UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

TOWN OF WOLFEBORO	)	
	)	Civil No. 1:12-cv-000130-JD
Plaintiff,	)	
v.	)	
	)	
WRIGHT-PIERCE,	)	
	)	
Defendant.	)	

AMENDED VERIFIED COMPLAINT

NOW COMES the Plaintiff, the Town of Wolfeboro, by and through their attorneys, Hinckley, Allen & Snyder LLP, and complains against the Defendant, Wright-Pierce, as follows:

PARTIES

1. The Town of Wolfeboro ("Wolfeboro") is a New Hampshire municipal corporation with a place of business at 84 South Main Street, P.O. Box 629, Wolfeboro, New Hampshire 03894.

2. Defendant Wright-Pierce ("WP") is a Maine corporation with its principal place of business at 99 Main Street, Topsham, ME 04086.

JURISDICTION AND VENUE

3. Jurisdiction is based on 28 U.S.C. §1332(a)(1), which grants this Court original jurisdiction over actions between citizens of different states when the amount in controversy exceeds $75,000 exclusive of interest and costs.

4. Venue is proper pursuant to 28 U.S.C. § 1391(a)(2), in that a substantial part of the event or omissions giving rise to the claims occurred in the State of New Hampshire.

FACTS COMMON TO ALL COUNTS

History of Wolfeboro's Treatment of Wastewater

5. Wolfeboro operates a Wastewater Treatment Facility ("WWTF") which is permitted to treat up to 600,000 gallons of wastewater per day.

6. For at least the past thirty (30) years, Wolfeboro has stored its treated wastewater in an unlined lagoon known as an Effluent Storage Pond ("ESP").

7. Prior to the events giving rise to this Complaint, Wolfeboro disposed of treated effluent by pumping the effluent from the ESP over numerous "spray fields" covering approximately 100 acres. This disposal method is known as a "slow rate spray irrigation effluent disposal system."

8. The slow rate spray irrigation effluent disposal system was permitted by the New Hampshire Department of Environmental Services ("NHDES") on February 14, 2000 for a five (5) year period pursuant to permit no. GWP-198705015-W-001 (the "Permit").

9. Under the terms of the Permit, Wolfeboro was allowed to dispose of treated effluent by utilizing spray fields between May and October annually at an application rate of 2 inches per week of wastewater application (including precipitation).

Wolfeboro's Application for Permit Renewal

10. After NHDES issued the Permit, NHDES sent Wolfeboro numerous letters between September 12, 2003 and November 5, 2004 citing various concerns with Wolfeboro's disposal of treated effluent. During this time, NHDES observed overland flow from spray areas and directed Wolfeboro to obtain additional disposal areas and to develop a long range site management plan.

11. On January 24, 2005, Wolfeboro submitted an "Application for Permit Renewal" to NHDES in which it sought to continue utilizing its, then current, system of treating wastewater and storing and disposing of treated effluent.

12. On April 19, 2005, NHDES issued an Administrative Order (No. WD 05-014) (the "Administrative Order") identifying several existing violations in Wolfeboro's system of treating wastewater and storing and disposing of treated effluent. NHDES directed Wolfeboro to take the following actions:

A. Wolfeboro was prohibited from allowing any expansion, additions, or changes to its sewer collection system, the effect of which would be to increase the volume of wastewater flow to the wastewater treatment facility;

B. Wolfeboro was required to submit an updated map to NHDES showing, *inter alia*, the location of spray fields, the ESP, surface water areas, and wetlands and roads by July 1, 2005;

C. Wolfeboro was required to submit a "Wastewater Treatment and Disposal Management Plan" by December 31, 2005;

D. Wolfeboro was required to implement all necessary improvements to bring its WWTF into compliance with the Water Pollution Act and NH RSA 485-A by May 1, 2007; and

E. Wolfeboro was required to submit a scope of work and schedule for implementing facility improvements necessary to meet the future capacity requirements of the WWTF by May 1, 2007.

Engagement of Wright-Pierce as the Engineer of Record

13. In September of 2005, Wolfeboro's engineering consultant, Woodward & Curran, issued an "Effluent Disposal System Evaluation Report." In response to the issues identified in that report, Wolfeboro sought to engage an outside engineering consultant to assist in responding to the Administrative Order issued by NHDES.

14. On or about November, 11, 2005, Wolfeboro notified WP that it intended to select WP as the Engineer of Record to assist Wolfeboro in responding to and complying with the Administrative Order.

15. WP issued a status update memorandum to Wolfeboro on or about November 30, 2005 in which it identified the scope of services that it had performed to date and recommended an additional scope of services.

16. On or about December 12, 2005, Wolfeboro formally issued two purchase orders to WP. These purchase orders were signed by the Town on December 28, 2005 and by NHDES on January 4, 2006.

17. Pursuant to the terms of the second purchase order, WP agreed to develop a "Wastewater Treatment and Disposal Management Plan as per Administrative Order No. WD 05-104." WP's fee for the scope of services set out in Purchase Order No. 001934 was $27,000.

18. The first purchase order (Purchase Order No. 001930) also required WP to perform soil evaluations on three (3) parcels of land for a fee of $12,000.

19. On or about December 30, 2005, WP wrote to NHDES on Wolfeboro's behalf to submit Wolfeboro's draft Wastewater Treatment and Disposal Management Plan and to update NHDES on Wolfeboro's progress in developing the plan. The Draft Wastewater Treatment and

Disposal Management Plan was subsequently updated by WP on January 24, 2006 and April 18, 2006.

20. WP's December 30, 2005 letter to NHDES identified, *inter alia*, a "Rapid Infiltration System" as one of the options available to Wolfeboro to expand its effluent disposal facilities. A Rapid Infiltration System allows treated effluent to be discharged into the ground at various locations, which results in treated effluent percolating through the soil and eventually into the groundwater.

21. WP's December 30, 2005 letter advised the NHDES that Wolfeboro was conducting a "town-wide" investigation to identify potential sites for the location of a rapid infiltration disposal system.

22. WP described the action it would take on Wolfeboro's behalf to investigate potential rapid infiltration sites as follows: *"This effort will utilize available soils and mapping data and a windshield survey to identify areas and parcels that may be suitable for use with a moderate or high rate of infiltration means to disposal (sic) of treated wastewater effluent. If the effort results in the identification of suitable parcels, the Town intends to make inquires into the availability of parcel access to complete additional investigations and evaluate acquisition."*

23. At a meeting of the Board of Selectmen on January 4, 2006, Wolfeboro approved the placing of two (2) wastewater improvement related bonds. The value of the first bond was $1,737,000. This bond was intended to cover the costs of four (4) tasks to be performed by WP and also contained allowances for three (3) items: (1) evaluation of the physical characteristics and disposal capacity of the existing spray field ($130,000); (2) evaluation of alternatives to provide expanded and/or additional effluent disposal capacity ($630,000); (3) evaluation of the alternatives to reduce the amount of nutrients in treated effluent ($107,000); (4) development of

a long-term wastewater plan to meet future needs ($220,000); (5) an allowance for the design of disposal facilities, additions and/or improvements ($250,000); (6) an allowance for land acquisition ($150,000); and (7) an allowance for ice crystallization during winter 2006/2007 ($250,000). The value of the second bond was $600,000. The second bond was intended to provide financing for the design and construction of infiltration and inflow reduction improvements.

24. On or about January 24, 2006, WP again wrote to the NHDES on Wolfeboro's behalf ("Wastewater Treatment and Disposal Management Plan (Update 1)"). In this letter, WP described Wolfeboro's "Wastewater Treatment Disposal Management Plan", which WP had created and was under contract with Wolfeboro to finalize and execute in part, as being "multifaceted". In the letter, WP summarized the actions to be taken by WP, on Wolfeboro's behalf during 2006 as follows:

- *" Evaluate all feasible effluent disposal options and be in a position to begin the design of the most cost effective solution(s) prior to the 2007 Town Meeting;*
- *Evaluate and implement cost effective WWTF improvements to reduce nutrients in the near-term, while planning for the future; and*
- *Proactively pursue I/I reduction through inspection, enforcement, design and construction activities."*

25. Wolfeboro authorized a bond in March of 2006 to fund the tasks mandated by NHDES's Administrative Order. These tasks included evaluating and mapping the existing spray fields, evaluating the options available to Wolfeboro to expand its effluent disposal facilities, and designing the selected option.

26. Wolfeboro issued several purchase orders to WP on April 18, 2006. These purchase orders became signed contracts on or about May 25, 2006 ("Contract 1" and "Contract #2" and "Contract #3" and "Contract #4"). Pursuant to the terms of the contracts, WP agreed to perform the tasks mandated by NHDES's Administrative Order, as well as other tasks specifically identified in the scope of services for each contract.

Contract #1

27. The scope of services of Contract #1, dated May 25, 2006, included the *"mapping and evaluation of character and capacity of existing spray field(s)."* The fee for this scope of services was $110,000.

Contract #2

28. On or about May 16, 2006, Wolfeboro signed a contract with WP under which WP was to perform an *"evaluation of alternatives to expand effluent disposal including: continued and/or expanded use of spray field; use of ice-crystallization (i.e., E-Snow); and effluent reuse as per the attached Plan of Study."* ("Contract #2"). Contract #2 was approved by the NHDES on May 25, 2006.

29. A detailed scope of work to be performed by WP under Contract #2 was set out in the "Plan of Study" dated April 17, 2006 which was attached to and expressly incorporated into Contract #2 by paragraph 1(A).

30. Contract #2 required WP to "evaluate disposal system alternatives associated with an expanded spray system and the application of E-Snow, as well as, assess the feasibility of effluent reuse". Further, Contract #2 required WP to "*produce a complete and definitive Engineering Report to meet current [NHDES] requirements* ***and to perform any and all engineering incidental thereto.***" (emphasis added).

31. The fee for WP's performance of the scope of services set out in Contract #2 was $249,000.

32. The evaluation of rapid infiltration systems as a potential means of satisfying Wolfeboro's future effluent disposal needs was expressly excluded from the Contract #2 scope of work.

Contract #3

33. On or about May 16, 2006 Wolfeboro signed a third contract with WP under which WP was to perform a *"hydrogeological investigation of rapid infiltration for wastewater treatment plant effluent disposal"* ("Contract #3"). Contract #3 was approved by the NHDES on May 25, 2006.

34. A detailed scope of work to be performed by WP under Contract #3 was set out in the "Plan of Study" dated April 17, 2006 which was attached to and expressly incorporated into Contract #3 by paragraph 1(A).

35. The "Plan of Study" for Contract #3 provided that the purpose of Contract #3 was "to evaluate the disposal system alternatives associated with Rapid Infiltration (RI)". Further, Contract #3 required WP to *"produce a complete and definitive Engineering Report to meet current [NHDES] requirements* ***and to perform any and all engineering incidental thereto****."* (emphasis added).

36. The original fee for WP's performance of the scope of services set out in Contract #3 was $160,000.

37. The original Contract #3 "Plan of Study" set out a three phased approach which WP was to follow when conducting the evaluation of the disposal system options available to Wolfeboro. In a technical memorandum dated September 19, 2006 (the "2006 Technical

Memorandum"), WP had identified site "WOLF-1" as *"having the highest potential and within close proximity to the existing infrastructure to dispose of the Town's present and future treated wastewater effluent."* Subsequently, field investigations performed by WP had identified three *"distinct areas"* within WOLF-1 which WP believed had *"very permeable soils with an appropriate depth to groundwater"* and were therefore potentially suitable for locating a rapid infiltration disposal system. Simply put, Contract #3 required WP to further explore a site it had already identified as being potentially suitable for locating a rapid infiltration disposal system to determine which, if any, area within WOLF-1 was most suitable for locating such a system.

38. As described in Contract #3, Phase I Site Inspections were to be performed by WP on all three (3) areas within WOLF-1 identified by WP as being most suitable for locating a rapid infiltration disposal system. Phase II Site Inspections were to be performed by WP on the two (2) most favorable areas and Phase III Site Inspections were to be performed by WP on the most favorable of the three areas.

39. The "Plan of Study" for Contract #3 indicated that WP would conduct a site walk through and perform geologic mapping of the entire WOLF-1 site followed by limited test pitting (the "Phase I Site Investigations"). The Contract #3 "Plan of Study" represented that the purpose of the test pitting was to *"obtain preliminary characterization of soil and shallow geologic deposits in order to select the best of three sites for further detailed subsurface investigations."*

40. The "Plan of Study" for Contract #3 further provided that WP would perform initial test borings and install monitoring wells in order to further evaluate the three (3) areas within Wolf-1 to assess their suitability as a location for a rapid infiltration disposal system. The "Plan of Study" provided that these investigations would produce *"key data"* which would

indicate "the overall saturated and unsaturated thickness of overburden deposits [to] provide a preliminary characterization of saturated and unsaturated zone permeability."

41. Following the drilling of test borings and the installation of monitoring wells, the Contract #3 "Plan of Study" required WP to perform hydraulic testing and preliminary infiltration testing on the two (2) areas within WOLF-1 which WP had determined was most suited for locating a rapid infiltration disposal system (the "Phase II Site Investigations"). The "Plan of Study" provided that the purpose of the preliminary infiltration testing was to "*obtain preliminary characterization soils ability to vertically transfer treated effluent into the ground.*" In addition, the Phase II Site Inspections required WP to perform a preliminary residential and public well water analysis and to conduct a preliminary predictive mounding analysis. The purpose of the mounding analysis was to show "*the highest potential at assumed wastewater loading rates.*"

42. As anticipated, on February 22, 2007, Contract #3 was amended to include an addition scope of services for the performance by WP of the Phase III Site Investigations. The Contract #3, Amendment No. 1 "Plan of Study" required WP to perform load cell and wick testing on the area identified by WP as being the site most suitable for locating a rapid infiltration disposal system ("Wolf-1A"). In addition, the Phase III Site Investigations required WP to perform modeling using the data acquired by WP under Contract #2 and Contract #3. Further, the Contract #3, Amendment No. 1 "Plan of Study" required WP to prepare and submit a groundwater discharge permit application on Wolfeboro's behalf. WP's fee for Contract #3 was increased by an additional $179,000 for this scope of services pursuant to this Amendment No. 1. WP's combined fee for Contract #3 was $339,000.

43. Upon information and belief, WP failed to fully and adequately investigate potential sites suitable for the discharge of treated effluent. Further, WP failed to adequately perform a site hydrogeoligic investigation on the specific site (Wolf-1A) which WP identified and recommend be acquired and used by Wolfeboro as the site for a rapid infiltration system for its effluent disposal. WP represented that Wolf-1A was able to handle the disposal of more than 600,000 gallons per day of treated effluent as a monthly average for twelve (12) months per year. In fact, the site is unable to handle that amount of treated effluent. The current capacity is approximately 340,000 gallons per day based on subsequent reports.

44. Specifically, WP did not perform an adequate geotechnical analysis of Wolf-1A sufficient to confirm WP's recommended design flow of 600,000 gallons per day. Based on WP's visual observations, data collected and information available from the results of the groundwater flow modeling, WP should have recognized the potential for slope stability and seepage issues at Wolf-1A and accordingly performed a thorough geotechnical analyses on the selected site. WP's Preliminary Design Report dated March 2007 contains a section titled *"4.3 GEOTECHNICAL DESIGN CRITERIA, Effluent Disposal Site,"* but no geotechnical analysis or design was performed by WP prior to the construction of the rapid infiltration disposal system at Wolf-1A.

45. WP did not collect enough data to accurately and more completely characterize the subsurface conditions at Wolf-1A. For instance, groundwater elevation data in Table 1 of the WP's 2006 Technical Memorandum indicated the presence of groundwater channeling toward the area of MW-8 within Wolf-1A. However, WP failed to subsequently collect sufficient data in and surrounding that area to adequately characterize the area and degree of groundwater channeling to the extent warranted for a project of this scale and cost.

46. WP simplified soil permeability distribution laterally throughout Wolf-1A, did not acknowledge vertical permeability variation in the groundwater flow model, and chose permeabilities for the model that were less conservative (higher) than the actual permeabilities.

47. WP's groundwater flow model of Wolf-1A incorporated the use of drain cells to model the wetlands, which artificially depressed the potentiometric contours in the areas above the wetlands and under-predicted the effect of the proposed discharge just uphill from the western and central wetland's groundwater discharge areas, where groundwater breakouts and geotechnical issues have occurred.

48. However, despite WP's failure to adequately investigate its recommended location for the construction of the rapid infiltration basins at Wolf-1A, at the time WP recommended the purchase of Wolf-1A for use as the site of Wolfeboro's new rapid infiltration disposal system, WP possessed considerable evidence that the 600,000 gallons per day loading rate might not be attainable and that, at a minimum, additional investigation was necessary to confirm the attainable loading rate, evaluate the potential geotechnical issues and determine whether additional capacity should be sought elsewhere. At the time it was recommending Wolf-1A as the best location for the construction of a rapid infiltration disposal system, WP was in possession of information which should have caused it to perform further analysis and/or qualified its recommendation of Wolf-1A, namely:

A. the steeply-sloped nature of Wolf-1A, which was referenced in the Preliminary Design Report but not identified by WP as a cause for concern;

B. the information available from logs of borings drilled in the lower half of the slope at Wolf-1A, which indicated that below the 560-foot elevation, which runs through the middle of the western and central wetlands, the

stratified drift deposits become poorly sorted and finer in grain size. As WP pointed out in its critique of kame deltas in the 2006 Technical Memorandum, the poorly-sorted, finer-grained material at depth restricts the downward migration of wastewater;

C. the heterogeneity and anisotropy of the kame delta deposit, as noted in WP's Preliminary Design Report dated March 2007and WP's Phase 3 reports identifying the presence of *"non-favorable materials"* at boring B-7, above the eastern wetland, due to the presence of dense silty fine sand and shallow depth to bedrock. Boring B-10 also identified the silty sand layers at multiple elevations, but was identified as representing an *"excellent (permeable) soil material"* in the 2006 Technical Memorandum; and

D. the results of the groundwater flow model simulation of the 600,000 gallons per day loading rate, which showed: modeled potentiometric contours at elevations equal to or actually higher than the ground surface elevation contour in the area between the northern half of the central wetland extending eastward beyond boring B-7 to the right of way; and the modeled potentiometric elevation at the top of the central wetland rising by approximately 20 feet from the calibrated pre-loading conditions.

49. However, despite those very clear warning signs that Wolf-1A was not suitable for use as site for a rapid infiltration disposal system capable of handling 600,000 gallons per day, WP represented to Wolfeboro that Wolf-1A was a "gold mine" and that Wolfeboro should purchase the site and construct a rapid infiltration disposal system at that location.

Contract #4

50. The scope of services of Contract #4, dated May 25, 2006, was to provide Wolfeboro with a "comprehensive Wastewater Treatment Facility Basis of Design Report with concept layouts, updated costs, recommendations, and suggested financing and implementation plan."

51. The fee for this scope of services was $87,000.

52. This contract amount was later increased to $114,500 by an amendment dated June 7, 2007 with no change in the scope of work.

The Selection of the Rapid Infiltration Disposal System

53. WP's 2006 Technical Memorandum, identified Wolf-1A as the location recommended by WP for the construction of a rapid infiltration disposal system.

54. In the 2006 Technical Memorandum, WP characterized the geological formation found at Wolf-1A as a segmented esker. Subsequently, WP revised this classification to a classification of kame deltas.

55. In December of 2006, WP submitted a "Wastewater Effluent Disposal Alternatives Draft Report" to NHDES (the "December 2006 Report") in which it identified effluent disposal options.

56. This report was finalized by WP in March 2007. One of the options included in WP's "Wastewater Effluent Disposal Alternatives Report" dated March 2007 (the "March 2007 Evaluation") was the construction of a rapid infiltration disposal system on the Wolf-1A site. Indeed, WP indicated in the March 2007 Evaluation that it had a *"high degree of confidence"* that Wolf-1A would have the ability to dispose of the entire design flow of 600,000 gallons per day.

57. In March of 2007, WP submitted a "Preliminary Design Report" in which it represented that the rapid infiltration disposal system identified in the December 2006 Report and the March 2007 Evaluation was the preferred option for expanding Wolfeboro's effluent disposal facilities.

58. The Preliminary Design Report recommended the "Wolf 1A" or "Whitten West" site for the construction of a rapid infiltration disposal system (also known as a Rapid Infiltration Basin or a "RIB" or "RIB system") (The design and construction of the RIB system is hereinafter referred to as the "Project").

59. WP represented that the construction of a RIB at this location was Wolfeboro's best long term solution for the disposal of wastewater effluent.

60. As a result of WP's recommendation and representation, Wolfeboro negotiated the purchase of a 35 acre parcel (the "Wolf 1A" site, hereinafter "the Site") in 2007 for the specific purpose of constructing a rapid infiltration system on the site. Wolfeboro paid approximately $1,050,000.00 to purchase the Site.

61. In March of 2007, WP prepared three (3) engineering reports: (1) the March 2007 Evaluation, (2) Whitten West Site Wolfeboro – Phase 3 Hydrogeologic Report, and (3) the Preliminary Design Report.

62. Based on these reports, WP prepared and obtained NHDES approval of a Groundwater Discharge Permit for the Site for the disposal of an annual average of 600,000 gallons per day of treated effluent in accordance with permit number GWP-200707014-W-001.

63. WP prepared and obtained NHDES approval in 2007 for the construction of RIBs 1, 2, and 3 on the westerly portion of the Site.

WP's Design of the Rapid Infiltration Disposal System

64. Wolfeboro entered into a contract with WP on or about March 21, 2007 ("Contract 5") to design a *"Treated effluent disposal system including new effluent pump station, force main, and Rapid Infiltration Disposal Facility."*

65. The fee for this scope of services was $343,900.

66. The scope of services was modified in Amendment 1 to include, among other things, additional sub-surface investigations.

67. WP's fee was increased to $442,400 as a result of Amendment 1.

68. The scope of services of Contract #5 was subsequently modified by Amendment 2 and WP's fee was further increased to $636,200.

69. Despite all of the previous data collection, including but not limited to borings, test pits, monitoring wells and infiltration testing, WP continued to disregard potential geotechnical issues at the steeply sloped Wolf-1A site. References in the Preliminary Design Report comparing the Wolf-1A site characteristics to another RIB system constructed in Conway, NH implied a level of confidence in the Wolfe-lA site similar to the Conway site, despite major and important differences in the surficial geology and hydrogeology of the sites. In addition, the design of the effluent pump system described in the Preliminary Design Report stated that the pumps were sized to enable the instantaneous peak flow of effluent (approximately 1.8 MGD) directly to the RIBs should the storage pond be taken off-line, suggesting that the RIBs could accommodate much higher flows than the 600,000 gallons per day for short periods of time, if the need should arise.

70. At each stage of WP's design of the RIB at Wolf-1A, opportunities to perform additional subsurface investigations to address, investigate and analyze areas of geotechnical concern were disregarded or omitted by WP, and the issues pertaining to stability of slopes were not addressed.

71. In sum, Wolfeboro paid WP over $1,500,000 for engineering services pursuant to five (5) separate contracts concerning the WWTF, the development of effluent disposal alternatives, and the design of the rapid infiltration system.

Construction of RIBs 1, 2 and 3

72. WP's design called for the construction of three (3) RIBs.

73. Construction of RIBs 1, 2 and 3 began in 2008 and was completed in 2009.

74. Operation of the RIBs commenced on March 3, 2009.

Discovery of Defects

75. The first significant performance issues with the RIB's began to surface after six (6) weeks of operation.

76. On April 3, 2009 and April 4, 2009, WP conducted a site performance test and concluded that "everything looked good."

77. On or about April 17, 2009, Wolfeboro staff noticed groundwater coming to the surface above and around the Central Groundwater Discharge Area.

78. On or about April 20, 2009, Wolfeboro staff observed that this area had developed into a slope failure area.

79. As a result of the observed defects, RIB flow was reduced to low levels for approximately 20 days.

80. On or about June 8, 2009, a significant sink hole developed along the northwest side of the Central Groundwater Discharge Area and fine sands had migrated from the hillside down slope, covering an area of approximately 1600 square feet.

81. As a result of the defects discovered on or about June 8, 2009, discharge to the RIBs was stopped for approximately 6 days to allow NHDES and WP to address the issue.

82. Wolfeboro reported the April 20, 2009 and June 6, 2009 incidents to NHDES and provided a report to NHDES on August 12, 2009. The Report included an Action Plan requiring a more detailed study of the RIB site.

83. In July of 2009, the Effluent Storage Pond ("ESP") had increased to approximately 76 million gallons (roughly 82% of capacity). As a result of the observed defects with the RIBs noted above, Wolfeboro reduced the RIB flow to less than 400,000 gpd and operated the Spray Irrigation System from August 1 through October, bringing the ESP down to 34 million gallons by October 28, 2009.

84. On or about August 26, 2009, WP, Wolfeboro, and NHDES attended a meeting at which NHDES required Wolfeboro to design and construct RIBs 4 and 5.

85. As a result of the meeting, Wolfeboro proceeded with the design and construction of RIBs 4 and 5 in 2010.

86. Operation of RIBs 4 and 5 commenced on June 1, 2010.

87. The total costs related to the study, engineering, land purchase, construction of the RIB facilities, and dealing with the defects was over $7.1 million.

Remedial Measures

88. The RIBs do not perform as intended, as designed, as represented, and/or as warranted by WP.

89. As a result of the defects and deficiencies in WP's design of the rapid infiltration system, Wolfeboro is unable to fully comply with the DES permit for the disposal of its treated effluent.

90. Wolfeboro will be required to operate the RIB site in a manner inconsistent with WP's design, resulting in significant damages to Wolfeboro, which may include, but are not limited to:

A. consulting, engineering, design, construction, operating, and maintenance costs and fees associated with the construction of RIBs that do not perform as represented, designed, and guaranteed;

B. additional consulting fees;

C. potential fines and penalties from DES;

D. additional costs to comply with future DES mandates;

E. additional unanticipated operating costs;

F. additional future design and construction costs to repair, remediate, replace, or supplement the RIBs; and

G. additional costs and expenses not known at this time.

Factual Allegations Regarding WP's Fraudulent Misrepresentations, Violations of RSA 358-A, and Gross Negligence

91. As part of the professional engineering services that WP agreed to provide to Wolfeboro for the design of a long term means of disposing of Wolfeboro's treated wastewater effluent, WP engaged Jesse Schwalbaum of Watershed Hydrogeologic Inc. to develop a computer model of the Wolf-1A Site in order to determine how much treated wastewater effluent the Site could dispose of if it were used as a location for an RIB system.

92. Subsequently, Mr. Schwalbaum developed a computer model of the Site using data provided by WP.

93. On or about February 4, 2007, Mr. Gary Smith of WP received an email from Mr. Schwalbaum concerning the results of the computer model when simulating WP's recommended design load of 600,000 gpd. A true and accurate copy of the email is attached hereto as Exhibit A. Mr Schwalbaum's email indicated that the computer model yielded unfavorable results, Specifically, the email stated:

> *With 600,000 gpd the mound under the discharge area looks fine, but there appears to be a little bit of 'break out' in the southeast - just west of the power line and the southern extent of sand and gravel.*
>
> *I would feel a lot better if everything looked good on the most conservative run but this is the real world. I could make this breakout go away by opening up the drains, increasing the K values, or reducing the discharge. But we should put our heads together and figure out what (sic) how far out on a limb we want to go and what makes the most sense.*
>
> *I've also included a run with slightly higher K values (wolfe6). There is still a very small area indicating breakout but I don't know how real that is. For all we know there could be springs there already or the bedrock could be lower. I just don't think we have much data there.*

94. Mr. Schwalbaum's email expressly stated that (1) the Site could not handle WP's recommended design load of 600,000 gpd without breakouts occurring, (2) he had been provided with insufficient data by WP to accurately construct the computer model, and (3) he could alter the input data to "make this breakout go away." In other words, Mr. Schwalbaum proposed to WP that he could manipulate the input data to eliminate the problematic results of the computer model if WP and Mr. Schwalbaum decided that this was the preferred course of action.

95. Upon information and belief, WP and Mr. Schwalbaum altered the computer model's input data in the manner described in Mr. Schwalbaum's February 4, 2007 email.

96. Mr. Schwalbaum's email was not copied to Wolfeboro and the contents were never conveyed to Wolfeboro.

97. Two days after Mr. Schwalbaum's email, WP discovered an error in the data used to construct the computer model. Mr. Smith of WP wrote an internal email to fellow WP employees Neil Cheseldine, Gary Smith, and Melissa Hamkins which stated *"I do not want to have this discrepancy picked up by reviewers and have it raise questions on the accuracy of the model and its results."* A true and accurate copy of the email is attached hereto as Exhibit B. It is unknown whether this error was ever corrected. Mr. Smith's email was not sent to Wolfeboro and the contents were never conveyed to Wolfeboro.

98. Just three hours after the discovery of this error, Mr. Peter Atherton of WP responded by asking Mr. Smith of WP when the computer model results would be available so that he could provide them to Wolfeboro. See Exhibit B. Mr. Smith responded that although the results would not be ready for a couple weeks, WP should *"shoot for a loading rate from NHDES greater than N. Conway so we can be the highest in the country!!! Soils can handle it fine."* See Exhibit B. Mr. Smith's statement evidences both WP's intent to push forward with the construction of the RIB system at the Site at all costs and WP's intent to obtain permission from NHDES to discharge flow to the Site in excess of what WP knew, based on the results of the computer model, the Site could handle without break-outs.

99. The next day, Mr. David Ford of Wolfeboro wrote an email to Mr. Atherton asking whether the computer model had yielded any results. Instead of informing Wolfeboro of the fact that WP's computer modeling expert had advised WP that he did not have sufficient data to properly model the Site and despite the fact that the computer model showed that the Site could not dispose of the 600,000 gpd without break-outs occurring, Mr. Atherton wrote *"Hi*

Dave - The model results indicate that the site can take up to 600,000 gpd…" A true and accurate copy of the email is attached hereto as Exhibit C. Mr. Atherton's statement was knowingly false, as there were no modeling results to support this statement. Mr. Atherton's statement was made for the purpose of hiding deficiencies in WP's analysis, shielding WP from liability and continuing the design process so that WP could benefit commercially by having designed the RIB system with the highest loading rate in the United States.

100. On February 14, 2007, Mr. Neil Cheseldine of WP sent an internal confidential email in which he indicated that Mr. Schwalbaum had verbally indicated that the Site had a capacity above 1,000,000 gpd. A true and accurate copy of this email is attached as Exhibit D. Mr. Cheseldine instructed the team not to tell Wolfeboro of the results, only that the *"modeling results continue to look pretty good."* These results are clearly contrary to Mr. Schwalbaum's emails just days before, which indicated breakouts at the Site at a 600,000 gpd loading rate and a lack of data provided by WP.

101. On February 20, 2007, Mr. Cheseldine emailed Mr. Ford of Wolfeboro stating *"The groundwater flow modeling is complete and still looks good in terms of site capacity accommodating future annual average design flow of 600,000 gpd."* A true and accurate copy of this email is attached as Exhibit E. Mr. Cheseldine's statement was knowingly false: there were no modeling results to support this statement. Once again, Mr. Chesedine's statement was made for the purpose of hiding deficiencies in WP's analysis, shielding WP from liability, maintaining its lucrative professional services contract with Wolfeboro, and continuing the project so that WP could benefit commercially from having designed RIB system with the highest loading rate in the United States.

102. On March 7, 2007, Mr. Smith sent an internal email to four WP employees in which he stated that the Site could not handle any load above 600,000: *"It is our opinion the modeling does show breakout will occur in the vicinity of B-7 at flows of 800,000 and 1,000,000 gpd. The memo and Section 9.5 of our report needs to be changed to reflect this finding."* A true and accurate copy of this email is attached as Exhibit F.

103. Mr. Atherton of WP subsequently voiced concern in a reply email that if the Site could not handle these levels of discharge, it would be impossible to achieve an annual average of 600,000 gpd (design capacity for the Site produced by WP and the Site's permitted loading capacity per NHDES). See Exhibit G. In other words, WP knew that the Site could not dispose of the 600,000 gpd annual average without causing damage to the Site. WP never informed Wolfeboro of these results.

104. Mr. Smith responded to Mr. Atherton's email stating *"At this time I do not believe we could pass the straight face test if we try to overstate the sites capability without the modeling results to support this"* and suggested that WP could gather more data and re-run the computer model. See Exhibit F. However, WP did not gather additional data. Instead, it produced its Phase 3 Hydrogeologic Report in March of 2007 in which it stated *"Wright-Pierce and Watershed Hydrogeologic conclude that an annual average treated effluent discharge of 600,000 gpd on the Whitten West site is feasible."* WP knowingly made this false statement to shield itself from liability, to maintain its lucrative professional service contracts with Wolfeboro, and to continue with the project so that WP could benefit commercially from having designed the RIB system with the highest loading rate in the United States.

105. Additional internal WP emails on March 7, 2007 confirm that the computer model showed that there was the potential for breakouts at an 800,000 gpd loading rate. See Exhibit H.

106. On March 3, 2009, the RIB's commenced operation and breakouts were subsequently observed on or about April 20, 2009. On June 16, 2009, Mr. Schwalbaum issued an internal memorandum to WP indicating numerous flaws in the computer model and highlighting the fact that the computer model was constructed without sufficient or adequate data. A true and accurate copy of Mr. Schwalbaum's memorandum is attached hereto as Exhibit I.

107. Despite the content of Mr. Schwalbaum's memorandum, WP has continued to make numerous statements to Wolfeboro (both orally and in writing) that (1) the Site could be repaired, and (2) following repair, the Site could dispose of an annual average flow of 600,000 gpd. These statements were knowingly false. WP made these statements for the purpose of generating additional engineering fees to correct its mistakes. WP also made these knowingly false statements to attempt to shield itself from liability that would arise if Wolfeboro became aware that WP knew as early as 2007 that the Site could not handle the design flow recommended and warranted by WP and that WP had insufficient data to properly model the Site.

COUNT I
Professional Negligence

108. Wolfeboro repeats and re-alleges the allegations in the above paragraphs as if stated fully herein.

109. WP had a duty to provide professional engineering services in accordance with the professional standard of care.

110. WP breached this duty in the following respects:

A. Failing to adequately investigate the existing site conditions prior to recommending the use of RIBs.

B. Failing to adequately investigate existing site conditions after recommending the use of RIBs;

C. Failing to design an effluent disposal system that met the performance criteria required by Wolfeboro;

D. Failing to design an effluent disposal system that met the performance criteria required by NHDES;

E. Failing to design an effluent disposal system that complied with DES requirements.

111. WP's negligent conduct was a proximate and foreseeable cause of the damages sustained by Wolfeboro.

112. As a result of WP's negligent conduct, Wolfeboro has sustained significant damages which may include, but are not limited to:

A. lack of compliance with NHDES permits and mandates;

B. additional and extras costs and expenses associated with monitoring and reporting RIB system activities;

C. additional and extra costs and expenses associated with operating alternative effluent disposal systems to account for operating deficiencies in the RIB system;

D. costs and expenses associated with the purchase of land and construction of an RIB system that does not perform as intended, designed, recommended, or represented;

E. remediation costs associated with removing, replacing, or repairing the RIB system; and

F. other costs, expenses, and damages to be proven at trial.

COUNT II
Gross Negligence

113. Wolfeboro repeats and re-alleges the allegations in the above paragraphs as if stated fully herein.

114. WP had a duty to provide professional engineering services in accordance with the professional standard of care.

115. WP was grossly negligent in its breach of this duty in the following manner:

A. Failing to advise Wolfeboro of the actual results of the computer model, which indicated that the Site could not handle the design and permitted flow of 600,000 gpd;

B. Altering the input data of a computer model to yield acceptable results, knowing that the altered input data did not accurately represent the performance of the Site when operating under design conditions;

C. Failing to perform further testing of the Site during the modeling stage despite being informed by the modeling expert that he lacked sufficient data to properly model the Site; and

D. Intentionally misrepresenting the results of the computer model to Wolfeboro.

116. WP's gross negligence was a proximate and foreseeable cause of the damages sustained by Wolfeboro.

117. As a result of WP's grossly negligent conduct, Wolfeboro has sustained significant damages at an amount to be proven at trial.

COUNT III
Breach of Contract

118. Wolfeboro repeats and re-alleges the allegations in the above paragraphs as if stated fully herein.

119. Wolfeboro entered into five (5) separate contracts with WP wherein WP agreed to provide certain professional engineering services.

120. WP breached the express terms of Contracts 1, 2, 3, 4 and 5 by failing to perform all of the engineering necessary to fulfill its obligations under these Contracts.

121. As a result of WP's beaches of contract, Wolfeboro has sustained significant damages which may include, but are not limited to:

A. lack of compliance with NHDES permits and mandates;

B. additional and extras costs and expenses associated with monitoring and reporting RIB system activities;

C. additional and extra costs and expenses associated with operating alternative effluent disposal systems to account for operating deficiencies in the RIB system;

D. costs and expenses associated with the purchase of land and construction of an RIB system that does not perform as intended, designed, recommended, or represented;

E. remediation costs associated with removing, replacing, or repairing the RIB system; and

F. other costs, expenses, and damages to be proven at trial.

COUNT IV
Negligent Misrepresentation

122. Wolfeboro repeats and re-alleges the allegations in the above paragraphs as if stated fully herein.

123. WP is a professional engineering firm in the business of providing professional engineering advice and recommendations.

124. Wright Pierce negligently misrepresented that the Wolf 1A Site was suitable to meet the NHDES requirements and negligently misrepresented that the Wolf 1A could handle the effluent load that would be required when in fact WP had no basis to make this recommendation and when in fact WP had not fully and adequately investigated the Site to confirm this representation.

125. WP negligently misrepresented that the design and construction of an RIB system was the best alternative to address Wolfeboro's disposal of treated effluent without fully, adequately, and completely investigating and vetting other potential options available to Wolfeboro.

126. Wolfeboro relied on WP's negligent misrepresentations in (a) purchasing the Wolf 1A Site, (2) entering into Contract #5 with WP for the design of the RIB system in which Wolfeboro paid WP $612,017, and (3) constructing the RIB system on the Wolf 1A Site.

127. As a result of WP's negligent misrepresentations, Wolfeboro has sustained significant damages which may include, but are not limited to:

A. lack of compliance with NHDES permits and mandates;

B. additional and extras costs and expenses associated with monitoring and reporting RIB system activities;

C. additional and extra costs and expenses associated with operating alternative effluent disposal systems to account for operating deficiencies in the RIB system;

D. costs and expenses associated with the purchase of land and construction of an RIB system that does not perform as intended, designed, recommended, or represented;

E. remediation costs associated with removing, replacing, or repairing the RIB system; and

F. other costs, expenses, and damages to be proven at trial.

COUNT V
Breach of Warranty

128. Wolfeboro repeats and re-alleges the allegations in the above paragraphs as if stated fully herein.

129. WP warranted that it would "*produce a complete and definitive Engineering Report to meet current (NHDES) requirement and to perform any and all engineering incidental thereto.*"

130. WP also warranted that the Wolf-1A site could dispose of an annual average of 600,000 gallons per day.

131. The RIB system designed by WP and constructed by Wolfeboro does not perform as guaranteed by WP and WP is liable to Wolfeboro for all damages, which may include, but are not limited to:

A. lack of compliance with NHDES permits and mandates;

B. additional and extras costs and expenses associated with monitoring and reporting RIB system activities;

C. additional and extra costs and expenses associated with operating alternative effluent disposal systems to account for operating deficiencies in the RIB system;

D. costs and expenses associated with the purchase of land and construction of an RIB system that does not perform as intended, designed, recommended, or represented;

E. remediation costs associated with removing, replacing, or repairing the RIB system; and

F. other costs, expenses, and damages to be proven at trial.

COUNT VI
(Violation of RSA 358-A)

132. Wolfeboro repeats and realleges the allegations contained in the above paragraphs as if fully stated herein.

133. At all times relevant hereto, WP and its agents and affiliates have been engaged in the conduct of trade or commerce in the State of New Hampshire within the meaning of RSA 358-A:1, II.

134. WP's conduct, as fully articulated in paragraphs 91 through 107 of this Amended Complaint, and as further described below, constitute unfair and deceptive trade practice within the meaning of RSA 358-A:2 and 358-A:10, I:

A. Failing to inform Wolfeboro that the computer model indicated that the Site would not perform as intended, as warranted by WP, and as permitted, despite knowledge of this fact well in advance of the construction of the RIB system at the Site;

B. Intentionally hiding errors in the computer model from NHDES and Wolfeboro to avoid potential liability and to maintain harmonious relations with Wolfeboro;

C. Intentionally making false and misleading statements to Wolfeboro in emails dated February 8, 2007 and February 20, 2007 regarding the results of the computer model for the purposes of inducing Wolfeboro to continue with the construction of the RIB system and so that WP could benefit commercially from having designed the RIB system with the highest loading rate in the United States;

D. Continuing to make written and oral statements to Wolfeboro that the Site could handle the design flow and could be repaired after the defects were discovered, despite knowledge that both of these statements were false, and making these statements for the purpose of continuing to generate engineering fees and to attempt to avoid liability.

135. WP's conduct as alleged above constituted knowing and willful unfair and deceptive acts within the meaning of RSA 358-A:10, I.

136. Wolfeboro has been injured as a result of WP's unfair and deceptive acts and practices.

137. As a result of its unfair and deceptive conduct, WP is liable to Wolfeboro for damages, including treble damages, as well as costs and attorneys' fees, pursuant to RSA 358-A:10, I, in an amount within the jurisdictional limit of this Court.

COUNT VII
(Fraudulent Misrepresentation)

138. Wolfeboro repeats and realleges the allegations contained in the above paragraphs as if fully stated herein.

139. WP fraudulently misrepresented that "*The model results indicate that the site can take up to 600,000 gpd…*" See Exhibit D. WP made this representation knowingly that it was

false in order to hide deficiencies in WP's analysis, shield WP from liability, and continue the design process so that WP could benefit commercially by having designed RIB system with the highest loading rate in the United States.

140. WP fraudulently misrepresented that the *"modeling results continue to look pretty good."* See Exhibit E. WP made this representation knowingly that it was false in order to hide deficiencies in WP's analysis, shield WP from liability, and continue the design process so that WP could benefit commercially by having designed the RIB system with the highest loading rate in the United States.

141. WP fraudulently misrepresented that *"The groundwater flow modeling is complete and still looks good in terms of site capacity accommodating future annual average design flow of 600,000 gpd."* See Exhibit F. WP made this representation knowingly that it was false in order to hide deficiencies in WP's analysis, shield WP from liability, and continue the design process so that WP could benefit commercially by having designed the RIB system with the highest loading rate in the United States.

142. Wolfeboro relied on WP's fraudulent misrepresentations to its detriment.

143. Wolfeboro has been injured as a result of WP's fraudulent misrepresentations and its reliance thereupon.

WHEREFORE, the Plaintiff, Wolfeboro, respectfully requests that this Court:

A. Enter judgment in favor of Wolfeboro on each of its claims, as set forth herein;

B. Award Wolfeboro damages in an amount to be determined at trial;

C. Award Wolfeboro treble damages, costs, and attorneys' fees as a result of WP's violations of RSA 358-A; and

D. Grant such other and further relief as this Court deems just and equitable.

JURY DEMAND

Wolfeboro demands a jury trial on all issues so triable.

Respectfully submitted,

The Town of Wolfeboro,

By its attorneys,

/s/ Seth M. Pasakarnis, Esq.
Hinckley, Allen & Snyder LLP
Rhian M.J. Cull (Admitted Pro Hac)
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Date: August 29, 2013

VERIFICATION

I, David W. Ford, P.E., on behalf of the Town of Wolfeboro, certify that I have read the above Amended Complaint and that the allegations therein are true to the best of my knowledge, information and belief.

Date: August 29, 2013

By: /s/ David W. Ford
David W. Ford, P.E.

STATE OF NEW HAMPSHIRE
COUNTY OF CARROLL

Personally appeared before me, the above-named David W. Ford who made an oath that the above statements are true to the best of his knowledge and belief.

Date: August 29, 2013

/s/ Theresa Tavares
Justice of the Peace/Notary Public
My commission expires: *10/3/17*