

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

OTIS KURTIS BISHOP AND)
RICKY LEE JARRETT,)
)
Plaintiff,)
)
vs.)
)
THE WATER WORKS AND SANITARY)
SEWER BOARD OF THE CITY OF)
MONTGOMERY,)
)
Defendant.)

Case No.: 00-A-527-N

2000 DEC 18 P 5:09

**BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES
AS *AMICUS CURIAE* IN SUPPORT OF THE WATER WORKS & SANITARY SEWER
BOARD OF THE CITY OF MONTGOMERY**

The Association of Metropolitan Sewerage Agencies (hereinafter "AMSA") respectfully submits the following brief in this case as *amicus curiae* in support of the Water Works & Sanitary Sewer Board of the City of Montgomery ("the Board").

I. STATEMENT OF INTEREST

AMSA has represented the interests of the nation's publicly owned treatment works ("POTWs") and municipal wastewater treatment agencies since 1970. AMSA members and affiliates play a key role on the development of environmental legislation, and work closely with federal regulatory agencies in the implementation of environmental programs. AMSA's members include more than 240 city, county, and separate wastewater treatment agencies. Those members serve the majority of this country's sewered population and treat more than 18 billion gallons of

sewage each day. AMSA's affiliate members include public and private organizations that are supportive of the goals and objectives of AMSA

AMSA has been an advocate in the development and implementation of scientifically based, technically sound, and cost-effective environmental programs. For this reason, AMSA is dedicated to providing its members with the tools and information needed to help achieve national water quality goals and standards. AMSA's members work together to participate in the legislative and regulatory process at the local, state, and national levels.

AMSA has an interest in this case in that AMSA's members include point source dischargers permitted to discharge treated effluents under the Federal Water Pollution Control Act's National Pollutant Discharge Elimination System ("NPDES") codified at 33 U.S.C. § 1342 *et seq.* The Water Works & Sanitary Sewer Board of the City of Montgomery ("the Board") is a member of AMSA. As NPDES permit holders, AMSA's members will be affected directly by the resolution of this case.

AMSA's other members who are NPDES permit holders, like the Board, face similar requirements with regards to the monitoring and reporting of effluent discharges pursuant to the terms of their individual NPDES permits, the Code of Federal Regulations, and the instructions promulgated by the Environmental Protection Agency and state regulatory agencies. In particular, if this Court determines that the Board violated the monitoring and reporting requirements of its permit by under-reporting or failing to properly report the effluent discharges, when the Board complied with the terms of the permit, the instructions provided with the Discharge Monitoring Reports ("DMRs"), and EPA's guide, this Court will, in effect, have abrogated the entire

monitoring and reporting procedures followed by every NPDES permittee. If such a result is followed in other cases, other AMSA members who are NPDES permit holders could be exposed to potential civil and criminal penalties.

II. FACTUAL BACKGROUND

On April 26, 2000, Plaintiffs filed a citizen suit in this Court pursuant to §505(a) of the Federal Water Pollution Control Act (hereinafter "FWPCA"), 33 U.S.C.A. §1365(a), alleging that the Board discharged pollutants in violation of its NPDES permit at various times between July 1999 and December 1999. On July 7, 2000, Plaintiffs requested leave to amend their Complaint to add Count II to allege additional violations from August 1999 to the present. On August 8, 2000, the Board filed its Motion for Summary Judgment as to Count I of the Complaint and reserved responding to Count II until such time as the Court ruled on Plaintiffs' request for leave to amend. On August 21, 2000, the Court granted Plaintiffs' motion to add Count II to their Complaint. Plaintiffs responded to the Board's Motion for Summary Judgment as to Count I with Plaintiffs' Reply to Defendant's Motion for Summary Judgment. The Board filed a Reply to Plaintiffs' Reply

The focus of Count II is a claim by the Plaintiffs that the Board failed to properly report the results of its monitoring samples. The Plaintiffs maintain that the results of each and every sample taken by the Board must be repeated on the monthly report. The Board maintains that in accordance with its permit and applicable guidelines the monthly report only contains the required summaries of its monitoring and sampling results. Pursuant to a new scheduling order for Count II, Parties filed Motions for Summary Judgment. Cross-responses were filed and cross-replies were also filed.

Realizing the importance of the issue of reporting requirements of an NPDES permit raised by Count II, the Court issued an Order and Invitation to the Environmental Protection Agency and to the Alabama Department of Environmental Management to each file an amicus brief on the issue

III. SUMMARY OF ARGUMENT

The issue for this Court to determine in the instant action is whether the Board has complied with the reporting requirements of the NPDES permit. The Plaintiffs maintain that the Board has not complied because it has not reported the result of each monitoring sample. Because it reports the summaries of the sampling results as outlined in the *NPDES Self-Monitoring System User Guide*, the *NPDES Reporting Requirements Handbook*, and the format of the DMR, the Board maintains that its actions are in complete compliance with its NPDES permit and the FWPCA.

If the Court accepts the Plaintiffs' interpretation of reporting requirements, this result applied elsewhere could expose those other NPDES permit holders, who have been diligent in following the reporting requirements as set forth in the *NPDES Self-Monitoring System User Guide*, the *NPDES Reporting Requirements Handbook* and the DMR, to charges of non-compliance and potential civil and criminal penalties as set forth in the applicable statutes and regulations. As explained below, the FWPCA and the regulations promulgated thereunder set forth a procedure for reporting monitoring results to the state agency or EPA to which an NPDES permit holder must adhere. An NPDES permit holder has fully complied with the reporting requirements of the FWPCA when it follows the reporting requirements prescribed in its permit, the *NPDES Self-Monitoring System User Guide*, the *NPDES Reporting Requirements Handbook*, and the DMR. To the extent that Plaintiff argues that the DMR format and the EPA guidance relied upon by the Board and every other NPDES permit holder fails to fully comply with the reporting requirements mandated by the FWPCA, such

arguments are due to be rejected

IV. HISTORY AND PURPOSE OF THE FWPCA AND NPDES

A. The Legislative History and Purpose of the FWPCA

The history and purpose of the FWPCA and the National Pollutant Discharge Elimination System is critical to the analysis of the issue at hand. Congress established a comprehensive statutory program to abate water pollution when it passed the Federal Water Pollution Control Act Amendments of 1972. *See* 33 U.S.C. § 1251(a)(1994). The objective of the 1972 Amendments was “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a)(1994). The 1972 Amendments originally contemplated that all discharges of pollutants into our nation’s navigable waterways would cease by 1985. *See id.* The basic framework of the FWPCA, while undergoing at least one major revision in 1977 to deal with toxic water pollutants, essentially remains true to its stated purpose. *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 2 (codified as amended at 33 U.S.C. §§ 1251-1387 (1994) and renaming the FWPCA to the Clean Water Act).

Realizing the near impossibility of zero discharges of pollutants, Congress established the National Pollutant Discharge Elimination System (NPDES) as part of the FWPCA. *See* WILLIAM GOLDFARB, WATER LAW 143 (1984). The NPDES is the cornerstone of the FWPCA because it is the principle method for regulating discharges by balancing the need for waste disposal with maintaining the integrity of the nation’s waters. J. GORDON ARBUCKLE, ET AL., ENVIRONMENTAL LAW HANDBOOK 276 (8th ed. 1985). The FWPCA authorizes the EPA and its Administrator to regulate, under NPDES, the discharge of pollutants into the nation’s navigable waters by issuing

discharge permits. *See* 33 U.S.C. § 1342(a)(1)(1994).

B. The National Pollutant Discharge Elimination System

Thirty-three U.S.C. § 1342(a) establishes the National Pollutant Discharge Elimination System. Thirty-three U.S.C. § 1342(a) provides that the EPA Administrator may issue a permit for the discharge of any pollutant so long as the discharge complies with sections 1311 (effluent limitations), 1312 (water quality related effluent limitations), 1316 (national standards of performance), 1317 (toxic and pretreatment effluent standards), 1318 (records and reports), and 1343 (ocean discharge criteria). States may also issue NPDES permits by virtue of the authority granted to the states by the EPA in accordance with the FWPCA. 33 U.S.C.A. § 1342(b). In order to issue NPDES permits, a state must submit a program to the Administrator of the EPA for approval. *Id.* Once the Administrator approves a state permitting program, the state has a continuing duty to comply with the requirements of 33 U.S.C.A. § 1342(b) and the rules promulgated thereunder by the EPA. 33 U.S.C.A. § 1342(c)(2) (stating that “[a]ny State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title”).

V. ARGUMENT

Compliance By The Board With Its Permit In Submitting Its DMRs In The Specified Format Is Compliance Under The FWPCA

The Plaintiffs maintain that the Board has not complied with the reporting requirements of its NPDES permit because it has not reported the result of each monitoring sample. Instead, the Board reports the summaries of the sampling results as outlined in the *NPDES Self-Monitoring System User Guide*, *NPDES Reporting Requirements Handbook*, and the format of the DMR.

While not directly challenging the EPA guidance or DMR format, Plaintiffs argue that these documents relied upon by the Board and every other NPDES permit holder fail to fully comply with the reporting requirements mandated by the FWPCA. AMSA urges this Court to reject Plaintiffs' argument because it is an attempt by Plaintiffs to create violations by changing the standards for monitoring and reporting and construe them into meaning something wholly inconsistent with the plain terms of the FWPCA and its implementing regulations.

One of the basic functions of an NPDES permit is to “specify the level of performance which the discharger must maintain and it places on the discharger an affirmative obligation to report to the cognizant authorities when that level of performance is not achieved.” J. GORDON ARBUCKLE, ET AL., ENVIRONMENTAL LAW HANDBOOK 276 (8th ed. 1985). In fact, the monitoring and reporting requirements of the NPDES program are considered to be of critical importance to the effectiveness of the permitting program. *See id.* It is the monitoring and reporting requirements and the interpretation of those requirements which is the central issue for determination by this Court in the instant action. This Court's ruling, if followed elsewhere, could expose those NPDES permit holders, who have been diligent in following the reporting requirements as set forth in the *NPDES Self-Monitoring System User Guide*, the *NPDES Reporting Requirements Handbook*, and the DMR, to charges of non-compliance and potential civil and criminal penalties as set forth in the applicable statutes and regulations.

The FWPCA and the regulations promulgated thereunder set forth a procedure for reporting monitoring results to EPA or the state regulatory agencies. The FWPCA provides that the EPA Administrator is vested with the duty to “prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including collections on data

and information collection, reporting, and such other requirements as he deems appropriate.” 33 U.S.C. § 1342(a)(2). Thirty-three U.S.C. § 1318 specifies the records and reports which are required to be maintained by a permit holder:

the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require

33 U.S.C. § 1318. The Environmental Protection Agency, pursuant to its power to establish and implement monitoring and reporting requirements, 33 U.S.C. § 1318, 1342(a)(2), has promulgated 40 C.F.R. § 122 *et seq.* to implement those requirements.

40 C.F.R. § 122.41 specifically provides that:

(j) Monitoring and records. (1) Samples and measurements taken for the purpose of monitoring shall be representative of monitored activity. . .

(3) records of monitoring information shall include:

- (i) The date, exact place, and time of sampling or measurements;
- (ii) The individual(s) who performed the sampling or measurements;
- (iii) The date(s) analyses were performed;
- (iv) The individual(s) who performed the analyses;
- (v) The analytical techniques or methods used; and
- (vi) the results of such analyses.

. . .

(4) Monitoring results must be conducted according to test procedures approved under 40 CFR part 136.

. . .

(l) Reporting requirements. . . (4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(i) **Monitoring results must be reported in a Discharge Monitoring Report (DMR)** or forms provided or specified by the director for reporting results of monitoring of sludge use or disposal practices.

(ii) **If the permittee monitors any pollutant more frequently than required by the permit using test procedures approved under 40 CFR part 136, or, . . . the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR** or sludge reporting form specified by the Director.

(iii) Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Director in the permit.

40 C.F.R. § 122.41 (emphasis added). From the plain language of this regulation, it is apparent that an NPDES permit holder is charged with completing a DMR which is provided by the EPA or the state regulatory agency. The regulation does not permit any deviation from the use of a DMR by providing that “[m]onitoring results must be reported in a Discharge Monitoring Report (DMR).” 40 C.F.R. § 122.41. In fact, if an NPDES permit holder **did not** use the DMR form supplied to it by the EPA and/or its state regulatory agency, the permit holder would be subject to civil and/or criminal penalties for failure to comply with FWPCA reporting requirements. 33 U.S.C. § 1318; 40 C.F.R. § 122.41.

Moreover, the courts in cases relied upon by Plaintiffs¹ recognized that NPDES permit holders are required by the FWPCA to report their monitoring results on DMRs provided by the EPA or their state regulatory agency. (See Plaintiffs’ Reply to Defendant’s Response to Plaintiffs’ Motion for Summary Judgment at pg. 6)(citing *SPIRG v. Tenneco Polymers*, 602 F. Supp. 1394, 1396 (D.N.J. 1985) (stating “[a]s a condition of the permit, the holder must make a report of all monitoring results in a Discharge Monitoring Report (“DMR”) at intervals specified by the permit’.”) (Plaintiffs’ emphasis omitted); *Sierra Club v. Simkins Industries*, 617 F. Supp. 1120, 1127-28 (D.C. Md. 1985) (“ ‘33 U.S.C. § 1318 provides that the . . . EPA shall require all

¹Plaintiffs mischaracterize the holdings in these cases by over emphasizing phrases outside the context of the case.

NPDES permit holders to monitor their discharges. Permit holders must maintain records of the results of this monitoring, and report the results to the relevant state or federal agency in a DMR. 40 C.F.R. 122.41 (1)(4)(i). . . The DMRs must contain a complete and accurate record of pollutant monitoring by the permit holders. 40 C.F.R. §§ 122.22(d). 122.41 (1)(4)(i)'") (Plaintiffs' emphasis omitted)). By Plaintiffs' own case citations, it is apparent that their rejection of the DMR format must fail. The DMR forms and agency guidance in use by NPDES permit holders are consistent with the necessary reporting requirements, and the DMR forms are wholly adequate for NPDES permit holders to report *all* of the information that it is required to report under the Permit. Further, EPA publications and guidance, in the form of instructions printed on the reverse side of DMRs, provide step-by-step explanations of how to fill out the DMRs, including explicit directions on how to report "minimum," "maximum," and "average" measurements. If this Court were to accept the argument that permit holders are not to follow the DMR and its format, NPDES permit holders, who have heretofore diligently complied with the reporting requirements by completing the DMRs provided by the EPA and/or their state regulatory agencies, would have no clear requirements to follow for the completion of the required DMRs. Instead, AMSA requests this Court to determine that an NPDES permit holder has fully complied with the reporting requirements of the FWPCA when it follows the reporting requirements prescribed in its permit and the DMR.


Fundamental Fairness Entitles NPDES Permit Holders To Rely Upon EPA's Regulation and Guidance Documents

In addition, two nationally applicable guidance publications provided by EPA are instructive on how to complete DMRs and comply with the NPDES reporting requirements: the *NPDES Self-Monitoring System User Guide*, which was published in March 1985 by the EPA Office of Water

Enforcement and Permits, Washington, DC 20460, and the *NPDES Reporting Requirements Handbook* which was produced by the Compliance Assurance and Enforcement Division of the NPDES Compliance Monitoring Section, EPA Region 6, 1445 Ross Avenue, Dallas, TX 75202, August 1, 1997. In publishing these Guides, EPA was performing its duty under 33 U.S.C. § 1342(a)(2) to assure compliance with the NPDES permitting provisions of the FWPCA when it published its guides for use by NPDES permit holders to assist them in completing the DMRs. Further, 33 U.S.C. § 1314 authorizes the EPA Administrator to develop and publish information and guidelines for implementing the FWPCA. On the first page of its *NPDES Reporting Requirements Handbook*, EPA states that the booklet was “designed to assist the permittee in complying with the reporting requirements in the NPDES Permit.” This stated purpose supports the purpose and provisions of the NPDES by assisting permit holders to fulfill their duties of reporting as well as monitoring. Because these EPA guidances were published under EPA's statutory authority and are consistent with the statutory purpose, permit holders nationwide as well as in Alabama, are entitled to rely upon the instructions provided therein and such compliance should be a safe haven to any claim of noncompliance under FWPCA.

WHEREFORE, AMSA respectfully requests this Court to reject Plaintiffs' interpretation of the reporting requirements and, instead, determine that an NPDES permit holder has fully complied with the reporting requirements of the FWPCA when it follows the reporting requirements prescribed in its permit, the *NPDES Self-Monitoring System User Guide*, the *NPDES Reporting Requirements Handbook*, and the DMR.

Respectfully submitted,


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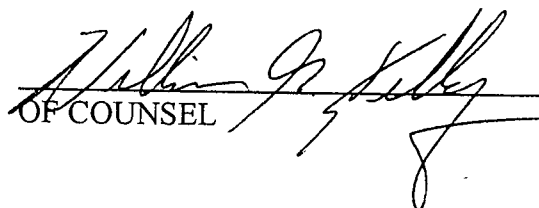
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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following by mailing a copy of same by United States Mail, properly addressed and first class postage prepaid, on this the 18th day of December, 2000:

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