

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

OTIS KURTIS BISHOP AND)	
RICKY LEE JARRETT,)	
et al,)	
)	
Plaintiffs)	
)	
v.)	No. 00-A-527-N
)	
THE WATER WORKS AND SANITARY)	
SEWER BOARD OF THE CITY)	
OF MONTGOMERY,)	
)	
Defendant)	
)	
)	

AMICUS CURIAE BRIEF OF THE UNITED STATES

INTEREST OF THE UNITED STATES

This citizen suit action, brought by Plaintiffs Otis Kurtis Bishop and Ricky Lee Jarrett ("Plaintiffs") pursuant to section 505 of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §1365, concerns alleged violations of a National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Alabama to the Water Works & Sanitary Sewer Board of the City of Montgomery ("Defendant"). This Court has invited the United States to submit an amicus curiae brief to assist the court in determining the proper interpretation of the permit reporting conditions alleged to have been violated, in particular because the Parties have alleged that this interpretation may be affected by the application of an NPDES Self-Monitoring System User Guide (March 1985) ("User Guide"), issued by the Environmental

Protection Agency ("EPA").

The United States, together with individual States such as Alabama, is responsible for implementing and enforcing the CWA, 33 U.S.C. §1251 et. seq. The Act prohibits discharge of pollutants without a permit and establishes the National Pollutant Discharge Elimination System ("NPDES") to govern the issuance of permits for such discharges. See 33 U.S.C. §§1311(a), 1342. EPA issues NPDES permits under § 402(a) of the Act, unless it has authorized a State to do so under § 402(b). To be authorized to issue permits, EPA must determine that the State's program meets the requirements of the Act. See 33 U.S.C. §1342(b).

On October 19, 1979, EPA approved the State of Alabama's request to administer the NPDES program. From that date, Alabama has issued permits to facilities that discharge to waters in Alabama's jurisdiction. However, even where EPA authorizes a State to administer the program, EPA retains oversight authority and independent enforcement authority with respect to State-issued NPDES permits. See 33 U.S.C. §§1319(a) and 1342(b), 1342(c), and 1342(d).

The United States also maintains an interest in citizen

suits, which serve as an important supplement to EPA and the States' enforcement authority. The United States appreciates the opportunity to provide its views on the application and interpretation of NPDES requirements and guidance relevant to the enforcement of NPDES permits.

BACKGROUND

On April 26, 2000, the Plaintiffs, two individuals living near a waterbody into which the Defendant discharges pollutants, filed a citizen suit complaint alleging that the Defendant discharged pollutants in violation of effluent limits set in its Alabama NPDES permit. On August 21, plaintiffs amended their complaint to allege that the Defendant also violated reporting requirements by failing to report in its monthly Discharge Monitoring Reports ("DMRs") every monitoring result undertaken pursuant to the permit. The Court's invitation to the United States to file a brief as amicus curiae relates to the second allegation.

On September 16, 1999 the Alabama Department of Environmental Management ("ADEM") issued an NPDES permit renewal to the Defendant for its wastewater treatment plant. The permit contains limits on the discharge of various pollutants, including pH, total residual chlorine, dissolved oxygen, fecal coliform,

biological oxygen demand, total suspended solids, and ammonia as nitrogen. The permit imposes daily minimum and maximum requirements for pH and total residual chlorine, a daily minimum requirement for dissolved oxygen, and a daily maximum and monthly average requirement for fecal coliform. The permit imposes monthly and weekly average requirements for biological oxygen demand, total suspended solids, and ammonia as nitrogen. *Permit* at 1-A and 1-B. The permit defines weekly average to mean the arithmetic mean of all samples collected during a calendar week. The permit defines monthly average as the arithmetic mean of all samples taken for daily discharges in a one-month period. Daily maximum and minimum are defined as the highest and lowest value, respectively, of any individual sample result obtained during a 24-hour period. *Permit* at 13-16.

The permit requires the Defendant to monitor the discharge of these pollutants by sampling its effluent three times per week. *Permit*, at Part I.A and B. It further requires the Defendant to record by whom and from where the samples were taken and the results of each sampling analysis, *Permit*, at Part I.B.4, and requires the Defendant to retain all records and information relating to these monitoring requirements for a period of at least three years or such additional time as is specified by ADEM. ADEM must be given access to these results. *Permit*, at

Part I.B.5. Regarding the reporting of these monitoring results, the permit states that "[m]onitoring results obtained during each monthly period shall be summarized for that month on a Discharge Monitoring Report (DMR) form." *Permit*, at Part I.C(1). To assist the Defendant in preparing its DMRs, we understand that ADEM provided the Defendant with the DMR form and the NPDES User Guide, issued by EPA. *Brief in Support of Defendants's Motion for Summary Judgment on Count II*, p. 6.

There appears to be no dispute among the Parties that the Defendant has submitted DMRs to ADEM since October, 1999. The dispute here relates to the amount of monitoring information that must be included on those DMRs. The Defendant maintains that it is required by the permit to report only summarized values of the maximum and minimum monthly monitoring results, along with the total number of exceedences for each pollutant during the month, and has reported consistently such summary information since October, 1999. In part, the Defendant supports its position by reference to the EPA-issued User Guide. *Brief in Support of Defendants's Motion for Summary Judgment on Count II*, p. 6. The Plaintiffs contend that by not reporting on its DMR each and every monitoring analysis it has undertaken, the Defendant has violated the reporting requirements of its permit on thousands of occasions since 1999. *Plaintiffs' Brief in Support of Their*

At the outset, the United States would like to make clear that as a non-party to this proceeding, it takes no position on whether the Defendant has in fact complied with the terms of its Alabama permit. The United States comments herein relate to the interpretation and application of federal NPDES requirements and guidance.

THE PERMIT'S REPORTING REQUIREMENT

It is clear and undisputed by all parties to this case, that a permittee's reporting obligations are governed by the express terms of the permit itself. Public Interest Research Group of New Jersey v. US Metals Refining Co., 681 F. Supp. 237, 244-245 (D.N.J. 1987) (holding that the permit language required the regulated party to report the results of its weekly monitoring on its DMR); NRDC, Inc. v. Texaco Refining and Marketing, Inc., 800 F. Supp. 1, 18-20 (D. Del. 1992) (holding that the permit's definition of the term "average" controlled).

As noted above, in this case, the permit requires the permittee to summarize its monitoring results on a DMR form. *Permit*, at Part I.C(1), emphasis added. Although the permit does not explicitly define the term "summarize," the ordinary meaning

of the term indicates that something less than all gathered information is intended. For example, Webster's dictionary defines a "summary" to mean "an abstract, abridgement, or compendium, esp. of a preceding discourse." Merriam-Webster's Collegiate Dictionary 1179 (10th ed. 1999). (See, e.g., United States v. Iverson, 162 F. 3d 1015, 1022-1023 (9th Cir. 1998) (in the absence of a [statutory] definition, words should be interpreted as taking their ordinary, contemporary, common meaning.) The Permit's terms also make clear that the Defendant was required to report its summary of sampling results on an approved DMR form. Instructions to the DMR form make clear that summary information (such as that provided by the Defendant) would not be inconsistent with the requirements of the Alabama permit.^{1/}

These permit requirements are also consistent with applicable EPA regulations which state that "[m]onitoring results shall be reported at the intervals specified ... in this permit"

^{1/} The instructions state that in completing the column entitled "sample measurement" on the DMR form, "[i]t may be necessary to do calculations to convert data to the units required in the permit. 'Average' is normally arithmetic average (geometric average for bacterial parameters) of all sample measurements for each parameter obtained during the monitoring period. 'Maximum' and 'Minimum' are normally the highest and lowest measurements obtained during the monitoring period." See Discharge Monitoring Reports, Instructions for Completion #8.

and "must be reported on a Discharge Monitoring Report (DMR)". 40 C.F.R. §122.41(1)(4) (1999). The EPA regulations further require that permittees must retain records of all monitoring results for at least three years from the date of measurement, or additional time specified by a State. See 40 C.F.R. 122.41(j). Most importantly, the regulations governing the State of Alabama's authorized program, under which the instant Permit was issued, contain the same requirements.^{2/}

EPA interprets its equivalent federal regulations to mean that all monitoring results must be retained by the permittee, but that the permit defines the manner in which monitoring results must be reported on the DMR. Therefore, it is possible that a permit may specify that only certain monitoring results must be reported on the DMR. However, regardless of which monitoring results must be reported on the DMR under a particular permit, all results must be included in calculations of compliance with permit limits, and the DMR form must clearly communicate how the reported values and exceedances relate to

^{2/} See Ala. Admin. Code r. 335-6-6-.12(1)(5)(i)-(ii) "Monitoring results shall be summarized for each monitoring period on a Discharge Monitoring Report form (DMR). . . [and] monitoring reports shall be submitted with a frequency dependent on the nature and effect of the discharge . . . and as required by the NPDES permit." Alabama regulations also require that adequate notice and comment be provided to the public on the terms of this Permit before issuance by the State. See Ala. Admin. Code r. 335-6-6.21(1)(a) (2000).

each relevant permit limit.^{3/} As a prerequisite to obtaining approval to administer the NPDES program, Alabama is required to implement regulations equivalent to EPA's regulations, including §122.41, and to administer these requirements in conformance with the federal regulations, except where a state chooses to impose more stringent requirements. See 40 C.F.R. §123.25(a)(12).

The permit terms, which incorporate by reference the DMR form, and which comply with applicable federal and state NPDES regulations, govern the reporting obligations imposed on the defendant. While these provisions authorize the submission of summary information,^{4/} the submission of summary information is also consistent with EPA's User Guide.^{5/} Although the User Guide

^{3/} A permit provision requiring monitoring results to be summarized is consistent with permits issued by EPA, and is reasonable assuming the permit is interpreted in such a manner as to provide sufficient information to allow EPA, the State, or the public to determine that exceedances are being reported.

^{4/} This does not mean that an NPDES permittee will never be required to report all data collected. If the language of the permit requires more comprehensive reporting, that requirement would control, regardless of what is said in DMR instructions, EPA regulations, or the interpretation of these regulations expressed in guidance. Note also that if the permittee monitors more frequently than required by the permit, the results of the more frequent monitoring must be included in the calculation and reporting of the data submitted in the DMR, including the determination of violations. See 40 C.F.R. 122.41(1)(4) and Ala. Admin. Code r. 335-6-6-.12(1)(5)(iii) (2000).

^{5/} The User Guide confirms that the permit first and foremost determines the actual monitoring and reporting requirements imposed on a permittee. "The permit stipulates the self-

is not legally binding, it does summarize EPA's long-standing views on what reporting is required under applicable federal NPDES provisions. Since Alabama's NPDES regulations impose virtually identical requirements, we believe it is also instructive in interpreting the Alabama permit. Indeed, in this case it appears that Alabama provided the EPA User Guide to the Defendant as an instructional tool in complying with the reporting requirements of the permit. The User Guide provides pertinent guidance on how to comply with those requirements; relevant portions of the Guide confirm that information summarized in the manner reported by the Defendant in this case would not be inconsistent with the User Guide.⁶⁷

monitoring requirements that are the responsibility of the discharger." *User Guide*, p.4. "The overall objectives of a self-monitoring program are to collect, analyze and report accurate data that is representative of the actual discharge(s) as required by the permit." *Id.* at p. 5 (emphasis added). "[A]n acceptable self-monitoring program will include ... [d]ata reporting via the DMR in the manner specified in the permit". *Id.* at p. 6. "Recordkeeping and reporting in accordance with permit requirements." *Id.* at p. 9.

⁶⁷The User Guide indicates that a permit may require only a summary of the monitored data to be reported, rather than every monitoring result. See generally *User Guide* at 10-11. More specifically, the Guide recognizes that the purpose of the DMR is to provide "a summary of the quality and/or quantity of the permittee's discharge." *Id.* at p. 10. Further, the Guide provides detailed instructions for completion of the DMR form. After the collection of the monitoring data, the guidance instructs the permittee to enter the highest concentration and the monthly average concentration on the monthly monitoring report as the maximum and the average concentrations. *User Guide*, p. 17. The Guide states that "the 'average figure' reported will correlate with the 'average monthly' limit in the

The United States agrees with the position expressed by each of the parties herein that neither the DMR form nor the Permit User Guide can change the requirements of the underlying permit. Nevertheless, these documents, which have been used for over 15 years by EPA and many approved States, can be instructive in better understanding the requirements of an NPDES permit and the procedures for accurately completing a DMR form.¹⁷

The Plaintiffs cite to several cases to support their proposition that *all* monitoring results must be reported by the Defendants on its DMR form. *Plaintiffs Reply to Defendant's Response to Plaintiffs' Motion for Summary Motion*, pp. 4-13. However, these cases do not stand for this proposition.

Plaintiffs' reliance on International Union, et al. v. Amerace Corp., Inc., et al., 740 F.Supp. 1072, 1079-80 (D.N.J. 1990), is

discharge permit and the 'maximum' figure reported will correlate with the 'maximum daily-maximum instantaneous concentration' limits in the discharge permit." *Id.*

¹⁷ The User Guide reflects EPA's interpretation of its DMR form, whose use is required by regulation for filing NPDES reports under both EPA and equivalent State of Alabama regulations. The User Guide is a non-binding expression of the views of an expert administrative agency which, "while not controlling . . . do[es] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 144 (1944); see also Dade County, Florida v. Alvarez, 124 F.3d 1380, 1385 (11th Cir. 1997). The State's distribution of the Guide apparently signals that they intend to endorse its use in reporting under the State's programs.

clearly misplaced since the pretreatment regulations at issue there -- which apply to indirect dischargers as opposed to direct dischargers such as the Defendant -- specifically require monitoring results to be included in the periodic compliance report required of indirect dischargers, unlike the regulations at issue in this case, which state that the monitoring results shall be reported at intervals specified in the permit. See 40 C.F.R. 403.12(e)(1). Neither does Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3rd Cir. 1990) support Plaintiffs' proposition that all monitoring analyses must be reported, since the court there was not even considering alleged violations of reporting violations, and merely generically stated that monitoring results must be reported under NPDES permits. Plaintiffs' reliance on NRDC, et al. v. Texaco Refining and Marketing, Inc., 800 F.Supp. 1, 54, is also misplaced. At issue there was whether DMR data is controlling to determine if a violation occurred where there is a discrepancy between DMR data and raw monitoring data held by the Defendant. The court held that DMR data is controlling absent clear and convincing evidence of a reporting violation.^{2/}

^{2/}Additional cases cited by Plaintiff similarly do not represent court holdings that all monitoring results must always be reported. See e.g., Student PIRG of New Jersey, Inc. v. Tennoco Polymers, Inc., 602 F. Supp. 1394, 1400 (D. N.J. 1985) (holding simply that reports that are required to be kept by law, such as DMRs, can be used to establish a defendant's liability); Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120, 1127-1128

Since the United States agrees with both the Plaintiffs and the Defendant that neither the DMR form nor any guidance document can change the terms of the permit, the remaining cases Plaintiffs cite are simply inapplicable. As explained above, the directions for submitting data explained in the DMR form, its instructions, and the User Guide, are entirely consistent with the terms of the Alabama NPDES permit.

CONCLUSION

For the reasons explained above, the Court should conclude that the terms of the Defendant's permit, which require only that monitoring results be summarized and submitted on the DMR, are controlling. Such a requirement is not inconsistent with EPA or Alabama regulations or relevant interpretative guidance.

(holding that the EPA regulations require permit holders to maintain records of the results and report their monitoring results on a DMR and that the DMR must contain a complete and accurate record of the pollutant monitoring (citing to Chesapeake Bay Foundation v. Bethlehem Steel Co., 608 F. Supp. 440, 451 (D. Md. 1985)) and that improper recording is not a good defense.

Respectfully submitted,

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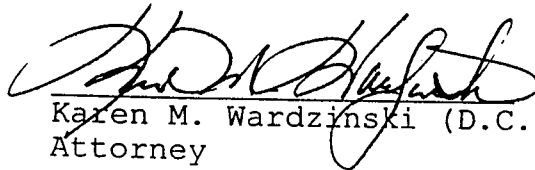
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CERTIFICATE OF SERVICE

I, Karen M. Wardzinski, do hereby certify that on December 15, 2000, I caused a true and correct copy of the above and foregoing motion to be forwarded, via United States mail, postage prepaid, to:

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