

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO.
)	
THE TOWN OF SWAMPSCOTT,)	
MASSACHUSETTS,)	
)	
Defendant,)	
)	
and,)	
)	
COMMONWEALTH OF MASSACHUSETTS,)	
)	
Necessary Party required by)	
33 U.S.C. § 1319(e))	
)	
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COMPLAINT

Plaintiff, the United States of America, through its undersigned attorneys, 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 Town of Swampscott, Massachusetts (“Town”, “Swampscott”, or “Defendant”) pursuant to Sections 309(b) and (d) of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1319(b) and (d).

2. The claims arise from the Defendant's failure to comply with the CWA in the operation of its municipal stormwater collection system.

JURISDICTION/VENUE/NOTICE

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

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

5. Notice of the commencement of this action has been given to the Commonwealth of Massachusetts pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

DEFENDANT

6. Swampscott is a political subdivision of the Commonwealth of Massachusetts and 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).

NECESSARY PARTY

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 such 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 Commonwealth of Massachusetts is joined in this action as a necessary party pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e). The United States reserves all claims that it may have against the Commonwealth under Section 309(e), 33 U.S.C. § 1319(e).

STATUTORY BACKGROUND

9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters of the United States except in compliance with, *inter alia*, the terms and conditions of a National Pollutant Discharges Eliminations System 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. Part 122 of Title 40 of the Code of Federal Regulations, promulgated under the CWA to regulate the NPDES permit program, defines “waters of the United States” 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 to such waters. 40 C.F.R. § 122.2(a) and (e).

14. Pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p), on December 8, 1999 (64 Fed. Reg. 68722), EPA promulgated regulations at 40 C.F.R. § 122.26 that set forth NPDES permit requirements to address stormwater discharges from municipal separate storm sewer systems serving populations of less than 100,000 persons.

15. 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.”

16. Section 402 of the CWA, 33 U.S.C. § 1342, provides that the Administrator may issue permits under the NPDES program for the discharge of pollutants into navigable waters of

the United States upon such specific terms and conditions as the Administrator may prescribe.

17. 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 Sections 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. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Sections 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, shall be subject to a civil penalty for each violation each day.

GENERAL ALLEGATIONS

18. Swampscott owns and operates a municipal separate storm sewer system (“MS4”), which is a system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, and storm drains) designed to collect, convey, and directly discharge stormwater to receiving waters.

19. Swampscott’s MS4 outfalls, from which pollutants are discharged, are “point sources,” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

20. Swampscott’s MS4 is intended to keep sewage and other wastewater separated from stormwater in the MS4.

21. On April 18, 2003, EPA issued the NPDES General Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems (“Small MS4 General Permit”) pursuant to Section 402(p) of the Act, 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.26.

22. In accordance with the Small MS4 General Permit, the Town notified EPA that it was seeking coverage under the Small MS4 General Permit on July 29, 2003.

23. EPA authorized the Town to discharge stormwater from its MS4 on September 29, 2003.

24. Swampscott discharges from its MS4 outfalls to Massachusetts Bay and Nahant Bay, both of which are navigable waters under the Act.

25. Nahant Bay and Massachusetts Bay are Class SA surface water bodies under the Massachusetts Surface Water Quality Standards, 314 C.M.R. §§ 4.00. Class SA segments to which the Town discharges are designated “for primary and secondary contact recreation.” 314 C.M.R. §§ 4.03(3)(b), 4.03(3)(a) and 4.03(3)(b).

26. The bacteria water quality standard for Class SA waters provides as follows:

[a]t bathing beaches as defined by the Massachusetts Department of Public Health in 105 CMR 445.010, no single enterococci sample taken during the bathing season shall exceed 104 colonies per 100 ml, and the geometric mean of the five most recent samples taken within the same bathing season shall not exceed a geometric mean of 35 enterococci colonies per 100 ml. In non-bathing beach waters and bathing beach waters during the non-bathing season, no single enterococci sample taken shall exceed 104 colonies per 100 ml and the geometric mean of all samples taken within the most recent six months typically based on a minimum of five samples shall not exceed 35 enterococci colonies per 100 ml.

27. Part II.A.1 of the Small MS4 General Permit requires permittees to develop a stormwater management program implementing the minimum control measures described in Part II.B of the Small MS4 General Permit.

28. Part II.A.2 of the Small MS4 General Permit also requires that all elements of a stormwater management program be implemented by the Permit’s expiration.

29. Part I.B.2(j) of the Small MS4 General Permit specifically provides that the Small MS4 General Permit does not authorize the discharge of stormwater that is mixed with non-storm water, unless the non-stormwater discharge is in compliance with another NPDES permit or is allowable under Part I(F) of the Small MS4 General Permit.

30. Part II.B.3 of the Small MS4 General Permit provides that each permittee must develop, implement, and enforce a program to detect and eliminate illicit discharges and “[to] the extent allowable under state or local law, the permittee must effectively prohibit, through an ordinance or other regulatory mechanism, non-storm water discharges into the system and implement appropriate enforcement procedures and actions. If a regulatory mechanism does not exist, development and adoption of such a mechanism must be included as part of the stormwater management program.”

31. Part II.B.3(c) of the Small MS4 General Permit provides that “[the] permittee must develop and implement a plan to detect and address non-stormwater discharges, including illegal dumping, into the system.”

32. Part II.B.4. of the Small General MS4 Permit provides that “[the] permittee must develop, implement, and enforce a program to reduce pollutants in any stormwater runoff to the MS4 from construction activities that result in a land disturbance of greater than or equal to one acre. The permittee must include disturbances less than one acre if part of a larger common plan.”

33. Part II.B.4(a) of the Small MS4 General Permit provides that the construction site stormwater run-off control program must include “[t]o the extent allowable under state or local law, an ordinance or other regulatory mechanism to require sediment and erosion control at construction sites. If such an ordinance does not exist, development and adoption of an ordinance

must be part of the program.”

34. Part II.B.5 of the Small MS4 General Permit provides that “[t]he permittee must develop, implement and enforce a program to address storm water runoff from new development and redevelopment projects that disturb greater than one acre and discharge into the municipal system.”

35. Part II.B.5(a) of the Small MS4 General Permit specifies that the program must include “[t]o the extent allowable under state or local law, an ordinance or other regulatory mechanism to address post construction runoff from new development and redevelopment. If such an ordinance does not exist, development and adoption of an ordinance must be part of the program.”

36. Part I.B.2(k) of the Small MS4 General Permit specifically provides that the Small MS4 General Permit does not authorize the discharge of stormwater that would cause or contribute to instream exceedances of water quality standards.

37. The Small MS4 General Permit expired on May 1, 2008. Under 40 C.F.R. § 122.6, the Town may continue to discharge in accordance with the Small MS4 General Permit.

COUNT ONE

(Unauthorized Discharges of Pollutants From MS4 Outfalls)

38. The United States realleges and incorporates by reference the allegations of paragraphs 1 through 37 above.

39. From at least April 18, 2003, through the present, the Town has discharged untreated wastewater containing pollutants, including sewage, from the Town’s MS4 outfalls to waters of the United States.

40. Results from samples taken on multiple occasions from the Town’s MS4 outfalls

between July 2010 and September 2012 demonstrate that the Town is discharging pollutants, including E. coli, and/or Enterococcus bacteria and one or more of surfactants, ammonia, and/or selected pharmaceuticals and personal care products (“PPCP”), all indicative of non-stormwater sewage and municipal waste of human origin, from the Town’s MS4 outfalls.

41. Fecal coliform, E. coli, and Enterococcus bacteria, sewage, biological materials, and municipal waste are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

42. The discharge of non-stormwater from the Town’s MS4 outfalls is not authorized by the Small MS4 General Permit regardless of whether it commingles with stormwater. Further, these discharges are not otherwise covered by a separate NPDES permit.

43. The discharges of pollutants from the Town’s MS4 outfalls, as described above, are violations of Section 301(a) of the CWA, 33 U.S.C § 1311(a).

44. Upon information and belief, the Town will continue to discharge pollutants to waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C § 1311(a), unless restrained by this Court.

45. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, Swampscott is liable for injunctive relief and for civil penalties not to exceed \$32,500 per day for each violation occurring after March 15, 2004, but prior to and including January 12, 2009, and \$37,500 per day for each violation occurring after January 12, 2009.

COUNT TWO

(Violations of the Small MS4 General Permit)

46. The United States realleges and incorporates by reference the allegations of paragraphs 1 through 45 above.

47. The Town failed, to the extent allowable under state or local law, to effectively prohibit, through an ordinance or other regulatory mechanism, non-stormwater discharges into the system by the Small MS4 General Permit's expiration date. To date, Swampscott has not adopted such a ordinance or other regulatory mechanism.

48. To date, the Town inspected a total of only 22,000 linear feet of storm drain (less than 15 percent of the Town MS4). The Town did not, therefore, implement a plan to detect and address non-stormwater discharges, including illegal dumping, into the system prior to the expiration of the Small MS4 General Permit and has not done so.

49. The Town failed, to the extent allowable under state or local law, to adopt an ordinance or other regulatory mechanism to require sediment and erosion control at construction sites prior to the expiration of the Small MS4 General Permit. To date Swampscott has failed to adopt such an ordinance or other regulatory mechanism.

50. The Town failed, to the extent allowable under state or local law, to adopt an ordinance or other regulatory mechanism to address post construction runoff from new development and redevelopment by the Small MS4 General Permit's expiration date. To date, Swampscott has failed to adopt such an ordinance or other regulatory mechanism.

51. From January 2009 to the present, Swampscott's discharges from its MS4 outfalls have persistently exceeded the Massachusetts WQSs for fecal coliform, *E. Coli*, and/or *Enterococcus* bacteria on at least numerous occasions. These discharges violated the terms and

conditions of the Small MS4 General Permit.

52. Pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), and the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, Swampscott is liable for injunctive relief and for civil penalties not to exceed \$32,500 per day for each violation occurring after March 15, 2004, but prior to and including January 12, 2009, and \$37,500 per day for each violation occurring after January 12, 2009.

PRAYER FOR RELIEF

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

1. Permanently enjoin Swampscott, 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. Order the Town to comply with all requirements of its MS4 Permit and CSO Permit;
3. Order the Town to pay a civil penalty not to exceed \$32,500 per day per violation occurring prior to and including January 12, 2009, and \$37,500 per day per violation occurring after January 12, 2009;

4. Award the United States its costs in this action; and,
5. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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United States Attorney

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