

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
STATE OF NEW HAMPSHIRE,)	Civil Action No. 1:20-cv-00762-SM
)	
Plaintiff-Intervenor,)	
)	
v.)	
)	
CITY OF MANCHESTER, NEW HAMPSHIRE,)	
)	
Defendant.)	

COMPLAINT IN INTERVENTION OF CO-PLAINTIFF, STATE OF NEW HAMPSHIRE

The State of New Hampshire, Dept. of Environmental Services (“NHDES”), through its counsel the Office of the Attorney General (collectively “State”) hereby alleges as follows:

NATURE OF ACTION

1. This is a civil action brought against the City of Manchester, New Hampshire (“Manchester” or the “City”) under Section 309(b) of the Federal Water Pollution Control Act of 1972, as amended (commonly referred to as the “Clean Water Act” and hereinafter referred to as the “CWA”), 33 U.S.C. § 1319(b) and N.H. RSA 485-A:13. The claims arise from the City’s failure to comply with the CWA and State law by discharging pollutants from its wastewater collection system both without authorization of, and in noncompliance with, its National Pollutant Discharge Elimination System (“NPDES”) permit, State law, and the rules promulgated thereunder.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345 and 1355. This Court has supplemental jurisdiction to resolve the State of New Hampshire's claims derived from a nucleus of operative facts common to the alleged federal claims.

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

DEFENDANT

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

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

STATUTORY BACKGROUND

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

7. 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."

8. 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."

9. 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.”

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

11. 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.”

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

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

14. New Hampshire RSA 485-A:13, I(a), like Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any sewage or waste into its navigable surface waters except in compliance with the terms and conditions set forth in a discharge permit issued pursuant to Chapter 485-A and rules adopted thereunder.

15. RSA 485-A:13, I(a) provides that NHDES, like EPA under Section 402 of the CWA, 33 U.S.C. § 1342, may issue surface water discharge permits for the discharge of sewage or waste to the surface waters of the State.

16. Like Section 309(b) and (d) of the CWA, 33 U.S.C. §1319(b) and (d), RSA 485-A:22, II authorizes commencement of an action for civil penalties not to exceed \$10,000 per day per violation of any condition of a permit issued under RSA 485-A:13. Such violations may also be enjoined upon application of the Attorney General. RSA 495-A:22, III.

GENERAL ALLEGATIONS

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

18. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA issued NPDES Permit No. NH0100447 to the City on September 25, 2008 (the “2008 Permit”), and reissued it on February 11, 2015 (the “2015 Permit”). The 2015 Permit became effective on May 1, 2015.

19. NHDES adopted the 2015 Permit as its own discharge permit on May 5, 2015.

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

21. Manchester’s NPDES Permit authorizes Manchester to discharge pollutants from 15 CSO outfalls, identified in the 2015 Permit, only in conformity with and as limited by the terms

of the 2015 Permit.

22. Manchester's CSO outfalls are "point sources" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

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

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

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

26. The City has, in violation of its NPDES Permit, its State permit, and State law, discharged and continues to discharge "pollutants," including *E. coli*, within the meaning of Sections 502(6) and (12) of the CWA, 33 U.S.C. §§ 1362(6) and (12), from its wastewater treatment plant and wastewater collection system through "point sources" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14), into "navigable waters" within the meaning

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