COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY
TIDEWATER REGIONAL OFFICE
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Doug Domenech
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Regional Director

STATE WATER CONTROL BOARD
ENFORCEMENT ACTION - ORDER BY CONSENT
ISSUED TO
THE TOWN OF CAPE CHARLES
FOR
TOWN OF CAPE CHARLES WASTEWATER TREATMENT PLANT
VPDES Permit No. VA0021288

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and the Town of Cape Charles, regarding the Town of Cape Charles Wastewater Treatment Plant, for the purpose of resolving certain violations of the Permit, the State Water Control Law and the VPDES Permit Regulation.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.

2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.

3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "DMR" means Discharge Monitoring Report.

5. "Facility" or "Plant" means the Wastewater Treatment Plant located at 1270 Bayshore Road in the Town of Cape Charles, Northampton County, Virginia, which treats and discharges treated sewage and other municipal wastes, for the residents and businesses of the Town under VPDES Permit No. VA0021288.

6. "Letter of Agreement" or "LOA" means an informal enforcement mechanism, which represents an agreement between a responsible party and the Department to correct suspected violations.

7. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

8. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.

9. "Permit" means VPDES Permit No. VA0021288, which was issued under the State Water Control Law and the Regulation to the Town on September 21, 2004, and which expired on September 20, 2009. The Permit was renewed effective September 21, 2009, and expires September 20, 2014.

10. "Pollutant" means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 USC § 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. 9 VAC 25-31-10.

11. "Pollution" means such alteration of the physical, chemical, or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety, or welfare or to the health of animals, fish, or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses, provided that (i) an alteration of the physical, chemical, or biological property of state waters or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution but which, in combination with such alteration of or discharge or deposit to state waters by other owners, is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution." Va. Code § 62.1-44.3.

12. "Regulation" means the VPDES Permit Regulation, 9 VAC 25-31-10 *et seq.*

13. "SSO" means a sanitary sewer overflow.

14. "State Water Control Law" means Chapter 3.1 (§§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code.

15. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3.

16. "Town" means the Town of Cape Charles, a political subdivision of the Commonwealth of Virginia. The Town is a "person" within the meaning of Va. Code § 62.1-44.3.

17. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.

18. "TSS" means total suspended solids.

19. "Va. Code" means the Code of Virginia (1950), as amended.

20. "VAC" means the Virginia Administrative Code.

21. "VPDES" means Virginia Pollutant Discharge Elimination System.

22. "Warning Letter" or "WL" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.

SECTION C: Findings of Fact and Conclusions of Law

1. The Town owns and operates the Facility. The Permit allows the Town to discharge treated sewage and other municipal wastes from the Facility, to Cape Charles Harbor, in compliance with the terms and conditions of the Permit. The Facility has a design capacity of 250,000 gallons per day.

2. Cape Charles Harbor is located on the Chesapeake Bay. Cape Charles Harbor is listed in DEQ's 305(b) report as impaired due to high levels of *Enterococci,* for the presence of polychlorinated biphenyl ("PCB") in fish tissue, and for deficiencies in dissolved oxygen and aquatic plants (macrophytes). The sources of the *Enterococci* and PCB impairments are unknown; the sources of the dissolved oxygen and aquatic-plant impairments include municipal point-source discharges and SSOs.

3. On February 8, 2006, the Town had signed an LOA that addressed SSOs caused by infiltration and inflow. On April 23, 2008, the Town signed another LOA that addressed, among other things, deficiencies in the operation and maintenance of the facility, laboratory deficiencies, and exceeding the limits for ammonia and fecal coliform contained in the Permit.

4. Part I.A of the Permit requires the Town to submit DMRs monthly for discharges from the Facility to State waters.

5. In submitting its DMRs for the month of January 2009 the Town has indicated that it exceeded discharge limitations contained in Part I.A.1 of the Permit for *Enterococci.*

6. In submitting its DMR for March 2009, the Town indicated that it exceed discharge limitations for TSS and ammonia. The Town also reported an SSO from a manhole on March 18, 2009, which resulted in the unpermitted discharge of about 1,500 gallons of untreated sewage into State waters.

7. In submitting its DMR for April 2009, the Town indicated that it continued to exceed discharge limitations for *Enterococci.*

8. In submitting its DMR for May 2009, the Town indicated that it continued to exceed discharge limitations for TSS, fecal coliform, and *Enterococci.*

9. In submitting its DMR for June 2009, the Town indicated that it continued to exceed discharge limitations for TSS, ammonia and *Enterococci.*

10. In submitting its DMR for July 2009, the Town indicated that it continued to exceed discharge limitations for TSS, ammonia, fecal coliform, and *Enterococci.*

11. In submitting its DMR for August 2009, the Town indicated that it continued to exceed discharge limitations for TSS, ammonia and *Enterococci.*

12. In submitting its DMR for September 2009, the Town indicated that it continued to exceed discharge limitations for TSS and *Enterococci* as well as for Dissolved Oxygen ("DO").

13. In submitting its DMR for October 2009, the Town indicated that it continued to exceed discharge limitations for ammonia.

14. In submitting its DMR for November 2009, the Town indicated that it continued to exceed discharge limitations for ammonia and *Enterococci.*

15. In submitting its DMR for December 2009, the Town indicated that it continued to exceed discharge limitations for TSS, fecal coliform, ammonia and *Enterococci* and, in addition, had exceeded the discharge limitation for carbonaceous biochemical oxygen demand ("CBOD").

16. During an inspection of the Facility's laboratory on September 28, 2009, DEQ staff determined that the procedures used to analyze the concentrations of CBOD and *Enterococci* in the Facility's effluent did not comport with 40 Code of Federal Regulations Part 136 as required by Part II.A of the Permit.

17. TRO issued Warning Letters and Notices of Violation for the exceedances described in Sections C(5) through C(15) as follows: Warning Letters Nos. W2009-03-T-1007 (dated March 18, 2009), W2009-04-T-1005 (dated May 6, 2009), and W2009-06-T-1003 (dated June 10, 2009) and in Notices of Violation ("NOV") W2009-07-T-0001 (dated August 3, 2009), W2009-09-T-0001 (dated September 14, 2009), W2009-09-T-0002 (dated October 6, 2009), W2009-10-T-0001 (dated November 3, 2009), W2009-12-T-0001 (dated December 7, 2009), and W2010-02-T-0003 (dated March 9, 2010). The unpermitted discharge that resulted from the SSO described in Section C(6) was addressed in WL No. W2009-04-T-1005 and NOV No. W2009-07-T-0001. The laboratory deficiencies described in Section C(16) were addressed in NOV No. W2009-12-T-0001.

18. The Town responded to each of the Warning Letters and Notices of Violation. It attributed the exceedances of the discharge limitations for TSS to excess duck weed in the Facility's holding (or "polishing") pond. The excess solids, in turn, "masked" the ultraviolet lights in the effluent disinfection unit resulting in excess levels of fecal coliform and *Enterococci*. The exceedances of the discharge limitations for ammonia were attributed to the chronic inability of the antiquated equipment at the Facility to maintain adequate levels of dissolved oxygen in the effluent, especially during hot weather. The Town attributed the exceedances of the discharge limitations for November and December 2009 to extremely high flows. The SSO addressed in paragraph C(6) above was reportedly caused by the buildup of grease in the sewer lines. The Town stated that it has increased its maintenance effort on the Facility's holding pond and blowers and nozzles; has remedied the laboratory deficiencies noted during the September 28, 2009, laboratory inspection; and is now adding degreasers to the manholes upstream of the pump stations every two weeks.

19. Va. Code § 62.1-44.5 states that: "[E]xcept in compliance with a certificate issued by the Board, it shall be unlawful for any person to discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious substances."

20. The Regulation, at 9 VAC 25-31-50, also states that except in compliance with a VPDES permit, or another permit issued by the Board, it is unlawful to discharge into state waters sewage, industrial wastes or other wastes.

21. Va. Code § 62.1-44.15(5a) states that a VPDES permit is a "certificate" under the statute.

22. The Department has issued no permits or certificates to the Town other than VPDES Permit No. VA021288.

23. Cape Charles Harbor is a surface water located wholly within the Commonwealth and is a "state water" under State Water Control Law.

24. Based on the results of the DMRs and accompanying documentation submitted by the Town to DEQ for the months of January 2009 through December 2009, the September 28, 2009, laboratory inspection, and the Town's responses to the Warning Letters and

NOVs, the Board concludes that the Town has violated the Permit, Va. Code § 62.1-44.5 and 9 VAC 25-31-50, by discharging treated sewage and municipal wastes from the Facility while concurrently failing to comply with the conditions of the Permit, as described in paragraphs C(5) through C(16), above.

25. The Town has submitted documentation that verifies and DEQ staff inspected the Facility on December 8, 2009, and verified that the violation as described in paragraph C(16), above, has been corrected.

26. In order for the Town to complete its return to compliance, DEQ staff and representatives of the Town have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

27. Part I.B.7 of the Permit provides that, when the monthly average influent flow to the Facility reaches 95 percent of the permitted design capacity (i.e., 237,500 gallons per day) for each month of any three consecutive month period, the Town is required to submit to DEQ a plan of action and schedule for controlling any current or reasonably anticipated problem resulting from high influent flows.

28. DEQ has assigned the Facility wasteload allocations for nitrogen and phosphorus under General Permit VPDES Regulation for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (9 VAC 25-820-10 *et seq.*) through Registration No. VAN050001, which take effect January 1, 2011.

29. The Town has received funding from a number of State and Federal sources to replacing the Facility with an upgraded Facility at a separate location. The contract to construct the Facility upgrade was awarded on September 24, 2009, with construction to replace the existing Facility scheduled to be completed by November 1, 2011. The upgraded Facility will also have a design capacity of 250,000 gallons per day. Appendix B contains interim effluent limitations that the existing Facility will be expected to meet until the Facility upgrade is completed.

30. In submitting its DMRs for the months of September 2009 through February 2010, the Town indicated that the monthly average influent flow to the Facility had exceeded the 250,000 gallon per day design capacity for each of the six months. With a view toward eliminating the occurrence of SSOs and reducing influent flow to the Facility, the Town is in the process of upgrading the Town's waste water collection system. That upgrade is scheduled to be completed by April 30, 2011.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders the Town, and the Town agrees to:

1. Perform the actions described in Appendices A and B of this Order; and

2. Pay a civil charge of $9,030 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

The Town shall include its Federal Employer Identification Number (FEIN) (54-6001186) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF).

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of the Town for good cause shown by the Town, or on its own motion pursuant to the Administrative Process Act, Va. Code §§ 2.2-4000 *et seq.*, after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specifically identified in Section C of this Order. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the Facility; or (3) taking subsequent action to enforce the Order.

3. For purposes of this Order and subsequent actions with respect to this Order only, the Town admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.

4. The Town consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. The Town declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.

6. Failure by the Town to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.

7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.

8. The Town shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. The Town shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. The Town shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:

   a. the reasons for the delay or noncompliance;

   b. the projected duration of any such delay or noncompliance;

   c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and

   d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

   Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the Town intends to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and the Town. Nevertheless, the Town agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

    a. The Town petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or

b. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to the Town.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve the Town from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

12. Any plans, reports, schedules or specifications attached hereto or submitted by the Town and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. The undersigned representative of the Town certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind the Town to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of the Town.

14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signature below, the Town voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2010.

_____
Francis L. Daniel, Regional Director
Department of Environmental Quality

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The Town of Cape Charles voluntarily agrees to the issuance of this Order.

Date: May 18, 2010 By: Heather Arcos, Town Manager
(Person) (Title)
Town of Cape Charles

Commonwealth of Virginia
Town/County of Northampton

The foregoing document was signed and acknowledged before me this 18TH day of MAY, 2010, by Heather Arcos who is TOWN MANAGER of the Town of Cape Charles, on behalf of the Town.

Linda Frances Carola
Notary Public

7199648
Registration No.

My commission expires: 7/31/2012

Notary seal:

LINDA FRANCES CAROLA
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
NOTARY REGISTRATION NUMBER: 7199648
MY COMMISSION EXPIRES JULY 31, 2012

APPENDIX A
SCHEDULE OF COMPLIANCE

1. The Facility upgrade referenced in paragraph C(29) of this Order shall be substantially complete by November 1, 2011.

2. Beginning July 10, 2010, the Town shall submit quarterly progress reports to DEQ. Quarterly reports shall be due on January 10, April 10, July 10, and October 10 of each year and shall continue until the quarterly reporting date next following DEQ's issuance of a certificate to operate ("CTO") for the Facility upgrade. Quarterly reports shall include at a minimum: the status of the upgrades to the Facility and the waste water collection system and all maintenance performed on the Facility's polishing pond and disinfection unit during the preceding three-month period.

3. By January 10, 2011, the Town shall submit to DEQ for review and approval a plan of action and schedule ("Plan and Schedule") to ensure that the monthly average influent flow to the upgraded Facility will consistently remain below 95 percent of the upgraded Facility's design capacity. The Plan and Schedule shall include at a minimum: the upgrade of the Town's waste water collection system referenced in paragraph C(30) of this Order; measures in addition to the collection-system upgrade for controlling any current or reasonably anticipated problems resulting from high influent flows; and a demonstration that the monthly average influent flow to the upgraded Facility has consistently remained below 95 percent of its design capacity for a period of sixty days after the CTO for the upgraded Facility has been issued. Upon its approval by DEQ, the Plan and Schedule shall become a part of and enforceable under the terms of this Order. The Town shall complete the Plan and Schedule in accordance with its terms. Any changes to the approved Plan and Schedule shall not be initiated without advance notice to and approval by DEQ.

4. Unless otherwise specified in this Order, the Town shall submit all requirements of Appendix A of this Order to:

   Regional Director
   DEQ, Tidewater Regional Office
   5636 Southern Boulevard
   Virginia Beach, VA 23462

APPENDIX B

INTERIM EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

1. The parties acknowledge that, until the Facility upgrade has been completed and in operation, the Town may experience additional violations of discharge limitations for ammonia. Accordingly, pending completion of the Facility upgrade, the Town shall operate the Facility in a manner that produces the best quality effluent of which it is capable, in order to minimize such additional violations and minimize potential impacts to water quality

2. Effective January 1, 2011, the Town shall monitor and limit the discharges from Outfall 001 of the Facility in accordance with VPDES Permit Number VA0021288 and General Permit VPDES Regulation for Total Nitrogen and Total Phosphorus Discharges and Nutrient Trading in the Chesapeake Bay Watershed in Virginia (9 VAC 25-820-10 *et seq.*) through Registration No. VAN050001, except as specified below. These interim limits shall remain in effect until January 1, 2012.

Parameter Description	**Parameter Limits**		**Monitoring Requirements**	
	Concentration Average (mg/l)	**Mass Load (lbs/yr)**	**Frequency of Analysis**	**Sample Type**
Total Nitrogen	NL	NL	1/YR	CALC
Total Phosphorus	NL	NL	1/YR	CALC