 9, 2018) (attached as Exhibit K).

89. Two years later, in April 2020, the RTKL and FOIA Documents show that CRW had still yet to produce a sufficient LTCP. Ex. J, Letter from Stacie Pratt, EPA, to Charlotte Katzenmoyer, CRW, Re: U. S and PADEP v. Capital Region Water and City of Harrisburg Civil Action No. 1:15-cv-00291-WWC, at 1 (Apr. 27, 2020) (“After two years of very little progress, the LTCP still does not meet the requirements specified in the [Partial CD], and despite the lengthy discussions and analyses undertaken by the parties, CRW still seems to be struggling with the concept of the LTCP plan.”). According to the letter, “CRW has failed to provide actual CSO projects that will reduce volume and frequency of overflows.” *Id.*

90. The RTKL and FOIA Documents also show that CRW has been unable to provide realistic cost estimates to carry out LTCP projects. *Id.* (“Despite the myriad discussions between the parties over the past two years, and the

delivery of our last set of comments during our March 19, 2020 technical call, CRW continues to provide cost estimates for small scale remediation projects with contingency costs built in and then adding contingency costs to a project's cost estimate for a second time, thereby inflating the overall cost estimate of each project and CRW's ability to pay."); Letter from David Stewart, CRW to EPA and DEP Re: Civil Action No. 1:15-cv-00291-WWC: City Beautiful H2O Program Plan –Response to PG Environmental CBH2OPP Costs Review (Nov. 27, 2019), at 1 (attached as Exhibit L) (“[I]t appears that costs for many key project components have been grossly exaggerated.”).

91. CRW's ongoing failure to submit a LTCP consistent with the requirements of the Clean Water Act and EPA's CSO Policy is a continued violation of the Clean Water Act, Clean Streams Law, and the NPDES Permit.

92. Despite the passage of nearly six years since the Partial CD, the RTKL and FOIA Documents do not include any documents that indicate evidence of significant progress on efforts to abate the outstanding Clean Water Act, Clean Streams Law, permit, or other violations related to Harrisburg's sewage discharges.

CAUSES OF ACTION

COUNT I

Violations of the Clean Water Act, Pennsylvania's Clean Streams Law, the NPDES Permits, and Implementing Regulations

93. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

94. CRW has incurred, and continues to incur, the violations alleged against it in the 2015 Complaint and incorporated herein. These violations of the Clean Water Act and Clean Streams Law remain unabated by the Partial CD and continue to date, as the Partial CD explicitly did not resolve those violations.

95. Upon information and belief based on the RTKL and FOIA Documents obtained from the Plaintiffs, the Parties have not made meaningful progress since the Partial CD was entered towards abating or resolving CRW's violations by a date certain or stopping CRW from violating the Clean Water Act or Clean Streams law in the future.

96. The violations identified in the 2015 Complaint as well as violations that have occurred since the filing of the 2015 Complaint will continue and remain unabated unless and until this Court imposes additional injunctive relief designed to achieve compliance with the Clean Water Act and Clean Streams Law.

97. CRW is subject to a civil penalty of up to \$56,460 per day for each day CRW continues to incur each of the violations described herein, including:

- a. Discharging SSOs in violation of the Clean Water Act, Clean Streams Law, NPDES Permit, and the Partial CD;
- b. Discharging dry weather CSOs in violation of the Clean Water Act, Clean Streams Law, NPDES Permit, and the Partial CD;
- c. Discharging effluent from the AWTF that exceeds permitted limits in violation of Clean Water Act, Clean Streams Law, and NPDES Permit;
- d. Failing to maintain NMCs that meets the requirements of EPA's CSO Policy;
- e. Failing to develop and implement an approved LTCP that meets the requirements of EPA's CSO Policy in violation of the Clean Water Act, Clean Streams Law, and NPDES Permit; and
- f. Failing to adhere to any other legal obligations in violation of the Clean Water Act, Clean Streams Law, NPDES Permit, and the Partial CD.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Intervenor LSRA respectfully requests that this Court provide the following relief:

- A. A declaration that CRW is in violation of the Clean Water Act, Clean Streams Law, the NPDES Permit, and the Partial CD;

B. A declaration that the Partial CD fails to require compliance with the Clean Water Act, Clean Streams Law, or the NPDES Permit;

C. An order requiring the parties to submit to this Court by a date certain, and no later than April 1, 2022, a proposed final consent decree with enforceable deadlines designed to achieve compliance with the Clean Water Act, Clean Streams Law, and the NPDES Permit;

D. An injunction against CRW compelling compliance with the Clean Water Act, Clean Streams Law, and the NPDES Permit;

E. An order enforcing the Clean Water Act and Clean Streams Law and imposing civil penalties against CRW pursuant to 33 U.S.C. §§ 1319, 1365 for outstanding violations;

F. An award of attorney's fees and reasonable litigation expenses including litigation costs and expert fees incurred in this case; and

G. Such other relief as this Court may deem just and appropriate.

Dated: May 6, 2021

Respectfully submitted,

/s/ Lisa Widawsky Hallowell

Lisa Widawsky Hallowell

Environmental Integrity Project

1000 Vermont Avenue NW, Suite 1100

Washington, DC 20005

Phone: (202) 294-3282

Fax: (202) 296-8822

Lhallowell@environmentalintegrity.org

Counsel for Plaintiff-Intervenor LSRA