

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
IN THE WESTERN DIVISION AT MEMPHIS**

THE UNITED STATES OF AMERICA)	
and THE STATE OF TENNESSEE, <i>ex. rel.</i>)	
ROBERT E. COOPER, JR., in his official)	
capacity as the Attorney General and)	
Reporter of Tennessee)	
)	
Plaintiffs,)	
)	
and)	No. 2:10-cv-02083-SHM-dkv
)	
TENNESSEE CLEAN)	
WATER NETWORK)	
)	
Intervenor-Applicant,)	
)	
v.)	
)	
THE CITY OF MEMPHIS,)	
)	
Defendant.)	

**MEMORANDUM OF THE TENNESSEE CLEAN WATER NETWORK IN SUPPORT
OF ITS MOTION TO INTERVENE AS A MATTER OF RIGHT**

INTRODUCTION

The Tennessee Clean Water Network ("TCWN") hereby moves to intervene as a matter of right in the above-captioned action pursuant to Fed. R. Civ. P. 24(a)(1), and Section 505(b)(1)(B) of the Clean Water Act (the "Act"), 33 U.S.C. § 1365(b)(1)(B).

This action was filed on February 5, 2010, by the United States of America on behalf of the Administrator of the United States Environmental Protection Agency ("EPA") and by the

State of Tennessee on behalf of the Tennessee Department of Environment and Conservation (“TDEC”), against Defendant City of Memphis (“Defendant”) regarding violations of the Act and of the Tennessee Water Quality Control Act (“TWQCA”) at the Maynard C. Stiles Waste Water Treatment Plant (“M.C. Stiles WWTP”), at the T.E. Maxson Waste Water Treatment Plant (“T.E. Maxson WWTP”), and throughout the City of Memphis’ sanitary sewer system.

The Complaint filed by EPA and TDEC alleges that the City of Memphis has repeatedly violated Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, and the TWQCA, Tenn. Code Ann. §§ 69-3-108(a) & (b), 69-3-114(a), by violating the terms of the applicable National Pollutant Discharge Elimination System (“NPDES”) permits. Specifically, the Complaint alleges: numerous unpermitted sanitary sewer overflows throughout the City of Memphis’ sanitary sewer collection system (“sanitary sewer system”), ¶¶ 34-39; failure to comply with standard permit conditions, ¶¶ 40-45; unpermitted bypasses of treatment, ¶¶ 46-50; discharges of biochemical oxygen demand, total suspended solids, settleable solids, heptachlor, DDT, and dieldrin that exceed numeric effluent limits of the NPDES permits, ¶¶ 51-57. The Complaint seeks civil penalties and injunctive relief.

TCWN is a membership organization whose individual members are or may be adversely affected by the disposition of this enforcement action. Accordingly, TCWN is a “citizen” entitled to “intervene as a matter of right” in this action. Fed. R. Civ. P. 24(a)(1); 33 U.S.C. § 1365(b)(1)(B). Moreover, TCWN has a special interest in this action because it filed a 60-day Notice of Violation pursuant to Section 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A) (“Notice Letter,” attached as Exhibit 2), on December 7, 2009, precisely sixty days prior to the filing of the instant action.

FACTUAL BACKGROUND

The Tennessee Clean Water Network is a Tennessee nonprofit corporation. TCWN empowers Tennesseans to claim their right to clean water and healthy communities by fostering civic engagement, building coalitions and advancing water policy for a sustainable future. TCWN is a membership organization, and has members who are injured by illegal discharges from the M.C. Stiles WWTP, the T.E. Maxson WWTP, and the City's sanitary sewer system.

TCWN has identified numerous problems with the City of Memphis' treatment plants and sanitary sewer system. In 2008 and 2009, TCWN commented on the draft renewal NPDES permits for the M.C. Stiles WWTP. These comments raised concerns that the NPDES permit was not sufficiently stringent, and particularly that it did not address the significant environmental impacts of discharging large quantities of nutrients (nitrogen and phosphorus) to the Mississippi River. In 2009, responding to concerns raised by some of its members, TCWN conducted several file reviews at EPA, TDEC, and at the M.C. Stiles WWTP to determine whether the City of Memphis was complying with the Act and with the TWQCA.

Based on the results of these file reviews, TCWN has identified several types of ongoing violations at the M.C. Stiles WWTP, including: more than 1,000 unpermitted sanitary sewer overflows ("SSOs") in a five-year period; exceedances of numeric effluent limits for biochemical oxygen demand ("BOD"); discharging effluent that contains distinctly visible floating foam; bypassing treatment; and failing to report all of these bypasses. *See* Notice Letter, Exhibit 2. EPA documents indicate that the T.E. Maxson WWTP has a similar pattern of violations. These ongoing violations of the Act and of the TWQCA threaten human health and the environment.

The SSOs involve the discharge of raw sewage from the sanitary sewer system to communities throughout Memphis. Pathogens contained in SSOs may cause diseases ranging in severity from mild gastroenteritis (causing stomach cramps and diarrhea) to life-threatening ailments such as infections hepatitis and severe gastroenteritis. Many SSOs also reach the Mississippi River and its tributaries, including, among others: Wolf River, Nonconnah Creek,

Cypress Creek, Cane Creek, Todd's Creek, and the Loosahatchie River. Nearly all of the rivers and streams that receive the sewage from SSOs are listed pursuant to Section 303(d) of the Act, 33 U.S.C. § 1313(d), as impaired for E. coli, a pollutant that is contained in raw sewage. It is likely that these SSOs are a significant contributor to violations of water quality standards for pathogens in the receiving streams. Although TCWN has only reviewed public records covering the past five years, TCWN is aware that Memphis has committed numerous SSOs over a period of decades, and that neither TDEC nor EPA has previously undertaken a significant enforcement action to bring an end to these violations.

In addition, discharges of pollutants in excess of numeric permit limits can harm aquatic ecosystems in the Mississippi River. For example, elevated levels of BOD reduce the level of dissolved oxygen in the water column. Highly mobile fish and other aquatic organisms may react by avoiding the resulting hypoxic (low-oxygen) zone, but less mobile organisms may not be able to avoid the affected area, and thus may not get the oxygen they need to grow and reproduce optimally.

TCWN and its members are particularly concerned that the treatment plants have unlawfully discharged distinctly visible foam to the Mississippi River. This foam is a significant pollutant that interferes with recreational activities downstream from the plant. In fact, the foam plume can even be identified in a January 31, 2006 satellite photograph available through Google Earth. TCWN has received several complaints from Memphians who object strongly to this illegal discharge, and who have provided eyewitness reports and photographic documentation of the foam. In addition to aesthetics, the foam plume is likely caused by a pollutant contained in the discharge that could harm the aquatic ecosystem.

Finally, the plants have violated their NPDES permits by bypassing wastewater treatment and failing to report all of these treatment bypasses. These bypasses result in the discharge of untreated, or only partially treated, sewage directly to the Mississippi River. These discharges contain not only municipal sewage, but also industrial wastewater that is discharged to the plants.

TCWN believes that the City of Memphis has not reported all of its bypasses as required by its permits. *See Exhibit 2, at 6-7.*

Accordingly, after consultation with EPA, TCWN sent a 60-day notice of violation on December 7, 2009 to the City of Memphis, EPA, and TDEC. *See Exhibit 2.* The Notice Letter was a statutorily-mandated precursor to allowing TCWN to file its own citizen suit against the City of Memphis. Because EPA and TDEC filed the Complaint in the instant action on the sixtieth day of the notice period, prior to TCWN filing a suit, TCWN's citizen suit may be barred pursuant to 33 U.S.C. § 1365(b)(1)(B).¹ Moreover, even if TCWN's own case is not barred, TCWN prefers to participate cooperatively in this enforcement action by becoming a co-plaintiff in the instant case.

ARGUMENT

TCWN is entitled to intervene as a matter of right in this action pursuant to Fed. R. Civ. P. 24(a)(1) and Section 505(b)(1)(A) of the Act. TCWN is a "citizen" under the Act, and has interests that will be affected by the outcome of this enforcement action. Moreover, allowing TCWN to intervene will not prejudice the rights of the existing parties.

A. Section 505(b)(1)(B) of the Clean Water Act Confers an Unconditional Right Upon the TCWN to Participate in This Action

Rule 24(a)(1) provides for intervention of right "when a statute of the United States confers an unconditional right to intervene." Section 505(b)(1)(A) of the Act confers just such an unconditional right to intervene in this case. That provision states that "no [citizen] action may be commenced... (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, *but in any such action in a court of the United*

¹ The Act allows a citizen suit to proceed in this circumstance, but only if the citizens prove that the EPA and TDEC are not diligently prosecuting their own action. 33 U.S.C. § 1365(b)(1)(B).

States any citizen may intervene as a matter of right.” 33 U.S.C. § 1365(b)(1)(B) (emphasis added). Thus, Section 505 confers an unconditional right to intervene, as long as all other applicable requirements under Rule 24(a)(1) are met. *See Ohio v. Callaway*, 497 F.2d 1235, 1242 (6th Cir. 1974) (explaining that “33 U.S.C. § 1365(b)(1)(B) confers upon all applicants an unconditional right to intervene under rule 24(a)(1)”); *United States v. Metropolitan St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989) (“The plain language of section 1365 states that, if the Administrator has commenced a civil action such as the one here, “any citizen may intervene as a matter of right”) (emphasis in original).

Moreover, the statutory language suggests that this right to intervene is intended to provide affected citizens an alternative means of participating when a citizen suit is barred by the filing of a court case by EPA or the state. The provision barring citizen suits under such conditions is contained in the same sentence as the language providing a right to intervene. 33 U.S.C. § 1365(b)(1)(B). In the present situation, TCWN is foregoing the filing of its own lawsuit in order to participate in this case initiated by EPA and TDEC.

B. TCWN Has an Interest in the Subject Matter of This Action, and Therefore is a “Citizen” Within the Meaning of Section 505 of the Clean Water Act

Section 505(g) of the Act, 33 U.S.C. § 1365(g), defines a “citizen” as “a person or persons having an interest which is or may be adversely affected.” As a Tennessee nonprofit corporation, TCWN is a legal “person.” TCWN is a statewide organization dedicated to citizen participation in seeking to improve water quality throughout Tennessee. TCWN has a documented, long-standing interest in the operation of the City of Memphis’ treatment plants and sanitary sewer system, as evidenced by its comments on the draft renewal NPDES permit for M.C. Stiles WWTP and its Notice Letter.

TCWN is a membership organization, and has several dozen members in Memphis, many of whom are affected by the ongoing violations of the Act and of the TWQCA. TCWN has involved itself in commenting on the NPDES permit, conducting file reviews, and sending the Notice Letter at the behest of its members, including one Memphian who sits on TCWN's Board of Directors.

TCWN has attached several Affidavits of members who live in Memphis and who have been injured by the violation of the Act that are the subject of this action, which are attached hereto as Exhibits 3-5. James H. Baker has lived in Memphis nearly his entire life; worked for the City of Memphis from 1977-2002 at the M.C. Stiles WWTP, the T.E. Maxson WWTP, and in the City's stormwater enforcement program; lives near a chronic SSO location; and has observed the foam discharge from the M.C. Stiles WWTP. *See* Exhibit 3. Sandra Upchurch is a lifelong Memphian who serves on the Board of Directors of TCWN and is a co-owner of property that abuts Cypress Creek, one of the streams that has been polluted by the City's SSOs. *See* Exhibit 4. Zorina E. Brown is a nearly lifelong Memphian who lives in a neighborhood plagued by chronic SSOs, and who also has observed SSOs in the community where her father lives. *See* Exhibit 5.

C. TCWN's Motion to Intervene is Timely

Under Rule 24, an application for intervention must be timely. *See* Fed. R. Civ. P. 24. For purposes of intervention of right under Fed. R. Civ. P. 24(a)(1) based on the unconditional right to intervene under Section 505(b)(1)(B) of the Act, "intervention of right without prior notice is to be allowed if all the prerequisites to such intervention are met," and "any pre-suit inaction does not preclude intervention." *United States v. Ketchikan Pulp Co.*, 74 F.R.D. 104, 106 (D. Alaska 1977) (citing *State of Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235, 1242 (6th

Cir. 1974)). EPA filed its complaint on February 5, 2010. No additional motions or other papers have been filed, and no briefing schedule or substantive order has issued. TCWN is filing this just 7 days after the Complaint was filed. The TCWN has not delayed in filing its motion to intervene. Therefore, this motion is timely filed.

CONCLUSION

For the foregoing reasons, TCWN respectfully requests this Court to grant its motion to intervene in this case as a matter of right under Fed. R. Civ. P. 24(a)(1) and Section 505(b)(1)(B) of the Act.

Respectfully submitted on this, the 12th day of February, 2010.

s/Stephanie D. Matheny _____
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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2010, the foregoing **Memorandum in Support of the Motion of the Tennessee Clean Water Network to Intervene as of Right, and its accompanying exhibits**, were filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system. Parties served in this manner include:

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I further certify that I have served the following parties by certified mail, return receipt requested, per Fed. R. Civ. P. 5(b)(1) & (b)(2)(C):

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