



April 4, 2018

Mayor Rick Kriseman  
City of St. Petersburg  
St. Petersburg City Hall  
175 5th St. N.  
St. Petersburg, FL 33701  
Email: [mayor@stpete.org](mailto:mayor@stpete.org)

Councilmember Charlie Gerdes, Email: [Charlie.Gerdes@stpete.org](mailto:Charlie.Gerdes@stpete.org)  
Councilmember Brandi Gabbard, Email: [Brandi.Gabbard@stpete.org](mailto:Brandi.Gabbard@stpete.org)  
Councilmember Ed Montanari, Email: [Ed.Montanari@stpete.org](mailto:Ed.Montanari@stpete.org)  
Councilmember Darden Rice, Email: [Darden.Rice@stpete.org](mailto:Darden.Rice@stpete.org)  
Councilmember Steve Kornell, Email: [Steve.Kornell@stpete.org](mailto:Steve.Kornell@stpete.org)  
Councilmember Gina Driscoll, Email: [Gina.Driscoll@stpete.org](mailto:Gina.Driscoll@stpete.org)  
Councilmember Lisa Wheeler-Bowman, Email: [Lisa.Wheeler-Bowman@stpete.org](mailto:Lisa.Wheeler-Bowman@stpete.org)  
Councilmember Amy Foster, Email: [Amy.Foster@stpete.org](mailto:Amy.Foster@stpete.org)

**Re: Proposed Resolution Increasing Retainer Sum for Manson Bolves Donaldson Varnes, P.A. to \$500,000 in Clean Water Act Citizen Suit against the City of St. Petersburg, April 5, 2018 Agenda Item K.2**

Dear Mayor Kriseman and St. Petersburg City Councilmembers:

We write on behalf of the three non-profit plaintiff organizations involved with the Clean Water Act citizen suit against the City of St. Petersburg: Suncoast Waterkeeper, Our Children's Earth Foundation, and Ecological Rights Foundation. Through our ongoing legal campaign, we seek an enforceable agreement that will ensure compliance with federal law and provide our members and other St. Petersburg residents with certainty regarding eventual sewage system improvements. We write at a time when the litigation is accelerating to urge you to carefully consider the City's options for resolving this lawsuit and moving forward toward goals we believe we share; namely, ecosystem stewardship, public health protection, and necessary maintenance and improvements to St. Petersburg's beleaguered sewage collection and treatment system.

As you are aware, Executive Assistant City Attorney Joseph Patner has recommended the City Council approve a resolution increasing the retainer for Manson Bolves Donaldson Varnes, P.A. to \$500,000 in the Clean Water Act citizen suit brought by Suncoast Waterkeeper ("SCWK"), Our Children's Earth Foundation ("OCE") and

Ecological Rights Foundation (“ERF”) against the City of St. Petersburg.<sup>1</sup> We urge the City Council that rather than continue to dedicate a large amount of taxpayer dollars towards fighting the citizen suit with losing arguments, the City Council approve a much more modest sum and direct the City Attorney and its outside counsel at Manson Bolves to pursue in earnest settlement of this citizen suit.

We filed our federal court citizen suit because St. Petersburg has repeatedly violated the Clean Water Act by discharging raw and only partly treated sewage from its sewage collection and treatment system, endangering the health of our members and the public generally and significantly harming the environment. As St. Petersburg's consultants' reports and the testimony of St. Petersburg staff in depositions that we have taken in our case have well-documented, the St. Petersburg sewage collection system is aging and is in poor condition. St. Petersburg's consultant reports have documented in detail extensive defects in the City's sewer main lines that have led to excessive rainfall derived infiltration and inflow (RDII) into the City's sewage collection system. This excessive RDII has led to massive sewage spills from St. Petersburg's sewage collection system that befouled Tampa Bay's waters that are heavily used for water contact recreation and support sensitive wildlife. These spills have sent raw and partially treated sewage streaming into streets, storm drains, Tampa Bay, Clam Bayou, and various other local waters. These spills have repeatedly posed serious public health threats and created severe nuisance in exposing substantial numbers of people to raw and partially treated sewage. Raw and partially treated sewage contains a variety of human bacteriological, viral, and parasitic pathogens, and exposure to raw and partially treated sewage is well-known to cause various human illnesses. In addition to human waste, sanitary sewage contains various toxic chemicals in the wastes discarded by households and businesses. Thus, St. Petersburg's sewage spills pose a serious public health risk in exposing members of the public and SCWK, OCE and ERF's members to sewage-borne pathogens and various toxic pollutants. These sewage spills further contributed to killing off of vital sea grasses, bird deaths, and likely exacerbated red tide conditions with nutrient loading.

These sewage spills were caused by years of St. Petersburg's considerable neglect in undertaking the sewer line replacement and rehabilitation projects necessary to reduce RDII in its sewage collection system. There remains an urgent need for St. Petersburg to implement extensive sewer line repair and rehabilitation work to address its excessive RDII problem. The City continues to lag behind in completing work that should have been done years ago--well in advance of the irresponsible closure of the Albert Whitted Wastewater Reclamation Facility in the face of a consultant report

---

<sup>1</sup> SCWK, OCE and ERF are non-profit citizen groups with members across the United States, including Florida and specifically the Tampa Bay area. SCWK, OCE and ERF's members use the ocean and bay waters and other waters adjoining and in St. Petersburg for body contact water sports and other forms of recreation, wildlife observation, aesthetic enjoyment, educational study, and spiritual contemplation. These SCWK, OCE and ERF members are concerned about water quality and are and will continue to be adversely affected by St. Petersburg's sewage discharge violations.

expressly warning (presciently) city staff that the other existing treatment plants lacked the capacity to handle the added wastewater flow in a storm event that would result from closure of the Albert Whitted facility.

We further filed our lawsuit because, as has been repeatedly reported in the press, St. Petersburg officials have not been forthcoming to the public, members of the City Council, and officials in other cities, including Gulfport, concerning these spills and the public health threats they posed. St. Petersburg officials were slow to warn the public that large amounts of sewage had been spilled into waters they recreate in and have been less than candid about the causes of these spills and the fixes that are needed to prevent future spills. Against this backdrop, we felt it very important that there be citizen watchdogs backed by the authority of a federal court to ensure that St. Petersburg is transparent about its sewage spill problem going forward and the steps it is taking to curb future sewage spills.

OCE and ERF, along with other citizen groups that are part of the nationwide Waterkeeper Alliance that SCWK belongs to, have been involved in several sewage spill cases under the Clean Water Act in other areas of the country. All of these actions have been resolved through settlement agreements that have helped improve the local environment and curb sewage spill problems. We were hopeful that St. Petersburg would follow the example of these other cities. Unfortunately, instead, the City's administration and its legal representatives have elected to pursue an extensive legal campaign to defeat the citizen suit rather than settle.

To date, the City's lawyers have brought three motions in federal court that failed and a fourth one that is almost certain to soon fail. The first of these motions sought to have the case dismissed on the argument that our groups' members hadn't been sufficiently harmed by the sewage spills so as to have standing to sue. The City withdrew this motion when it became clear that the City was flat wrong. The City next brought a motion to have the case dismissed on the argument that a Florida Department of Environmental Protection (FDEP) consent order issued to the City would preempt and bar our citizen suit. Federal Court Judge Whittemore denied this motion, holding that the FDEP's administrative enforcement scheme is not comparable to the Clean Water Act, which would be required before any FDEP administrative enforcement action could preempt a Clean Water Act citizen suit (see attached January 19, 2018 Order from Judge Whittemore). The City also filed a motion requesting the court to stay our citizen suit until the outcome of the FDEP administrative action, but Judge Whittemore denied this motion as well, expressly finding that "though the terms of the final consent order may be considered with respect to any relief granted in this case, those terms will not resolve all the issues or moot the remedies available under the CWA" (see attached January 22, 2018 Order from Judge Whittemore).

The City has filed a fourth motion asserting two arguments: (1) that it is not liable under the Clean Water Act for several of its sewage spills in issue because they didn't reach surface waters protected under federal law, so-called "waters of the United States" and (2) our case is "moot" because the violations were "isolated, wholly-past,

and/or are not reasonably likely to recur.” Like the prior motions, this fourth motion also is likely to fail.

On the first argument as to “Waters of the United States,” a City employee acknowledged under oath that he had not prepared the key declaration in support of the motion and he further testified to an erroneous understanding of the legal term “waters the United States,” saying it only meant “any major water body that falls within the jurisdiction of the United States government.” This is plainly wrong, U.S. Environmental Protection Agency regulations define waters of the United States to not be limited to “major water bodies,” but instead to include any water subject to the ebb and flow of the tide, the territorial seas of the United States, wetlands adjacent to such waters, and any tributaries to any such waters--regardless of size. 40 C.F.R. § 230.3(o). The employee also testified that some of the spills that he identified in his declaration as not having reached waters of the United States plainly reached waters that are subject to the ebb and flow the tide (such as the 45th Avenue Canal and the 54<sup>th</sup> Avenue Ditch) or that are tributary to such waters (such as Jungle Lake, and another unnamed canal leading to Placido Bayou)--thus are jurisdictional waters of the United States.

The second argument is equally meritless — that the case is “moot” because we cannot show that the precise sewage spills that we list in our complaint will recur at the same locations that they did in the past. The City’s lawyers are again wasting the City’s resources in pressing this argument. United States Supreme Court decisions have made the law clear: to establish mootness, the City “bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189-90 (2000). To meet this standard, the City would have to show that it has eliminated *all possibility* of further sewage spills to waters of the United States not just from the precise locations where sewage spilled in the past but from anywhere within its still existing sewage collection system. Obviously, the City cannot meet this burden, given that it spilled over 400,000 gallons and illegally injected 15 million gallons into the deep wells during Hurricane Irma just six months ago. In addition, a City employee testified that addressing the cause of a specific past spill does not mean that a similar spill will not occur elsewhere in the system for the same reason. Clearly the violations are ongoing and our citizen claims are not moot.<sup>2</sup> See *San Francisco Baykeeper v. Tidewater Sand & Gravel*, 1997 U.S. Dist. LEXIS 22602, at \*\*26-27 (N.D. Cal. Sept. 9, 1997); *Save Our Bays & Beaches v. City & County of Honolulu*, 904 F. Supp. 1098, 1120-21 (D. Hawaii

---

<sup>2</sup> Even if the City’s compliance activities could moot a case for injunctive relief, they could not moot a case for declaratory relief and penalties. *Laidlaw*, 528 U.S. at 192-93 (penalties under the CWA can issue without an injunction); *San Francisco Baykeeper v. Tosco Corp.*, 309 F.3d 1153, 1159-60 (9th Cir. 2002) (“district courts can still impose civil penalties for violations that have already taken place”); *Nw. Envtl. Def. Ctr. v. Grabhorn*, 2009 U.S. Dist. LEXIS 101359, at \*\*48-49 (D. Or. Oct. 30, 2009). The citizen groups have proven and the City has effectively conceded that it has violated the Clean Water Act, at a minimum entitling the citizen groups to declaratory judgment, civil penalties and the recovery of litigation expenses.

1994) (finding plaintiffs' claims not moot when defendant continued to *operate* sewage plant).

As a result of the City electing to pursue a litigation approach rather than a settlement approach, we have had no choice but to pursue extensive discovery. To date, we have taken nine depositions of City and FDEP officials and have scheduled or proposed three to four additional depositions. We have also had to ask for extensive document productions. The City's attorneys have proposed taking their own deposition or depositions and have served us with requests for production of documents as well. This continues to add up to extensive costs for all concerned. Perhaps the City Council has not been apprised of this, but should the City continue to pursue this case to trial, rather than negotiate a Consent Decree with plaintiffs, Clean Water Act section 505 (33 U.S.C. § 1365) would make the City liable to our citizen groups for our attorneys fees and costs in addition to having to pay its own lawyers. Indeed, a citizen plaintiff in a Clean Water Act citizen suit that has established that a defendant violated the Clean Water Act is entitled to an award of fees and costs unless "special circumstances" are shown. *See Resurrection Bay Conservation Alliance v. City of Seward*, 640 F.3d 1087, 1092 (9th Cir. 2011). The court's discretion to deny a fee award to a prevailing plaintiff is narrow, and denial is "extremely rare." *St. John's Organic Farm v. Gem County Mosquito Abatement Dist.*, 574 F.3d 1054, 1062-64 (9th Cir. 2009); *Resurrection Bay Conservation Alliance*, 640 F.3d at 1092. Such an award easily be hundreds of thousands of dollars given the extensive litigation approach that the City has been pursuing and the court's denial of two of the City's motions already.

Additionally, if the City continues to pursue a litigation approach rather than a settlement, it will almost certainly be on the hook for potentially large civil penalties that the Clean Water Act will mandate be paid to the U.S. Treasury. This would be an unfortunate turn of events, as settlements of Clean Water Act citizen suits need not include penalties payable to the U.S. Treasury, and our citizen groups would advocate that rather than pay a fine to the U.S. Treasury, St. Petersburg fund locally environmentally beneficial projects.

With respect to the City's potential civil penalty liability for its Clean Water Act violations, numerous cases have held that once a defendant's Clean Water Act liability is established, the district court's assessment of some amount of civil penalty is mandatory. *See Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990) ("This language [Clean Water Act § 309(d)] makes clear that once a violation has been established, some form of penalty is required."); *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1397 (9th Cir. 1995) ("We agree with the [Fourth and Eleventh C]ircuits that have held that civil penalties are mandatory under section 309(d)"); *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986) (finding that section 309(d)'s penalty provision "leaves little doubt that . . . a penalty in some form is mandated. Liability under the [CWA] is a form of strict liability."); *Haw. 's Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993) ("Civil penalties are mandatory once [CWA] violations are found...."); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 48 n.6

(N.D.N.Y. 2003). Accordingly, the issue is not whether, but how large a civil penalty the court will assess for the City's violations. This penalty must be substantial to deter Clean Water Act noncompliance and impose appropriate retribution. *Laidlaw Env't'l Serv's*, 528 U.S. at 185 ("A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again."); *see, e.g., United States v. City of San Diego*, 1991 WL 163747 at \*3-6, 21 ELR 21,223 (S.D. Cal. Apr. 18, 1991) (penalizing San Diego \$3 million for Clean Water Act violations, the most serious of which were about 400 sewage spills to waters); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2nd Cir. 2006); *cert. denied City of New York v. Catskill Mts. Chapter of Trout Unlimited, Ltd.*, 127 S. Ct. 1373 (2007) (materially approving of District Court assessment of \$5,749,000 CWA civil penalty against the City of New York even though violations created no substantial environmental harm and city reasonably believed its discharges were lawful); *Upper Chattahoochee Riverkeeper v. Atlanta*, 98 F. Supp. 2d 1380, 1384 (N.D. Ga. 2000) (stipulated penalty of \$20,000 per sewage spill imposed, rejecting defendant's argument that this penalty was excessive under Clean Water Act section 309(d)'s penalty assessment factors).

Moreover, should this matter be litigated, the Court would be compelled to set a civil penalty large enough to be at least equal to the City's economic benefit of noncompliance to achieve deterrence. *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 529-531 (4th Cir. 1999), *cert. denied, Smithfield Foods, Inc. v. United States*, 531 U.S. 813 (2000); *United States v. Dean Dairy*, 150 F.3d 259, 263-264 (3rd Cir. 1998); *United States v. Allegheny Ludlum Corp.*, 187 F. Supp. 2d 426, 436-437 (W.D. Pa. 2002), *aff'd in part and vacated in part on other grounds United States v. Allegheny Ludlum Corp.*, 366 F.3d 164 (3rd Cir. 2004). St. Petersburg's consultants' reports well-establish that the City should have incurred large sums years ago for the capital projects needed to prevent the City's large SSOs in recent years. The City has enjoyed a very large economic benefit in avoiding these costs for several years. *See, e.g., Sierra Club, Lone Start Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 574 (5th Cir. 1996) (economic benefit includes both avoided and delayed costs of compliance); *United States v. City of Beaumont*, 786 F. Supp. 634, 637-38 (E.D. Tex. 1992) (\$400,000 civil penalty imposed to recover city's economic benefit of noncompliance of \$316,000 and to impose additional deterrent penalty).

Consideration of the remaining statutory penalty criteria would warrant increasing the City's civil penalty above its economic benefit of noncompliance. In spilling raw sewage on multiple days to waters used by the public, the City has posed public health risks, making its violations necessarily serious. *See City of San Diego*, 1991 WL 163747 at \*3. The economic impact of the penalty factor would not weigh in favor of any reduction in the City's civil penalty. At most, the penalty would necessitate a slight increase in the City's sewer rates, which alone is insufficient basis for reducing a city's penalty. *Hawaii's Thousand Friends*, 821 F. Supp. at 1396 ("The impact of a penalty on the city will be a slight increase in the monthly rates paid by users of the sewer system. Therefore, economic impact is not a mitigating factor."). The City's belated efforts to reduce its sewage spills would not warrant any substantial reduction in its civil penalties

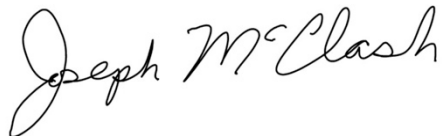
as these efforts should have commenced before our suit. The sewage spills proved in this case have extended over several years, weighing against any reduction in the City's penalty for the prior history of such violations factor. *See, e.g., United States v. Smithfield Foods*, 972 F. Supp. 338, 349 (E.D. Va. 1997), *rev'd in part on other grounds*, 191 F.3d 516.

In closing, we again urge the City Council not to approve a large increase in the litigation budget to continue fighting our citizen suit, but instead to increase the sought retainer amount by a modest sum while directing its counsel to pursue settlement. The citizen groups remain ready to reach a reasonable settlement along the lines of the many settlement agreements reached in similar cases. A settlement will: (1) ensure that the City will implement the measures needed to curb its sewage spills given the oversight and authority of the federal court, (2) provide for appropriate consultation with and accountability to the public and our group as citizen watchdogs, and (3), excuse the City from paying large civil penalties to the U.S. Treasury and to keep funds that otherwise might be paid to the federal government available for local beneficial use.

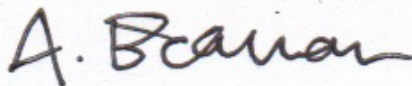
We know that you share our goals to protect our environment. We applaud the City for its many environmentally-friendly initiatives. However, we encourage you not to be lulled into a path of a legal standoff that prevents constructive dialogue to implement a reasonable solution. There is a problem, and we are prepared to offer a solution that will result in full compliance with the Clean Water Act, a resolution of our citizen suit, and certainty for St. Pete residents.

Thank you for consideration of our views.

Sincerely,



Joseph McClash  
Board Chair  
Suncoast Waterkeeper



Annie Beaman  
Director of Advocacy & Outreach  
Our Children's Earth Foundation

R. Kriseman, et al.

8

April 4, 2018

Cc: Brian Bolves, Esq.

Douglas Manson, Esq.

Manson Bolves Donaldson, P.A.

Justin Bloom, Esq.

Molly Coyne, Esq.

Frederic Evenson, Esq.

Kaki Schmidt, Esq.

Christopher Sproul, Esq.