

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION

09 SEP 17 PM 2:13

SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

UNITED STATES OF AMERICA,

and

THE STATE OF INDIANA,

Plaintiffs,

v.

THE CITY OF JEFFERSONVILLE,
INDIANA

Defendant

Civil Action No.

4:09-cv-0125DFH-WGH

COMPLAINT

The United States of America, by authority of the Attorney General of the United States, and acting on behalf of the Administrator of the United States Environmental Protection Agency ("U.S. EPA"), and the State of Indiana (the "State"), by the authority of its Attorney General and on behalf of the Indiana Department of Environmental Management ("IDEM"), allege as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to Section 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d), for injunctive relief and for the assessment of civil penalties against Defendant City of Jeffersonville, Indiana ("Jeffersonville" or "Defendant") for unauthorized and illegal discharges of pollutants and other violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and the National Pollutant Discharge Elimination System ("NPDES") permit that has been issued to it. For many years, the Defendant has discharged

sewage and other harmful pollutants from the sewage collection system that is part of its Publicly Owned Treatment Works ("POTW") into navigable waters flowing through and around the City of Jeffersonville, including but not limited to the Ohio River and Cane Run Creek. These discharges are caused by the POTW's lack of capacity to convey wastewaters through its collection system and fully treat those wastewaters at its Waste Water Treatment Plant ("WWTP") in its service area, and by poor maintenance and operation of the POTW. As a result, as further alleged below, the Defendant violated several terms and conditions of the NPDES permits that have been issued to it, has violated Section 301(a) of the CWA, and has violated Indiana law.

JURISDICTION, VENUE, AUTHORITY AND NOTICE

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d) and 28 U.S.C. §§ 1331, 1345 and 1355. The State is a party to this action pursuant to Section 309(e) of the CWA, 33 U.S.C. § 1319(e), and 28 U.S.C. § 1367(a).

3. This Court has supplemental jurisdiction over the State law claims alleged herein pursuant to 28 U.S.C. § 1367(a) because the State claims are related to the federal claims and form part of the same case or controversy.

4. Venue is proper in the Southern District of Indiana pursuant to 28 U.S.C. § 1391(c), and Section 309(b) of the CWA, 33 U.S.C. § 1319(b), because it is the judicial district where Defendant is doing business and where the alleged violations occurred. Venue in this District is also proper under 28 U.S.C. § 1367(a).

5. As a signatory to this Complaint, the State has actual notice of the commencement of this action in accordance with Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

6. The Attorney General of the United States is authorized to appear and represent the United States in this action pursuant to Section 506 of the CWA, 33 U.S.C. § 1366, and 28 U.S.C. §§ 516 and 519.

7. The Indiana Attorney General is authorized to appear and represent the State in this action pursuant to Ind. Code §§ 4-6-3-2(a), 13-30-4-1 and 13-14-2-6.

DEFENDANT

8. Defendant City of Jeffersonville owns and operates a POTW which consists of a Class IV primary wastewater treatment facility and wastewater collection systems. The Jeffersonville POTW serves the City of Jeffersonville, Indiana.

9. The City of Jeffersonville is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and Jeffersonville is a "municipality" within the meaning of Section 502(4) of the CWA, 33 U.S.C. § 1362(4).

JOINDER OF A NECESSARY PARTY

10. 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 Indiana is a co-plaintiff, along with the United States, in this action. IDEM is authorized to implement the CWA within the State of Indiana. Ind. Code § 13-13-5-1(1). Indiana regulations incorporate the CWA by reference. 327 IAC 5-2-1.5(1).

FEDERAL AND STATE STATUTES AND REGULATIONS

11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and Ind. Code § 13-30-2-1 prohibit the discharge of any pollutants by any person except, *inter alia*, in compliance with an NPDES permit issued by U.S. EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

12. Section 502(12) of the CWA defines "discharge of a pollutant" to mean, among other things, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). See also 327 IAC 5-1.5-11 (similarly defining "discharge of a pollutant").

13. Section 502(7) of the CWA defines navigable waters to be "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). U.S. EPA regulations promulgated pursuant to the CWA define the term "waters of the United States" to include, among other things: 1) all 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; 2) all interstate waters; 3) all other waters such as intrastate lakes, rivers and streams (including intermittent streams), the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce; 4) tributaries of waters of the United States; and 5) certain wetlands (including wetlands adjacent to these waters). 40 C.F.R. § 122.2.

14. Indiana law defines "waters of the state" to include "the accumulations of water, surface and underground, natural and artificial, public and private; or . . . a part of the accumulations of water . . . that are wholly or partially within, flow through, or border upon Indiana." Ind. Code. § 13-11-2-265.

15. Section 502(6) of the CWA and Indiana regulations define "pollutant" to include, *inter alia*, sewage. 33 U.S.C. § 1362(6); 327 IAC 5-1.5-41.

16. 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.

17. The term "point source" is defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14), as "any discernible, confined and discrete conveyance, including but not limited to

any pipe, ditch, channel, tunnel . . . from which pollutants are or may be discharged.” *See also* 327 IAC 5-1.5-40.

18. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that U.S. EPA may issue to “persons” NPDES permits that authorize the discharge of any pollutant to navigable waters, but only in compliance with Section 301 of the CWA, 33 U.S.C. § 1311, and such terms and conditions as U.S. EPA determines are necessary to carry out the provisions of the CWA. *See also* 327 IAC 5-2-2.

19. Section 402(b) of the CWA, 33 U.S.C. § 1342(b), provides that a State may establish and administer its own permit program, and, after U.S. EPA authorizes the State’s program, may issue NPDES permits. At all times relevant to this complaint, IDEM has been authorized by U.S. EPA to administer an NPDES permit program for regulating discharges of pollutants into navigable waters within its jurisdiction. 40 Fed. Reg. 4033 (Jan. 27, 1975). IDEM administers the NPDES permitting program in Indiana pursuant to Ind. Code § 13-13-5-1(1) and maintains concurrent enforcement authority with U.S. EPA over NPDES permits in Indiana. 327 IAC 5-2-2 prohibits the discharge of pollutants to “waters of the state” except as authorized by a duly issued NPDES permit.

20. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes U.S. EPA to commence a civil action for appropriate relief, including a permanent or temporary injunction, when any person violates, among other things, Section 301 of the CWA, 33 U.S.C. § 1311, or violates any of the terms or conditions of an NPDES permit. Indiana’s water pollution control laws may be enforced under Ind. Code §§ 13-30-1-1, 13-30-3 or 13-14-1-12.

21. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates, among other things, Section 301 of the CWA, 33 U.S.C. § 1311, or who violates any condition or limitation of an NPDES permit issued pursuant to Section 402 of the CWA, 33

U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$25,000 per day of violation, with each day in which a violation occurs constituting a separate violation.

22. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. § 2461 note; Pub. L. 101-410, enacted October 5, 1990; 104 Stat. 890), as amended by the Debt Collection Improvements Act of 1996 (31 U.S.C. § 3701 note; Pub. L. 104-134, enacted April 26, 1996; 110 Stat. 1321), U.S. EPA promulgated the Civil Monetary Penalty Inflation Adjustment Rule. Under that rule, U.S. EPA may seek civil penalties of up to \$27,500 per day for each violation occurring from January 31, 1997 through March 15, 2004, \$32,500 per day for each violation occurring from March 16, 2004 through January 12, 2009, and \$37,500 per day for each violation occurring after January 12, 2009. *See* 61 Fed. Reg. 69,364 (Dec. 31, 1996); 69 Fed. Reg. 7,121 (Feb. 13, 2004); 73 Fed. Reg. 75,345 (Dec. 11, 2008).

23. 327 IAC 5-2-20 and Ind. Code §§ 13-30-4-1 and 13-14-2-6 authorize the State to commence a civil action for appropriate relief to address violations of Title 327 of the Indiana Administrative Code, Article 5, including injunctive relief and civil penalties. Such relief may include a permanent or temporary injunction, as well as a civil penalty of up to \$25,000 per day for each violation.

GENERAL ALLEGATIONS

24. Defendant owns and operates a "treatment works" as that term is defined in CWA Section 212(2), 33 U.S.C. §1292(2), and a "publicly owned treatment works" as that term is defined in U.S. EPA regulations implementing the CWA, 40 C.F.R. § 122.2 (cross-referencing the definition at 40 C.F.R. § 403.3). Defendant's POTW consists of one WWTP (the Jeffersonville WWTP) and the sewage collection systems for that plant.

25. Defendant's POTW collects, conveys, treats and disposes of sanitary sewage from the City of Jeffersonville, an area covering approximately 13 square miles, with a service population of approximately 29,000 people.

26. The Jeffersonville WWTP has an average design flow of 6.0 million gallons per day ("MGD"), and an average peak design flow of up to 25.0 MGD. The mass limits for Carbonaceous Biochemical Oxygen Demand ("CBODs") and Total Suspended Solids ("TSS") in its NPDES permit for that plant are based on that average peak design flow.

27. Defendant has one collection system that consists of approximately 9 miles of pipe that convey sewage and other pollutants to the WWTP. The collection system includes both "combined sewers" (*i.e.*, the pipes carry both wastewater and stormwater in the same pipe) and "separate sewers" (*i.e.*, there are two sets of pipes, one for wastewater and the other for stormwater).

28. Most of the "combined" portion of the collection system is in older areas of the City of Jeffersonville, and the "separate" portion of the system is in the newer area of the City. Of Jeffersonville's total sewerage area, approximately 15% (1,350 acres) is served by combined sewers.

29. The wastewater that Defendant conveys and/or stores in its collection system, and the wastewater that Defendant treats and disposes of at its WWTP, contains "pollutants" as that term is defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6) and 327 IAC 5-1.5-41.

30. On or about May 13, 1999, IDEM issued NPDES Permit No. IN0023302 to Defendant and Environmental Management Corporation for the Jeffersonville WWTP under the authority of Section 402 of the CWA, 33 U.S.C. § 1342, and Ind. Code § 13-13-5-1(1). IDEM renewed the permit on October 30, 2006, and amended it on March 13, 2009. NPDES Permit No. IN0023302 is hereinafter referred to as the "NPDES Permit."

31. The NPDES permit that Defendant holds for its WWTP authorizes the discharge of effluent only from the specific outfalls identified in the permit and only in compliance with the conditions and limitations set forth in the permit.

32. Part I.A. of Attachment A of Defendant's 1999 NPDES permit authorized discharges from sixteen (16) designated Combined Sewer Overflow ("CSO") outfalls during wet weather, subject to the requirements and limitations of the permit.

33. Part I.A. of Attachment A of Defendant's 2006 NPDES permit authorized discharges from thirteen (13) designated CSO outfalls during wet weather, subject to the requirements and limitations of the permit.

34. Part I.A. of Attachment A of Defendant's 1999 NPDES permit and Part I.B. of Attachment A of Defendant's 2006 NPDES permit provide, among other things, that the discharge from any and all CSO outfalls shall not cause receiving waters to contain substances, materials, floating debris or other pollutants that: 1) will settle to form putrescent or otherwise objectionable deposits; 2) are in amounts sufficient to be unsightly or deleterious; or 3) produce color, odor, or other conditions in such a degree as to create a nuisance.

35. Attachment B to the 2006 NPDES permit prohibits overflows from the sanitary sewer system or a sanitary portion of a combined system from discharging at any time.

36. Untreated sewage contains organic matter, bacteria and other potential pathogens, which are or may be harmful to human health and the environment, including but not limited to aquatic life. The pathogens in raw sewage can cause a number of diseases in humans, including but not limited to enteric diseases such as gastroenteritis, dysentery, and cholera.

37. Defendant's WWTP outfalls, Sanitary Sewer Outfalls, and CSO outfalls are located on the Ohio River, Mill Creek, and Cane Run Creek. The Ohio River is navigable-in-fact. On information and belief, Mill Creek in the area that has received Jeffersonville's

discharges is a perennial tributary that flows into the Ohio River. On information and belief, Cane Run Creek in the area that has received Jeffersonville's discharges is a perennial tributary that flows into the Ohio River. Mill Creek, Cane Run Creek and the Ohio River are each "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and each is a "water of the state" of Indiana as defined in Ind. Code § 13-11-2-265.

38. The State of Indiana, under 327 IAC 2-1-3(a)(1), has designated the Indiana portions of the Ohio River as a "full body contact recreation" water body. Indiana regulations specify the water quality criteria that full body contact recreation waters must meet, including a requirement that these waters be free from "substances, materials, [and] floating debris" that are "unsightly or deleterious," and a requirement that full body contact recreation waters contain no more than 235 *E. coli* bacteria colonies per 100 milliliters of water in any one sample taken in a 30 day period. 327 IAC 2-1-6(a) and (d).

FIRST CLAIM FOR RELIEF

(Combined Sewer Overflows - Prohibited Wet Weather Discharges)

39. Paragraphs 1 through 38 are realleged and incorporated herein by reference.

40. On numerous occasions in the past, the Defendant discharged pollutants from designated CSO outfalls specified in Attachments A to Defendant's 1999 NPDES permit and 2006 NPDES permit in amounts and quality that violated the terms and conditions of the then-applicable permit. The permit terms violated include Part I.A of Attachment A to the 1999 NPDES permit and Part I.B. of Attachment A to the 2006 NPDES permit, which both provide, *inter alia*, that the discharge from any and all CSO outfalls shall not cause receiving waters to contain substances, materials, floating debris or other pollutants that, among other things: 1) will settle to form putrescent or otherwise objectionable deposits; 2) are in amounts sufficient to be

unsightly or deleterious; or 3) produce color, odor, or other conditions in such a degree as to create a nuisance.

41. Each of those discharges from designated CSO outfalls that violated the terms and conditions of Defendant's 1999 and 2006 NPDES permits constitutes a separate violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), for each discharge on each day from each CSO outfall.

42. Each such discharge on each day constitutes a separate violation of Ind. Code § 13-30-2-1 and 327 IAC 5-2-2.

43. Unless enjoined by the Court, the Defendant will continue to discharge pollutants from CSO outfalls in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

44. Unless enjoined by the Court, the Defendant will continue to discharge pollutants from CSO outfalls in violation of Ind. Code § 13-30-2-1 and 327 IAC 5-2-2.

45. For each violation referred to in this claim, Defendant is subject to civil penalties in the amounts as set forth in paragraphs 22-23, *supra*.

SECOND CLAIM FOR RELIEF

(Overflows from the Sanitary Sewer Collection System - Prohibited Discharges)

46. Paragraphs 1 through 38 are re-alleged and incorporated herein by reference.

47. On numerous occasions in the past, Defendant has discharged sewage and other pollutants from point sources (including designed overflow points and points not designed to overflow) in the sanitary sewer system, and/or sanitary portions of the combined sewer system for the POTW, and, on information and belief, these sewage discharges reached navigable waters and/or "waters of the state," including, but not limited to, Mill Creek.

48. Each such discharge of pollutants from Defendant's sanitary sewers to navigable waters on each day constitutes a separate violation of Attachment B to the 2006 NPDES permit and is a separate violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

49. Each such discharge of pollutants from Defendant's sanitary sewers to "waters of the state" on each day is a separate violation of Ind. Code § 13-30-2-1 and 327 IAC 5-2-2.

50. Unless enjoined by an order of the Court, Defendant will continue to discharge pollutants from Defendant's sanitary sewers to navigable waters in violation of the Sanitary Sewer Overflow prohibition in Attachment B of the 2006 NPDES permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

51. Unless enjoined by an order of the Court, Defendant will continue to discharge pollutants from Defendant's sanitary sewers to "waters of the state" in violation of the Sanitary Sewer Overflow prohibition in Attachment B of the 2006 NPDES permit, in violation of Ind. Code § 13-30-2-1 and 327 IAC 5-2-2.

52. For each violation referred to in this claim, Defendant is subject to civil penalties in the amounts as set forth in paragraphs 22-23, *supra*.

THIRD CLAIM FOR RELIEF

(Violation of Effluent Limitations)

53. Paragraphs 1 through 38 are re-alleged and incorporated herein by reference.

54. On numerous occasions in the past, Defendant has discharged effluent containing pollutants in excess of effluent limitations contained in the 1999 NPDES permit and 2006 NPDES permit at Outfall 001 for dissolved oxygen, total suspended solids, *E.coli*, copper, and cyanide.

55. Each such discharge of pollutants from Outfall 001 on each day in excess of each effluent limitation contained in the 1999 NPDES permit and the 2006 NPDES permit is a separate violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

56. Each such discharge of pollutants from Outfall 001 on each day in excess of each effluent limitation contained in the 1999 NPDES permit and the 2006 NPDES permit is a separate violation of Ind. Code § 13-30-2-1 and 327 IAC 5-2-2.

57. Unless enjoined by an order of the Court, Defendant will continue to discharge pollutants in excess of the effluent limitations contained in the 2006 NPDES permit, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

58. Unless enjoined by an order of the Court, Defendant will continue to discharge pollutants in excess of the effluent limitations contained in the 2006 NPDES permit, in violation of Ind. Code § 13-30-2-1 and 327 IAC 5-2-2.

59. For each violation referred to in this claim, Defendant is subject to injunctive relief and civil penalties in the amounts as set forth in paragraphs 22-23, *supra*.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America respectfully prays that this Court provide the following relief:

1. A permanent injunction directing Defendant to take all steps necessary to come into permanent and continuous compliance with all terms and conditions of its NPDES permits for the East Plant and West Plant, including but not limited to:

- a. the conditions in Attachment A to the NPDES permit prohibiting wet weather discharges of pollutants except as authorized by the NPDES permit;
- b. the permit's prohibition of Sanitary Sewer Overflows; and

c. the effluent limitations set forth in the 2006 NPDES permit;

2. A permanent or temporary injunction ordering the Defendant to mitigate the past environmental harm caused by its violations of the NPDES permit, Section 301(a) of the CWA, Ind. Code § 13-30-2-1, and 327 IAC 5-2-2;

3. A judgment assessing civil penalties against Defendant and in favor of the United States, not to exceed \$27,500 per day for each violation of the CWA which occurred after January 30, 1997 and on or before March 15, 2004, not to exceed \$32,500 per day for each violation of the CWA which occurred after March 15, 2004 and on or before January 12, 2009, and not to exceed \$37,500 per day for each violation of the CWA which occurred after January 12, 2009;

4. A judgment assessing civil penalties against Defendant and in favor of the State, not to exceed \$25,000 per day for each violation of Ind. Code § 13-18-4-5 which occurred;

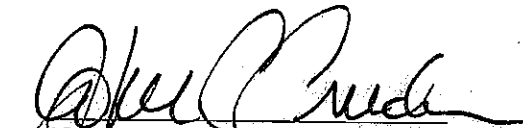
5. Award the United States of America and the State of Indiana their costs and disbursements in this action; and

6. Grant such other relief as this Court deems appropriate.


Respectfully submitted,

FOR THE UNITED STATES OF
AMERICA

Dated: _____

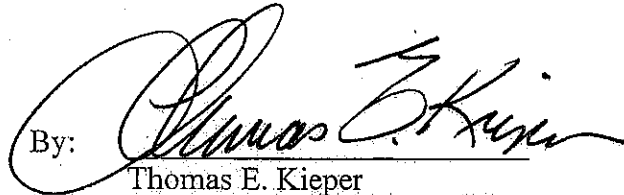

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice

Dated: 9-14-09


ANDREW C. HANSON
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Phone: (202) 514-9859
Facsimile: (202) 616-6584
Email: Andrew.hanson2@usdoj.gov

TIMOTHY M. MORRISON

United States Attorney

By: 

Thomas E. Kieper
Assistant United States Attorney
Southern District of Indiana
10 West Market Street, Suite 2100
Indianapolis, IN 46204
Phone: (317) 226-6333
Facsimile: (317) 226-5027
Email: Tom.Kieper@usdoj.gov

OF COUNSEL:

JOHN TIELSCH
Assistant Regional Counsel
U.S. EPA Region V
77 West Jackson Blvd.
Chicago, IL
(312) 353-7447

GINNY PHILLIPS
Attorney Advisor
U.S. EPA Headquarters
Ariel Rios Building (2243A)
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
(202) 564-6139

GREGORY F. ZOELLER
Indiana Attorney General

Dated: 8-26-2009



SIERRA L. ALBERTS
Deputy Attorney General
Office of the Indiana Attorney General
302 West Washington Street
Indiana Government Center South, 5th Floor
Indianapolis, Indiana 46204
Phone: (317) 232-5663
Facsimile: (317) 232-7979
Email: Sierra.Alberts@atg.IN.gov