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

OTIS KURTIS BISHOP AND  
RICKY LEE JARRETT, )

Plaintiff, )

vs. )

Case No.: 00-A-527-N

THE WATER WORKS AND SANITARY )  
SEWER BOARD OF THE CITY OF )  
MONTGOMERY, )

Defendant. )

**BRIEF OF THE ALABAMA WATER AND WASTEWATER INSTITUTE**  
**AS AMICUS CURIAE**

COMES NOW, the **Alabama Water and Wastewater Institute** (“AWWI”) and files the following brief in this case as *amicus curiae*.

**INTERESTS OF THE AMICUS**

AWWI is a non-profit organization that represents the interests of fourteen of Alabama’s largest water producers. Membership includes public corporations and municipal boards organized and existing under Alabama statutes for the purposes of operating water or sanitary sewer facilities or both in this State. AWWI members operate wastewater treatment facilities throughout Alabama. Therefore, the *amicus*, AWWI, has an interest in this litigation because the positions advanced by Plaintiffs in Count II of their complaint and in their summary judgment arguments regarding monitoring and reporting requirements conflict with the procedures which

AWWI members have followed in compliance with the *NPDES Self-Monitoring System User Guide* (“the Guide”) and the Discharge Monitoring Report (“DMR”). If this Court were to accept the Plaintiffs’ position, then AWWI’s members and other permit holders, who have followed the monitoring and reporting requirements established in the Guide and the DMR, may be subjected to claims of non-compliance, resulting in possible fines or other penalties.

### **ISSUE PRESENTED**

The focus of Count II of Plaintiffs’ Complaint is a claim by the Plaintiffs that the Board failed to properly report the results of its monitoring samples as specified by its NPDES Permit. The Plaintiffs maintain that the results of each and every **sample** taken by the Board must be reported on the monthly DMR. For example, Plaintiffs state in their Brief in Support of Their Motion For Summary Judgment that the Board reported:

one monitoring result per month for each discharge limitation set out in the Permit regardless of the frequency of monitoring required by the Permit. . . In other words, Defendant is ordinarily required to obtain twelve monitoring results each month for each of the three parameters that have daily minimum discharge limitations (for a total of 36 values), but Defendant has reported only one value per month for each of the three parameters for the past fifteen months.

(See Plaintiffs’ Brief in Support of Their Motion for Summary Judgment at pg. 5.) It is obvious from this quotation from the Plaintiffs’ brief that Plaintiffs confuse the difference between an NPDES permit holder’s **monitoring** requirements and its **reporting** requirements. The Board asserts that it reported the required results when it completed the DMRs in accordance with the methods and provisions contained in its Permit, the instructions on the DMR form, the *NPDES Self-Monitoring System User Guide*, and the *NPDES Reporting Requirements Handbook*. Thus, in the case of the parameters in the Plaintiffs’ example quoted above, after reviewing the data

collected from the 12 monitoring samples, the Board reports the absolute minimum number of all twelve samples for each parameter. When reviewing the DMR, it is obvious that the other samples were greater than the minimum number and thus, as long as the minimum number was in compliance all samples were in compliance. If the absolute sample minimum number is not in compliance with the minimum standard established by the Permit, the Board reports the sample minimum number and any other samples which fall between the sampled minimum and the Permit minimum as exceedances. It is this summary of information which the DMRs were designed to contain and which efficiently allows a determination of the number of violations by reviewing the "No. of exceedances" column and the scope of the violation by comparing the minimum reported to the minimum allowed under the Permit, which is also reflected on the DMR.

The issue for this Court to determine, therefore, is whether an NPDES permit holder has complied with the FWPCA, the AWPCA, and the terms of its permit when it has completed the DMR supplied to it by ADEM and EPA in accordance with the permit, instructions provided on the DMR, and the guides published by the EPA. AWWI asserts that this Court must answer this question in the affirmative and, as a result, Plaintiffs' motion for Summary Judgment on Count II of their Complaint is due to be denied.

### **ARGUMENT**

#### **I. FEDERAL AND STATE LAWS AND REGULATIONS**

##### **A. The Federal Clean Water Act And The National Pollutant Discharge Elimination System**

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, codified at 33 U.S.C. § 1251 *et seq.* (as amended at 33 U.S.C. §§ 1251-1387 (1994)), in order to restore

and maintain the integrity of the navigable water of the United States. *See* 33 U.S.C. § 1251(a). To further these goals, Congress provided that the discharge of any pollutant into any navigable water of the United States was unlawful “[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of [the FWPCA] ” 33 U.S.C. § 1311(a). In section 1342, Congress established the National Pollutant Discharge Elimination System to regulate the discharge of pollutants (also referred to as effluents) and conferred oversight of this system on EPA. According to this system, the Administrator of the EPA was authorized to issue permits for the discharge of pollutants subject to the provisions established in the FWPCA and its implementing regulations.

Congress also recognized the “primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” within their borders, 33 U.S.C. § 1251(b), and authorized the States to participate in the NPDES permitting program, 33 U.S.C.A. § 1251(b), 1342(b). In order to issue NPDES permits, a State must submit a program to the Administrator of the EPA for approval. *Id.* Prior to approval, the Administrator is required to scrutinize each state program submitted and determine that it complies with the requirements of the FWPCA. 33 U.S.C.A. § 1342(b)(3); *see also* 33 U.S.C.A. § 1314. 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”). If a State fails to comply with the requirements set forth in the FWPCA, the Administrator of the EPA must withdraw

approval of the program and strip the state of its permitting authority pursuant to 33 U.S.C.A. § 1342(c)(3). Alabama has been authorized by the Administrator of the EPA to issue NPDES permits. *See* Ala. Admin. Code r. 335-6-6-.02 (1991)

**B. Alabama Department Of Environmental Management Regulations**

The Alabama Legislature enacted water quality control standards entitled the Alabama Water Pollution Control Act (“AWPCA”) based upon the federal model. *See generally* ALA. CODE §§ 22-22-1 to 22-22-14 and §§ 22-22A-1 to 22-22A-16 (1975 & 1997 Repl. Vol.). The Alabama Department of Environmental Management (“ADEM”) has been authorized by the Legislature to establish rules and procedures and to administer the state NPDES program. ALA. CODE §§ 22-22A-2 (1975 & 1997 Repl. Vol.); Ala. Admin. Code r. 335-6-6-02 (1991). Pursuant to the authority vested in ADEM by the Legislature, ADEM promulgated Chapter 335-6-6 of the Alabama Administrative Code to regulate and administer the NPDES permitting program.

In order to resolve Plaintiffs’ claim in Count II of their Complaint, this Court must examine the conditions applicable to all NPDES permits, in Alabama, which are codified at Ala. Admin. Code r. 335-6-6-.12 (1995). First and foremost, Ala. Admin. Code r. 335-6-6-.12 provides that a permit holder “must comply with all conditions of the permit. Any permit noncompliance constitutes a violation of the AWPCA and the FWPCA.” In order to assure compliance with the conditions of the permit, the Legislature has enacted civil and criminal penalties for violation of permit conditions. *See* ALA. CODE § 22-22A-5(18) (1975 & 1997 Repl. Vol.); Ala. Admin. Code r. 335-6-6-.12(a)(3). Second, Ala. Admin. Code r. 335-6-6-12 establishes minimum monitoring and reporting guidelines for permit holders. It is important to

note that the Administrative Code distinguishes between **monitoring** requirements and **reporting** requirements. Plaintiffs ignore this distinction and, instead, apparently argue that a permit holder must report every result obtained from monitoring. These two words, and the duties with which they are associated, are not interchangeable.

### 1. Monitoring Requirements

Ala. Admin. Code r. 335-6-6-.12(j) sets forth a permit holder's duties with respect to monitoring discharges of effluents. First, Ala. Admin. Code r. 335-6-6-.12(j)(1) states that permits shall: (1) specify the requirements concerning use, maintenance, and installation of monitoring equipment; (2) set forth monitoring requirements (which include the type, frequency, and intervals); and (3) specify the reporting requirements. Second, this Chapter also requires permit holders to retain records of "all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the above reports. . . for a period of at least three years." Ala. Admin. Code r. 335-6-6-12(j)(4). Third, ADEM requires that the records of monitoring shall include specific information (date, time and place of sampling, person who performed the sampling, date of analysis, person who performed analysis, analytical techniques used to perform analysis, and results of analysis) and the location for maintaining the records. Ala. Admin. Code r. 335-6-6-12(j)(5)-(6). Finally, the monitoring is to be conducted in accordance with the test procedures approved under 40 C.F.R. 136 (1994).

## 2. Reporting Requirements

The Alabama Administrative Code next sets forth the reporting requirements for NPDES permit holders. Ala. Admin. Code r. 335-6-6-.12(l) Among other things a permit holder must report, ADEM specifies the substance of the report of the monitoring of effluent discharges Ala. Admin. Code r. 335-6-6-.12(l)(5)(i) provides that “[m]onitoring results shall be summarized for each monitoring period on a Discharge Monitoring Report form (DMR) approved by the Department.” Finally, if a permit holder monitors any effluent “more frequently than required by the permit, using test procedures approved under 30 C.F.R. Part 136 (1994) or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR.” Ala. Admin. Code r. 335-6-6-.12(l)(5)(ii).

Although Plaintiffs have not directly contested the validity of the federal or state laws and regulations which create and implement the FWPCA, the NPDES, or AWPCA, Plaintiffs have created artificial requirements by failing to acknowledge the clear distinction between the monitoring requirements and the reporting requirements. Contrary to the federal and state laws and regulations which AWWI has set forth herein, Plaintiffs would have this Court believe that the Board, and all NPDES permit holders, must report each and every sample taken. This is simply not the case. By its very nature, a DMR is not meant to contain the results of every single monitoring sample taken by a permit holder. Instead, the DMR is meant to be a summary This is clearly evident from the plain language of the Code, which provides “results shall be **summarized**.” Ala. Admin. Code r. 335-6-6-.12(l)(5)(i). Similarly, Plaintiffs’ contention that a permit holder who tests more frequently than is required by the permit must report the individual

results of each additional sample or test on the DMR is not true. As stated previously, the Administrative Code requires a permit holder to include the additional monitoring results in the **calculations** called for in the permit. Ala. Admin. Code r. 335-6-6-.12(1)(5)(ii). The understanding of the distinction between monitoring and reporting requirements is fundamental to the analysis required in deciding the issue raised by the pending motions for summary judgment as to Count II of Plaintiffs' Complaint. As evident by the state statutory scheme, the respective legislatures and agencies established separate requirements of monitoring and reporting. As equally evident is that the reporting to be done by the permit holders is not merely a regurgitation of the samples collected. Rather, it is a report analyzing and summarizing the monitoring samples by identifying averages, maximum and minimum results, frequency and other summary information. Based upon these EPA and ADEM standards, which were followed by the Board, summary judgment in favor of the Board is due to be granted.

## **II. PERMIT CONDITIONS**

In determining compliance, the actual conditions of the permit must be reviewed because ADEM and EPA's regulations require compliance with the conditions of an individual permit. The Board's NPDES Permit No. AL0066354 ("Permit") was issued on October 1, 1999, to allow its Pike Road Wastewater Treatment Plant to discharge into Miller Creek. The Permit dictates the monitoring requirements, test procedures, and recording of results. (*See* Permit at pg. 2-3.) The Permit also sets establishes the Board's reporting requirements. According to the terms of the Permit, the "[m]onitoring results obtained during each monthly period shall be summarized for that month on a Discharge Monitoring Report (DMR) form approved by the Department."



(*See id* at pg 3.) Finally, if the Board tests more frequently than required by the terms of the Permit. “results of such monitoring shall be included in the calculation and reporting of values on the DMR form and the increased frequency shall be indicated on the DMR form.” (*See id*) The terms of the Permit at issue in the instant case mirror the conditions applicable to all NPDES permits as required by Ala. Admin. Code r. 335-6-6-.12 and its federal counterparts, 40 C.F.R. 122.44, 122.48.

Plaintiffs spend a great deal of their motion for summary judgment “interpreting” the Board’s Permit and “calculating” the results they deem to be required based upon their interpretation of the Permit. AWWI asserts that both the interpretation and calculations asserted by the Plaintiffs should not be accepted by this Court. This Court should, instead, look to the actual terms and definitions contained in the Board’s Permit. Nowhere in the Permit is the Board required to report individually each and every result from each and every monitoring sample it takes. Moreover, such a requirement cannot be found in the FWPCA, the AWPCA, or any of their implementing regulations.

Further, Plaintiffs would have this Court believe that if the Board samples for a particular effluent more frequently than is required by its Permit, then the Board must report the specific results of that monitoring sample. This is simply not required by the regulations or the Permit. The Permit, in accordance with Ala. Admin. Code r. 335-6-6-.12 and its federal counterparts, 40 C.F.R. 122.44, 122.48, requires the Board to include the additional results in the **calculations** and to show the actual number of times the particular effluent was tested on the DMR.

Finally, the Board completed its DMRs in accordance with the methods and provisions

contained in its Permit, the instructions on the DMR form, the *NPDES Self-Monitoring System User Guide*, and the *NPDES Reporting Requirements Handbook*.

### CONCLUSION

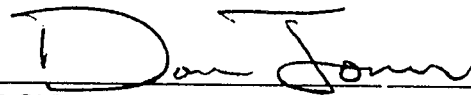
The Board reported the required results when it completed the DMRs in accordance with the methods and provisions contained in its Permit, the instructions on the DMR form, the *NPDES Self-Monitoring System User Guide*, and the *NPDES Reporting Requirements Handbook*. The Board, and other NPDES permit holders, must be able to rely on the forms and guides provided by the agencies responsible for administering the NPDES program. Otherwise, NPDES permit holders face a catch-22: failure to complete the exact forms provided by ADEM and EPA in accordance with the instructions on the forms and EPA guides could subject the permit holder to civil and criminal penalties, while citizens who bring enforcement suits may be permitted to recover against permit holders because the permit holders did, in fact, complete the forms provided by ADEM and EPA in accordance with the instructions provided on the forms and EPA guides.

As previously discussed, the DMRs are not meant to contain all the information generated by monitoring samples. Instead, they were intended by Congress and EPA to be summaries of the monitoring results in order to give the EPA and/or the state regulatory agency an opportunity to determine compliance or noncompliance with the FWPCA and individual permit conditions expeditiously. If NPDES permit holders are required to report the results of each and every monitoring sample taken, in the manner urged by the Plaintiffs, the information which regulatory authorities and citizens would have to review in order to determine compliance with permit

conditions would be so voluminous that it would be inefficient and likely too difficult to review. Rather, Congress chose a system whereby short, concise summaries of monitoring data would be submitted on the DMR under penalty of perjury which would allow the reviewing authority to quickly determine if there was a problem with compliance. From that determination based upon the summaries, the authority could then, if necessary, seek a review of all the specific monitoring data which the permit holder is required, also under penalties, to maintain. Thus, the integrity of the NPDES system remains intact.

WHEREFORE, above premises considered, the Alabama Water and Wastewater Institute respectfully requests this Court to determine that an Alabama NPDES permit holder has complied with the terms of its permit, the FWPCA, and the AWPCA when it has completed the DMR supplied to it by ADEM and EPA in accordance with the permit, instructions provided on the DMR, and the guides published by the EPA. AWWI also respectfully requests this Court to deny Plaintiffs motion for summary judgment and, instead, to grant summary judgment in favor of the Board.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing on the following by hand delivery or 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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