

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

_____)	
UNITED STATES OF AMERICA,)	
)	
and)	
)	
THE STATE OF ARKANSAS,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO. 14-2266
)	
CITY OF FORT SMITH, ARKANSAS,)	
)	
Defendant.)	
_____)	

AMENDED COMPLAINT

The United States of America, by the authority of the Attorney General of the United States and through its undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of Arkansas, by the authority of the Attorney General of Arkansas and through its undersigned attorney, acting at the request of the Arkansas Department of Environmental Quality (“ADEQ”), file this complaint and allege as follows:

1. This civil action for injunctive relief and civil penalties is brought under Section 309(b) and (d) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(b) and (d), against the Defendant City of Fort Smith, Arkansas (“Defendant City”) for numerous unpermitted and illegal discharges of pollutants in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). This complaint also alleges that Defendant City violated certain terms and conditions of its

National Pollution Discharge Elimination System (“NPDES”) permits, also in violation of Section 301(a) of the CWA.

JURISDICTION, VENUE, AND NOTICE

2. This Court has subject matter jurisdiction over 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. This Court has personal jurisdiction over Defendant City and venue is proper in the Western District of Arkansas pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and 1395(a), because this is the district where Defendant City is located and in which the alleged violations occurred.

4. The United States Department of Justice has authority to bring this action on the behalf of the Administrator of the EPA (“the Administrator”) under Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

5. Pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), the United States has notified the State of Arkansas of the filing of this action and the State joins in this action as a co-plaintiff.

PARTIES

6. Plaintiff United States of America is acting at the request and on behalf of the Administrator.

7. Plaintiff the State of Arkansas is acting at the request and on behalf of the Director of the ADEQ. Section 309(e) of the CWA requires that a State be joined as a party when the United States sues a municipality of the State. The State of Arkansas is a co-plaintiff, along with the United States, in this action. ADEQ is authorized to implement provisions of the CWA within the State of Arkansas.

8. Defendant City is a political subdivision of the State of Arkansas, created pursuant to the laws of the State of Arkansas, and is therefore a “municipality” within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4).

9. Defendant City is a “person” as defined in Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.

10. Defendant City owns, operates, and controls two “publicly owned treatment works” (“POTW”), as that term is defined in 40 C.F.R. § 122.2.

11. The wastewater treatment plant (“WWTP”) for the P Street POTW is located at 13 North P Street in Fort Smith, Arkansas.

12. The WWTP for the Massard POTW is located near 1609 North 9th Terrace, in Barling, Arkansas.

13. Combined, Defendant City’s two POTWs serve an area covering approximately 86 square miles, with a population of approximately 87,443. The town of Arkoma, population approximately 2,000, is also served by Defendant City’s P Street POTW.

STATUTES AND REGULATIONS

14. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutants except as authorized by, and in compliance with, certain enumerated sections of the CWA, including Section 402 of the CWA, 33 U.S.C. § 1342.

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

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

17. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” as “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.”

18. 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 territorial seas.

19. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the Administrator may issue a permit, termed a NPDES permit, that authorizes discharges of pollutants to navigable waters, subject to such conditions that the Administrator determines are necessary to carry out the provisions of the CWA.

20. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), a State may establish its own permit program and, after receiving program approval from EPA, may issue NPDES permits. The State of Arkansas established its own NPDES permit program and received EPA approval of its program in 1986. See generally, the Arkansas Water and Air Pollution Control Act at Ark. Code Ann. §§ 8-4-206- 8-4-208, and the Arkansas Pollution Control and Ecology Commission (“APC&EC”) Regulation No. 6.

21. Pursuant to Section 301 of the CWA, 33 U.S.C. § 1311, and Section 402 of the CWA, 33 U.S.C. § 1342, the Administrator is authorized to specify effluent limitations in NPDES permits. Effluent limitations include -- but are not limited to -- restrictions on the quantity, rate, and concentration of chemical, physical, biological, and other constituents of wastewater discharges, as defined in Section 502(11) of the CWA, 33 U.S.C. § 1362(11).

22. Pursuant to 40 C.F.R. § 403.3, promulgated under the CWA, a POTW is defined as a “treatment works,” as defined under Section 212 of the CWA, 33 U.S.C. § 1292, that treats

municipal sewage and is owned by a State or municipality. This definition includes the sewers, pipes, and other conveyances that convey sewage to the sewage plants.

23. Pursuant to 40 C.F.R. § 122.41, promulgated under the CWA, the Administrator may require the holder of a NPDES permit to monitor and report the pollutant levels in its discharged wastewater. Such reports are referred to as Discharge Monitoring Reports (“DMRs”) and, in Defendant City’s situation, are required to be submitted monthly.

24. Pursuant to 40 C.F.R. § 122.41(k)(1) and 40 C.F.R. § 122.22 (3)(a) and (b), promulgated under the CWA, a standard condition of all NPDES permits requires that all DMRs and non-compliance reports submitted to the Administrator be signed by a responsible executor or authorized agent of the organization that controls the point source -- who certifies that the reports are accurate.

25. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the Administrator to commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person is in violation of, inter alia, Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation implementing, inter alia, Sections 301, 308, or 402 of the CWA, 33 U.S.C. §§ 1311, 1318, or 1342.

26. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates, inter alia, Section 301 of the CWA, 33 U.S.C. § 1311, or who violates any condition or limitation of a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty.

27. Pursuant to the Debt Collection Improvement Act of 1996 and 40 C.F.R. Part 19, the maximum penalty for a violation of Section 309(d) of the CWA, 33 U.S.C. § 1319(d), is \$27,500 for a violation committed between January 30, 1997, and March 16, 2004, \$32,500 for a

violation committed between March 16, 2004 and January 12, 2009, and \$37,500 for violations committed on or after January 13, 2009. See 78 Fed. Reg. No. 66643, 66647 (Table 1 of Section 19.4) (Nov. 6, 2013).

GENERAL ALLEGATIONS

28. Historically, EPA has taken several enforcement actions against Defendant City. For example, in 1983 the United States, on behalf of EPA, entered into a judicial Consent Decree with Defendant City to address NPDES permit violations that were occurring in the early 1980s. Between December 1988 and September 2005, EPA Region 6 issued numerous administrative orders to Defendant City to address various areas of NPDES permit noncompliance, including but not limited to unauthorized Sanitary Sewer Overflows (“SSOs”) resulting from excessive “inflow and infiltration” (“I/I”) and violations of the effluent limits set in Defendant City’s NPDES Permits for Outfall 001 at the Massard WWTP and Outfall 001 at the P Street WWTP. Notwithstanding the administrative orders issued by EPA Region 6, Defendant City continues to have numerous SSOs from both the P Street and the Massard POTWs, to exceed the effluent limits set for its two WWTPs, and to fail to comply with other terms and conditions of its NPDES permits, as set forth below.

29. Times relevant to this complaint are September 1, 2004 to the present.

The P Street POTW

30. The P Street WWTP treats and discharges domestic, commercial and industrial wastewater. Under all of the below-mentioned NPDES permits applicable to the P Street POTW, there is only one “permitted” or legal outfall: Outfall 001, located at the P Street WWTP, which discharges to the Arkansas River, a navigable water of the United States, and a “water of the State” of Arkansas under Ark. Code Ann. § 8-4-102(10).

31. The State of Arkansas has classified portions of the Arkansas River in the Fort Smith area as primary contact recreation, raw water source for water supplies, propagation of desirable fish species and other compatible uses. AAPC&EC Reg. 2.302 or APC&EC Reg. 2, Appendix A (2013).

32. Defendant City's P Street WWTP and the sanitary sewer system serving the P Street WWTP are "point sources" as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

33. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, ADEQ issued NPDES Permits for the P Street POTW (all with the Permit Number AR033278), effective on the following dates:

- October 1, 2001 ("the 10/1/01 P Street Permit");
- January 1, 2007 (the "1/1/07 P Street Permit"); and
- March 1, 2012 ("the 3/1/12 P Street Permit).

Hereinafter when referred to collectively, the three above-listed permits shall be called "the Three P Street Permits." When referred to individually, the above-listed names will be used.

34. The currently effective P Street Permit (the 3/1/12 P Street Permit) is set to expire on February 28, 2017.

35. The Three P Street Permits authorize(d) the discharge of wastewater from the P Street POTW only in accordance with the effluent limitations, monitoring and reporting requirements, and other conditions set forth in the permits.

36. Part I. A. of the Three P Street Permits limits the levels of certain pollutants that may be discharged from Outfall 001 at the P Street WWTP, including but not limited to total

suspended solids (“TSS”), Total Residual Chlorine (“TRC”), fecal coliform bacteria (“FCB”) and pH.

37. Untreated sewage can carry bacteria, viruses, parasitic organisms, intestinal worms, and boroughs (inhaled molds and fungi). The diseases these may cause range in severity from mild gastroenteritis (causing stomach cramps and diarrhea) to life-threatening ailments such as cholera, dysentery, infectious hepatitis, and severe gastroenteritis. Untreated sewage may pose an endangerment to the health of persons. Groups facing greater risks include children, the elderly, immune-compromised groups, and pregnant women.

38. Beginning with the 1/1/07 P Street Permit, Part I.A. of that permit required that starting three years from the effective date of the permit (*i.e.* starting 1/1/10), effluent limits for Ammonia Nitrogen (NH₃-N), Dissolved Oxygen (“DO”), and Carbonaceous Biochemical Oxygen Demand (“CBOD₅”) would commence. The 3/1/12 P Street Permit also contains effluent limits for NH₃-N, DO and CBOD₅.

39. Part I. A. of the Three P Street Permits requires Defendant City to monitor the pollutants mentioned in Paragraphs 36 and 38, *supra*, as well as conduct other pollutant monitoring, either daily or three times per week.

40. Part II.C.5. of the 10/1/01 P Street Permit and Part III.C. 5. of the 1/1/07 P Street Permit and the 3/1/12 P Street Permit, require Defendant City to report the results of the pollutant monitoring that it performs on the discharge from Outfall 001 at the P Street WWTP in DMRs to be submitted to ADEQ monthly.

41. Part II.A.1. of the 10/1/01 P Street Permit and the 1/1/07 P Street Permit, and Part III.A.1. of the 3/1/12 P Street Permit state that: “Any values reported in the required Discharge

Monitoring Reports (DMR) which are in excess of an effluent limitation specified in Part I shall constitute evidence of violation of such effluent limitation and of this permit.”

42. Part II.D.11. of the 10/1/01 P Street Permit and the 1/1/07 P Street Permit, and Part III.D.11. of the 3/1/12 P Street Permit require Defendant City to certify to the accuracy of the information contained in each DMR that it submits to ADEQ.

43. Part III.7. of the 10/1/01 P Street Permit and Part III.5. of the 1/1/07 P Street Permit required Defendant City to report “all overflows” (*i.e.* SSOs) from its POTW in its monthly DMRs, in table format, and to include: the date, time, duration, location, estimated volume, and cause of the SSO, observed environmental impacts, actions taken to address; and ultimate discharge location if not contained (e.g. storm sewer system, ditch, tributary).” Further, Part III.7. of the 10/1/01 P Street Pert and Part III.5. of the 1/1/07 P Street Permit required that “all overflows” (*i.e.* SSOs) which endanger health or the environment shall be reported to ADEQ within 24 hours from the time Defendant City first becomes aware of them, and that a written report shall be submitted to ADEQ within 5 days of when Defendant City first becomes aware of them.

44. Part II.5.A. of the 3/1/12 P Street Permit defines SSO as: “any spill, release or diversion of sewage from a sanitary sewer collection system, including: 1. An overflow that results in a discharge to waters of the state; and 2. An overflow of wastewater, including a wastewater backup into a building (other than a backup caused solely by a blockage or other malfunction in a privately owned sewer or building lateral), even if that overflow does not reach waters of the state.”

45. Arkansas defines “waters of the state” as “all streams, lakes, marshes, ponds, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other

bodies of accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion of the state.” Ark. Code Ann. § 8-4-102(10).

46. Part II.5.B. of the 3/1/12 P Street Permit requires that all SSOs be reported within 24 hours of Defendant City’s first becoming aware of the SSO, with the report including, at a minimum: the location, receiving water (if one), duration, cause and estimated volume of the SSO.

47. Part II.5.C. of the 3/1/12 P Street Permit also requires that all SSOs (as defined in Part II.5.A.) be reported in the monthly DMRs, and include: 1. location; 2. receiving water (if one); 3. duration; 4. cause; 5. estimated volume; 6. description of sewer system component from which release occurred; 7. estimated date and time when the SSO began and stopped; 8. cause or suspected cause; 9. steps taken or planned to reduce, eliminate or prevent reoccurrence, and schedule of major milestones for such steps; 10. if reasonably made, an estimate of number of persons who came into contact with wastewater from the SSO; and 11. steps taken or planned to mitigate the impact(s) of the SSO and a schedule of major milestones for such steps.

48. Part II.B.1.A. of the 10/1/01 P Street Permit and the 1/1/07 P Street Permit, and Part III.B.1.A. of the 3/1/12 P Street Permit require that: “[t]he permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.” The term “treatment works” includes any devices and systems used for storage, treatment, recycling and reclamation of municipal sewage and industrial waste, including, among other things, intercepting sewers, sewage collection systems, pumping, power and other equipment. See Part IV.24. of the Three P Street Permits.

49. Part II.B.2. of the 10/1/01 P Street Permit and the 1/1/07 P Street Permit, and Part III.B.2. of the 3/1/12 P Street Permit state: “Need to Halt or Reduce not a Defense It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.”

50. Part II.B.3. of the 10/1/01 P Street Permit and the 1/1/07 P Street Permit, and Part III.B.3. of the 3/1/12 P Street Permit state: “Duty to Mitigate The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment or the water receiving the discharge.”

51. Part II.B.7. of the 10/1/01 P Street Permit and the 1/1/07 P Street Permit, and Part III.B.7. of the 3/1/12 P Street Permit state: “Power Failure The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternative power sources, standby generators, or retention of inadequately treated effluent.”

The Massard POTW

52. The Massard WWTP treats and discharges domestic, commercial and industrial wastewater. Under all of the below-mentioned NPDES permits applicable to the Massard POTW, there is only one “permitted” or legal outfall: Outfall 001, located at the Massard WWTP, which discharges to the Arkansas River, a navigable water of the United States and a “water of the state” of Arkansas under Ark. Code Ann. § 8-4-102(10).

53. The Massard WWTP and the sanitary sewer system that serves it are “point sources” as that term is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

54. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, ADEQ issued NPDES Permits (or Minor Permit Modifications) for the Massard POTW (all with the Permit Number AR0021750), effective on the following dates:

- April 1, 1998 (“the 4/1/98 Massard Permit”);
- September 1, 2003 (“the 9/1/03 Massard Permit”);
- February 1, 2009 (“the 2/1/09 Massard Permit”);
- February 19, 2010 (“the 2/19/10 Minor Mod.”); and
- March 1, 2013 (“the 3/1/13 Minor Mod.”).

Hereinafter when referred to collectively, the five above-listed NPDES permits and minor modifications shall be referred to as “the Massard Permits & Minor Mods.” When referred to individually, the above-listed names next to each bullet shall be used.

55. The currently effective Massard Permit (*i.e.* the 2/1/09 Permit as modified by the 3/1/13 Minor Mod) was set to expire on January 31, 2014, but has been administratively extended until it is reissued.

56. The Massard Permits & Minor Mods. authorize(d) the discharge of wastewater from the Massard POTW only in accordance with the effluent limitations, monitoring and reporting requirements, and other conditions set forth in the permits.

57. Part I. A. of the Massard Permits & Minor Mods. all limit the levels of certain pollutants that may be discharged from Outfall 001 at the Massard WWTP, including but not limited to BOD5, FCB, pH, and TSS. Starting with the 9/1/03 Massard Permit and for all above-listed permits and Minor Mods. thereafter, Part I.A. included limits on the following additional pollutant parameters: CBOD5, Cyanide- Total Recoverable (“CN”), NH3-N, and TRC. Starting

with the 2/1/09 Massard Permit and for the two Minor Mods. thereafter, Part I.A. included a limit on DO.

58. Part I. A. of the Massard Permits & Minor Mods. require Defendant City to monitor the pollutants mentioned in Paragraph 57, *supra*, as well as conduct other pollutant monitoring, either daily, three times a week, or monthly, depending on the pollutant parameter.

59. Part II.C.5. of the Massard Permits & Minor Mods. requires Defendant City to report the results of the pollutant monitoring that it performs on the discharge from Outfall 001 at the Massard WWTP in monthly DMRs to be submitted to ADEQ.

60. Part II.A.1. of the Massard Permits & Minor Mods states: “Any values reported in the required Discharge Monitoring Reports (DMR) which are in excess of an effluent limitation specified in Part I shall constitute evidence of violation of such effluent limitation and of this permit.”

61. Part II.D.11. of the 4/1/98 Massard Permit and the 9/1/03 Massard Permit, and Part III.D.11. of the 2/1/09 Massard Permit and the two Minor Mods. thereto require Defendant City to certify to the accuracy of the information contained in each DMR that it submits to ADEQ.

62. Part III.10. of the 4/1/98 Massard Permit, Part III.6. of the 9/1/03 Massard Permit and Part II.5 of the 2/1/09 Massard Permit and the two Minor Mods. thereto require Defendant City to report “all overflows” (*i.e.* SSOs) from its POTW in its monthly DMR, in table format, and to include: the date, time, duration, location, estimated volume, and cause of the SSO, observed environmental impacts, actions taken to address; and ultimate discharge location if not contained (e.g. storm sewer system, ditch, tributary). Further, Part III.10. of the 4/1/98 Massard Permit, Part III.6. of the 9/1/03 Massard Permit, and Part II.5. of the 2/1/09 Massard Permit and

the two Minor Mods. thereto required that “all overflows” which endanger health or the environment shall be reported to ADEQ within 24 hours from the time Defendant City first becomes aware of them, and that a written report shall be submitted to ADEQ within 5 days of when Defendant City first becomes aware of them.

63. Part II.B.1. of the 4/1/98 Massard Permit and the 9/1/03 Massard Permit, and Part III.B.1. of the 2/1/09 Massard Permit and the two Minor Mods. thereto require that: “[t]he permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit.” The term “treatment works” includes any system used for storage, treatment, recycling and reclamation of sewage, including, among other things, intercepting sewers, sewage collection systems, pumping, power and other equipment. See Part IV.24. of the Massard Permits & Minor Mods.

64. Part II.B.2. of the 4/1/98 Massard Permit and the 9/1/03 Massard Permit, and Part III.B.2. of the 2/1/09 Massard Permit and the two Minor Mods thereto state: “Need to Halt or Reduce not a Defense It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.”

65. Part II.B.3. of the 4/1/98 Massard Permit and the 9/1/03 Massard Permit, and Part III.B.3. of the 2/1/09 Massard Permit and the two Minor Mods state: “Duty to Mitigate The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment or the water receiving the discharge.”

66. Part II.B.7. of the 4/1/98 Massard Permit and the 9/1/03 Massard Permit, and Part III.B.7. of the 2/1/09 Massard Permit and the two Minor Mods thereto state: “Power Failure The permittee is responsible for maintaining adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failure either by means of alternative power sources, standby generators, or retention of inadequately treated effluent.”

FIRST CLAIM FOR RELIEF

(Unpermitted Discharges of Pollutants in Violation of CWA Section 301(a))

67. Paragraphs 1-66 are re-alleged and incorporated herein by reference.

68. At times relevant to this complaint, Defendant City of Fort Smith has on numerous occasions discharged pollutants from point sources not specified in any NPDES Permit issued by ADEQ or EPA pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, to waters of the United States and/or waters of the State, including but not limited to the Arkansas River. These unpermitted discharges occurred from the Massard POTW and the P Street POTW, including but not limited to their collection and conveyance systems.

69. Section 301(a) of the CWA, 33 U.S.C. § 1311(a) prohibits the unpermitted discharge of pollutants.

70. 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, shall be subject to a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in Paragraph 27, *supra*.

71. Unless enjoined by an order of Court, Defendant City will continue to engage in unpermitted discharges of pollutants from its Massard POTW and P Street POTW, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

SECOND CLAIM FOR RELIEF

**(Violation of the “Proper Operation and Maintenance” Condition
in Defendant City’s NPDES Permits)**

72. Paragraphs 1-66 are re-alleged and incorporated herein by reference.

73. 40 C.F.R. § 122.41 sets forth a list of conditions that all NPDES permits issued under State NPDES permitting programs must contain to meet Federal minimum standards. Subpart (e) of 40 C.F.R. § 122.41 sets forth a condition requiring the “Proper Operation and Maintenance” of facilities and systems. Section 122.41(e) states that a “permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of [the] permit.”

74. The term “facility” is defined in the regulations as “any NPDES ‘point source’ or any other facility . . . (including land or appurtenances thereto) that is subject to regulation under the NPDES program.” 40 C.F.R. §122.2.

75. The term “point source” is defined in the regulations as “any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged” Id.

76. As described more fully in Paragraphs 48 and 63 of this complaint, the NPDES Permits for both the Massard POTW and the P Street POTW contain this “Proper Operation and Maintenance” condition, and each of Defendant City’s Permits defines “treatment works” to include any system used for storage, treatment, recycling and reclamation of sewage, including, among other things, intercepting sewers, sewage collection systems, pumping, power and other equipment.

77. These unauthorized discharges (SSOs) from the Massard POTW and the P Street POTW were self-reported by Defendant City, as required by the SSO reporting requirements in the Massard Permits and Minor Mods. and the P Street NPDES permits, as more fully described in Paragraphs 43, 47 and 62, *supra*.

78. As evidenced by the hundreds of SSOs, including building backups, that have occurred during times relevant to this complaint that were caused by excess flow conditions, blockages, power outages, and/or other defects in the Massard POTW and the P Street POTW, Defendant City has failed to properly operate and maintain “all facilities and systems of treatment and control (and related appurtenances) which [were] installed or used by the permittee [the City] to achieve compliance with the conditions of [its] permit[s].”

79. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates any condition in a permit issued under Section 1342 of the CWA [the Section establishing the NPDES system] shall be subject to a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in Paragraph 27, *supra*.

80. Unless enjoined by an order of Court, Defendant City will continue to violate the “Proper Operation and Maintenance” conditions in its NPDES Permits for the Massard POTW and for the P Street POTW.

THIRD CLAIM FOR RELIEF

(Violation of the “Duty to Mitigate” Condition in Defendant City’s NPDES Permits)

81. Paragraphs 1-66 are re-alleged and incorporated herein by reference.

82. 40 C.F.R. § 122.41 sets forth a list of conditions that all NPDES permits issued under State NPDES permitting programs must contain to meet Federal minimum standards.

Subpart (d) of 40 C.F.R. § 122.41 establishes a “Duty to Mitigate,” and states “[t]he permittee shall take all reasonable steps to minimize or prevent any discharge . . . in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.”

83. Part II.B.3. of the 10/1/01 P Street Permit and the 1/1/07 P Street Permit, and Part III.B.3. of the 3/1/12 P Street Permit all contain the above-quoted language from 40 C.F.R. §122.41(d). Additionally, Part II.B.3. of the 4/1/98 Massard Permit and the 9/1/03 Massard Permit, and Part III.B.3. of the 2/1/09 Massard Permit and the two Minor Mods. contain the same above-quoted language from 40 C.F.R. § 122.41(d).

84. Defendant City has violated this “Duty to Mitigate” by failing to take “reasonable steps” to minimize or prevent discharges from its POTWs into waters of the United States and/or waters of the State.

85. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates any condition in a permit issued under Section 1342 of the CWA [the Section establishing the NPDES system] shall be subject to a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in Paragraph 27, *supra*.

86. Unless enjoined by an order of Court, Defendant City will continue to violate the “Duty to Mitigate” unauthorized discharges set forth in its NPDES Permits.

FOURTH CLAIM FOR RELIEF

(Violations of the Final Effluent Limits Set in Defendant City’s NPDES Permits for the Massard WWTP and the P Street WWTP)

87. Paragraphs 1 through 66 are realleged and incorporated herein by reference.

88. At times relevant to this complaint, Defendant City has discharged pollutants from Outfall 001 at the Massard WWTP to the Arkansas River at levels in excess of the effluent

limitations authorized for CN, FCB, NH₃-N, pH and TSS found in Part I.A. of the Massard Permits & Minor Mods., as more fully described in Paragraph 57, *supra*. Defendant City self-reported these exceedances in its DMRs, and such self-reported exceedances are evidence of violations, as described in Paragraphs 58-60.

87. Each day of Defendant City's discharge of each pollutant listed in excess of the effluent limit authorized for that pollutant in the Massard Permits constitutes a separate violation of the applicable permit, and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

88. At times relevant to this complaint, Defendant City has discharged pollutants from Outfall 001 at the P Street WWTP to the Arkansas River at levels in excess of the effluent limitations authorized for BOD₅, DO, FCB, NH₃-N, pH and TRC found in Part 1(A) of the P Street Permits, as described in Paragraph 38, *supra*. Defendant City self-reported these exceedances in its DMRs, and such self-reported exceedances are evidence of violations, as described in Paragraphs 40-42.

89. Each day of Defendant City's discharge of each pollutant listed in excess of the effluent limit authorized for that pollutant in the P Street Permits constitutes a separate violation of the applicable permit, and Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

90. Section 309(d) of the CWA, 33 U.S.C. §1319(d), provides that any person who violates any condition in a permit issued under Section 1342 of the CWA [the Section establishing the NPDES system] shall be subject to a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in Paragraph 27, *supra*.

91. Unless enjoined by an order of Court, Defendant City will continue to violate the effluent limits contained in Part I.A. of its NPDES Permits for the Massard POTW and the P Street POTW.

FIFTH CLAIM FOR RELIEF

(Violation of the SSO Reporting Requirements in Defendant City's NPDES Permits)

92. Paragraphs 1-66 are re-alleged and incorporated herein by reference.

93. As described in Paragraphs 43- 47, *supra*, (relating to the Three P Street NPDES Permits) and in Paragraph 62, *supra* (relating to the Massard Permits & Minor Mods.), Defendant City must report certain information to ADEQ in its DMRs regarding all "overflows" (*i.e.* SSOs) that occur in its two POTWs. On numerous occasions at times relevant to this complaint, Defendant City has failed to report SSOs in accordance with these reporting provisions. These failures include providing no notice of an SSO (either in a monthly DMR or within 24 hours), failing to provide the required 24 hour notice, and failing to supply all of the required information regarding SSOs (as set forth in Paragraphs 43, 47 and 62, *supra*).

94. Section 309(d) of the CWA, 33 U.S.C. §1319(d), provides that any person who violates any condition in a permit issued under Section 1342 of the CWA [the Section establishing the NPDES system] shall be subject to a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in Paragraph 27, *supra*.

95. Unless enjoined by an order of Court, Defendant City will continue to violate the SSO reporting requirements in its NPDES Permits for the Massard POTW and the P Street POTW.

SIXTH CLAIM FOR RELIEF

(Violation of the “Adequate Safeguards for Power Failures Condition” in Defendant City’s NPDES Permits)

96. Paragraphs 1-66 are re-alleged and incorporated herein by reference.

97. As more fully stated in Paragraph 51 (for the P Street POTW) and Paragraph 66 (for the Massard POTW), each of Defendant City’s NPDES permits that apply to times relevant to this complaint contain a condition which requires Defendant City “to maintain adequate safeguards to prevent the discharge of untreated or inadequately treated wastes during electrical power failures either by means of alternative power sources, standby generators, or retention of inadequately treated effluent” (“Adequate Safeguards for Power Failures Condition”).

98. At times relevant to this complaint, Defendant City has failed to maintain adequate backup power at certain of its facilities, including but not limited to pump stations, to prevent the discharge of untreated or inadequately treated wastewater into waters of the United States and/or waters of the State.

99. Section 309(d) of the CWA, 33 U.S.C. §1319(d), provides that any person who violates any condition in a permit issued under Section 1342 of the CWA [the Section establishing the NPDES system] shall be subject to a civil penalty. The statutory maximum civil penalty amounts that may be awarded per day for each violation are set forth in Paragraph 27, *supra*.

100. Unless enjoined by an order of Court, Defendant City will continue to violate the Adequate Safeguards for Power Failures Condition in its Massard NPDES Permit and its P Street NPDES Permit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs the United States of America and the State of Arkansas respectfully pray that this Court provide the following relief:

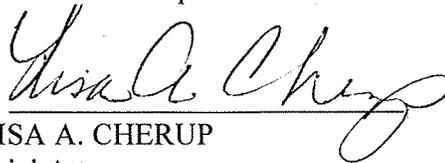
1. A permanent injunction directing Defendant City to take all steps necessary to come into permanent and consistent compliance with the prohibition on unpermitted discharges contained in Section 301(a) of the Clean Water Act;
2. A permanent injunction directing Defendant City to take all steps necessary to comply with the conditions in its NPDES Permits requiring “Proper Operation and Maintenance” of its two POTWs;
3. A permanent injunction directing Defendant City to comply with all of the effluent limits established in its NPDES Permits for discharges from Outfall 001 at the Massard WWTP and Outfall 001 at the P Street WWTP;
4. A permanent injunction directing Defendant City to comply with all of the SSO reporting requirements set forth in its NPDES Permits;
5. A permanent injunction directing Defendant City to comply with the “Adequate Safeguards for Power Failures” condition set forth in its NPDES Permits;
6. A permanent injunction directing Defendant City to comply with the “Duty to Mitigate” condition set forth in its NPDES Permits;
7. A judgment assessing civil penalties against Defendant City and in favor of the United States of up to the statutory maximum penalty figures set forth in Paragraph 27 of this complaint per day for each violation of CWA Section 301(a) and/or each term or condition of its NPDES permits;

8. An award to the United States of America of its costs and disbursements in this action; and
9. The granting of such other relief as this Court deems appropriate.

FOR THE UNITED STATES OF AMERICA:



SAM HIRSCH
Acting Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

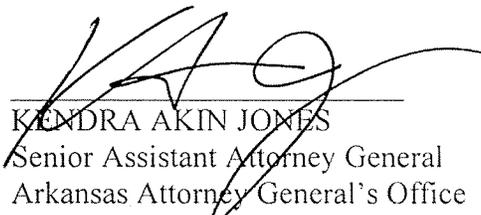


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