

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
STATE OF NEW HAMPSHIRE,)	CIVIL ACTION NO.
)	
Plaintiff-Intervenor,)	
)	
v.)	
)	
CITY OF MANCHESTER, NEW HAMPSHIRE,)	
)	
Defendant.)	
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COMPLAINT

The United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), alleges as follows:

NATURE OF ACTION

1. This is a civil action brought against the City of Manchester, New Hampshire (“Manchester” or the “City”) under Section 309(b) of the Federal Water Pollution Control Act of 1972, as amended (commonly referred to as the “Clean Water Act” and hereinafter referred to as the “CWA”), 33 U.S.C. § 1319(b). The claims arise from the City’s failure to comply with the CWA by discharging pollutants from its wastewater collection system both without authorization

of, and in noncompliance with, its National Pollutant Discharge Elimination System (“NPDES”) permit.

JURISDICTION, VENUE AND NOTICE

2. This Court has jurisdiction over the subject matter of this action under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper in this district under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), 28 U.S.C. § 1391(b), and 28 U.S.C. § 1395.

4. Notice of the commencement of this action has been given to the State of New Hampshire pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

DEFENDANT

5. Manchester is a municipality incorporated under the laws of the State of New Hampshire.

6. Manchester is a “municipality” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4), and a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

INTERVENING PLAINTIFF

7. Section 309(e) of the CWA, 33 U.S.C. § 1319(e), provides:

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

8. The State of New Hampshire has committed to join this action pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e), as an intervening plaintiff. The United States reserves all claims that it may have against the State of New Hampshire under Section 309(e).

STATUTORY BACKGROUND

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant to navigable waters of the United States except in compliance with, *inter alia*, the terms and conditions of a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

10. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutants” to include “any addition of any pollutant to navigable waters from any point source.”

11. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” to include, *inter alia*, “sewage . . . , biological materials . . . , and . . . municipal . . . waste discharged into water.”

12. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as “the waters of the United States, including the territorial seas.”

13. In turn, “waters of the United States” has been defined to include, in relevant part, “[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide,” and tributaries of such waters. 40 C.F.R. § 122.2.

14. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged.”

15. Section 402 of the CWA, 33 U.S.C. § 1342, provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of pollutants into navigable waters upon such specific terms and conditions as the Administrator of EPA may prescribe.

16. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates Section 301(a) of the CWA, 33 U.S.C. § 1311(a), or a permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

GENERAL ALLEGATIONS

17. The City of Manchester is the owner and operator of a treatment works including a wastewater treatment plant that serves Manchester and portions of Bedford, Londonderry, and Goffstown, New Hampshire, with a sewered population of approximately 155,000 people. The City owns and operates a wastewater collection system that consists of approximately 385 miles of sewer pipeline. Of this system, approximately 55% are sanitary sewers, which carry domestic, industrial, and commercial wastewater, and 45% are combined sewers which carry such wastewater and, in addition, stormwater runoff.

18. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA issued NPDES Permit No. NH0100447 to the City on September 25, 2008 (the “2008 Permit”), and reissued it on February

11, 2015 (the “2015 Permit”). The 2015 Permit became effective on May 1, 2015 and will expire on April 30, 2020.

19. During rain events, rainwater often overwhelms the capacity of the Manchester combined sewer system, resulting in excess storm- and wastewater, including untreated sewage, being diverted to the City’s combined sewer overflow (“CSO”) outfalls, and thereafter, into receiving water bodies including, but not limited to, the Merrimack River, Piscataquog River, Ray Brook and Tannery Brook.

20. Manchester’s NPDES Permit authorizes Manchester to discharge pollutants from 15 CSO outfalls, identified in the Permit, only in conformity with and as limited by the terms of the Permit.

21. Manchester’s CSO outfalls are “point sources” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. Discharges from Manchester’s CSO outfalls include, among other contaminants, “sewage,” “biological materials,” and “municipal waste,” all “pollutants” under Section 502(6) of the CWA, 33 U.S.C. § 1362(6). These contaminants can cause a variety of adverse impacts on the physical characteristics of water resources, present threats to human health and welfare and the environment, and significantly degrade the aesthetic value of surface waters.

23. Discharges from Manchester’s CSO outfalls enter, directly or indirectly, the Merrimack River, Piscataquog River, Ray Brook, and Tannery Brook, which are “navigable waters” and “waters of the United States” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

24. New Hampshire's water quality standard for *E. coli* bacteria is 1,000 colonies per 100 milliliters for discharges into non-tidal waters, such as the Merrimack River, Piscataquog River, Ray Brook, and Tannery Brook. Both the 2008 Permit and the 2015 Permit provide that the City's CSOs may not contain *E. coli* bacteria in excess of 1,000 colonies per 100 milliliters. Both the 2008 and 2015 Permit require that the City's CSOs shall not cause violations of water quality standards.

25. The City has, in violation of its NPDES Permit, discharged and continues to discharge "pollutants," including *E. coli*, within the meaning of Sections 502(6) and (12) of the CWA, 33 U.S.C. §§ 1362(6) and (12), from its wastewater treatment plant and wastewater collection system through "point sources" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), into "navigable waters" within the meaning of Section 502(7). These waters include, but are not limited to, the Merrimack River, Piscataquog River, Ray Brook and Tannery Brook.

CLAIM FOR RELIEF

26. The United States realleges and incorporates by reference the allegations of Paragraphs 1 through 25 above.

27. According to the two most recent years of data reported by Manchester, the City's combined sewers overflowed by an average discharge volume of approximately 295 million gallons annually.

28. Manchester conducts annual effluent characteristic monitoring of its CSOs. Data reported by the City itself over the past nine years reveal levels of *E. coli* colonies ranging between 1,250 and 560,000 per 100 milliliters in samples of combined sewage.

29. Manchester's CSO discharges contain *E. coli*, among other pollutants, in excess of the amounts allowed under New Hampshire water quality standards and the City's 2008 Permit and 2015 Permit.

30. Manchester's CSO discharges containing pollutants that cause or contribute to violations of New Hampshire water quality standards in the Merrimack River, Piscataquog River, Ray Brook, and Tannery Brook are violations of the 2008 Permit and 2015 Permit and the CWA.

31. Upon information and belief, Manchester will continue to discharge pollutants from its CSO outfalls in violation of the New Hampshire water quality standards and the 2015 Permit unless restrained by this Court.

32. Pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), Manchester is subject to injunctive relief to prevent future violations of the CWA.

33. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or any condition or limitation of a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. This civil penalty level has been adjusted upward over time at 40 C.F.R. § 19.4 as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410), as amended by the Debt Collection Improvement Act of 1996 (28 U.S.C. § 2461 note; Pub. L. 104-134) and the Federal Civil

Penalties Inflation Adjustment Act Improvements Act of 2015 (28 U.S.C. § 2461 note; Pub. L. 114-74, Section 701). Pursuant to this authority, Manchester is subject to civil penalties up to \$37,500 per violation per day occurring after January 12, 2009 through November 2, 2015 and \$55,800 per violation per day occurring after November 2, 2015.

PRAYER FOR RELIEF

WHEREFORE, the United States of America respectfully requests that the Court grant the following relief:

1. Permanently enjoin the City, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), from any and all future violations of the CWA and from discharges of pollutants except as authorized by a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342;
2. Pursuant to Section 309(d) of the CWA and C.F.R. § 19.4, assess civil penalties against Defendant in amounts up to \$37,500 per violation per day occurring after January 12, 2009 through November 2, 2015 and \$55,800 per violation per day occurring after November 2, 2015;
3. Award the United States its costs in this action; and
4. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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