Eastern District of Kentucky
FILED
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AT LEXINGTON
LESLIE G WHITMER
CLERK U S DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON DIVISION

THE COMMONWEALTH OF KENTUCKY, ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, acting by and through its DEPUTY SECRETARY, JOHN W. CLAY	)	
Plaintiffs,	)	Civil Action No. 05-199-LWB
v.	)	
SANITATION DISTRICT NUMBER 1 OF NORTHERN KY	)	
Defendant.	)	

COMPLAINT

The Commonwealth of Kentucky ("Commonwealth"), Environmental and Public Protection Cabinet ("Cabinet"), acting by and through its Deputy Secretary, John W. Clay, hereby files this complaint and alleges as follows:

NATURE OF ACTION

1. This is a civil action for penalties and injunctive relief brought under Section 309 of the Clean Water Act ("CWA"), 33 U.S.C. § 1319, and Kentucky Revised Statute ("KRS") § 224.99-010, 224.70-110, against Defendant Sanitation District No. 1 of Northern Kentucky ("District") for discharges of pollutants in violation of CWA Section 301, 33 U.S.C. § 1311, Section 402, 33 U.S.C. § 1342 and KRS Chapter 224, Subchapter 70, and the regulations

promulgated thereunder, including violation of conditions established in the National Pollutant Discharge Elimination System ("NPDES") permits issued to the District by the Kentucky Department of Environmental Protection ("KDEP"), pursuant to authority delegated to it by EPA under CWA Section 402(b), 33 U.S.C. § 1342(b), and for discharges of pollutants without an NPDES permit.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to CWA Section 505(a), 33 U.S.C. § 1365(a), and 28 U.S.C. §§ 1331, 1355, and 1367. The Commonwealth and John W. Clay are "persons" within the meaning of CWA Section 502(5), 33 U.S.C. § 1362(5), and John W. Clay is a "citizen" within the meaning of CWA Section 505(g), 33 U.S.C. § 1365(g).

3. The Commonwealth has authority to bring this action on behalf of the Cabinet pursuant to KRS § 224.99-020.

4. Venue is proper in the Eastern District of Kentucky pursuant to CWA Sections 309(b) and 505(c), 33 U.S.C. §§ 1319(b), 1365(c), and 28 U.S.C. §§ 1391(b), (c) and 1395(a).

5. The Commonwealth has provided timely notice of this action and the underlying violations to the Administrator of the U.S. Environmental Protection Agency and to Defendant District.

DEFENDANT

6. Defendant District is a political subdivision of the Commonwealth established under the laws of the Commonwealth, KRS Chapter 220, and is a "person" within the meaning of CWA Section 502(5), 33 U.S.C. § 1362(5), and a "municipality" within the meaning of CWA Section 502(4), 33 U.S.C. § 1362(4).

7. Defendant District is responsible for the operation and maintenance of wastewater treatment facilities and the sanitary sewer and stormwater drainage system serving residential, commercial and industrial entities throughout Boone, Kenton and Campbell Counties of Kentucky.

8. The Commonwealth has been authorized by EPA to administer the NPDES program within its jurisdiction pursuant to CWA Section 402(b), 33 U.S.C. § 1342(b), and to issue NPDES permits authorizing the discharge of pollutants directly into navigable waters of the United States in compliance with the applicable requirements of CWA Section 301, 33 U.S.C. § 1311, and such other conditions as the Administrator determines are necessary to carry out the provisions of the CWA. The Commonwealth has accepted this delegation pursuant to KRS 224.16-050, and issues discharge permits under the Kentucky Pollution Discharge Elimination System ("KPDES").

9. John W. Clay is the Deputy Secretary of the Environmental and Public Protection Cabinet of the Commonwealth of Kentucky and he and the Cabinet are charged with the statutory duty of enforcing KRS Chapter 224 and the regulations promulgated pursuant thereto.

GENERAL ALLEGATIONS

10. At all times relevant herein, the District has owned or operated wastewater treatment plants ("WWTPs") and their associated sanitary sewer and combined sanitary sewer - storm sewer ("combined sewer") collection systems, which receive and treat wastewater and storm water runoff from residential, commercial, industrial and combined sewage sources located within Boone, Kenton and Campbell County, Kentucky, and discharge treated, partially treated, and untreated wastewater into the Ohio River and its tributaries.

11. The Ohio River and its tributaries are "navigable waters of the United States" within the meaning of CWA Section 502(7), 33 U.S.C. § 1362(7).

12. Under its authority to issue NPDES permits, the Commonwealth, through KDEP, has issued KPDES permits to the District for each of the WWTPs operated and maintained by the District, authorizing the discharge of pollutants, within the meaning of CWA Section 502(12), 33 U.S.C. § 1362(12), in accordance with effluent limitations, monitoring requirements, and other conditions set forth in each KPDES permit. Each KPDES permit has been in effect at all times relevant to this Complaint.

13. Only one of the KPDES permits issued to the District, permit no. KY0021466 issued for the Dry Creek WWTP, authorizes the discharge of pollutants from point sources other than a WWTP post-treatment outfall, those point sources being the combined sewer overflow (CSO) points specified in that permit.

14. At all times relevant to this Complaint, the District has violated, and continues to violate, CWA Section 301, 33 U.S.C. § 1311, by failing to meet the conditions contained in the KPDES permits issued by KDEP, and by discharging pollutants without an NPDES/KPDES permit.

FIRST CLAIM FOR RELIEF: UNPERMITTED DISCHARGES FROM SANITARY SEWER SYSTEM AND COMBINED SEWER SYSTEM

15. Paragraphs 1 through 14 are realleged and incorporated herein by reference.

16. On over 1700 different occasions after January 1, 2000, continuing through the date of this Complaint, the District has discharged into the Ohio River and/or its tributaries untreated sewage from discharge points within its sanitary sewer system and combined sewer system which were not and are not authorized by any KPDES or NPDES permit.

17. Each of the discharges referred to in Paragraph 16 involved a discharge of pollutants from a point source into navigable waters of the United States, within the meaning of CWA Section 502, 33 U.S.C. § 1362, without a NPDES or KPDES permit or other exception specified in CWA Section 301(a), 33 U.S.C. § 1311(a), in violation of CWA Section 301, 33 U.S.C. § 1311.

18. These unauthorized discharges and overflows constitute a violation of KRS Chapter 224.70-110. These violations have caused the degradation of the waters of the Commonwealth in violation of 401 KAR 5:031.

19. Each discharge referred to in Paragraph 16 constitutes a separate violation of CWA Section 301, 33 U.S.C. § 1311.

20. Under Sections CWA 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to $27,500 per day for each violation of CWA Section 301, 33 U.S.C. § 1311 occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to $32,500 per day for each violation of CWA Section 301, 33 U.S.C. § 1311, occurring on or after March 16, 2004.

21. Unless restrained by an order of the Court, the District will continue to violate CWA Section 301, 33 U.S.C. § 1311, by discharging untreated sewage from unpermitted discharge points within its sanitary sewer system into the Ohio River and/or its tributaries.

SECOND CLAIM FOR RELIEF:

FAILURE TO COMPLY WITH STANDARD PERMIT CONDITIONS - PROPER OPERATION, MAINTENANCE AND REPORTING

22. Paragraphs 1 through 21 are realleged and incorporated herein by reference.

23. On numerous occasions after January 1, 2000, in addition to the discharges referred to in Paragraph 16, the District has allowed spills of untreated sewage to occur from various points within its sanitary sewer system and combined sewer system that did not reach navigable waters of the United States.

24. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with 401 KAR 5:065, which is incorporated by reference as a standard permit condition in Part II of each KPDES permit issued by KDEP to the District as set forth in Paragraph 10, by failing to properly operate and maintain all of its permitted facilities, and systems of treatment and control and related appurtenances which are installed or used by the District, to achieve compliance with the conditions of the permits, as evidenced, in part, by the discharges and spills referred to in Paragraphs 16 and 23 and by failing to report all unpermitted discharges.

25. Each failure by the District to comply with the operation, maintenance and reporting provisions of the KPDES permits issued to it as set forth in Paragraph 24 constitutes a separate violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342.

26. Under Sections CWA 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil

penalty of up to $27,500 per day for each violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to $32,500 per day for each violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

27. Unless restrained by an order of the Court, the District will continue to violate CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, by failing to properly operate and maintain all of its permitted facilities, and systems of treatment and control and related appurtenances which are installed or used by the District, to achieve compliance with the conditions of the permits.

THIRD CLAIM FOR RELIEF: FAILURE TO COMPLY WITH STANDARD PERMIT CONDITIONS - BYPASS PROHIBITION

28. Paragraphs 1 through 27 are realleged and incorporated herein by reference.

29. On at least 30 separate occasions after January 1, 2000, the District intentionally diverted sewage or waste-streams containing pollutants from a portion of its WWTPs, each such diversion constituting a "bypass" within the meaning of 401 KAR 5:002(36).

30. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with 401 KAR 5:065 Section 1(13)(c), which is incorporated by reference as a standard permit condition in Part II of each KPDES permit issued by KDEP to the District as set forth in Paragraph 12, by allowing bypasses, as described in Paragraph 29, that were not excepted from the bypass prohibition of 401 KAR 5:065 Section 1(13)(c).

31. Each failure by the District to comply with the bypass prohibitions of the KPDES permits issued to it as set forth in Paragraph 30 constitutes a separate violation of CWA Sections 301 and 402, 33 U.S.C. § 1311 and 1342.

32. Under Sections CWA 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to $27,500 per day for each violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to $32,500 per day for each violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

33. Unless restrained by an order of the Court, the District will continue to violate CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, by allowing bypasses that are not excepted from the bypass prohibition of 401 KAR 5:065(13)(c).

FOURTH CLAIM FOR RELIEF: FAILURE TO COMPLY WITH CSO PERMIT CONDITIONS

34. Paragraphs 1 through 33 are realleged and incorporated herein by reference.

35. On at least 87 separate occasions after January 1, 2000, the District allowed the discharge of untreated sewage mixed with storm water from permitted discharge points within its combined sewer system into the Ohio River and/or its tributaries ("combined system overflows" or "CSOs") during dry weather.

36. From at least January 1, 2000 and continuing through the date of this Complaint, the District failed to comply with permit condition B.5 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek

WWTP by failing to have in place mechanisms and specific procedures to prevent CSOs during dry weather.

37. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.1 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place mechanisms and specific procedures to ensure proper operation and regular maintenance programs for the sewer systems and the CSOs, as evidenced, in part, by the discharges and spills referred to in Paragraphs 16, 23, and 35.

38. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.2 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to SD1 for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures to ensure the maximum use of the combined sewer collection system for storage of combined sewage.

39. From at least January 1, 2000, and continuing through the date of this complaint, the District failed to comply with permit condition B.4 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to SD1 for the Dry Creek WWTP by failing to have in place adequate mechanisms and specific procedures to ensure the maximization of sewage flow to the WWTP.

40. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.6 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place mechanisms and specific procedures to ensure the control of solid and floatable materials at all permitted CSO discharge points.

41. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.8 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place mechanisms and specific procedures to ensure that the public receives adequate notification of CSO occurrences and CSO impacts.

42. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit condition B.9 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to have in place mechanisms and specific procedures to ensure adequate monitoring to characterize CSO impacts and the effectiveness of CSO controls.

43. From at least January 1, 2000, and continuing through the date of this Complaint, the District failed to comply with permit conditions B.11 and B.12 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP by failing to implement a long term CSO control plan, as required by CWA Section 402(q), 33 U.S.C. § 1342(q), and EPA's CSO Control Policy, 59 Fed. Reg. 18688 (April 19, 1994), that includes mechanisms to ensure the evaluation and prioritization of long term alternatives for CSO remedial measures and an implementation schedule for such measures.

44. Each failure by the District to comply with permit conditions B.1, B.2, B.4, B.5, B.6, B.8, B.9, B.11, and B.12 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP, constitutes a separate violation of CWA Sections 301 and 402, 33 U.S.C. § 1311 and 1342.

45. Under Sections CWA 309(b) and (d), 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990),

amended by Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to $27,500 per day for each violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to $32,500 per day for each violation of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

46. Unless restrained by an order of the Court, the District will continue to violate CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, by failing to comply with permit conditions B.1, B.5, B.6, B.8, B.9, B.11, and B.12 of the Sewer System Overflows section of Part II of KPDES permit no. KY0021466 issued by KDEP to the District for the Dry Creek WWTP.

FIFTH CLAIM FOR RELIEF: FAILURE TO COMPLY WITH PERMIT EFFLUENT LIMITATIONS

47. Paragraphs 1 through 46 are realleged and incorporated herein by reference.

48. On at least 230 separate occasions from January 1999 through the date of this complaint, the District allowed discharges of effluent from permitted outfalls into the Ohio River and/or its tributaries that did not comply with the effluent limitations and requirements set forth in the KPDES permits issued to the District for its WWTPs.

49. Each event of discharge of effluent from permitted outfalls that did not comply with the effluent limitations and requirements set forth in the KPDES permits issued to the District constitutes a separate violation of Sections 301(a) and 402 of the Act, 33 U.S.C. § 1311(a) and 1342, on the part of the District.

50. Under Sections 309(b) and (d) of the Act, 33 U.S.C. §§ 1319(b) and (d); the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990), *amended by* Pub. L. No. 104-134, § 31001(s)(1), 110 Stat. 1321-373 (1996) (28 U.S.C. § 2461 note); 61 Fed. Reg. 69,360 (Dec. 31, 1996); and 69 Fed. Reg. 7121 (Feb. 13, 2004), codified at Title 40 of the Code of Federal Regulations (CFR) Part 19, the District is liable for a civil penalty of up to $27,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after January 31, 1997, but before March 16, 2004, and a civil penalty of up to $32,500 per day for each violation of Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, occurring on or after March 16, 2004.

51. Unless restrained by an order of the Court, the District will continue to violate Sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342, by allowing discharges of effluent from permitted outfalls into the Ohio River and/or its tributaries that do not comply with the effluent limitations and requirements set forth in the KPDES permits issued to the District for its WWTPs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court enter judgment on behalf of Plaintiff against the Defendant as follows:

a. Pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), order the District to undertake a program to achieve permanent and consistent compliance with all terms and conditions of its NPDES/KPDES permits for all of its WWTPs and with the requirements of the Clean Water Act and the regulations promulgated thereunder;

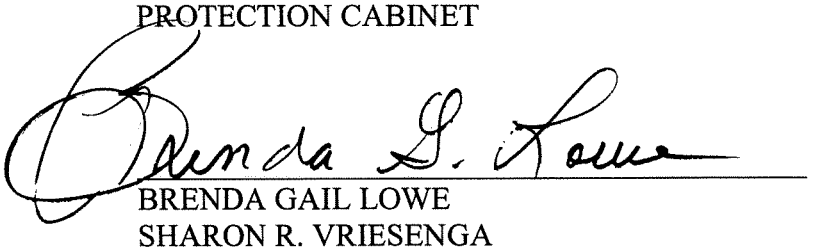
b. Pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), assess civil penalties against the District of up to $27,500 per day for each violation of CWA Sections 301 and/or 402, 33 U.S.C. §§ 1311, 1342, as alleged in this Complaint, occurring on or after January 31, 1997, but before March 16, 2004; and up to $32,500 per day for each violation of CWA Sections 301 and/or 402, 33 U.S.C. §§ 1311, 1342, as alleged in this Complaint, occurring on or after March 16, 2004;

c. Award the Plaintiff its costs in the action; and

d. Grant the Plaintiff such other relief as the Court deems appropriate.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET



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